

In this issue

- 3 Developing Countries and Dispute Settlement: Having One's Day in Court
- 5 WTO News
- 10 US Extends Preference Programmes
- 11 Regional Integration News
- 13 Little Progress in Climate Meeting
- 14 Bioenergy and Africa: Trade Opportunities and Challenges
- 15 Public Participation Brings a Fresh Approach to WIPO
- 16 Thailand Issues Compulsory Drug License
- 17 Exceptions to Patent Rights
- 19 ICTSD and Partner News
- 20 Meeting Calendar and Resources

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Facts and Figures

- Rapid population growth in the Middle East and North Africa (MENA) carries serious implications for employment, access to services and the cost of subsidies. The region's population has grown from 127 million in 1970 to 305 million in 2005 – and indeed doubled between 1976 and 2005. The 'demographic momentum' from the exceptional growth in the 1970s and 1980s will remain a powerful factor into the future: 33 percent of MENA's population is under the age of 14 compared to 25 percent in the lower middle income developing countries. The peak for MENA was in 1978 when 45 percent of the population was under 14. The US Census Bureau estimates the MENA population will double by 2030.

Source: *Middle East: Population Growth Poses Huge Challenge*. Oxford Analytica, 18 January 2007

- China's GDP growth for 2006 was 10.7 percent. Real import growth has revived; retail sales were up 13.7 percent from 2005, car sales grew by 25 percent and crude oil imports by 12 percent. Disposable income increased by 15 percent.

Source: Chinese National Bureau of Statistics, 25 January 2007

Political Momentum for Doha Round

Hopes have revived that the Doha Round negotiations may resume following an intensification of ministerial contacts, but so far there are no formal offers of significant new concessions from any WTO Members.

At a joint press conference on 8 January, European Trade Commissioner Peter Mandelson and US Trade Representative Susan Schwab spoke of progress, new impetus and a shared sense of urgency to complete the round. However, their meeting – like other recent high-level bilateral contacts – seemed to be more about boosting political momentum than negotiating the details of an eventual breakthrough. Indeed, neither offered any concrete examples of convergence or new flexibility in their negotiating positions, and both emphasised that no EU-US bilateral deal would be cooked up and then passed on to other WTO Members.

Commissioner Mandelson said his meetings with Democratic leaders in Congress, President Bush and Ambassador Schwab had given him "renewed confidence that the Doha deal is doable and that it can be done within the narrow timeframe that has opened up." Ms Schwab was more cautious, but stressed that the consultative processes underway at different levels were "extremely useful in getting a sense of specifics, priorities and sensitivities" to ensure that there would be no 'nasty surprises' if and when the negotiations resume.

Speaking to journalists on 12 January, Ambassador Schwab said she was 'personally more optimistic' than she had been in many months about countries being 'on a path that could enable us to reach a successful conclusion to the Doha Round'. She also appeared confident that the expiry of the president's trade negotiating authority (TPA) on 1 July 2007 would not spell the end of the round. The TPA would be extended once there was sufficient progress in the negotiations, she predicted, but underscored that substance rather than the calendar would dictate the pace. In related news, White House Deputy Secretary Tony Fratto indicated on 25 January that President Bush would request TPA extension in the first week of February.

The Elusive Bumper Sticker Numbers

Despite the optimism, Ms Schwab stressed that there was still a long way to go for a breakthrough to occur. Much technical work would need to be done on many issues before negotiators could come up with 'bumper sticker' numbers for domestic agricultural support and tariff cuts, she said. This represents a change from June 2006, when ministerial talks at the WTO focused largely – and unsuccessfully – on a tradeoff between steeper US reductions in trade-distorting farm subsidies and a substantially improved agricultural tariff cut proposal from the EU. While agreement on those numbers remains key to unlocking the current stalemate, Ambassador Schwab said Members first needed to look into other elements, such as market access flexibilities, in more detail (see page 2).

Nevertheless, news reports of an imminent 'bumper sticker' deal on agriculture between the US and the EU have abounded in recent weeks. The figures most often cited are a 54 percent average tariff cut for the EU (up from 39 percent offered in October 2005) and a US commitment to reduce its ceiling for trade-distorting domestic subsidies to US\$17 billion (down from the US\$22.5 billion in the October 2005 offer). In addition, the two trading powers are rumoured to have agreed to limit sensitive products to four percent of all agricul-

Continued on page 2

Bridges

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tural tariff lines, down from the EU's request of eight percent and up from the US proposal of one percent. None of these figures have been officially confirmed.

Focus on Flexibilities?

Ambassador Schwab has singled out the treatment and number of 'special' and 'sensitive' agricultural products as priorities for technical consultations. Both categories will be at least partially exempt of the tariff cuts that will apply to other products, and agricultural exporters are concerned about the impact of these flexibilities on market access.

