Bridges

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In this issue

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Facts and Figures

The International Energy Agency has projected global energy demand over the next 25 years under a 'reference scenario' reflecting a business-as-usual growth pattern, as well as an 'alternative scenario', under which governments would implement all the policies they are currently considering to reduce energy use.

- The world's primary energy needs in the reference scenario are projected to grow by 55 percent between 2005 and 2030, at an average annual rate of 1.8 percent. Oil demand would reach 116 billion barrels per day (mb/d) by 2030, while coal demand would jump by 73 percent.
- Under the alternative scenario, energy demand would grow 1.3 percent a year. Oil demand in 2030 would reach 102 mb/d. Demand for coal would drop the most in absolute and percentage terms. Even under this scenario, CO_2 emission would be 25 percent above current levels in 2030.

Source. *World Energy Outlook*. IEA, 2007

WTO Closes Year on Hopeful Note

Geneva diplomats appear slightly more optimistic about the chances of wrapping up seven years of multilateral trade negotiations despite the goalpost shifting until end-2008.

WTO Director-General Pascal Lamy told the membership on 18 December that the Doha Round could be concluded by late 2008 if governments were able to reach consensus on the broad parameters of liberalisation – 'modalities' in WTO language – in agriculture and non-agricultural market access (NAMA) early next year.

The chairs of the two negotiating groups had been expected to release revised modalities texts in December, but that date has been put off to late January in order to allow Members more time to reach agreement on a number of issues related to farm trade.

Lamy Outlines Process for 2008

Following the release of the revised drafts, Mr Lamy said a more 'horizontal' process, lasting perhaps a month, would be necessary to consider both texts together. That phase would be likely to involve Geneva-based representatives, senior officials from capitals and ministers 'as necessary'. He stressed, however, that the point of ministerial involvement could only be determined "once we see how much work remains to be done to get to the modalities."

It is likely that informal ministerial input will be sought during the annual World Economic Forum to be held in Davos in January. However, the outcome of such consultations has not proved decisive for the Geneva-based negotiations in the past.

Once the modalities are agreed, Mr Lamy said three processes would be likely to run in parallel: scheduling commitments in agricultural and industrial market access, tabling and scheduling final market access commitments in services, and finalising negotiations in other areas of the Doha Round. These include changes to WTO rules on subsidies, anti-dumping and regional trade agreements; the establishment of a register for geographical denominations of wines and spirits; liberalisation of environmental goods and services; and a possible new treaty on trade facilitation.

Other rules-related issues should also be resolved, including amendments to WTO provisions on special and differential treatment for developing countries, as well as dispute settlement disciplines.

Director-General Lamy has sought to allay fears that these issues would be sidelined. They were part of the 'single undertaking' agreed in Doha, he said, advising Members who had "important horses running in other areas than agriculture and NAMA" to keep a sustained pace of work in the other negotiating groups. More broadly, he warned in November that the 'second half of overtime' for the Doha Round would be starting in January, and Members should keep in mind that "the time allowed for overtime in any sport is always limited."

Official Rhetoric at Odds with Geneva Talks

Most negotiators and the WTO Secretariat concur that Members' level of engagement and spirit of co-operation in the agriculture negotiations has never been as high as in recent weeks. Outside the WTO, however, the blame game is still in full swing.

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French government officials remain sceptical about the chances of concluding negotiations in 2008. The country's Agriculture Minister Michel Barnier again stressed in November that EU Trade Commissioner Peter Mandelson had reached the limit of his negotiating mandate and any concessions beyond those already offered – in October 2005 – were out of the question. In early December, US Trade Representative Susan Schwab likened Brazil, India and other advanced developing countries to excited teenagers who had just got their driver's licences. These countries were discovering that it was "hard to be at the big table in the small room where you are also expected to contribute rather than just ask," she said. Brazil and India called the remark 'obnoxious', and India's Commerce and Industry Minister Kamal Nath accused rich countries of trying to perpetuate distortions in international trade, contrary to the Doha Round's mission to put development at the heart of the negotiations.

Contrasting Picture for Agriculture and NAMA

The agriculture negotiations have gained unexpected momentum since early November. Despite the general mood of optimism, however, no major breakthroughs have occurred in the talks, which have not addressed the key issues of subsidy and tariff cuts (see page 5).

The picture is much less rosy for non-agricultural market access. Negotiations remain at a near impasse over a large number of issues, including the balance between developed and developing country commitments, as well as the disparity in the level of ambition sought in the industrial tariff negotiations compared to the agriculture talks. Most recently, Members have strongly disagreed on requests for additional flexibility put forward by a number of developing country groups (see page 6). Nevertheless, some sources predict that a NAMA deal could be reached relatively quickly once the level of ambition in agriculture becomes clear.

Director-General Lamy acknowledged on 30 November that more technical work remained in the NAMA negotiations, and that there were some subjects where the final decision would "depend on the overall package and the balance contained therein."

Preparing for the Grand Bargain: Rules Text Is Out

Although agriculture and NAMA continue to dictate the pace of the Doha Round, WTO Members generally recognise that substantive negotiating drafts on other elements of the talks should quickly follow any breakthrough in the two key areas if an overall agreement is to be reached within 2008.

On 30 November, the chair of the rules negotiations Guillermo Valles Galmés released a draft text, which covers potential amendments to subsidy and countervailing provisions, including new disciplines for fisheries subsidies.

While the 93-page document contains no brackets or blanks, chair Valles stressed that his objective was to stimulate serious reflection on the broad parameters of possible negotiating outcomes, and that work on solving specific problems would start after February 2008. He acknowledged that Members would inevitably disagree with some of his proposals, but urged them to "assess these texts as a whole, and to carefully consider those elements that respond to their demands and interests, rather than concentrating on those elements that they do not like." Immediate criticism did follow, however, particularly on the chair's acceptance of 'zeroing' as a method for calculating anti-dumping margins (see page 10).

Agreement on new fishing subsidy disciplines is widely held to be one of the key sustainable development deliverables of the round. Although the seven-page fisheries annex in chair Valles's draft does not call for a general prohibition of subsidies accompanied by a few exceptions (as advocated by the 'friends of fish'), it does propose forbidding eight different types of specific support, as well as any subsidy that confers benefits to a "fishing vessel or fishing activity affecting fish stocks that are in an unequivocally overfished condition" (see page 10).

In view of the 'horizontal' negotiations that are to follow the conclusion of the agriculture and NAMA modalities, Members have also tabled controversial new proposals on services, environmental goods and intellectual property rights (pages 6-9).

A Competition Approach to Intellectual Property Protection

Carlos Correa

The relationship between intellectual property protection and fair competition presents difficult challenges to policy-makers, particularly in developing countries that have little experience in the application of competition law and policies.

Intellectual property (IP) law subjects intellectual assets to the exclusive control of right owners. In contrast, competition law seeks to avoid market barriers and benefit consumers by ensuring that a multiplicity of suppliers of goods, services and technologies may effectively compete against each other.

Competition laws can be applied to remedy anti-competitive practices related to the acquisition and exercise of intellectual property rights (IPRs). However, many developing countries lack competition laws or effective mechanisms for their implementation. These countries may apply a broader competition policy approach to deal with the IP-competition relationship by ensuring that certain regulations that directly influence market entry and contestability IPRs, such as those dealing with the marketing approval of pharmaceuticals and agrochemicals, are designed and applied in a pro-competitive manner.

Developing countries can follow their own approach to competition law and IPRs since there are no other international rules than Article 40 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) that constrain their capacity to discipline IP-related anti-competitive behaviour. They could, for instance, include provisions in national competition law to address situations in which IPRs are used to charge excessive prices for or to prevent access to protected technologies.

'Refusal to Deal' and the 'Essential Facilities' Theory

Competition provides a strong incentive for the development of new technologies in certain fields. Even in cases where a country does grant IPR protection, governments can adopt measures to mitigate the monopolisation of technologies and promote competition. Thus, although TRIPS Article 31(b) refers only to the refusal of a voluntary licence as a *condition* for the granting of a compulsory licence, the unilateral refusal to voluntarily licence a patent (known as 'refusal to deal') can be autonomous grounds for the grant of a compulsory licence. Such clauses have been contemplated in a number of national patent laws.

Some countries have also considered the possibility of permitting third parties' use of inventions under patent in cases of refusal to deal in the context of the 'essential facilities' concept. This doctrine applies when a firm that controls an essential facility denies a second firm reasonable access to a product or service that the latter must obtain in order to compete with the first.

While some US court decisions have suggested that information may constitute an essential facility, the extent of the application of this doctrine to intellectual property cases is uncertain. Under European Community law, an 'essential facility' may include an intellectual property right. An IPR-holder is not entitled to exclude competitors from the use of his rights when a licence thereof is essential to competition, i.e. the refusal to licence prevents the introduction of a new product or allows the right-holder to monopolise a secondary market.

Developing countries may draw interesting lessons from the application of the concepts of 'refusal to deal' and 'essential facilities' in developed countries. However, there are no rigid models and developing countries are free to elaborate their own approaches to competition law in order to respond to their public interests.

Patents and Competition Policy

Respect for IPRs under competition law is premised on the assumption that the intellectual property was lawfully obtained. Competition law may be applied when a particular intellectual property right was not obtained in the proper manner or is otherwise not justified (for instance, because the rights-holder deceived the patent office). In addition, low standards of patentability and shortcomings in patent examination may lead to the grant of 'poor quality' patents that can hamper competition. Acquiring patent rights for frivolous developments or with overly broad claims can provide grounds for anti-competitive intervention even in jurisdictions where IP is essentially seen as compatible with competition law.

The accumulation of private rights in the form of 'patent packages' may also have anti-competitive effects. This could happen, for instance, if the 'package' is used to inappropriately extend legitimate patents' market power to illegitimate patents, or to coerce a party into licensing patents that it might have chosen to avoid. 'Patent thickets' may also raise competition law concerns, as co-operation among competitors (including cross-licensing) may be necessary to navigate the thicket, thus ultimately limiting competition. 'Sham petitioning' may equally provide the basis for a claim under competition law. The US Federal Trade Commission, for instance, has intervened in some cases of fraudulently obtained patents.

Other Elements of a Pro-competitive IP Regime

While much of the literature on IPRs and competition law focuses on patents, anti-competitive behaviour may also take place in the context of other intellectual property rights. Copyrights, for example, have been involved in important competition law disputes. Several studies have shown that copyrights create monopoly power, and that progressive concentration is occurring in the majority of information goods markets at both national and international levels. The anti-competitive effects of copyright protection of software, and interfaces in par-

Continued on page 4

ticular, have been central in several cases, notably involving Microsoft. Competition law concerns have also frequently arisen in relation to copyright-collecting societies. Fundamental tension between the goals of trademark and competition law has been observed in some cases as well.

Moreover, undue *enforcement* of IPRs can amount to anti-competitive conduct. In particular, preliminary injunctions may be effectively used to prevent legitimate competition. This is why courts in the United States and Europe have generally taken a very cautious approach towards granting injunctions in patent cases. Border measures may also be used with an anti-competitive intent.

Enforcement measures should allow the protection of the right-holder's legitimate interests, but equally protect against abuses that may unjustifiably distort competition. In the US, the concept of 'sham' litigation may be applied in cases of abuses of legal procedures, notably when a legal action is based on fraudulently acquired IPRs or on an obviously incorrect legal theory; on valid rights that are known to be unenforceable; or where the plaintiff knew that there was no infringement.

Compulsory licensing provisions can be included in both intellectual property and competition laws. Article 31(k) of the TRIPS Agreement, explicitly provides for the granting of such licences in the case of patents. Grounds for granting compulsory licences under competition law have included in the US the use of patents as a basis for price-fixing or entry-restricting cartels, the conclusion of market-concentrating mergers in which patents played an important role, and practices that extend the scope of patent restrictions beyond the bounds of the patented subject matter. Compulsory licences may also be issued when cross-licensing unduly limits competition, particularly in cases that involve substitute technologies, i.e. technologies that actually or potentially compete with each other, independently of their intrinsic characteristics.

'Patent pools' provide another situation that may be subject to analysis from a competition policy perspective. While such pools may be used for pro-competitive purposes, they may also facilitate tacit collusion in a multiplicity of markets and allow the pool members to impose abusive terms on non-members seeking access to the technologies in question.

Finally, there are a number of areas in which IPRs play an important role and where actions taken by governments decisively shape competitive relations. This is notably the case with regulations determining the requirements for marketing approval of pharmaceutical and agrochemical products. The *sui generis* system of 'data exclusivity' applied in some countries – and promoted through free trade agreements – confers a temporary right to the exclusive use of such data by the first applicant (generally the company that developed a new product), thereby excluding generic competition during the period of exclusivity.

Restrictions to competition may also arise from the so-called 'patent-registration linkage' under which a national health authority cannot approve a medicine without the consent of the owner of patents covering it.

Some Recommendations

In conclusion, intellectual property legislation cannot be designed and applied in isolation from other legal disciplines, particularly competition law. The 'competition policy' approach suggests that creating and preserving the conditions for competition and market contestability in the area of IPRs is not only the task of competition law or antitrust authorities. Defining the right balance between competition and IPRs is an objective to be achieved through a diversity of policies and regimes.

A number of recommendations to developing countries can be made, namely:

- establish or strengthen competition laws in order to control, *inter alia*, possible abuses emerging from the acquisition and exercise of IPRs;
- consider the competition implications of various policies and regimes that determine market entry, such as marketing approval of pharmaceutical and agrochemical products;
- ensure an adequate co-ordination among the competition law agency and other agencies whose decisions may influence the market structure and operation, with the aim of maintaining a competitive environment;
- fully use the flexibilities allowed by the TRIPS Agreement to determine the grounds for the rant of compulsory licences to remedy anti-competitive practices relating to IPRs;
- consider, in particular, the granting of compulsory licences in cases of 'refusal to deal';
- apply the 'essential facilities' doctrine to address situations of control of essential technologies, taking into account the relevant market conditions and public needs;
- develop policies, including guidelines, to prevent and correct abuses in the acquisition and enforcement of IPRs;
- address situations that may normally lead to the anti-competitive conduct such as 'package' and 'thicket' patents;
- adopt guidelines for the use of patent offices to prevent the granting of frivolous or low-quality patents, as well as patents with overbroad claims, which may be used to unduly restrain legitimate competition and block innovation; and
- avoid 'linkage' provisions and data exclusivity in order to promote competition in markets of regulated products.