The US considers it 'critically important' to define the coverage of and treatment for the special products (SPs) that developing countries may designate on the basis of their food security, livelihood security and rural development needs. The July 2004 Framework Agreement lacks definition on how many products could be designated and the extent (if any) of tariff cuts. Official positions on the number of SPs currently range from 20 percent of agricultural tariff lines proposed by the G-33 coalition of developing countries to just five tariff lines suggested by the US. Pakistan has floated an informal document on 'possible elements for discussion', which does not specify a number, but provides options for using indicators in the selection of special products. It also proposes the possibility of a tradeoff between the number of SP tariff lines and their treatment: the fewer products a country designates, the smaller would be the tariff cut required and vice versa.

As a prelude to tackling sensitive products at the WTO, the EU and the US are already discussing quota expansion for beef and dairy, as well as lowering out-of-quota duties for these products (in addition to the rumoured agreement on a four percent ceiling). According to the July 2004 Framework Agreement, market access for sensitive products must be expanded through a combination of tariff cuts and quota expansion.

France Says Non

On 11 January, French Prime Minister Dominique de Villepain and Agriculture Minister Dominique Bussereau told Peter Mandelson that the European Commission had reached the limit of its negotiating mandate with the conditional 39 percent offer it tabled in October 2005. French politicians have also repeatedly said that the majority of EU member states shares their view. Commissioner Mandelson called the French position hard and 'needlessly defensive' in an interview published in the business newspaper *Les Echos*, and cautioned against making the WTO negotiations a 'political football match' between the candidates in next April's presidential elections.

Mr Mandelson insists that the flexibility he has informally indicated to trading partners 'neither falls short of nor exceeds' the mandate that member states have given him. A document posted on the EU Trade Directorate's website in January 2007 states unequivocally that if others come to the table with 'serious offers', Europe is ready to add more than ten percentage points to the 39 percent it offered in 2005.

Davos Meeting May Point Way Forward

At press time, the Swiss government was about to host a gathering of some 30 trade ministers reflecting 'the full spectrum of trade sensibilities' in WTO negotiations. The meeting took place on the sidelines of the annual meeting of the World Economic Forum in Davos with the aim of taking stock and exchanging ideas on how to advance the Doha Round. WTO Director-General Pascal Lamy indicated that ministers might come up with a schedule for further negotiations, but were unlikely to discuss substance. While chances of a formal request for an immediate resumption of the Doha Round negotiations were generally deemed low, many expected the meeting to provide further momentum towards that goal.

Pascal Lamy has welcomed the renewed political energy to rescue the Doha Round. He told the *Financial Times* that the "signs we are seeing now are qualitatively different from what we heard last year. The political chemistry is beginning to work." He attributed the change to governments realising "the consequences of failure and the risk of a surge in protectionism."

Developing Countries and Dispute Settlement: Having One's Day in Court

Roderick Abbott

In light of statistical data on the WTO's dispute settlement process, the main obstacles to developing country participation may lie in other factors than the nature of the system itself.

It is often claimed that the Dispute Settlement Understanding (DSU) works more in favour of the richer WTO Members, which have vastly greater resources to pursue trade problems, as well as armies of staff lawyers. For developing countries, recourse to dispute settlement is perceived to be difficult, costly and time-consuming.

On the other hand, one of the principal objectives of the DSU was to create a system in which every Member could bring forward a complaint, have it fully investigated, obtain a ruling on the compatibility of the measure or practice with WTO rules, and – more generally – ‘have its day in court’. The guiding principle of ‘equality before the law’ was designed to lead to fairer opportunities than a system where power politics could, and did, influence the results.

So, in this rather positive atmosphere, how have developing countries been able to exploit their right to a day in court?

We start with the data on dispute cases, as provided by the WTO Secretariat at the end of 2005.¹ One should note the following:

- Developing countries are nowhere defined in WTO, i.e. ‘you claim to be one, you are one’.
- For this study, I place three OECD members that have been fairly active in disputes outside the developing country category (Korea, Mexico and Turkey).
- Taking account of that, raw WTO data suggest that 234 disputes were launched by developed countries, and 101 – or 30 percent of all cases – by developing country Members.
- When counted in terms of individual complainants, developing Members have made 13 complaints, some jointly with others.
- No fewer than 68 of these were initiated by just five Members: in order – Brazil, India, Thailand, Chile and Argentina. Each of these started at least nine disputes.
- Another eight Members account for a further 33 cases, which means that this group of 13 Members together is behind almost 90 percent of all cases.²
- A contrario, the vast majority of developing Members (90-100 in all) have been relatively absent and inactive, except perhaps where they requested to be third parties in consultations or, more rarely, during panel proceedings.

What Constitutes Participation?

There is a question regarding what exactly participation in the dispute settlement system means. Does it mean initiating a case? Or does it include being a respondent in a case started by another Member? Does it include being a third party either at the bilateral consultation stage or later during a panel or Appellate Body hearing?

My view is that we should measure participation both at the initial consultation stage – bearing in mind that many such cases have a short life – and at the panel/appeal stage where resource implications could be a serious deterrent. The data for participation at these later stages can be used to confirm or question the results obtained at the initial stage. I also incline to the view that disputes *initiated* by a developing country Member are a more relevant measure of their ability to participate effectively in the system than disputes where they are respondents. But the level of overall activity, offensive as well as defensive, needs to be considered.

That said, the fact that five Members account for just under 60 percent of dispute activity, and that with another eight Members this ratio reaches 90 percent, is a disturbing finding. It underlines the ‘absence from the game’ of large numbers of developing countries, and makes

us aware that least-developed WTO Members have hardly been touched by the dispute settlement system at all. Only Bangladesh has been active, with one single complaint, and no African Member (apart from South Africa and Egypt) has either made a complaint or been cited for alleged violation by others.

As we know, developing countries are far from being a homogeneous group. Therefore, one should perhaps not expect an analysis of participation that offers valid conclusions for all countries in the group. It begins to look as if we can be reasonably satisfied that a small number of more advanced developing Members have no substantial difficulty with the system, while a further group has established a record, albeit at a fairly low level of activity. For others, the data is silent.

Constraints That May Hold Back Greater Participation

In academic literature, there is much discussion and analysis of two main types of constraint that have been thought to hold back participation of developing countries in the system. These are ‘capacity constraints’ and ‘power constraints’, terms which have been summarised by Gregory Shaffer as follows:

“Although developing countries vary significantly in terms of trading profiles, they generally face three primary challenges if they are to participate effectively in the WTO dispute settlement system. These challenges are: (i) a relative lack of legal expertise in WTO law; (ii) constrained financial resources, including for the hiring of outside counsel; and (iii) fear of political and economic pressure. We can roughly categorise these as constraints of law, money and politics.”³

Before entering into any discussion of such constraints it will be useful to look at the role and the record of the Advisory Centre

Continued on page 4

on WTO Law (ACWL), which was set up to address some of these developing country Member problems and has – to a large extent – eliminated many of them over the last four years or more.

Recent ACWL reports⁴ show that the Centre has given assistance in about 20 percent of all dispute settlement cases begun since mid-2001, mostly to developing country Members as complainants, less often as respondents or as third parties. The only developing countries active in the dispute settlement process that have not joined the ACWL are Argentina, Chile, Brazil, Mexico and South Korea, all of which had extensive experience in the dispute settlement system and in using the resources available through private law firms even before the establishment of the ACWL. India, which has used the Centre's services in some cases, may now be able to manage future disputes on its own.

The key message here is that the ACWL has provided a service that its members clearly appreciate. Appendix 1 to the Report on Operations 2005 shows that among the main users of ACWL services over the four years were Thailand, Guatemala, Pakistan and the Philippines. These WTO Members have been relatively active in the disputes field, but seem nevertheless to feel that their experience of the procedures is not yet sufficient to go it alone. However, this may represent no more than some kind of extra insurance policy since it is certainly not the case that all developing country complaints have resulted from, or involved ACWL assistance.

While the availability of ACWL assistance has largely addressed many of the capacity constraints, there is one area where a developing WTO Member might still be at a disadvantage. This is in the pre-litigation, pre-consultation stage where the first steps have to be taken to identify the existence of a trade barrier or of a measure that is perceived to be affecting exports in an adverse fashion. Such identification clearly has to precede any help with legal evaluation of whether a violation of WTO rules can be shown to exist, as well as what chances there may be to initiate a WTO dispute with a prospect of success.

However, where this is a difficulty in fact, it has more to do with the state of governance and the capacity to monitor trade trends in the exporting country than it has to do with any defect in the DSU. One determinant factor present in the more successful developing country users of the system (such as Brazil) is the degree of knowledge about trade rules and rights under the WTO in the industry of the country concerned, and how far it is motivated to exert pressure on the government for the resolution of trade problems.

Other Factors That Affect Participation

There is no obvious answer to the question 'why have developing Members not made more complaints?', nor is it easy to guess at the underlying reasons. For a start, there is no law that states that developing and developed countries should have parity in the dispute settlement area. All depends on the perceived importance of the problem, the motivation and the circumstances.

I have heard it said that many developing country Members have relatively few products to export, and in many cases their access to major markets is duty-free. Schemes such as Generalised Systems of Preferences and the US African Growth and Opportunity Act offer real advantages, and it may be more important to maintain these than to make a formal complaint in the WTO. Or, if there are difficulties, these may well be due to specific measures in the technical barriers/sanitary and phytosanitary areas, which are less easy to challenge, thus making the motivation to do so less strong. Further, the major barrier faced by exports to other developing Members may be a high unbound duty rate, or one below a ceiling binding. Such cases offer no scope for reasonable challenge.

Is lack of resources, human or financial, one of the problems? The contribution of the ACWL has already been noted, and the signs are rather to the contrary. Assistance from outside lawyers in the preparation of cases, and in drawing up legal arguments, has become the norm

and the cost of this does not appear to have caused any major problem. Indeed, the Antigua/Barbuda dispute on offshore gambling, the prolonged banana saga and shrimp export cases amply demonstrate that financial resources can be made available.