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Agriculture: No Breakthroughs, but a Will to Move Ahead

The WTO agriculture talks have in recent weeks bathed in a rare mood of optimism as delegates continue efforts to narrow differences.

The main reason for the change of atmosphere appears to be that Members have focused on finding solutions to a number of questions – other than the 'headline' issues of the depth of domestic subsidy and tariff cuts – that have remained deadlocked for years. Ambassador Crawford Falconer, who chairs the agriculture talks, said in November that Members were 'serious': "Some ideas for compromise are on the table and they have not been rejected outright. We've never done that before. […] The underlying will is to get things moving."

Export Competition

Negotiators report near consensus on export competition following discussions on working documents released by chair Crawford Falconer on November. The four highly technical documents focused on export financing, state trading enterprises and food aid.

The most contentious issue in this pillar of the agriculture negotiations was resolved when Members agreed at the 2005 Hong Kong Ministerial Conference to end export subsidies by 2013. Chair Falconer has since proposed that developing countries phase out export subsidies by 2016. According to their most recent notifications to the WTO, only a small handful of the ten developing countries currently allowed to provide such support actually do so.

Chair Falconer's latest proposals spelled out further details on the treatment of other forms of export support. He suggested that developed countries' export credit programmes should be self-financing within four to five years, and the loan repayment period should not exceed 180 days. For developing countries, the repayment period should be 360 days at the most, and self-financing should be achieved within 6-7.5 years.

It had already been agreed that Members' export competition commitments should also cover any export subsidy elements in the operation of state trading enterprises. The new text adds no significant details in this regard.

International food aid should be needs-driven and not tied 'directly or indirectly' to the donor's commercial exports goods and services, or their market development objectives. Preferably, food aid should be cash-based and sourced either locally or regionally. Providing countries must ensure that in-kind donations do not displace locally available products or their substitutes. These restrictions would not apply to emergency food aid. A still open question is whether recipient governments would have the right to sell donated food to raise cash in non-emergency situations (this practice is called 'monetisation').

Market Access Exceptions

Members have also tried to obtain greater clarity on the use of flexibilities in the application of future tariff reduction obligations. Although no breakthroughs have occurred, Chair Falconer has floated some tentative figures for discussion.

For instance, he has asked whether Members could live with developing countries having the right to designate 8-12 percent of tariff lines as 'special' based on their food security, livelihood and rural development needs. Special products (SPs) will not be subject to standard formula cuts.

In his July draft, Ambassador Falconer had refrained from advancing a figure, noting instead that Members could work on developing indicators for Special Product (SP) selection. The latter approach is favoured by the G-33 group of developing countries (Bridges Year 11 No.6 page 7). The group has, however, showed more flexibility over the issue, particularly after the chair suggested that to achieve consensus Members would have to accept that some SPs would be exempt from tariff cuts altogether. This issue remains controversial.

Less progress has occurred on the two key issues that divide the membership on the Special Safeguard Mechanism (SSM) that is to be established for the use of developing countries. One of these is whether countries could temporarily raise tariffs above the rates they have bound at the WTO. The other is whether SSM duties could only be imposed if data showed both a surge in import volumes and a drop in prices (Bridges Year 11 No.6 page 3).

Members are also still struggling over technical issues concerning the use of domestic consumption data as a basis of quota expansion for 'sensitive' products. All countries may shield a certain number of 'sensitive' tariff lines from full formula cuts, but they must provide more market access through lowering tariffs and expanding import quotas. However, few countries have statistics precise enough to allow them to determine the share of a specific product – such as a certain type of cheese, say – in domestic consumption. As a possible solution, chair Falconer has proposed the establishment of a 'floor' as a minimum estimate of domestic consumption shares, or simply setting a minimum quota expansion.

Tropical Products

No decisive headway has been made on the 'fullest' liberalisation of tropical products, or products grown as alternatives for illicit drugs, required by the Doha Round agriculture mandate. This issue is particularly important to several predominantly Latin American countries, which on 1 November tabled a long list of tropical/alternative products, including bananas and sugar, as well many fruit, rice, onions, flowers and tobacco.

The African, Caribbean and Pacific (ACP) group seeks longer implementatation periods for tariff cuts on products (such as sugar and bananas, for instance) in order to avoid a rapid erosion of its trade preferences. The group has also called for 'targeted technical assistance to address supply-side constraints', as well as the establishment of a monitoring body to ensure that commitments are fully implemented.

NAMA Positions Diverging rather than Converging

Proliferating demands for more flexibilities in tariff reductions for industrial goods have brought deep divisions among WTO Members into an even sharper focus.

November negotiations on non-agricultural market access (NAMA) offered chair Don Stephenson little guidance for revising the draft modalities paper he issued in July. The majority of WTO Members has rejected that text as fundamentally imbalanced with regard to the level of tariff cuts proposed for developed and developing countries, as well as the NAMA text's high level of ambition compared to the draft agriculture modalities (Bridges Year 11 No.6 page1).

The latest industrial market access talks focused on exemptions from the standard tariff reduction formula applicable to developing countries. As the NAMA draft currently stands, about 30 developing countries – including most of the larger emerging markets – would be subject to full formula cuts (the rest will be eligible for gentler tariff reduction, for instance as 'small and vulnerable' economies). The July text would allow these countries to subject 10 percent of products to tariff cuts of only half those demanded by the formula (so long as this does not cover more than a tenth of manufacturing import volume), or to exclude 5 percent of tariff lines from reduction altogether (albeit limited to only 5 percent of imports).

Recent Demands

Mercosur countries (Argentina, Brazil, Paraguay and Uruguay) reiterated their request to be allowed to make lower tariff cuts on up to 16 percent of products without any import volume limitations, arguing that this was necessary for them to respond adequately to their different sensitivities without compromising their common external tariff.

The South African Customs Union (SACU) also asked for additional flexibilities. Since none of South Africa's four neighbours would ordinarily have to apply the formula, they would stand to be disproportionately affected by a WTO-driven cut to the bloc's shared external tariff (Bridges Year 11 No.6 page 8).

The Philippines called for loosening the import volume constraint, so that the 10 percent of tariff lines slated for 'half-formula cuts' could cover as much as 30 percent of manufacturing import value. Venezuela asked to be exempted from the tariff reduction formula, instead offering to bind its tariffs at a to-be-determined average percentage level. It argued that its heavy dependence on volatile oil export revenues should make it eligible for the special treatment currently foreseen for countries that account for 0.1 percent of global manufacturing trade.

China continued to insist that deal on the table did not accord recently acceded Members (RAMs) sufficiently flexible treatment. It is not entirely clear whether China was seeking a higher tariff ceiling for RAMs, or greater flexibility in shielding products from cuts.

Least-developed countries (LDCs) are not required to cut tariffs as part of the Doha Round negotiations, and thus do not need exemptions. The LDC Group has, however, requested the NAMA chair to strongly urge developed countries to phase out import duties and quotas for all LDC exports instead of just 97 percent of them as agreed in Hong Kong. It has also asked for simplified rules of origin for the remaining 3 percent products during the phase-out. Australia, the EU, New Zealand and the US asserted that their rules of origin were already simple and transparent, and complained that the LDCs demands went beyond what Members had agreed to.

Mixed Reactions to Flexibility Requests

The calls for flexibilities, with the partial exception of the appeal from SACU, met with significant opposition. Canada, the EU, Japan, Norway and the US were among those arguing that existing exceptions were sufficient. A group of developing countries led by Costa Rica, including Colombia, Ecuador, Mexico, Hong Kong, Peru, Singapore and Thailand, also rejected calls for extra flexibilities.

In contrast, South Africa, speaking for the so-called NAMA-11, defended the proposals from Mercosur and the Philippines. The group includes Mercosur members Argentina and Brazil, as well as countries such as Egypt, India, Indonesia, and the Philippines. Venezuela's proposal only received support from Cuba and Bolivia.

No significant progress was made on proposals to grant 'small and vulnerable economies' more extensive flexibilities than those suggested in the July NAMA draft. Nor was consensus achieved on the demand of countries with a low percentage of bound tariff lines to be allowed to bind 70-80 percent of them instead of the 90 percent currently envisaged.

Changes Unvoidable?

Even delegates from countries not among those critical of the July text suggested that Stephenson would likely have to alter its parameters to have a chance of coming up with the basis for an agreement.

"Positions are diverging rather than converging," said one official, pointing to the dilemma facing the NAMA chair as he prepares the revised draft agreement. "He may now paradoxically have to go backward to go forward," the source added. "These new proposals for flexibilities will have to be reflected to some extent, but this won't be easy for others to swallow."

A revised NAMA text, as well as a draft agreement on agriculture, were initially supposed to be released in mid-November. Due to ongoing intense negotiations in agriculture (see page 5), the modalities papers are now expected in late January at the earliest. Chair Stephenson has suggested that it may not be possible to resolve any issues in the industrial market access negotiations without ministerial involvement.

Members Differ on Need for Services Text

WTO Members have started to submit proposals on the elements they wish to see in the services negotiating text that is to complement the revised agriculture and NAMA modalities. Several developing countries, however, have doubts about the usefulness of such a document.

Although services are considered to be the 'third pillar' of the Doha Round's market-opening dimension, negotiations in this area continue to be overshadowed by developments – or the lack thereof – in agriculture and industrial goods. One of the reasons is that liberalisation of trade in services is essentially conducted through a much less visible process of bilateral requests and offers. The services modalities draft is therefore expected to establish guidelines for those negotiations, including new deadlines for submitting revised offers, rather than sketching out the level of ambition sought in the talks.

Need for Text Questioned

Bolivia, Cuba and Venezuela argued in December that there was no need for a services modalities text since the Hong Kong services annex and the in-built flexibility for developing countries in the General Agreement on Trade in Services (GATS) already provided sufficient parameters to conclude the negotiations. The African and ASEAN groups, as well as Brazil and India, which have also questioned the usefulness of developing a modalities paper, have indicated they will participate in the exercise provided that their issues and concerns are adequately reflected in the paper.

Developed countries – eager to raise the profile of the services negotiations – remain keen to see a draft text emerge as soon as possible. Nevertheless, the latest dicussions and proposals have underlined developing countries' reluctance to step up the pace until the outcome in agriculture and NAMA is better defined. Many have also made it clear that improved market access commitments will depend on how far developed countries are willing to open their markets to providers of services from developing countries.

Strong Focus on Mode 4

In a joint communication dated 9 November, India, Pakistan, Peru and Thailand highlighted developing countries' concerns about the lack of positive signals in response to their plurilateral and bilateral requests for market access commitments for temporary service providers (the so-called 'Mode 4' of services supply).

The submission argued strongly that both developed and developing countries stood to gain from liberal Mode 4 commitments. It also emphasised that Mode 4 access did not mean the entry of migrant workers into the labour markets of the Members granting the access, nor would it commit host countries to relax their migration regimes. What was sought, the proponents said, was smooth temporary entry for service providers who had received a contract to supply a service in a scheduled sector, so as to enable them to execute the contract efficiently.

The African Group also stressed that a meaningful outcome in Mode 4 was necessary, both to reflect the development dimension of the Doha Round and to ensure agreement on the overall final deal.

The group of least-developed countries (LDCs) has focused more specifically on the Hong Kong Declaration's call for Members to "give priority to the sectors and modes of supply of export interest to LDCs, particularly with regard to movement of service providers under Mode 4." The group has also requested that developed country Members establish 'appropriate mechanisms' to facilitate the effective access of LDCs' services and service suppliers to foreign markets before presenting their final market access offers. Ministers acknowledged in Hong Kong that LDCs were not expected to undertake new market opening commitments.

Developed countries – the primary recipients of Mode 4 requests – have only offered limited improvements in a few sectors involving skilled workers, and there are currently few signs of a significant change of heart. "One man's temporary worker is another man's immigrant," a recipient country negotiator observed despite developing country efforts to separate Mode 4 access from immigration issues.

Collective Requests Spurned

A heated discussion followed the submission of reports by the co-ordinators of negotiations on the 18 services sectors targeted by 'plurilateral' market access requests, presented by groupings of WTO Members to other, predominantly developing, countries. The requests focus heavily on key infrastructure sectors, such as telecoms, construction, computer, financial, transport and postal services.

According to the co-ordinators, responses have been sluggish. For instance, only one of 21 recipient countries had responded across the board to the financial services request, while several others had indicated unwillingness to bind their current applied levels of market access. Less than one-third of recipients had said they would answer, at least partly, to some of the demands, while two (unnamed) countries had indicated they would not improve their current offers.

The US, which co-ordinates the telecommunications sector, complained of 'very few positive signals' to the joint request by Australia, Canada, the EU, Hong Kong, Japan, Norway, Singapore, South Korea, Taiwan and the US. It noted that some of the 22 recipients had indicated that they would neither meet the key elements of the request, nor offer to reduce or eliminate existing market access barriers. Other co-ordinators reported similarly disappointing responses.

Developing countries argued strongly that the reports should not be reflected in the chair's draft modalities due to the subjective nature of their conclusions and recommendations.

A number of sources contacted by Bridges predicted that the release of a services text would probably be delayed until the issuance of the revised agriculture and NAMA modalities, currently expected in late January or early February 2008.

Disagreement over Biofuels, Climate-friendly Products

WTO negotiators are still grappling with the definition of environmental goods, slated for expedited liberalisation under the Doha Round.

In November, the WTO Committee on Trade and Environment (CTE) debated a Brazilian proposal to designate biofuels, including ethanol, as environmental goods. Ethanol has so far been considered as an agricultural product, and developed countries continue to maintain that its liberalisation should be addressed within the Doha Round farm negotiations.

Brazil countered that the environmental negotiating mandate (para.31(iii) of the Doha Declaration) did not exclude the consideration of agricultural products. It also stressed that biofuels were essentially environmental goods since they offered a promising substitute/complement for fossil fuels and other non-renewable energies. Both the EU and the US have described ethanol as an environmental good in reports to the UN Framework Convention on Climate Change. The US ethanol tariff exceeds 14 cents per litre; EU tariffs are roughly twice as high. Both also richly subsidise ethanol production, wich is based on corn in the US and sugarbeet in Europe.