Is there any other factor within the DSU system that works against participation by developing country Members? A large number of them have not been directly involved in disputes, and it is impossible to say whether bias in the system is responsible. When deciding whether to devote resources to a WTO challenge, there is always a tradeoff between the importance of a barrier or of policies affecting a Member's exports and the cost (in terms of both financial and human resources) of conducting a case. In many poorer countries, administrative problems rather than the WTO system are likely to be the determinant factors.

In conclusion, the jury is still out on the question examined in this article. There is good news and some less good news. The situation continues to evolve, and with added experience and over time, a future study may find that the record has further improved.

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ENDNOTES

¹ See the overview in WT/DS/OV/25 of 12 December 2005.

² The eight Members are Guatemala, Honduras (six complaints each); Colombia, Costa Rica and the Philippines (four each); Ecuador, Indonesia and Pakistan (three each). There are some doubts about the value of the data for this group due to duplication in several of these cases. However, such duplication occurs throughout the WTO database, and is an unavoidable fact of life.

³ Gregory Shaffer, article in the *World Trade Review*, July 2006, at page 177.

⁴ See the Management Board's progress report *The ACWL After Four Years* of October 2005, and the Executive Director's *Report on Operations 2005* of January 2006.

Banana Battleground Revisited

Familiar alliances and arguments emerged in dispute settlement consultations over the EU's banana import regime in December, but a negotiated solution may still be within reach.

On 1 January 2006, the EU eliminated import quotas for bananas from most-favoured-nation (MFN) suppliers, and set a new MFN tariff of • 176 per tonne. At issue in the dispute is whether this tariff complies with the Union's commitment to at least maintain MFN banana exporters' total market access in 2005, as well as whether the duty-free 775,000-tonne quota reserved for suppliers from the African, Caribbean and Pacific (ACP) Group of States is consistent with WTO rules (Bridges Year 10, No.7, page 7).

Twelve countries have joined the consultations as third parties. Three of these – Colombia, Panama and the United States – represent MFN supplier interests, while the others are ACP countries. In their requests to join the consultations, the latter stated that the preferential ACP quota was Ecuador's main target. They argue that the quota is necessary as the • 176/tonne tariff difference alone would not be enough to protect smaller ACP producers' access to their most important export market.

MFN suppliers, on the other hand, consider that the ACP quota is illegal since the special waiver that allowed the EU to maintain it lapsed on 1 January 2006. As of that date, the EU was supposed to establish a 'tariff-only' import regime, where all quotas would be abolished and a new MFN tariff would be negotiated with trading partners. In addition to challenging the ACP quota, these countries charge that the • 176/tonne tariff, set unilaterally by the EU, has proved too high to maintain MFN suppliers' pre-2006 market access.

In its defence, the EU has cited trade statistics showing that imports from MFN suppliers have grown. There are, however, large differences between individual countries – a 16.4-percent increase for Costa Rica, and a four-percent decline for Panama, for instance. In 2006, ACP countries' combined banana exports to the EU registered stronger growth (18 percent) than those of MFN suppliers (seven percent). Various government sources have been quoted in Ecuadorian press as reporting a 2.5 to 4-percent decline in the country's share of the European banana market, mainly attributed to an increase in exports from African ACP countries.

While no breakthroughs occurred during the 14 December consultations, both sides expressed their preference to pursue a negotiated solution. The EU appears to favour a resumption of the mediation carried out between all interested parties under the 'good offices' of Norway's Foreign Minister Jonas Gahr Store. Ecuador, which has complained that the year-old process has not yielded any significant results to date, is likely to insist on a deadline for solving the dispute through mediation.

The WTO consultation period runs until 20 January. If no mutually agreeable solution is found, Ecuador can formally request the establishment of a panel to determine whether the EU's banana import regime complies with prior WTO rulings in the more than decade-long dispute.

Impact on EU-CAN Negotiations Unclear

Beyond the rights and wrongs of the case, EU officials appear to have sent mixed signals over the conflict's potential impact on the Association Agreement the European Commission plans to start negotiating with the Andean Community in 2007 (see page 11). In early December, Reuters quoted EU Trade Commissioner Peter Mandelson as stating that it would "not be possible to litigate and negotiate at the same time. If the threat of litigation is not resolved, then it will certainly make negotiations very much more difficult if not impossible." In contrast, the EU representative in Ecuador, Michel Ceccarelli, has been reported in local press to have denied any connection between the opening of the negotiations and the banana dispute, as well as stressing that the EU would be prepared to adjust the tariff if Ecuador could demonstrate that its banana sales had decreased since the entry into force of the • 176 tariff.

Disputes in Brief

- Pakistan is considering a WTO challenge of the EU's Generalised System of Preferences (GSP). The move follows the EU's decision to exclude Pakistan from its 'GSP-plus' scheme. That regime allows duty-free entry into the EU for more than 7,000 products from eligible beneficiary countries, but only so long as the beneficiary's GSP-covered imports do not exceed one percent of total EU imports under the GSP (Bridges Year 8 No.9, page11). GSP imports from Pakistan amounted to 1.1 percent of the EU's total GSP imports in 2006.

Pakistan's grounds for the complaint are two-fold. First, it claims that the one-percent limit is arbitrary in that it does not treat countries at similar levels of development equally. Second, it contests the 5.8-percent anti-dumping duty that the EU currently levies on Pakistani bed linen.

The withdrawal of GSP-plus benefits puts Pakistani exports to the EU on par with those from India, while countries such as Sri Lanka – closer to the economic conditions prevailing in Pakistan – continue to benefit from the GSP-plus scheme. Adding to Pakistan's grievances is the fact that the EU is likely to start negotiations for a free trade agreement with India in 2007 (see page 11), while neighbouring Bangladesh will continue to enjoy virtually unlimited duty-free access under the Everything but Arms (EBA) initiative available to least-developed countries.

- On 23 January 2007, the Dispute Settlement Body established a panel to rule on Mexico's countervailing duties on EU exports of olive oil. The EU claims that Mexico's investigation contained several procedural flaws, including the "failure to examine any known factors other than the alleged subsidised imports which were causing injury to the domestic industry," as well as "the absence of evidence on material injury and causation." The duties (ranging from US\$0.41 to US\$0.73 per kilogramme) are in force since August 2005.

Less Acrimony in WTO Agriculture Talks

During informal meetings held in late 2006, WTO Members showed greater willingness to engage and explore their differences in agriculture, but offered no changes to long-held positions.

Ambassador Crawford Falconer, who chairs the agriculture negotiations, told WTO Members on 11 December that although delegations had not substantially shifted their positions since the talks were suspended in July, he had been somewhat reassured by the general tone of discussions at recent 'fireside chats' involving around two dozen ambassadors from key countries and groups.

Less Posturing on Subsidies

For instance, Ambassador Falconer noted that Members appeared less inclined to engage in empty posturing and more willing to engage in concrete discussions on domestic subsidies. He said that his consultations had focused primarily on cuts to overall trade-distorting support and product-specific 'amber box' subsidies. Cotton subsidies, and moderately trade-distorting payments in the WTO's blue box, had also been touched upon. Overall trade-distorting support is made up by the sum of farm payments classified as 'amber box', 'blue box', and 'de minimis' at the WTO. How much rich countries should reduce their spending limits for such support has been one of the key stumbling blocks in the Doha Round. Several Members, including the EU and India, insist that the US needs to deepen its offer of subsidy cuts.

In an attempt to probe Members' latitude for manoeuvre, Ambassador Falconer has presented negotiators with conditional scenarios asking them how flexible they might be if their partners also softened their bargaining positions. For instance, at his 29 November fireside chat, Mr Falconer reportedly asked whether the US would consider lowering its cap on trade-distorting farm subsidies to US\$15 billion, if the EU agreed to raise its farm tariff cut to an average of 60 percent, each with rules to minimise the extent to which specific products might escape reforms. The EU said the hypothetical bargain demanded more of Brussels than of Washington, while the US said little about it.

Market Access: More Consideration for Constraints

The Chair reported that his consultations had dealt mainly with tariff cuts and 'sensitive products', which all countries will be able to shield from the full force of the tariff reduction formula in exchange for the creation of a new import quota. With regard to tariff cuts and sensitive product flexibilities for developed countries, he said that Members had not really changed their positions, but seemed more open to discussing each others' constraints.

Developing country provisions for sensitive products, as well as their ability to designate 'special products' (SPs) for special tariff treatment based on food security, livelihood security and rural development grounds, were the subject of another 'fireside chat'. According to sources, there was some recognition at the meeting that sensitive products needed greater definition.

In related news, the G-33 coalition of developing countries has issued a stinging critique of a World Bank study on the potential implications of special products for poverty. The paper suggested that the use of SP flexibilities would not reduce poverty, and could increase it under certain conditions. The G-33 objected to the study's 'sweeping generalisation' that there was a need for caution in using the flexibility provided by SPs. The group contended that the authors had not understood the objective of SPs, that the paper's coverage of products and countries was too narrow, and that the situations simulated were 'completely arbitrary'.

Consultations on agriculture are set to continue in late January, including a further 'transparency forum' for all Members. Responding to Cuba's concerns that the reliance on informal 'fireside chats' risked excluding some countries, Ambassador Falconer said that it remained difficult to schedule more formal meetings since fully-fledged negotiations had yet to resume.

EU Notifies Ag Subsidies

According to an 8 December 2006 notification to the WTO, the EU's Total Aggregate Measure of Support (AMS, or – broadly speaking – 'Amber Box' spending) amounted to • 30.8 billion for the 2003/2004 marketing year. Although the figure was up nearly eight percent from the • 28.5 billion reported for the previous marketing year, it included price support for the ten countries that joined the European Union in May 2004. Both figures are well below the EU's annual AMS limit of • 67.2 billion under the WTO Agreement on Agriculture.