Cuba raised concerns over counting biofuels as environmental goods, citing both food security and environmental considerations. Prices of staple foods are soaring in several parts of the world as farmers shift production to corn – in high demand from the biofuel industry – to the detriment of other food crops such as wheat. Brazil emphasised, however, that sugarcane production for ethanol in Brazil had not affected domestic food availability or nutrition.

Peru Proposes Organics

Peru called for the inclusion of organically grown agricultural products in the environmental goods definition. Increased market access for organic crops would encourage farmers in poor nations to favour environmentally beneficial production methods, Peru argued, as well as help combat poverty and reduce the attraction of growing narcotics. Australia, Norway and Taiwan enquired how Peru proposed to address concerns about differentiating organic agricultural products from others based on process and production methods (PPMs).

A Request-Offer Approach?

Faced with persistent divisions on how to go about meeting the Doha mandate to reduce or eliminate trade barriers to environmental goods and services (EGS), Brazil suggested that complementing the 'list' approach favoured by developed countries with a 'request-offer' process akin to that used in the services negotiations could offer a way out of the deadlock.

Under this approach, countries would request specific market opening commitments from their trading partners, and any concessions granted through the process would be extended to all WTO Members on a most-favoured-nation basis. Many developing countries welcomed the suggestion, with some proposing to use a combination of a 'request-offer' process, a negotiated list of products, and a 'project'/'integrated' approach, which foresees temporary tariff cuts for goods and services to reach specific environmental objectives (as proposed respectively by India and Argentina). Some developed countries expressed concern that a request-offer process would be time consuming and cumbersome.

EU and US Propose Lists of 'Climate-friendly' Goods and Services

The EU and the US tabled a joint informal proposal on the liberalisation of 'climate-friendly' goods and services. The paper set out a two-tier approach, under which all WTO Members would eliminate tariffs on 43 specific goods ands services 'directly linked to addressing climate change' by 2013 at the latest, followed by the negotiation of a plurilateral Environmental Goods and Services Agreement between all developed countries and the 30-odd larger developing countries slated to apply the standard tariff reduction formula in the industrial goods talks.

The first tier comprised products identified as 'climate-friendly' in a recent World Bank report on trade and climate change, such as solar collectors and system controllers, wind-turbine parts and components, stoves, grates and cookers and hydrogen fuel cells. The same report concluded that removing tariffs and non-tariff barriers to key clean energy technologies could boost trade by 7-14 percent annually, and encourage greater investment in cutting-edge technology (for more details on the report see page 16). The proposal did not, however, mention several developing country concerns cited in the World Bank report, ranging from potential damage to domestic industry to the need for technology transfer. As for services, the proponents suggested that Members could remove obstacles to foreign competition in sectors such as air pollution and climate control; technical testing and analysis; energy-related services; and the design and construction of energy-efficient buildings and facilities.

The second tier involved products based on a consolidated list of 153 products compiled by the 'friends of environmental goods', a group of mostly developed countries (see page 27). The proposal called on participating countries to "eliminate tariffs and take appropriate actions to identify and address specific non-tariff barriers." Services in the second tier could include a broad set of environmental and climate-related sectors. Participating Members would be required to bind existing levels of market access commitments, and undertake new liberalisation to remove market access barriers. The second-tier proposal did not set any deadlines.

Developing countries expressed concern over several aspects of the proposal. Roberto Azevedo, a senior Brazilian negotiator, was especially critical of the two lists' exclusion of biofuels. "We find the proposal modest, we find it biased and we find it protectionist," he said. "Anything that [developed countries] don't produce is not on the list." India's Ambassador Ujal Singh Bhatia called the EU-US proposal "a disguised effort at getting market access through other means." These views were echoed by several other developing countries, which also noted that the proposal had not fully resolved the fundamental 'dual use' problem, i.e. goods that are also used for non-environmental purposes.The proposal was informally discussed at the trade ministers meeting held in the sidelines of the Bali climate change conference, where it came under similar criticism (see page 14).

LDCs Submit First Needs Assessments to TRIPS Council

In recent meetings, the TRIPS Council has considered technical assistance needs assessments prepared by two of the WTO's poorest Members, as well as revisited a number of long-standing agenda items, such as preventing biopiracy and the enforcement of intellectual property rights.

Governments agreed in November 2005 to extend least-developed countries' (LDCs') deadline for implementing and enforcing WTO protections for trademarks, copyright, patents and other intellectual property until July 2013 – seven and a half years later than originally foreseen. The decision asked LDCs to provide the TRIPS Council with "as much information as possible on their individual priority needs for technical and financial co-operation in order to assist them taking steps necessary to implement the TRIPS Agreement."

At the council's October 2007 meeting, Sierra Leone (IP/C/W/499) and Uganda (IP/C/W500) became the first LDCs to formally submit such needs identifications to the WTO.[1] Sierra Leone called for financial and logistical assistance to complement its ongoing intellectual property (IP) reform programmes, such as funds to hire IP policy analysts in its trade ministry and to set up a small permanent mission in Geneva. Uganda asked for help in creating a National Intellectual Property Policy Forum through which representatives from government, the private sector and civil society would produce a draft national policy framework.

Both countries set out specific activities and timelines for updating their legal IP frameworks and administrative infrastructures; strengthening enforcement and regulation; and using IP to promote innovation, creativity and technology transfer.

The EU said that it wanted to see more similar submissions from LDCs, so it could consider all of them together under its trade-related technical assistance programme. Sierra Leonean official Beatrice Dove-Edwin, however, stressed that assistance should be tailored to the needs identified by individual countries.

Members Step up Pressure on Biopiracy, GI Extension

Anticipating the 'grand bargain' phase of Doha Round negotiations (see page 2), two groups of countries proposed draft clauses on their priority areas during December consultations on TRIPS-related 'implementation issues' conducted by WTO Deputy Director-General Rufus Yerxa. These included a demand by the 'friends of geographical indications' – a group of both developed and developing countries led by the EU and Switzerland – to have the modalities decision state that Members 'agree to the extension' of a higher level of protection for geographical indications (GIs) to all products, not just wines and spirits. The other proposal concerned amending the TRIPS Agreement so it would be mandatory for patent applicants to disclose the origin of any genetic resources or traditional knowledge (TK) involved in their inventions. No progress was made on either of these highly divisive issues.

'New world' Members such as Argentina, Australia, Canada, South Africa and the US remain concerned about negative impacts of GI extension on products marketed under what they consider to be at least semi-generic names. The stonger protection sought would not only prohibit the use of a specific GI, such as Gruyère cheese, but also expressions such as Gruyère-type, -style, or -imitation. The opponents have called for additional technical discussions and consultations before moving forward with negotiations.

The 'disclosure group' – including countries such as Brazil, China, Ecuador, India, Peru, South Africa, Thailand and Uganda – called for language stating that "Members agree to the inclusion in the TRIPS Agreement of a mandatory requirement for the disclosure of origin of biological resources and/or associated traditional knowledge in patent applications." Patent applicants would also have to provide proof of prior informed consent and benefit-sharing, and patents would be revoked in cases involving misappropriation.

The amendment proponents consider that a disclosure requirement is necessary to harmonise the TRIPS agreement with the UN Convention on Biological Diversity (CBD), and to avoid the granting of 'bad' patents. This proposal also has the support of the African Group, as well as the 32 LDC members of the WTO.

Argentina, Australia, Canada, Costa Rica, Japan and the US continue to oppose disclosure requirements in patent applications. The EU and Switzerland agree that disclosure is important, but do not favour clauses that would revoke bad patents.

Other Developments in Brief

The council extended until 2009 the deadline by which Members must ratify an amendment to TRIPS rules aimed at facilitating poor countries' ability to import affordable medicines. So far, thirty-eight countries – including the 27 EU member governments (see page 22) – have ratified the amendment. It has also been approved by the Chinese Standing Committee of the National People's Congress, Xinhua reports.

If it enters into force, the amendment will make permanent an August 2003 procedure spelling out the conditions under which WTO Members can legally suspend drug patents for the production and export of cheap generic medicines to poor countries unable to manufacture them (for further details, see Bridges Year 11 No.5 page 9).

Members remain divided on whether IPR enforcement falls within the mandate of the TRIPS Council. Brazil, China, India, South Africa and Argentina continue to argue that it does not since the TRIPS Agreement recognises countries' freedom to determine the appropriate method of implementation within their 'own legal system and practice'. In contrast, the EU, Japan, Switzerland and the US have recently sought to inrease information exchange on domestic enforcement practices (see related story on page 22).

The TRIPS Council's next meeting is tentatively scheduled for February 2008.

ENDNOTE

[1] For background studies, see http://www.iprsonline.org/ictsd/LDCneeds.htm

Tough Negotiations Loom for New Rules Draft

A draft text proposing amendments to WTO subsidy and anti-dumping rules released on 30 November has provoked strong reactions from a large number of trade officials.

Members directed their strongest criticism against the draft proposal's explicit acceptance of certain forms 'zeroing' in the calculation of anti-dumping margins. Simply put, zeroing refers to investigating authorities taking into account only instances where a good is sold to an export market for less than the price charged in the domestic market. However, cases where the domestic price is lower than the export price are assigned the value of zero, rather than a negative margin, which can result in an artificially high anti-dumping duty.

Different aspects of zeroing have been condemned in numerous WTO dispute settlement rulings, and the majority of Members had sought an outright prohibition of the practice in the rules negotiations. However, chair Guillermo Valles Galmés proposed that in certain cases where anti-dumping investigators aggregate the results of multiple comparisons of normal and export values "they may disregard the amount by which the export price exceeds the normal value".

This was a clear victory for the United States, which continues to use the method, and has repeatedly accused dispute settlement panels and the Appellate Body of 'judicial activism' in interpreting WTO provisions as prohibiting virtually all forms zeroing.

At the rules group's December meeting, Brazil, China, Colombia, Costa Rica, Hong Kong, India, Indonesia, Japan, Mexico, Norway, Pakistan, Singapore, South Africa, South Korea, Switzerland, Taiwan and Thailand circulated a joint statement condemning the draft's zeroing provisions on the grounds that they would "nullify the results of trade liberalisation efforts." Argentina, Canada, Ecuador and the EU also endorsed the statement.

China, Brazil and the EU warned that the proposed zeroing language could undermine the credibility of the dispute settlement system. Brazil's Ambassador Clodoaldo Hugueney went even further, suggesting that reinstatement of the practice would 'negatively affect the level of ambition' in the agriculture and NAMA talks "since any market access achieved in these areas could be more than offset by the proliferation of unfair barriers to trade." The EU, India and Japan also strongly condemned the 'reappearance' of zeroing.

The US acknowledged that it would be difficult to keep the provision intact in up-coming negotiations. Nevertheless, Ambassador Peter Allgeier underlined the importance of the issue to his country, and reiterated the US view that "the Appellate Body went beyond what was agreed, and when that happens it is legitimate for the membership to correct that."

Fisheries Subsidies

Reactions have been more muted to the annex on fisheries subsidies proposed in the draft text, which sought to bridge the principal split in the negotiations between advocates of a 'top-down' blanket ban on fisheries subsidy payments (with negotiated exceptions), and countries that want a 'bottom-up' ban only on specific kinds of subsidies, most vocally Japan, Taiwan, and Korea. Subsidies covering the construction, operating and fuel costs of vessels, for instance, are among those slated to be banned. Other support for the fishing industry – such as that for port infrastructure 'exclusively or predominantly for activities related to marine wild capture' fishing, including storage and processing facilities – is also prohibited (see also page 2).

Some subsidies would be permissible for all countries, provided that they maintain an international-standard fisheries management system. These include payments aimed at boosting fishing vessel safety without increasing fishing capacity, reducing the environmental impact of fishing, or re-training fisheries sector workers into unrelated occupations. Governments would also retain the ability to grant limited fishing access to certain individuals and groups, so long as this does not affect migratory fish stocks or other countries' 'identifiable fishing interests'.

Under special and differential treatment provisions for developing countries, least-developed countries (LDCs) would be exempt from any disciplines prohibiting subsidies. Non-LDC developing countries would be allowed to provide otherwise-banned subsidies, including those that boost capacity, to small-scale fisheries in territorial waters characterised by non-mechanised fishing, family- or association-based fishing operations, catches consumed largely by fishing families, and the absence of a 'major employer-employee relationship'. So long as functional management systems to conserve fish stocks are in place, developing countries would be able to subsidise port infrastructure, and provide income and price supports.

With regard to 'access fees' (the payments that a government offers another coastal nation in exchange for right to fish in that nation's waters), the text explicitly states that government-to-government fees are not deemed to be subsidies. However, 'subsidies arising from the further transfer' of already-purchased access rights to a third party in the host nation, such as private industry, are normally prohibited – except when the host is a developing country, and the fishery is within that country's exclusive economic zone and operated in accordance with internationally-recognised best practices for fisheries management.

Marine conservation group Oceana welcomed the text's "strong prohibition on subsidies that increase overcapacity and overfishing." The US called the proposed disciplines a 'good first step', while New Zealand's trade minister Phil Goff said harmful subsidies should be eliminated. India expressed reservations on restrictions to support for small-scale fishing in developing countries, and the EU warned that the new rules might stretch too far in a way that could hurt port infrastructure and the aquaculture sector.

The rules negotiations are set to continue during the weeks of 21 January and 11 February, with a first revision of the text due in the second half of February.

Progress Elusive in SDT Negotiations

Doha Round negotiations on strengthening 'special and differential treatment' (SDT) for developing countries have made no significant headway in recent months.

On 7 December the Committee on Trade and Development (CTD) heard updates from smaller group consultations on possible amendments to SDT provisions.

Those discussions have lately focused on a few proposals, such as one from the African Group seeking to more clearly allow developing countries to temporarily deviate from legal WTO constraints in order to implement policies that promote economic development (GATT Article XVIII). Others demand partial or complete exemption based on "financial, trade, or development needs" from obligations under the Agreement on Sanitary and Phytosanitary Measures (Article 10.3), as well as administrative requirements in the Agreement on Import Licensing Procedures (Article 3.5). Members have also been discussing the establishment of a mechanism to monitor the implementation and effectiveness of existing SDT provisions and those resulting from the Doha Round.