Despite the blip in 2004, most-trade-distorting support has declined steadily since the 2001/2002 marketing year, which was the last for which the EU had notified its AMS spending to the WTO (then at • 39.3 billion). Much of the drop is due to reforms carried out under the Common Agricultural Policy (CAP), including the elimination of price support for beef and decreasing support for the wine sector. Further AMS reductions are expected as the EU continues to move away from product-specific support and price support payments. (The products currently benefiting the most from trade-distorting price support are sugar, butter and olive oil. Apples and tomatoes also receive high Amber Box support).

The downward trend in AMS outlays, as well as the huge gap between allowed support and actual spending, explain why the EU has offered to make the greatest cut (70 percent of its the current allowed ceiling) in trade-distorting domestic subsidies in the Doha Round negotiations. The offer reflects the expected results of continuing CAP reforms, which are set to take place independently of what happens in the Doha Round.

The EU would have more difficulty with the suggested new ceiling for Blue Box spending (2.5 percent of the value of total agricultural production). While the notification shows payments around • 25 billion for both marketing years, under the new cap they would be limited to roughly • 7 billion a year.

Soft Relaunch Meetings Resume Across the Board

Several negotiating groups have started meeting informally, or will do so in the course of January, to explore the potential for a formal revival of the Doha Round in early 2007.

This ‘soft restart’ of the talks agreed in November is aimed at preparing the ground while waiting for political decisions that would allow fully-fledged negotiations to resume.

Industrial Tariffs

Consultations on non-agricultural market access (NAMA) are set to resume in mid-January. Ambassador Don Stephenson, who chairs the negotiating group, proposed on 13 December that Members focus first on three key issues: the tariff reduction formula for industrial goods, the flexibilities available to developing countries, and the treatment of unbound tariff lines. During the week starting on 22 January, discussions are slated to cover exemptions/reductions from tariff cut commitments for small and vulnerable economies, recently-acceded Members, and countries that have a low level of bound tariffs. Members could also address sectoral initiatives targeting more ambitious liberalisation of certain products, as well as the treatment of non-tariff barriers and non-reciprocal tariff preferences. At the end of the week, an open-ended meeting is planned to take stock of progress.

The draft text on the state of the NAMA negotiations issued by Ambassador Stephenson in June showed a lack of consensus on virtually every aspect under discussion (Bridges Year 10 No.4, page 7), and few expect that serious efforts to bridge differences will occur until consultations on agriculture show signs of moving forward (see page 6).

Services

Members are also likely to meet in late January to continue bilateral negotiations on market access requests and offers in services. Chair Fernando de Mateo said in November that he had detected a ‘sense of urgency’ among Members to restart the process, but did not propose a deadline for the submission of revised offers. Japan, however, noted that revised offers would need to be submitted by mid-February if significant progress were to be made by the end of March. When the Doha Round was suspended in July, several key developing countries were holding off improving their initial offers due to lack of progress in agriculture. Many developing countries view services liberalisation as benefiting developed countries most, and seek to adjust their concessions according to the level of ambition in their priority areas.

Fisheries Subsidies

In December, the Negotiating Group on Rules discussed the possible role of external inputs, such as guidelines developed outside the WTO, in crafting and implementing new disciplines on fisheries subsidies. The largely technical debate focused on ways to ensure that subsidised fishing permitted to developing countries under special and differential treatment (STD) remains within sustainable limits.

Several countries have already tabled precise negotiating language on new rules (Bridges Year 10 No. 3, page 12). For instance, Argentina proposed in June that countries wishing to provide subsidies under SDT should be required to implement national management systems ‘in keeping with’ the FAO Code of Conduct for Responsible Fisheries. At the December meeting, some Members expressed concern about the implications such a direct cross-reference on an eventual WTO dispute, where a panel might be called upon to rule on a country’s compliance with the Code, which would exceed the competence and mandate of the trade body.

Members also debated the availability and reliability of data on stock levels necessary to prove that stocks are high enough to allow developing countries to subsidise fishing capacity enhancement under SDT provisions. The EU in particular noted that international data, such as that collected by the FAO, was too unreliable to assess stocks. On the other hand, relying entirely on national data would effectively mean that Members would police themselves.

As a compromise, it was suggested that capacity-enhancing subsidies would not be allowed for any fishery deemed depleted and overexploited by the FAO. For the remaining fisheries – only a few given that three quarters of global fish stocks are already at risk – countries would calculate their surplus themselves, which in the case of a dispute could be cross-checked with international data.

With regard to Argentina’s proposal to determine surplus ‘in accordance with’ the UN Convention on the Law of the Sea (UNCLOS), Members wondered about the implications of referring to other treaties, which could require potential dispute panels to examine compliance with these agreements.

The rules negotiations are to ‘clarify and improve’ existing WTO disciplines on anti-dumping, subsidies and countervailing measures, as well regional trade agreements. Only fisheries subsidies have been addressed since informal consultations resumed in November.

Intellectual Property Rights

The creation of a multilateral register of geographical indications (GIs) for wines and spirits is the only intellectual property issue addressed in formal negotiating sessions under the Doha mandate. The Chair of these negotiations, Ambassador Manzoor Ahmad of Pakistan, has resumed informal consultations on the register, but countries’ positions remain too far apart for him to draft a compromise text or even suggest possible middle ground, he told Members in December. The main points of contention are whether the registration of a term would oblige others to protect it, and whether legal obligations would apply to Members that do not use or consult the register. Ambassador Ahmed proposed that further consultations “not be overly constrained by the proposals on the table” in order to see whether any fresh ideas would emerge. An information sharing meeting for all Members is likely to be held in late January.

General Council: Doha Round Window Still Exists

At the last General Council meeting of 2006, Director-General Pascal Lamy briefed Members on the latest developments in the Doha Round and on how Aid for Trade work is likely to proceed in the WTO.

Mr Lamy warned that “failure could be just around the corner” despite manifest political will to conclude the round. He acknowledged that so far the general signals of flexibility given by ‘major players’ had not translated into real changes in positions, but stressed that an ‘increasing level of engagement’ was starting to appear. The informal work started in November (see pages 6 and 7) should be stepped up early in 2007, he said, so that Members could be “ready to engage fully on substance when the time comes [...] in order to exploit the window of opportunity that remains ahead of us in the first quarter of next year.”

The ‘window of opportunity’ is defined by the 1 July 2007 expiration of the US president’s trade negotiating authority (TPA). It is widely believed that if there is no substantial progress by early April, Congress will not renew the TPA, and the Doha Round will be either be dead or put in mothballs for possibly years to come.

Argentina, Chile and Japan cautioned that the total collapse of the negotiations was a real possibility. Mexico said that countries had not yet revealed their true cards, and could go further than they had suggested in recent informal discussions.

Several major groupings reminded the membership of their priorities. On behalf of the G-33, Indonesia stressed developing countries’ need for flexibilities to shield certain agricultural products from the full force of tariff reduction, and to protect farmers from the effects of import surges. The extent to which Members, both developed and developing, will be able to shelter products remains one of the key factors in the contentious market access negotiations.

Benin, representing the African Group, said that any potential Doha Round deal would have to address the needs of net food-importing developing countries and the beneficiaries of long-standing trade preferences. In addition, the outcome must include robust provisions special and differential treatment, technical assistance and financial support. South Africa, on behalf of the NAMA-11 group (a coalition focusing developing country interests in industrial market access), noted that development issues, which were supposed to be at the heart of the Doha Round, had been left behind by the focus on the agriculture and industrial tariff negotiations.

Some Flesh on the Aide for Trade Skeleton

Pascal Lamy updated the membership on how the WTO could carry out its task of monitoring and evaluating of Aid for Trade (A4T). To avoid duplicating work already being done elsewhere, Mr Lamy suggested that the database maintained by the OECD Development Assistance Committee be used to monitor A4T flows, as well as to official development assistance. This would provide an overall picture of the financial resources made available for A4T, as well as show potential gaps. Regular reports from multilateral, regional and bilateral development and financing agencies would provide a second level of monitoring, which should cover both the scope and the effectiveness of activities undertaken.

Recipient countries themselves should report on their trade strategies and related needs, as well donor responses and whether the A4T funding received had achieved the recipient’s goal. In its July 2006 recommendations, the Aid for Trade Task Force stressed the importance of making A4T ‘demand-driven’, and the recipients have much work to do in identifying priorities and putting in place the national A4T committees that are to monitor implementation and report to the WTO.

The WTO’s role would be to collate the information from all these sources. On the one hand, it would monitor A4T commitments and disbursements and, on the other, provide a qualitative evaluation of the impact of A4T on trade growth, export diversification, economic development and poverty reduction in recipient countries. Further work is needed on benchmarks

for assessing impacts, as well as a shared format that would encourage qualitative reporting from recipients and agencies. In the future, both beneficiary and donor countries’ Trade Policy Reviews will also contain an assessment of Aid for Trade.

Next autumn, the General Council will hold a debate on A4T. Such debates, which may involve other institutions as well, will take place once a year to give Members’ political guidance. In addition, the WTO Committee on Trade and Development will convene periodic global reviews of A4T.

An Ad Hoc Consultative Group – comprised of relevant multilateral institutions, regional development banks and institutional representatives of the private sector – will be convened periodically “to assist in preparing global reviews of Aid for Trade, as well as in providing follow up support in terms of advocacy and fund raising at country and regional levels.”