In July, chair Shree Baboo Chekitan Servansing tabled compromise language for the proposals in an attempt to find common ground. However, divisions persist: provisions that supporters deem strong enough to be effective go unacceptably far in the eyes of their opponents. According to a source, opponents say the African Group's proposal on Article XVIII could eventually translate into 'a blank cheque'. Countries such as Mexico, Chile and Costa Rica, as well as some developed countries, want compliance with commitments to be ensured.

Discussions on the structure and reach of an effective monitoring mechanism looked at how it could evaluate whether SDT provisions were meeting the Doha mandate to be "more precise, effective and operational." Some negotiators called for periodical reviews to see whether the mechanism itself needed altering. Members asked the WTO Secretariat to produce a document detailing similar mechanisms under discussion in other areas of the negotiations.

Least-developed countries continued to push Japan and the US to provide duty- and quota-free access to their exports, as most industrialised countries already do. Japan said it was planning to lift remaining barriers, but the US continues to link the extent of duty- and quota-free market access to the outcome of the Doha Round as a whole.

SVEs Stress Need for Continued Attention to Their Concerns

A group of 'small and vulnerable economies' (SVEs) in December underlined the importance of maintaining the CTD's 'dedicated session' as a monitoring forum, rather than one in which their various proposals for special treatment would be negotiated.

These countries, many of which are small island states, account for minute proportions of global trade. In the talks on agriculture and industrial goods, they have sought less exacting liberalisation obligations than those required of other developing countries. The Doha mandate calls on WTO Members to examine the problems faced by small and vulnerable economies, and to come up with recommendations to improve their integration into the multilateral trading system "without creating a new category of Members."

At a brief meeting on 3 December, Members of the group expressed concerns about a potential 'reopening' of negotiations on their proposals in the CTD, as opposed to the relevant Doha Round negotiating committees. Barbados, speaking for the SVE group, stressed three lines of future work for the CTD: raising awareness of the particular vulnerable situations and constraints on production faced by SVEs; evaluating whether accession procedures for SVEs seeking to join the WTO are unduly burdensome; and looking at WTO obligations from which SVEs could be temporarily exempt in the event of natural disasters or comparable situations.

Disputes in Brief

The Dispute Settlement Body (DSB) appointed Chinese attorney and legal scholar Zhang Yuejiao to the WTO's Appellate Body on 27 November after Taiwan lifted its objection to the nomination following a week-long standoff .

Taiwan's opposition stemmed from the decades-old conflict between the two countries over the island nation's political status. Citing 'deep concerns' over "the impartiality and qualification of one of the recommended candidates," Taiwan had blocked the adoption of the agenda of the DSB's 19 November meeting.

On 27 November, the DSB tackled the agenda originally scheduled for a week earlier. In addition to the nomination of Dr Zhang, it confirmed the AB appointments of former USTR general counsel Jennifer Hillman and the former WTO ambassadors of Japan and the Philippines, Shotaro Oshima and Lilia Bautista.

The meeting also established a dispute settlement panel on a US complaint regarding Chinese restrictions on the importation and distribution of books, journals, films and music (Bridges Year 11 No.3 page 10).

The US rejected first panel requests on its agricultural subsidies by Brazil and Canada. Both countries claim that, with the exception of 2003, the US exceeded its spending limit on the most trade-distorting subsidies every year between 1999 and 2005. Central to this argument is their contention that several US payment schemes in those years were wrongly classified as 'green box' support, which is not limited by WTO spending caps.

The complainants are likely to renew their requests at the DSB's 17 December meeting, when they will be automatically accepted. As the complaints are nearly identical, a single panel is expected hear both.

Canada has repeatedly stated that one of the motives behind its challenge is to influence the debate on the new US farm bill (see page19).

WTO Members Weigh Options in Gambling Dispute

Time is running out for a negotiated solution in the WTO remote gambling dispute opposing the tiny island nation of Antigua and Barbuda to the United States. In contrast, the US and the EU reached a mutually satisfactory compromise on 17 December.

The gambling dispute is unusual in many ways. First, it pits one of the WTO's smallest economies against its biggest and thus raises the difficult issue of effective retaliation. It also marks the first time that a public morals defence has been successfully used in a services-related dispute. In another first, the US has decided to implement the adverse ruling through withdrawing a scheduled market access commitment rather than changing the measures found to violate WTO rules.

Milestones of the Dispute

In April 2005, the Appellate Body ruled that certain market access limitations imposed by the US on remote betting services were inconsistent with its commitment to fully open recreational services to foreign competition. The AB accepted, however, the US defence that its restrictions on online gambling were justified under Article XIV(a) of the General Agreement on Trade in Services as measures "necessary to protect public morals or to maintain public order."

Despite this significant admission, the Appellate Body ultimately concluded that the US restrictions violated WTO rules because the prohibition of remote gambling did not extend to all such services. Internet or telephone bets on horse racing within national borders, for instance, are not explicitly forbidden, although the US claims that they are illegal under existing criminal statutes. Antigua has argued that prosecutions under those statutes are very rare and that domestic remote gambling services have in fact experienced 'significant growth and expansion' since the Appellate Body ruling (Bridges Year 10 No.5 page 9).

In March 2007, Antigua and Barbuda obtained a final confirmation that the US had not complied with previous rulings in the dispute. In response, the US took the unprecedented step of announcing a modification of its services schedule so as to explicitly exclude foreign access to its lucrative gambling market. US authorities argued that the government had never intended to open that market in the first place, and that the only way it could correct the more than decade-old scheduling 'oversight' was to specifically exclude gambling services from its market access commitments in services trade.

Antigua and Barbuda, Australia, Canada, Costa Rica, the EU, India, Japan and Macao subsequently entered into compensation negotiations with the US. While Australia, Canada and Japan settled their claims ahead of the 14 December deadline, negotiations with the EU went to the wire. Both sides declined to put a dollar value on the deal, which consists of increased access for European service suppliers to the US postal and courier, research and development, storage and warehouse markets, as well as the testing and analysis services.

Antigua and Barbuda is the only country to have requested formal arbitration of its US$3.4 billion compensation claim thus far (the US has put the figure at US$500,000). The WTO decision on Antigua's claim is reportedly delayed until early next year.

The other remaining complainants – Costa Rica, India and Macao – have not disclosed the amounts they are seeking. As no agreement was reached between them and the US by the 14 December deadline, the three developing countries have a 45-day window to ask the WTO to arbitrate the level of eventual trade sanctions.

Antigua Likely to Cross-retaliate

Antigua's 'victory' in the gambling case exemplifies one of the greatest flaws in the WTO's dispute settlement system: the difficulty of a small economy to make a disproportionately larger trading partner comply with adverse verdicts.

Ordinarily, the suspension of trade concessions should target the sector where the violation of WTO rules occurred. In Antigua's case, however, revoking the US' access to its services market would make no difference to the unsuccessful defendant: US bilateral trade with the less than 70,000-strong Caribbean nation represents just 0.02 percent of its total exports while 48.9 percent of Antigua's goods and services imports originate in the US.

In a bid to obtain compliance despite its unequal bargaining power, Antigua has announced its intention to suspend liberalisation commitments in the communication services sector, as well as 'cross-retaliation' through ceasing to honour its WTO obligations to protect US copyrights, trademarks, industrial designs, patents and data protection. Antigua argues that these measures are necessary, since standard means of retaliation, such as raising tariffs on US exports, would hurt its domestic economy far more than that of the US.

US Lawmakers Concerned about Possible WTO Precedent

In yet another unexpected twist in the gambling saga, the chairmen of two US congressional committees had in November called on the administration to amend its laws and regulations rather than modify its scheduled commitments. Among their principal reasons for advocating a change of tack, the chairs of the House financial services and judiciary committees cited the "precedent this sets for future situations in which parties to [WTO] agreements find a particular obligation inconvenient or politically difficult." A US withdrawal of concessions would represent a "drastic step which could have significant consequences for the entire WTO system," they said, since such a course of action could prompt other Members to follow the US example.

Instead of resorting to a modification of its services schedule, the US could have complied with the WTO ruling by revoking current exceptions to the interstate gambling prohibition, thus making all remote betting services – domestic and foreign– illegal within US territory.

EU Given a Respite in Biotech Dispute

The US, Canada and Argentina have agreed to prolong until 11 January 2008 the European Union's deadline for bringing its biotech approval practices in line with WTO rules.

At issue is the EU's compliance with 2006 panel rulings that faulted its application of marketing approval procedures for genetically modified organism (GMOs). The deadline was originally set for 21 November 2007.

Parties to the dispute are still negotiating a mutually acceptable solution, including an EU commitment to faster processing of pending applications. The complainants also hope that the additional time will allow the European Commission to persuade Austria, Hungary and Poland to lift the national bans they maintain on GMOs that have received a favourable safety assessment from the European Food Safety Agency (EFSA).

National Bans

Austria is the only country that still applies a national moratorium on a GM corn variety implicated in the US/Canada/Argentina WTO challenge. It also maintains a ban on another EFSA-approved maize strain. On 30 October, EU member states failed for the third time to mobilise enough votes for the Commission to order Austria to lift both bans. While the complainants want Poland and Hungary to end their marketing restrictions as well, these countries were not yet EU members at the time of the WTO dispute.

In addition, the complainants have raised concerns over President Sarkozy's 25 October announcement that France will suspend the cultivation of GMOs until a new body – to be created before the end of the year – has conducted an impact assessment. While at the time of writing it was not clear how the proposed body would differ from EFSA, a number of analysts predicted that it would look into the sanitary, economic and environmental implications of GMOs, rather than just the scientific factors taken into account in EFSA safety evaluations. Following the new impact assessment, France will draft national implementation regulations for the EU directive governing GMO approvals before next summer.

Apart from the problematic national moratoria, the EU is technically in compliance with the WTO rulings (Bridges Year 11 No.6 page 21). GMO marketing approvals resumed in 2004 after new regulations entered into force, although these have proceeded slowly due to continued dissent among member states. As the latter have consistently failed to muster the qualified majority necessary to either endorse or refuse approval of EFSA-cleared GMO varieties, it has fallen on the Commission to make the decisions. So far, the EU executive has followed EFSA's advice in each of the handful of cases it has been called to arbitrate. This trend, however, could be reversed.

Split Looms on Cultivation Approval

Environment Commissioner Stavros Dimas confirmed on 22 November his negative opinion on granting permission to cultivate two varieties of insect-resistant GMO corn on the grounds that research conducted since the positive EFSA assessment indicated potential risks to 'secondary species' such as birds and butterflies. The cultivation of the 1570 strain produced by US-based Dow and Pioneer could lead to potentially irreversible environmental damage, the commissioner said, while the cultivation of the Bt11 variety developed by Switzerland's Syngenta entailed an 'unacceptable' level of risk. In contrast, EU trade chief Peter Mandelson has repeatedly warned against the negative economic consequences to the regional bloc if it continues to reject 'safe biotechnology', as well as the likelihood of WTO challenges if the EU does not act consistently with EFSA's safety evaluations.

No genetically modified varieties have been approved for cultivation in the EU since the process restarted in 2004, and only one – Monsanto's 810 corn strain – was cleared under the old rules. That variety currently accounts for roughly 1 percent of European corn production.

The Commission is expected to consider approvals for the Dow/Pioneer and Syngenta varieties in the coming weeks. Sources indicate it may request EFSA to review the scientific evidence on which Mr Dimas has based his opposition.

Trade Retaliation Possible

Should the negotiations between the EU and the US, Canada and Argentina fail, the latter would be free to request a panel to rule on whether the EU has brought its approval practices into compliance with WTO rules. If the panel finds against the EU, the complainants may request the right to retaliate, most likely by imposing punitive tariffs on EU farm goods.

Determining the level of the sanctions could present some difficulties, however, as the complainants would not be able to quantify the value of lost trade since the EU never had a market of any consequence for GMO imports. This is one of the reasons why some US biotech companies and politicians have previously urged the administration to launch a case against the EU's entire GMO approval regime rather than just the inadequate application of its own procedures, which was the target of the present dispute.

Commenting on the possible refusal of approval for the cultivation of the Dow/Pioneer and Syngenta corn varieties, Rob Gianfranceschi of the US mission in Brussels noted that the United States had "consistently stated that the EU continues to lack a predictable, workable process for approving these products in a way that reflects scientific rather than political factors." Nathalie Moll, a spokeswoman for industry association Europabio, said that acceptance of the draft decisions "would be setting a precedent for EU officials to reject products based on nonverified scientific data." In contrast, Greenpeace has warned the Commission that the "vast majority of European citizens and consumers are opposed to genetically engineered plants in agriculture and for food."

Bali Climate Conference: The Next Two Years Will Tell

The most important outcome of the December climate change conference in Bali was to bring all governments on board to negotiate a successor treaty to the Kyoto Protocol, ending years of disagreement on a global approach to the challenges posed by rising temperatures.

Two weeks of arduous negotiations in Bali resulted in a unanimous recognition that 'deep cuts' in greenhouse emissions would be necessary to prevent dangerous human interference with the climate system. The Bali Roadmap commits the nearly 200 governments that attended the talks, including the US, to negotiate a global agreement to achieve this goal. The negotiations should conclude by 2009, so that a new international climate regime can enter into force when the Kyoto Protocol expires in 2012.

Commitments Remain Vague

The roadmap leaves out any specific future greenhouse gas reduction targets or deadlines for achieving them. It commits all countries to consider "enhanced national/international action on mitigation of climate change." For developed countries, such action would include "quantified emission limitation and reduction objectives […] while ensuring the comparability of efforts among them, taking into account differences in their national circumstances." Among potential developing country measures are "nationally appropriate mitigation actions […] in the context of sustainable development, supported and enabled by technology, financing and capacity-building."

The roadmap also suggests that negotiators consider the economic and social consequences of response measures, as well as opportunities for using markets to enhance the cost-effectiveness of mitigation action, and scaling up the development and transfer of environmentally sound technologies to developing countries.

A fund was established in Bali to provide financial assistance to help developing countries adapt to adverse effects of climate change. Governments also agreed to reward developing countries for curbing deforestation.

The next major negotiating meetings will take place in Poznan, Poland, in December 2008 and Copenhagen, Denmark, in 2009.

For more details, see Bridges Trade BioRes, 18 December 2007, at www.ictsd.org.

Ministers Discuss Links between Commerce and Climate Change

Bali marked the first time that trade officials met in parallel with climate negotiators. Ministers and senior government representatives from the US, Brazil, Japan, the EU, China, India and several other Asian and European countries – but none from Africa – attended an informal meeting intended as a platform for information exchange, rather than negotiation.

Ministers underlined that the most important contribution of the multilateral trade regime to climate change would be a successful and balanced conclusion of the Doha Round negotiations, including the environment mandate.

While the participants acknowledged that several measures addressed at the WTO – such as standards, subsidies, taxes and intellectual property rules – could have climate-related implications, they also made it clear that the issue should be tackled primarily in environmental fora. Indeed, most cautioned against the use of trade restrictions, either to compel others to action on climate change or to address competitiveness. US Trade Representative Susan Schwab, for instance, emphasised that "WTO Members should be cautious to avoid a rush to restricting trade in the name of climate change action."

However, David O'Sullivan, a top trade official at the European Commission, warned that failure to reach a global deal on climate change could complicate international trade relations: policy-makers could find themselves having to consider the use of trade policy tools, including controversial border tax adjustments on certain imports in order to achieve climate change objectives (see page 15).

Ministers agreed that, in accordance with the principle of 'common but differentiated' responsibilities, steps to address climate change must leave developing countries enough room in which to develop. However, they expressed concern about "the lack of adequate studies or empirical evidence" on the links between trade, climate change and poverty eradication, and called for further research in the area to enable governments to make more informed decisions.

Participants also discussed a recent proposal by the EU and the US for all WTO Members to liberalise trade in some 43 products identified by the World Bank as providing direct climate change benefits (see page 8). Brazil's Foreign Minister Celso Amorim strongly criticised the EU-US list of products for not including ethanol, the "single product whose effect on climate change is already demonstrated." He stressed that liberalising the ethanol trade would benefit other developing countries with conditions similar to Brazil. Mr Amorim also pointed to an anomaly in tariff classification for different biofuels: ethanol is classified as an agricultural product (which makes it easier for rich countries to shield it from tariff cuts) while biodiesel is considered to be an industrial good. He said that there was no rationale for the discrepancy, and called for it to be corrected.

USTR Schwab rejected complaints that the EU-US list consisted only of products of export interest to industrialised countries. She said that the US was in fact a net importer of the 43 products in 2006, with US$18 billion in imports surpassing exports by US$3 billion. The two top sources for those products were Mexico and China, she added.

Officials from both China and India raised concerns about barriers to accessing foreign technology. Notably, India referred to intellectual property protections as a potential obstacle, and called for a consideration of revisiting WTO intellectual property rules so as to ensure that they adequately respond to Members' pursuit of technology transfer objectives. Several developed country delegations warned that weakening the intellectual property regime could undermine innovation, and thus ultimately be counterproductive.

Unpacking the Wonder Tool: Border Charges in Support of Climate Change

Aaron Cosbey

Competitiveness is one of the potential flashpoints in the run-up to the Bali climate conference. The concern is that strong national measures to reduce greenhouse gas emissions will leave domestic producers at a disadvantage relative to those in countries that do not take similar actions.

Competitiveness concerns are traditionally overblown, although they may be more salient in the face of a truly ambitious post-2012 climate regime (see page 14). Competitiveness is not a concern for all producers, but only for those that are energy-intensive, producing goods that are heavily traded, and based in countries where the energy supply has relatively high greenhouse gas (GHG) emissions. Moreover, there are many positive ways to address competitiveness concerns, international agreement on action probably being the most desirable.

But when international agreement fails, past experience suggests that one fallback is likely to be particularly appealing: some sort of border charge (e.g., a border tax adjustment or BTA) to 'level the playing field' between domestic and foreign producers.

The point of such measures would be two-fold. First, they would encourage all countries to strengthen their efforts to address the global challenge. This, for example, is one of the motivations for the Montreal Protocol's ban on imports of ozone-depleting substances from non-Parties to the Treaty – a trade measure of a different sort. Second, they would level the playing field between foreign and domestic producers, ensuring that the former do not gain market share by dint of their domestic regulatory regime. Ultimately, the point is to make the imposing country better able to pursue its clean development path, a course of action that is much tougher when it entails injury to domestic producers.

Border charges to address environmental issues have been proposed by a number of countries, most recently by several EU politicians and institutions, and in two climate change proposals currently before the US Congress. They respond in part to the increased stringency of proposed future action, and in part to the sheer volume of global emissions that are outside of the current Kyoto Protocol targets (around 70 percent). Three questions that should be asked with respect to such measures are:

- Are they WTO-legal?
- Would they be feasible to administer?
- Would they be productive in the wider efforts to 'export' the EU's clean development model?

WTO Compatibility

There is no definitive answer the first question: would such measures be WTO-legal? In large part it depends on the design of the measure in question, of course. A host of analysis on the BTA question has produced divided opinion, and there will be no final answer outside of a WTO dispute settlement panel. Such measures might well be found to contravene GATT's Article I on most-favoured nation (MFN) treatment, but the question hinges on whether it is permissible to consider the method of production of a good when deciding whether two goods are due similar treatment. Of course, even if a panel rules that climate-related border charges violate MFN, the measures might still be saved by GATT's Article XX – General Exceptions.

Here the WTO's Appellate Body ruling in *US-Shrimp I* gives us some idea of what might be required of a WTO-compatible unilateral measure taken to try to regulate methods of production outside of the implementing jurisdiction. For the sake of the present analysis, two important requirements are:

- The measure must not be based on the regulatory regime in the country of production, but must rather be tailored to the specific circumstances of the exporter. Otherwise clean exporters from countries with lax regulations would be unfairly penalised.
- The measure must only be taken after the failure of good faith efforts to reach a multilateral agreement with the exporting countries that would address the environmental problem in question.

The first requirement will be discussed below, but it can be noted here that it would entail a rather complex regime.

The second requirement is of interest because it seems obvious that a complainant that is Party to the Kyoto Protocol – for example, China – could argue with some force that efforts at a multilateral agreement have *not* in fact failed, and that it is in full compliance with the obligations it undertook under said agreement. It is hard to imagine a WTO panel finding against such an argument, at least during the coverage of the Kyoto Protocol's first commitment period, which runs until 2012.

To summarise: legal opinion on whether climate-related BTAs and other border charges would be found WTO-illegalis divided. But it can be strongly argued that if the measures *are* found to violate MFN, then the GATT's environmental exceptions will not serve to save them. It should be noted that the US proposals are not strictly BTAs, but rather require that foreign producers purchase a certain value of US offsets (Bridges Year 11 No.6 page 16). In part they address the first requirement in that they would be imposed on a shipment-by-shipment basis, and are designed specifically to evade WTO strictures relevant to BTAs. Although a full legal assessment of this strategy is beyond the scope of this paper, it should be noted that the second requirement (good faith multilateral negotiations) is still not addressed. Perhaps the most salient question with respect to such measures concerns their administration.

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BTA Administration

Would climate-related border charges be feasible to administer? They would require several rather difficult calculations. They would first probably need to establish the extent to which a foreign government was in fact taking measures comparable to those of the domestic government. Given the fact that a raft of different policy instruments can be employed to reach the same environmental goal, this calculation would be extremely difficult. Depending on the design of the measure, it might need to establish the actual quantum of difference between the two regulatory efforts, so as to be able to derive the proper value of the border charge.

If, in accordance with the Appellate Body ruling in US-Shrimp I, the tax regime was applied not to countries but to individual producers, the calculation would need to establish, almost on a shipment-by-shipment basis, the GHG footprint of the goods in question – a daunting prospect given the reality of today's global value chains, coupled with the widespread data constraints that exist in most countries. Even given the ability to perform this calculation (cost issues aside for the moment), the taxing country would then need to make the judgement described above, to decide at what level the shipment would need to be taxed, given the relative GHG-intensity of the shipper as compared to domestic producers.

The cost and complexity of a regime capable of carrying out these calculations is likely to be well out of line with the potential benefits that it might deliver. It is worth noting that there would be enormous scope in the course of such calculations for political considerations to contaminate the objectivity of the final result – an expansive stage on which protectionism might masquerade as environmentalism.

Political Repercussions

Would such measures be productive in the wider efforts to achieve international consensus on a climate regime? The exceptionally virulent reactions to the unilateral US measures that featured as part of the shrimp-turtle and reformulated gas disputes in the WTO, and even to the Appellate Body rulings in US-Shrimp that cleared the way for such measures given certain conditions, suggest that developing countries would not respond well to the prospect of having such measures applied to their exports. Given that agreement on any post-2012 regime is highly dependent on developing countries as willing partners engaged as part of a win-win collaboration, trade measures as sticks should probably be considered only as a last resort (if at all). Otherwise the poisoned atmosphere they would create would almost certainly frustrate progress.

The concerns that make border charges appealing are important. They need to be addressed where they are real, and dispelled where they are not. And there may be a place for well-designed trade measures in the mix. But there is, at least, a need for more serious analysis to better understand the options available, and their full implications in terms of legality, feasibility and wider political repercussions.

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World Bank: Border Taxes Could Violate Trade Rules

The *International Trade and Climate Change* report released by the World Bank in October 2007 found that carbon taxes do not hurt countries' international industrial competitiveness. However, these policies have often been accompanied by increased exports by energy-intensive industries, lending weight to the notion that the subsidies and exemptions that most countries have granted to affected industries are overcompensating. Of specific energy-intensive industries in OECD countries, only the cement sector has seen trade reduced by the imposition of a carbon tax.

The report also noted that border tax measures on products from countries that do not have carbon restrictions would potentially risk violating WTO rules, and raise issues related to process and production methods (PPMs). Simulation analysis suggested that the 'Kyoto tariff' on US imports that some European leaders have called for could reduce US exports to the EU by about 7 percent, or even more as trade is diverted to countries that do not face the additional duties.

On the other hand, the report found energy efficiency standards – implented by many developed and developing countries – to be more likely to hurt industrial competitiveness. The metal and transport equipment industries were found to be particularly affected by such requirements.

Liberalising trade in low-carbon goods, including via the WTO, could be beneficial, the World Bank suggested, proposing a focus on specific sectors that could yield quick benefits, such as renewable energy and energy efficiency technologies.

For the climate regime, the report singled out efforts to develop a uniform approach to the pricing of greenhouse gas emissions as the most important priority. It identified a number of tariffs and non-tariff barriers in developing countries as huge impediments to the transfer of climate-friendly technologies, and encouraged them to strengthen intellectual property protection to stimulate the diffusion of clean technologies.

In addition, the report examined whether OECD countries' climate change policies had resulted in 'carbon leakage', i.e. the relocation of energy-intensive industries to developing countries. While the study pointed to a gradual shift of energy-intensive production to the latter – partly due to climate change mitigation measures in developed countries – it also noted that the trend was not pronounced.

EU Offers ACP Interim Trade Deals to Meet EPA Deadline

The European Commission has pulled back from its threat to end long-established trade privileges for African, Caribbean and Pacific countries unless they sign comprehensive Economic Partnership Agreements before the end of the year.

With less than a month remaining before existing preferential trade rules expire, the Commission has offered to sign interim deals limited to goods-only trade in order avoid disrupting trade. Remaining controversial issues – such as services, investment, intellectual property and competition policy – could then be negotiated in a second phase in early 2008.

"Our objective remains to conclude comprehensive, full economic partnership agreements with all interested ACP countries and regions," EU Trade Commissioner Peter Mandelson told the European Parliament on October 22. However, given that negotiations are more advanced in some regions than others, it was necessary to conclude WTO-compatible interim deals as a 'stepping-stone' to a comprehensive EPA, he said.

Until recently, the Commission had insisted there was no Plan B for maintaining ACP market access if the ongoing talks failed to meet the cutoff date.

WTO Compatibility

The pressure to meet the imminent deadline is the result of a waiver under which WTO Members allowed the EU to maintain its unilateral preference scheme for ACP states until the end of 2007, even if it violates multilateral trade rules by discriminating between developing countries. The five-year exemption was supposed to give the EU and the ACP countries time to negotiate reciprocal EPAs, which would be compatible with WTO rules.

However, the negotiations have lagged in each of the six geographical ACP blocs, with most regions struggling to recognise the deadline. Now, the 79 ACP countries have three options: sign a full and comprehensive EPA, sign a goods-only interim accord with firm commitments to negotiate remaining issues in 2008 or fall back to the Commission's less favourable Generalised System of Preferences (GSP) tariff scheme – applicable to all developing countries.

Pressure Amounts for Concluding Deals

This last option is particularly worrying for exporters in the 31 relatively richer ACP countries that cannot benefit from duty-and-quota free access to Europe under the 'Everything but Arms' initiative. Despite claims from development campaigners and civil society that falling back to GSP is nothing more than a bluff, the Commission insists that there is no other legal alternative. Fear of increased tariffs is also causing the once distinct set of negotiating regions to splinter into sub-regions and even individual countries in a bid to sign something concrete.

The state of play at the time of writing is outlined below.

- The Caribbean, where negotiations are most advanced, seems to be the only region capable and likely to sign a comprehensive EPA by the end-2007 deadline.

- Southern African Development Community members Botswana, Lesotho, Swaziland and Mozambique have submitted a WTO-compatible EPA market access schedule and agreed on provisions on development co-operation and other issues. Angola is still negotiating, while South Africa and Namibia look unlikely to conclude an interim agreement.

- Of the 15-member Eastern and Southern Africa group, Kenya, Uganda, Tanzania, Rwanda and Burundi – members of the East African Community customs union – have signed an interim agreement on goods trade, as have the Seychelles and Zimbabwe. Mauritius concluded an interim deal on 6 December.

- Papua New Guinea and Fiji – the two main economies and exporters in the 14-member Pacific group – have signed a goods agreement.

- Arguing that too much work still needed to be finished in terms of negotiating specific trade concessions and related development aid, the seven-nation Central African bloc asked the EU to seek an extension of the WTO waiver. The Commission refused the request, as it done earlier with regard to a two-year extension proposal from the West African ACP group.

- West Africa is unlikely to sign anything as a group. The Ivory Coast clinched an inividual interim deal on 7 December, and Ghana was reported to be on the point of concluding one within days.

The Interim Agreements

Under the interim agreements, the EU will offer duty-free access to almost all goods from the signatory ACPs as of 1 January 2008. Sugar and rice will be fully liberalised after a transition period (Bridges Year 11 No.4 page 15). ACP partners will phase in market access commitments within 15 to 25 years depending on the country or group. They will also be able to exclude certain agricultural and industrial products from liberalisation commitments.

Each regional deal will backed up by a development assistance package, some specifically earmarked for Aid for Trade. Some of the interim agreements already include development co-operation clauses, while for others such provisions will be agreed during the comprehensive EPA negotiations.

Commission Criticised

EPAs have been accused of opening the floodgates to a torrent of cheap European imports, as well as depriving poor governments of vital tariff income. The critics argue that the EU could seek an extension of the WTO waiver or fine-tune its GSP scheme to avoid raising tariffs in the middle of negotiations. The Commission insists that a waiver extension would not be granted, and that the deals are necessary to "move us from a regime that, although well-intentioned, has clearly not succeeded in promoting development in the ACP."

Free Trade Agreements in the Americas: Worth the Investment?

Kevin P. Gallagher

Nations that negotiate new trade agreements with the United States hope that such deals will attract foreign investment. This is certainly what Peruvians, Colombians and Panamanians are hoping for as an outcome of agreements currently in the pipeline for US Congressional approval.

The promise of investment is that it will translate into stable jobs, technology transfer and economic growth. However, new research suggests that signing a trade agreement with the United States may not bring the desired investment, and if it does, economic growth does not necessarily follow.

Critics argue that the investment chapters in these trade deals restrict the ability of signatory countries to require that foreign firms adhere to performance requirements, such as technology transfer and local content requirements.

Traditionally, nations have instituted performance measures to spur broad economic growth by creating links between foreign firms and the domestic economy. Indeed, China has become a master in using such tools over the past fifteen years. Although allowed under the World Trade Organisation, these development tools would be prohibited under bilateral and or regional free trade agreements (FTAs) with the United States.

These pacts also have a another little secret that is *not* allowed under the WTO: they leave open the possibility that ad hoc investment tribunals will interpret social and environmental regulations as 'indirect expropriation'. Under such interpretations, multinational firms themselves (as opposed to states filing on their behalf as required by WTO rules) can sue for massive compensation from foreign governments. For example, the US firm Occidental Petroleum in 2004 took advantage of a US-Ecuador investment treaty to challenge Ecuador's decision to cancel tax rebates and was awarded US$71 million.

Proponents of these deals argue that agreeing to such measures is the price that developing countries must pay for receiving more investment. The problem is that even in the event that the investment does materialise, US FTA partners may have traded away the tools that countries such as China have used to make foreign investment work for economic growth and poverty alleviation.

The World Bank's 2005 *Global Economic Prospects* report warned that trade and investment agreements by themselves would not necessarily translate into new foreign investment. This conclusion was based on a study the Bank commissioned on the experience of twenty developing countries between 1980 and 2000 in order to determine whether bilateral FTAs that provide assurances to foreign investors do indeed attract investors.

More recent studies have similar findings for Latin America. Articles in the peer reviewed journals *Latin American Research Review* and the *Journal of World Investment and Trade* found no independent correlation between foreign trade or investment agreements and increases in foreign investment in the region.

Mexico's experience with NAFTA, however, is an exception. At least until 2000, Mexico was able to attract unprecedented amounts of foreign investment, which increased more than fivefold and made Mexico the third largest recipient (after Brazil and China) of foreign investment in the developing world.

However, Mexico's foreign investment has not translated into the promised benefits. Although foreign investment has surged, total investment has lagged at less than 20 percent of GDP (compared to China's 40 percent) – one of the reasons why the Mexican economy has grown barely over one percent a year in per capita terms since NAFTA's entry into force in 1995.

New research shows that although Mexico was initially successful in attracting multinational corporations, foreign investments waned in the absence of active government support, as well as China's increasing competitiveness. Moreover, the foreign investment created an 'enclave economy', the benefits of which were confined to an international sector not connected to the wider Mexican economy. In fact, foreign investment put many local firms out of business and transferred only limited amounts of technology.

Conclusion

All this evidence does not in any way suggest that foreign investment or trade agreements are bad things. What it does suggest, however, is that the costs of prohibiting performance requirements and adopting draconian expropriation rules could very well outweigh the benefits of new treaties with such provisions. The experience of China suggests that investment rules should be left as they are under the WTO, which gives nations some flexibility to translate foreign investment into sustainable growth.

From a US perspective, the best trade deal with developing countries is one that helps our trading partners grow their economies. Growth leads to political and macroeconomic stability and (selfishly) to the ability to import more goods. The US Congress and its trading partners should think twice about agreeing to the investment rules in pending agreements.

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China and Mercosur: Perpectives for Bilateral Trade

Welber Barral and Nicolá s Perrone

While China's economic importance to Latin America, and to Mercosur in particular, has increased exponentially over the past few years, countries in the region should be wary of potential competition in their domestic markets.

Since the opening up of the Chinese economy and the reduction of export and import controls, Brazil and Argentina's foreign trade has shown sustained growth, which accelerated after China undertook trade reforms – including significant tariff cuts – in the 1990s. China's accession to the WTO in 2001 further contributed to this dynamic (see graph overleaf).

Mercosur Export Growth

In 1980, Argentine exports to China represented 2.34 percent the country's total foreign sales. This figure remained relatively stable until 2002. By 2004, however, it reached 7.58 percent and 7.94 percent two years later. Between 2000 and 2003, Argentina's exports to China grew by an astonishing 123.7 percent.

Imports from China also increased considerably. While they represented a negligible 0.3 percent of Argentina's total imports in the 1980s and 1990s, by the year 2000 they had climbed to 4.56 percent, followed by 6.23 percent in 2004 and 7.8 percent in 2005.

The scenario is largely similar for Brazil. Both exports and imports amounted to 3 percent in 1985, dropping to 1 percent in 1991. Although trade between the two countries increased steadily from 1993-1998, truly spectacular growth occurred between 1999 and 2003. During his period, Brazil's exports to China rose by 525 percent – compared to a 52-percent increase in exports to other destinations – making the country China's main supplier in Latin America.

While China is now Argentina's fourth largest export destination, and Brazil's third, the picture is quite different for the two smaller Mercosur partners Paraguay and Uruguay. In 2005, the latter's exports to China reached just US$119 million, while imports totalled US$242 million. For Paraguay, the gap was even larger: US$69 for exports versus US$716 million for imports.

From the Chinese perspective, however, Latin America remains a relatively unimportant export destination. According to 2002 data, Mexico, with 0.9 percent, is China's 20th export market and Brazil, with 0.5 percent, is 26th. The value of Chinese exports to Mercosur represented just 0.6 percent of the country's total at that time.[1]

Composition of Mercosur Exports

Between 2001 and 2003, primary products made up 55.5 percent of Brazilian shipments to China, i.e. double the proportion of such products in the country's total exports. Semi-processed goods represented 20.1 percent of exports to China compared to 14.7 percent in overall foreign sales. While shipments of fully processed manufactures accounted for 55.1 percent of Brazil's total exports, they amounted to only 24.1 percent of goods shipped to China.

In addition, Brazilian exports were concentrated in just eight sectors, with agrifood and extractive minerals representing 47 percent of the total. Interestingly, this ratio is virtually unchanged since 1985.

The 2001-2003 level of export concentration was also high for Argentina: three products – soya seeds (41 percent), unprocessed petroleum oil (25 percent) and soya oil (18 percent) – accounted for 84 percent of all goods exported to China. Industrial manufactures represented just 4 percent of the total, a 20-percent drop from the year 2000. From 2003-2006, the share of agrifood shipments reached 72 percent. These products involved no (or very little) processing, a figure far superior to the 49 percent that primary agricultural and industrial products (excluding fuels) represent in the country's total exports.

Furthermore, export concentration in Argentina continues apace. For instance, the metallurgic sector accounted for 15 percent and textiles 14 percent in 1996. In 2004 and 2006, their respective shares had fallen to 2 and 1 percent. Similar drops have occurred in Chile and Venezuela.[2] Both countries' exports to China are concentrated in very few sectors, composed essentially of minerals – and copper in particular – for Chile; and hydrocarbons – particularly crude oil – for Venezuela.

Trade Barriers

China's average bound tariff is 9.8 percent (14.9 percent for agricultural goods and 9 percent for manufactures). The highest tariffs apply to footwear, food products, beverages and tobacco. Import duties for live animals reach 12.4 percent, while applied tariffs on vegetables stand at 13.7 percent. Duties on edible fats and oils average 13 percent.

The Chinese tariff structure contains significant peaks. While these are more pronounced in the sector of industrial goods, they remain relevant in the agrifood sector. For instance, high tariffs are levied on unprocessed agricultural products such as strawberries (30 percent), plums (25 percent), wheat and rice (65 percent) and sugar (60 percent). In contrast, market access for minerals and fuels is largely duty-free, or tariffs are very low.

In addition to high tariffs for processed food products, Argentina and Brazil's exports to China continue to face considerable non-tariff barriers, including taxes, subsidies and phytosanitary measures.

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What Happened to Comparative Advantage?

Mercosur's integration into the Chinese economy has up to now been limited to the supply of raw materials. The bloc provides the Asian giant with products that are immediately processed and either exported to third markets or consumed locally. While the region's export frenzy toward China can be explained by the phenomenal growth of the Chinese economy, as well as certain complementarities between the economies involved, Mercosur clearly lacks an active reciprocal market opening strategy. Indeed, imports from China have registered their highest growth in sectors where Argentina and Brazil have major competitive advantages.

Although bilateral trade between Mercosur and China is – at least in theory – based on comparative advantages, intra-industrial trade remains quasi inexistent. This is not the case with other Asian developing countries, where the trade pattern reflects the partners' specialisation and division of labour at the global level.

There is no doubt that the principal challenge facing Mercosur is to maintain and improve its integration into the Chinese economy while at the same time preserving the competitiveness of its industrial products and eventually raising the value-added content of its exports. For Brazil and Argentina, Chinese industrial products present a latent danger, which is currently relegated to the back burner given the boom in their overall exports to China.

Conclusions

Mercosur's immediate problem vis-à-vis China appears to be not so much access to third markets, as the protection of domestic markets. It seems clear that low-cost Chinese imports pose a serious threat to regional industries, particularly due to their higher value-added technological content and better ability to meet quality standards.

As for external trade, the Inter-American Development Bank has estimated that only 2 percent of Argentine exports to third markets are likely to be displaced by Chinese competition. Brazil appears to have slightly more cause for concern: over the past decade, the country has lost 4 percent of its exports to third markets to China. Low-tech goods, such as textiles and steel products, were most affected in relative terms. In terms of value, however, products involving intermediate technologies were hit the hardest. However, the IADB also found that the composition of Chinese and Brazilian exports to the US in particular began to diverge markedly between 1992 and 2001.[3]

In short, Mercosur's trade relationship with China presents the same shortcomings as the region's overall trading pattern, except that in this case the shortcomings are more sharply evident. Without entering into a detailed discussion on the long-term effects of a trade strategy based on natural resources, we can nevertheless conclude that the industrialisation of Mercosur member countries is likely to be negatively impacted by a greater market penetration of Chinese imports.

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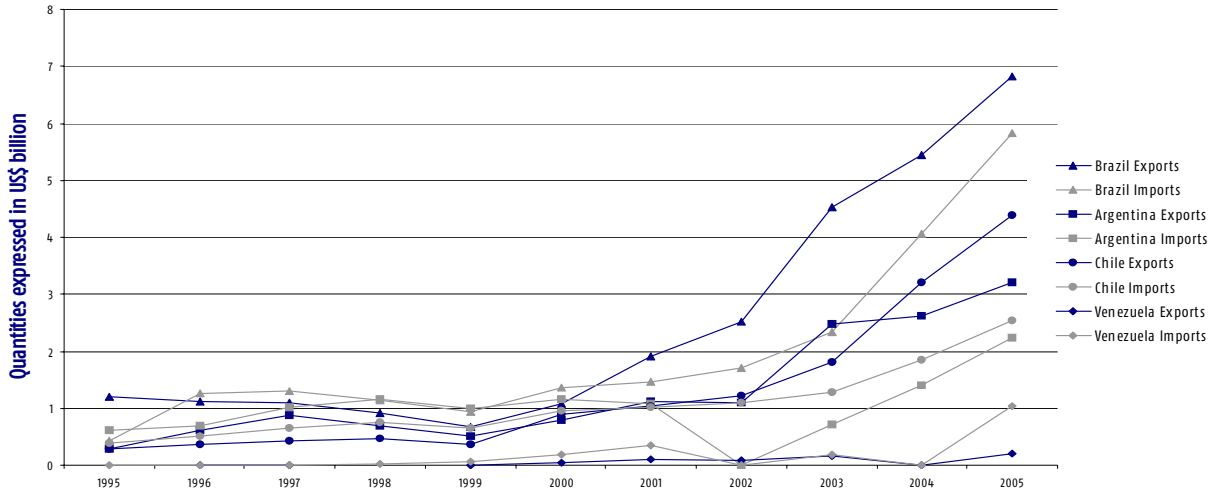
ENDNOTES

[1] IADB. March 2005. The Emergence of China: Opportunities and Challenges for Latin America and the Caribbean, page 27

[2] Chile is a Mercosur associate member. Venezuela's full accession to the bloc is currently pending.

[3] IADB. Op. Cit., pages 184 and 188

MERCOSUR CHINA BILATERAL TRADE 1995-2005



[1] For Paraguay and Uruguay, both imports and exports remained below US$1 billion throughout the decade.

Source: Elaborated by the authors from ALADI data

Update on Pending US FTAs

The US Senate approved the US-Peru free trade agreement on 4 December. The fate of three other pending FTAs, however, remains uncertain.

The Peru FTA, already endorsed by the House of Representatives on 8 November, is the first free trade deal approved by Congress since Democrats took control of both chambers a year ago. In May 2007, the administration and Congress agreed on a new blueprint for US FTAs with developing countries (Bridges Year 11 No.4 page 13). The revised template contains more stringent environmental and labour clauses, as well as less exacting requirements for intellectual property rights regarding pharmaceuticals. Peru's agreement also commits the government to take a large number of measures aimed at combating illegal logging and illegal trade in wildlife (Bridges Year 11 No.5 page 14).

The Bush administration hopes that the passage of the Peru deal will create momentum for approval of three other agreements – with Colombia, Panama and South Korea – in the pipeline. Consideration of the Korea agreement appears stuck for the foreseeable future owing to Democrats' objections to Korean restrictions on US beef imports on account of mad cow disease, as well as their demands for impoved US access to the Korean automobile market.

Colombia Defends Labour Activist Track Record

In the case of Colombia, congressional concerns centre largely on the level of violence against trade unionists. However, Colombian Vice President Francisco Santos argued forcefully in early November that the debate had less to do with his country's factual record than domestic US politics. He said labour union assassinations were down to 20 in 2007, compared to 60 last year and 205 in 2001. Mr Santos also pointed out that 27 anti-union assassins had been convicted so far this year, while only one conviction was obtained in 2001.

Echoing the views of US Senator Charles Grassley (Bridges Year 11 No.1 page 18), Vice President Santos warned that a rejection of the US-Colombia agreement would be a 'huge mistake' that would hurt US geopolitical interests in the long term.

Displaced Worker Benefits Could Affect FTA Outcome

The fate of all three pending FTAs is tied with the trade adjustment assistance (TAA) bill approved by the House of Representatives on 31 October despite a presidential veto threat.

The administration has made it clear that the threat will be carried out if the Senate, which is yet to consider the legislation, does not drop some of its key provisions. These include, *inter alia*, an extended period of income support to cover worker retraining following job losses caused by trade, expanded eligibility criteria and the extension of trade adjustment assistance to service sector and public agency workers.

Several Democratic leaders, including House Speaker Nancy Pelosi, have linked approval of a strengthened TAA bill to support for new bilateral trade agreements. The Senate is unlikely to consider the bill before next year, when some say a *quid pro quo* could emerge between Democratic support for the Colombia agreement and concenssions by the admistration on improved protection for workers displaced by trade.

Andean Preferences

In related news, US Trade Representative Susan Schwab has called for a further extension of the Andean Trade Promotion and Drug Eradication Act (ATPDEA), currently slated to expire on 28 February 2008. Four Andean countries – Bolivia, Colombia, Ecuador and Peru – are entitled to unilateral trade preferences under the legislation. ATPDEA was extended by eight months last June although a number of congressional Republicans, led by Senator Grassley, argued at the time that it was contrary to US interests to extend benefits to left-leaning Bolivia and Ecuador (Bridges Year 11 No. 5 page 14).

US Farm Bill

When this issue of Bridges went to press, it looked unlikely that new farm support legislation would be approved by the US Congress before the end of the year.

In July, the House of Representatives endorsed legislation that largely maintained the level of government support to farmers under the current farm bill. The Senate agriculture committee followed suit on 25 October, with only minor adjustments, such as increased spending on conservation programmes and more support for fruit and vegetable growers (Bridges Year 11 No.6 page 19).

Once the legislation was submitted to the full Senate, however, endless procedural wrangling over amendments – many of which had nothing to do with the farm bill as such – stalled the process.

In addition, President Bush on 6 November announced that he would veto the legislation unless the Senate brought the spending envelope within the limits set by the administration's January 2007 farm bill proposal (Bridges Year 11 No.1 page 3). The veto threat concerns tax increases, as well as a permanent disaster relief fund and the Senate agriculture committee's proposal for a US$600-million annual budget line for bolstering agriculture and health in fragile countries.

The Statement of Administration Policy also said the final farm bill must "remove provisions that make it more difficult to defend farm programmes against trade challenges and distort our ability to advance the goal of free trade in international markets."

Even if the Senate were to overcome the procedural roadblocks and adopt legislation before the end of the year, reconciliation between the Senate and House versions of the bill cannot be completed until February 2008, US sources say. Legislation to extend the 2002 farm bill by a year has already been introduced in the House of Representatives. Either way, major reductions in US farm spending do not seem imminent.

IP News in Brief

- Frustrated by both the increase in counterfeit products and the continued deadlock on enforcement-related issues in the WTO's Council for Trade-related Intellectual Property Rights (see page 9), eight countries have entered into preliminary discussions on a plurilateral anti-counterfeiting trade agreement, US Trade Representative Susan Schwab announced in October.

  She said that Canada, the EU, Japan, Korea, Mexico, New Zealand, Switzerland and the US had already agreed a blueprint for the negotiations, which are to focus on stronger laws, closer cross-border co-operation in law enforcement, and the adoption of practices that make IPR protection "real and effective, such as encouraging consultations with right-holders and specialisation in the IP law enforcement system."

  The pact will be negotiated independently from any international frameworks, such as the World Intellectual Property Organisation (WIPO) or the WTO. While no formal deadline has been set for concluding the negotiations, the US government is eager to move ahead as fast as possible.

- On 24 October, the European Parliament at long last endorsed an amendment to WTO intellectual property rules aimed at easing poor countries' access to essential medicines (Bridges Year 11 No.6 page 20).

  The parliamentary approval followed a statement from the EU's Portuguese presidency promising member governments' support for the use of TRIPS flexibilities, and an assurance that the EU was not asking "and does not foresee asking, to negotiate pharmaceutical-related provisions (sometimes referred to as TRIPS-plus provisions), affecting public health and access to medicines," either in its ongoing economic partnership agreement negotiations with African, Caribbean and Pacific countries, or in future accords with poor developing countries and LDCs.

ASEAN Strengthens Trade Ties

The Association of Southeast Asian Nations has concluded new trade agreements with Japan and South Korea, as well as agreed on modest steps to mitigate climate change.

The 'comprehensive' economic partnership agreement inked between ASEAN and Japan during the November ASEAN summit in Singapore covers trade in goods and services, as well as investment and development co-operation.

Import tariffs on some 90 percent of trade between the two sides will be lifted within ten years. Rice, beef and dairy products will remain protected as sensitive products.

ASEAN's more developed economies (Brunei, Indonesia, Malaysia, Philippines, Singapore and Thailand) will reduce 90 percent of tariffs over the next 10 years on major Japanese products, such as consumer electronics and automobiles. The other four (Cambodia, Laos, Myanmar and Vietnam) will eliminate tariffs within 15 to 18 years.

ASEAN also signed a services agreement with South Korea, marking the second in a three-step process for a comprehensive FTA between the 10-nation trading bloc and Asia's third largest economy. Korea's offer to open its market to ASEAN companies goes beyond its commitments to the WTO in areas such as financial services, adult education and environmental consultancy.

Negotiations on investment rules, the last step in the FTA process, will continue next year. Seoul is eager to complete the deal with ASEAN soon, because the bloc has either signed or is pursuing FTAs with other major competitors, including the EU, China and India. While ASEAN's agreement with China is expected to be fully operational in 2010, its talks with India have stumbled repeatedly on market access for farm goods, most recently over India's wish to protect its palm oil sector.

ASEAN is also negotiating a free trade agreement with Australia and New Zealand, although the 2009 completion target may prove ambitious on account of New Zealand's insistence on including labour, environmental and intellectual property right clauses in the pact.

On the South Korean side, FTAs are already in force with Chile and Singapore. Negotiations with the US concluded in June, but the deal still needs parliamentary ratification in both countries. The Korea-EU FTA will not be signed this year as originally hoped due to a persistent difference over EU access to the Korean automobile market.

Climate Change

ASEAN leaders and the heads of state of Australia, China, India, Japan, South Korea and New Zealand also issued a joint statement on energy, climate change and the environment. They promised to "participate actively in the process of developing an effective, comprehensive and equitable post-2012 international climate change arrangement under the UNFCCC process," as well as to intensify co-operation to improve energy efficiency and the use of cleaner energy, "including the use of renewable and alternative sources." The leaders vowed to enhance regional co-operation to develop cost-effective carbon mitigation technologies and to produce environmentally-friendly and sustainable biofuels. The statement also emphasised collaborative efforts to reduce deforestation, promote sustainable forest management and combat illegal logging.

At least two of the summit participants – China and India – face intense pressure to take on binding greenhouse gas reduction targets in the commitment period starting in 2012. Australia's newly elected prime minister Kevin Rudd has ratified the Kyoto Protocol, thus leaving the United States the only developed country formally outside the UN-led effort to reduce, the amount of greenhouse gases in the earth's atmosphere (see related article on 14).

The Development Agenda: The Implications for IP Governance and the Future of WIPO

Sisule F. Musungu

In September 2007, the World Intellectual Property Organisation established a 'development agenda', which is likely to have important long-term implications for the organisation's future, as well as the discourse on intellectual property more generally.

The Development Agenda is essentially a set of 45 recommendations, grouped by WIPO member states into six clusters, namely: technical assistance and capacity-building; norm-setting; technology transfer, information and communications technologies and access to knowledge; assessment, evaluation and impact studies; institutional matters including the mandate and governance; and other issues.

Why Was a WIPO Development Agenda Necessary?

The Development Agenda should be understood, first and foremost, as a reform platform. The discussion for the establishment of the agenda was initially introduced by Argentina and Brazil in 2004 to address a range of problems which can be grouped into four sets of issues.

The first of these revolves around the evident loss of balance between the public domain and the knowledge appropriated through intellectual property (IP) rights. In simple terms, a growing number of stakeholders, including civil society organisations, academics and governments – backed by new evidence such as that contained in the UK Commission on Intellectual Property Rights Report of 2002 and the ideas generated through processes such as the ICTSD- and UNCTAD-organised Bellagio series on development and IP policy – had reached the conclusion that WIPO was at the forefront of promoting IP rights as an end in themselves as opposed to seeing such rights as a means to serve the socio-economic needs of society.

The second set relates to regulatory capture. WIPO, for various reasons, was seen as being primarily concerned only with the interests and needs of industry actors. For example, while a high-profile Industry Advisory Commission was created by the Director-General to advice the Secretariat, there was no equivalent to represent consumers or the general public, or indeed companies and enterprises that did not rely on a proprietary business model, such as firms whose businesses were based on free and open-source software. Because WIPO derives the majority of its resources from the registration systems it administers and whose users are mostly multinational companies, a view seemed to have developed that such companies were its clients, and therefore the primary stakeholders.

The third set concerns what has been referred to as 'faith-based' standard-setting and rule-making in WIPO. The problem was that proposed new treaties, creating new rights (such as the treaty on the protection of broadcasting organisations), or seeking to harmonise standards (the Substantive Patent Law Treaty – SPLT), were being developed with little or no evidence justifying such rights, or harmonisation, especially for developing countries. In addition, the faith-based approach meant that alternative incentives mechanisms or business models were excluded from discussion at WIPO.

Finally, there was the issue of an undemocratic culture, lack of transparency and bias in WIPO manifested in two main ways. To start with, it was considered that there were serious problems with the orientation and delivery of technical assistance and that the assistance was making it difficult for developing countries and LDCs to implement IP treaties in a development-friendly manner. Then there were the instances where the Secretariat would push treaty or other initiatives favoured by one group of member states, mainly developed countries, as opposed to another group of member states, mostly developing countries.

Looking at the four sets of issues that the proponents of the development agenda sought to address, it is patently clear that the proposal for establishing a development agenda for WIPO aimed to strike at a complex web of issues ranging from governance and process to substantive issues through to fundamental philosophical questions about knowledge governance.

The Implications for the Future of WIPO and the IP Discourse

Beyond the vision of the Group of Friends of Development (Argentina and Brazil and the 12 other countries that co-sponsored the original proposal in 2004), there were also attempts outside WIPO to set out a vision of the role of IP in knowledge governance and the place of WIPO in the scheme of things. One such vision was expressed in the 2004 Geneva Declaration on the Future of WIPO (Bridges Year 8 No.8 page 2). The signatories hoped that a development agenda, based on the initial proposal by the Group of Friends of Development, would lead to the realisation of this vision of WIPO.

The WIPO Development Agenda does – or has the potential to do – four things, taking as a starting point the four sets of issues addressed in the original proposal:

- establish a set of general principles on knowledge governance and IP;
- provide a substantive programme of work for WIPO;
- ensure good governance and the democratisation of WIPO; and
- establish a basis for evidence-based standard-setting and rule-making.

Guiding Principles

To address the first problem, the loss of balance between the interests of IP holders and the interests of society, the Development Agenda establishes a set of general principles on knowledge governance and IP. Examples include recommendation 15 which provides, *inter alia,* that WIPO norm-setting activities shall be: inclusive and member-driven; take into account different levels of development; take into consideration a balance between costs and benefits; be a participatory process; and be in line with the principle of neutrality of the Secretariat.

Continued on page 24

Other general principles include some of the recommendations on technical assistance and capacity-building.

The adoption of these principles means that, for the first time ever, WIPO member states have agreed to establish reference points to guide their conceptual, as well as practical, approach to IP in the knowledge economy. The principles are also likely to provide a benchmark to guide norm-setting activities in other organisations and fora.

A New Work Programme for WIPO

In order to address regulatory capture, the Development Agenda sets out a detailed work programme for WIPO. The programme covers a range of activities from treaty-making to research and analysis. WIPO will be expected to commence dedicated work on, for example: access to knowledge and technology; the public domain; limitations and exceptions; transfer and dissemination of technology; the relationship between IP and competition; and special and differential treatment for developing and least-developed countries.

This new set of substantive issues will significantly alter WIPO's focus of norm-setting and research activities. While the last decade was dominated by various pro-rights agendas, the full implementation of the Development Agenda would see WIPO address in the coming years a range of issues of interest to developing countries, consumers and firms that depend on alternative incentives and/or business models. The idea that WIPO's mandate is only to promote IP and nothing else appears to have been abandoned. The stake-holders in WIPO are also expected to change or expand to reflect the change in substantive focus.

Evidence-based Rule-making

To address the problems arising from the 'faith-based' approach to standard-setting and rule-making, the Development Agenda establishes, for the first time in WIPO's history, an evaluation and impact assessment framework. An annual review and evaluation mechanism to assess the development-orientation of all WIPO programmes and activities, including technical assistance and capacity-building activities, is to be developed. To undertake evaluation and impact assessments – and to be able to carry out studies to assess the economic, social and cultural impact of IP systems, as well as on the impact of IP on the informal economy of some WIPO members – the organisation's capacity to perform objective assessments is to also to be strengthened. This is a quantum-leap for WIPO: a faith-based culture could be replaced with one based on research and evidence.

Good Governance and the Democratisation of WIPO

The Development Agenda establishes a set of parameters and mechanisms to address the democratic deficit in WIPO. In other words, it will be a force of good governance and democratisation of the institution. Three main areas are targeted here: the process of treaty-making, participation of non-traditional players in WIPO, and the organisation of meetings.

A new process for treaty-making has been introduced in WIPO. The components of this process include mandatory, member-driven, open and balanced consultations prior to the commencement of formal treaty negotiations. With respect to the participation of civil society, WIPO will be expected to take measures that ensure wider participation of these organisations in its activities. This could be done, for example, through speedy accreditation to formal meetings, as well as invitations to WIPO seminars and conferences. It is also expected that meetings, especially those that relate to treaty-making, will be organised in a transparent manner and preferably take place at the seat of the organisation to allow wide participation.

If implemented, these democratic practices and transparency measures are likely to make WIPO one of the most open international organisations. Its processes, governance practices and relations with civil society will no doubt be superior to those of most other institutions, including the WTO and the World Health Organisation.

The Determinants of Successful Implementation

The Development Agenda offers an unparalleled opportunity to reform WIPO and change the terms of debate in the IP discourse. While the agenda is by no means a perfect package – a significant number of recommendations could, for example, have benefited from more precision – it provides all the basic ingredients to tackle the core problems which the proponents hoped to address by launching the discussions in 2004. It is, however, not a done deal. The extent to which the original goals are achieved will depend on three key factors, namely: leadership; the staying power of developing countries and the watchdog function of civil society organisations; and changes in the institutional design of WIPO.

The commitment and leadership of the WIPO Director-General will be an important determinant of success . But leadership at other levels will also matter, including leadership of the Chairpersons of the WIPO General Assembly, the Committee on Development and IP, as well as the co-ordinators of the regional groups.

A second determining factor will be the staying power of developing countries as well as civil society organisations and other pro-development actors. Developing countries will have to continue to invest time and political capital in this process. Civil society organisations, which have played the watchdog role over WIPO and its member states, will also have to continue to be active. Without continued democratic scrutiny, incisive analysis and debate, as well as advocacy, the Development Agenda is likely to fail. New voices may also be required to take forward some of the recommendations, such as those related to access to knowledge.

Finally, to effectively implement the Development Agenda, organisational culture and structural changes will be required in WIPO. A first welcome step was taken by the WIPO General Assembly when it established a dedicated Committee on Development and IP. However, the Committee alone is not enough. The organisational culture will have to change, in addition to changes that may be necessary in the structure and organisation of WIPO committees in general, as well as a reorganisation of the Secretariat itself.

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Tackling the Research Gap on Neglected Diseases

Members of the World Health Organisation (WHO) have started negotiations for a global strategy to boost research on diseases that disproportionately affect developing countries.

At issue is how to respond to the international recognition of the need to improve research and development of new drugs to treat so-called 'neglected' tropical diseases that overwhelmingly, or exclusively, affect developing countries, i.e. malaria, dengue fever, leprosy, river blindness, Chagas disease, leishmaniasis, lymphatic filariasis (elephantiasis), schistosomiasis (bilharzia) and human African trypasomiasis. The negotiations also target access to, and improvement of, available treatments for diseases with a substantial proportion of sufferers in poor countries, such as HIV/AIDS and tuberculosis, as well as illnesses that are increasingly affecting developing country populations, including diabetes, cardiovascular diseases and cancer.

The WHO Intergovernmental Working Group (IGWG) on Public Health, Innovation and Intellectual Property, which held its second meeting in November, is charged with developing a global strategy and action plan to tackle these challenges.

Inching towards Consensus

While some were disappointed that a final draft document could not be agreed at the November meeting, most delegates seemed confident that one would be ready in time for adoption by the May 2008 World Health Assembly.

WHO members made some progress in further shaping the relatively vague draft they had discussed at the working group's previous meeting (Bridges Year 11 No.5 page 11). Most notably, they incorporated to the text a paper produced by 14 Latin American countries at one of a series of regional conferences on the process worldwide. This so-called 'Rio text' was more emphatic than the Secretariat's draft about the need to explore new ways of de-linking research and development costs from drug prices, as well as on the use of flexibilities in trade rules to promote public health.

Much of the discussion focused on a set of 11 principles outlined in the Rio text addressing issues such as the right to health, the relationship between intellectual property and access to medicines, and innovative capacity in developing countries. Members could not agree on two of the principles. One was whether to refer to international treaties in connection with the notion that the enjoyment of physical and mental health is a 'fundamental human right'. The other concerned the relationship between trade and health. Two options remain bracketed in the draft document: the Rio text's assertion that "the right to health takes precedence over commercial interests" and the phrase "the objectives of public health and the interests of trade should be appropriately balanced and co-ordinated," reportedly proposed by the EU.

Another outstanding issue is whether the global strategy/action plan should focus on the 14 diseases outlined in the WHO Secretariat's July draft (see para.1 above), or have a broader focus that would allow for adjustments to meet countries' diverse health needs, as suggested by a number of governments – including those of Brazil and several African nations.

Intellectual Property Rights

The link between medical research and intellectual property rights (IPRs) also remains controversial. Agreed text under the heading Application and Management of Intellectual Property to Contribute to Innovation and Promote Public Health states that "there is a crucial need to strengthen innovative capacity as well as capacity to manage and apply intellectual property in developing countries including […] the use to the full of the provisions in the TRIPS Agreement." In contrast, consensus is lacking on the actions to be taken under this heading, including the creation of "user-friendly global databases on the status of health-related patents." Central to this discussion is how the WHO and World Intellectual Property Organisation (WIPO) should work together to manage such databases, and how the information they contain might be used.

Industry, Civil Society Reactions

Prior to the working group's November meeting, the International Federation of Pharmaceutical Manufacturers and Associations (IFPMA) slammed the draft text, arguing that it focused too much on intellectual property rights, which it considers to be the bailiwick of the WTO and WIPO.

IFPMA took issue with the text's call for ensuring that bilateral trade agreements do not incorporate 'TRIPS-plus' protection that might reduce developing countries' access to medicines, and to encourage trade agreements that recognise the flexibilities available to countries under the TRIPS Agreement. It was not within the WHO's competence to advise governments on trade policy, the association argued.

Both negotiators and civil society observers highlighted delegations' serious engagement in substantive discussions, as well as an underlying consensus that the challenges related to research on neglected diseases are real and change is necessary to tackle them effectively.

"We are getting a sense that countries are pushing the WHO to be more active in resolving the access to medicines crisis, and take a pro-health approach to intellectual property," campaigner Michel Lotrowska of Médecins sans Frontières said. "And governments are taking steps to address the fundamental reasons why investment into innovation for diseases of the poor is lacking."

Next Steps

The IGWG is set to pursue the drafting of the global strategy and action plan in January 2008, and will meet again from 28 April to 3 May. In preparation for the work, the WHO Secretariat is accepting comments from members on parts of the text that have not yet been discussed until 31 January.

Open IT Standards Would Benefit Developing Countries

Susy Struble, Robin Gross and Thiru Balasubramaniam

While developing countries have taken many measures to improve their integration into the knowledge society, many have largely overlooked one of the most useful tools: open information technology standards.

Information technology (IT) standards are the co-operation agreements, or specifications, that make networked computing possible. In a network such as that embodied by the Internet – and the myriad applications and devices that use it – the standards that matter most are the 'interfaces' that enable technology users to access their data within the network, regardless of their choice of computing product or platform.

What Are Open Standards?

'Open' IT standards are not encumbered by legal or technical constraints, nor do they provide a unique advantage to any party. Contrary to popular belief, there is no guarantee that an IT standard is truly non-discriminatory and 'open' just because it is called a standard; was approved by a particular organisation; is supported by a set of vendors, or; is licensed under 'reasonable and non-discriminatory' terms.

The original goal of IT standards was to enable unfettered integration and interoperability on the network. However, with the introduction of software patents and the network's increasing value, companies now often use these standards to manipulate the direction of the network, and sometimes even to gain illegal competitive advantage. Indeed, recent court cases – such as the US Federal Trade Commission with RAMBUS, the US Federal Appeals court ruling against Qualcomm, and even the European Court of First Instance ruling against Microsoft – show that governments and the public are starting to wake up to this disintegration of trust in the standardisation system and the value of interoperability. Some governments are beginning to investigate how this problem might be addressed through competition law (Bridges, Year 11 No. 4, page 17).

What Is Being Done?

To mitigate the exclusionary effects of IPRs embedded in international standards, standard-setting organisations have adopted guidelines that require their members to disclose patented technology that is 'necessary for the implementation of a standard' before the standardisation process has been completed. Such technology should be made publicly available under 'reasonable and non-discriminatory terms and conditions'.[1]

However, these policies beg a host of questions. Who defines – and how – what a 'reasonable' cost is? Since such terms are almost always covered by confidentiality clauses in legal contracts, how can anybody know if they really are non-discriminatory? Who polices the implementation of these terms? Can they change over time and, if so, how? Are these terms explicitly and publicly known before the standard's adoption? And how could precluding open source code implementations ever be justified under the spirit of 'reasonable and non-discriminatory' licensing?

Why Does 'Openness' Matter?

IT is increasingly embedded into our daily lives and continues to meld with traditional industries and applications such as healthcare, transportation, media, security, and telecommunications. Battles over non-interoperability and consumer access due to a lack of open IT standards are popping up in unexpected places. The automotive repair industry provides a good example of this: consumers and non-dealer-owned repair shops are fighting for access to technical interface information required for diagnosing and repairing cars, which are quickly becoming computers on wheels. Another example is the global debate around varying levels of 'openness' in standardised office document formats.

Open IT standards directly benefit society by driving innovation while mitigating adoption risks. Multiple, competing implementations – and interchangeability between these implementations – mean prices drop while innovation flourishes. In a competitive market, consumers and small businesses are more likely to find the product that suits their needs, depending on factors such as price or availability in a native language. Should their needs change, they can more easily switch to another product. A corollary benefit to this is creator/user control of data.

The lack of open IT standards can act as a trade barrier if it denies market access for companies or even whole economies (this point has been raised by China and others in the WTO Committee on Technical Barriers to Trade). A particularly onerous burden is placed on developing economies when their consumers and businesses have to pay royalties or meet other terms and conditions in order to use IT standards that are not truly open but still necessary to participate in the network. After all, patents are a limited monopoly granted by a government. Embedding patents into technical standards that are required for effective participation in the information society overextends this monopoly.

Lastly, there are other standardisation-related problems that contribute to the low participation of developing countries in the global information society. While these undoubtedly stem from where countries stand in their IT adoption/diffusion 'lifecycle', many of them miss out on the standards-creation process itself. Their concerns must be taken into account; after all, they include the majority of the world's consumers and – hopefully soon – the majority of the world's IT users and innovators.

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ENDNOTE

[1] IEC, ISO and ITU. March 2007. *Guidelines for the Implementation of the Common Patent Policy.* http://www.iec.ch/tctools/patent-guidelines.htm

Drivers for Environmental Goods Trade

At a recent ICTSD roundtable held in Geneva trade negotiators and other stakeloders engaged in a frank exchange of views on the market and trade realities of the so-called 'convergence-set' of 153 products that has been informally proposed by the Friends of Environmeal Goods group for deeper liberalisation in the WTO.

Drawing on the GEO-4 Process

Participants reviewed a new ICTSD-commissioned study[1], which analysed how trade flows in the goods on the 153-list were linked to some of the major environmental challenges and priorities faced by developing countries as identified in UNEP's latest Global Environment Outlook (GEO-4) report. The study examined the main drivers of the trade patterns linked to the 153-list such as tariffs, level of industrialisation, foreign direct investment (FDI), environmental performance indices and the existence of environmental projects.

Among the findings were the following:

- Trade flows are largely limited to a few middle-income and rapidly emerging developing country economies, notably China, which is the dominant developing country exporter and importer in almost all categories.
- Tariffs are relatively insignificant determinant of trade flows, and only in a few categories would cutting them be likely to lead to import increases in developing countries. These are clean-up technologies, renewable energy, waste water, natural resources and heat reduction equipment.
- Africa is not a large importer of goods on the 153-list despite low tariffs and the continent's many serious environmental problems. For instance, while GEO-4 identified desertification and land degradation as one of the major challenges faced by Africa, no matching category of goods was found in the 153- list.

Another significant finding was that dynamic comparative advantage in certain sub-sectors of the 153-list was clearly moving in favour of a few developing countries. Lower-income developing countries stand to reap few export gains apart from certain environmentally-preferable products. With regard to environmental services, the study pointed to privatisation as being the most significant driver. In terms of exports, opportunities could be found in certain sectors such as consultancy services in both Mode 1 (cross-border supply) and Mode 4 (temporary movement of service providers).

Other ecosystem services – such as carbon sequestration, forestry management and biodiversity conservation – held out possible benefits, but would require the development of markets before significant trade can take place and market access commitments can be reflected within the General Agreement on Trade in Services.

Roundtable participants found the analysis useful, particularly in case WTO negotiators need to further narrow down the 153-list in order to ensure that the products on it are relevant from an environmental and market-access point of view for developing countries. Some participants emphasised that new products of export interest to developing countries must be added to the list. It was also pointed out that the 153-list still contained a number of 'dual-use' products – i.e. products that are not used only because of the environmental benefits they offer. Although some held that liberalising trade in such goods could still bring environmental benefits, others advocated caution in this area. In Mercosur countries, for instance, many small- and medium-size enterprises manufacture and trade in 'dual-use' waste- and water-treatment equipment of limited environmental relevance. Liberalisation of such goods could have significant repercussions on employment in the region, some participants warned.

ENDNOTE

[1] Jha, Veena. Forthcoming. *Environmental Priorities and EGS Trade Policy: A Reality Check*. ICTSD . Geneva

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WTO Meetings

Jan. 2008 Doha Round negotiations continue on agriculture and non-agricultural market access

Jan. 21 & Feb. 11 Doha Round negotiations continue on amendments to WTO rules

Feb. 2008 Council for Trade-related Aspects of Intellectual Property Rights

Other Meetings

Jan. 19-20 High-level Symposium on Results-oriented Development Co-operation
www.un.org/ecosoc/

Jan. 12-25 CBD Open-ended Working Group on Access and Benefit-sharing
www.cbd.int/

Jan. 14-15 UNCTAD High-level Panel on the Creative Economy and Industries for Development
www.unctsd.org/

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