Recipient countries have repeatedly emphasised that A4T must be additional to other development assistance in order to ensure that funds are not diverted from existing programmes. The Director-General’s report suggested that it would “seem reasonable to adopt 2002-2005 as the agreed baseline [for A4T commitments], beginning with the launch of the Doha Round and ending with the year of the Gleneagles Summit and the Hong Kong Ministerial Conference.” At Gleneagles, G-8 leaders agreed to double aid for Africa by 2010. They said that aid for all developing countries would increase by around US\$50 billion per year by 2010, of which at least US\$25 billion would go to Africa. In Hong Kong, the EU and the US pledged to provide additional A4T financing (respectively, • 2 billion and US\$2.7 billion) by 2010. Japan said it would spend US\$10 billion over three years. Mr Lamy told the General Council that the three donor countries had assured him that they remained committed to their Hong Kong pledges. In addition, he said that non-traditional donors – including developing countries – were interested in participating.

IP Protection Looms Large in Russia's Accession Pact

Now that details on the bilateral WTO accession deal between the US and Russia are starting to emerge, health activists are concerned about timely access to affordable medicines.

The bilateral market access agreement signed by Presidents Putin and Bush on 19 November includes nine side letters in which Russia promised, *inter alia*, to undertake regulatory reforms in the application of intellectual property rights, sanitary and phytosanitary measures in the meat sector, and biotechnology.

Pharmaceutical Test Data

The US-Russia agreement on intellectual property rights commits the Russian government to actively work with the Duma (the Russian Parliament) to secure the enactment and implementation of legislation that would, by 1 June 2007, require at least six years of protection against 'unfair commercial use' of undisclosed information submitted to obtain marketing approval of pharmaceutical products. The six years start on the day the approval is granted. During this period "no person or entity (public or private) [...] could without the explicit consent of the person or entity who submitted this data, rely on such data in support of an application for product approval/registration."¹

Generic drug manufacturers routinely rely on the safety and effectiveness information submitted by the company that first received marketing approval for its product. While the WTO's TRIPS Agreement does not specify how long such information must be protected, US domestic IP legislation, as well as recent bilateral trade treaties, generally require authorities not to disclose confidential test data for five years after granting marketing approval.

Should the new test data protection provision be approved by the Duma, the release of cheaper generic versions of drugs – including those no longer under patent – could be delayed for six years or more, even if the medicines were intended for public use such as the supply of government health clinics. The World Health Organisation estimates that Russia faces serious public health problems in areas such as HIV/AIDS and tuberculosis.

Piracy and Counterfeiting

Many provisions in the side letter relate to actions to be taken by the Russian government to prevent the production and export of counterfeited goods, particularly optical disks (CD-ROMs) that contain copyrighted material. Such measures include shutting down production facilities, repeated unannounced inspections of production facilities, stepped-up inspections of export shipments, and the initiation of criminal proceedings against those involved in piracy or counterfeiting on a commercial scale. By 1 June 2007, the licensing regime for optical media plants that produce copyright-protected material must be strengthened to prevent IPR infringements.

The side letter on intellectual property rights also commits the government to 'continue to take action' against the operation of webportals that promote 'illegal distribution of content protected by copyrights' such as the music site allofmp3.com; to investigate and prosecute companies that illegally distribute copyright-protected objects on the internet; and to work with the Duma to enact, by 1 June 2007, laws that would allow collecting societies to act only on behalf of rightholders that explicitly authorise such action. It does not, however, require the immediate shut-down of any particular site.

Biotechnology

The side letter on agricultural biotechnology commits Russia to maintain a risk assessment-based, predictable and WTO-compatible interim approval and registration system for products of modern biotechnology 'for cultivation, food, feed, processing and import'. The interim regime must enable the use of, and trade in, such products until a permanent regulatory system is complete and operational. By 15 November 2006, all pending product applications that had received a 'favourable science-based risk assessment' had to be registered.

Services

According to the Office of the US Trade Representative, Russia will allow 100 percent foreign ownership of non-life insurance firms upon accession, and permit direct branching for life- and non-life insurance companies nine years later. Express delivery and other distribution services, as well as telecommunications and environmental services, will liberalised upon accession. In the banking sector, however, Russia will continue to impose a 50-percent foreign ownership ceiling, as well as prohibit foreign banks from opening direct branch offices.

Russia's Take

A communiqué of the Russian Ministry of Economic Development and Trade sought above all to reassure domestic constituencies. It made no mention of intellectual property rights and glossed over the fact that some sanitary import restrictions on US beef were lifted upon the signature of the bilateral agreement (Bridges Year 10 No.7, page 6).

Russia's weighted average tariff on agricultural and industrial goods is to decrease by about three percentage points. The ministry emphasised that Russia would compensate any potential quota elimination in the meat sector through 'substantially higher' duties than the current in-quota tariffs. A number of agricultural goods not produced in Russia – or not produced in sufficient quantities to satisfy the needs of domestic agri-business – stand to be liberalised, while duties on cheeses, butter, vegetable oils and absolute alcohol will remain unchanged.

The communiqué underscored that 'special caveats' had been made in all services sectors that would provide Russian suppliers preferential access to the government procurement market. It also stressed that virtually no market opening commitments had been undertaken in services "vital for the functioning of the domestic economy."

ENDNOTES

¹This applies to confidential information in all marketing approval applications, irrespective of the drug's patent-protection status.

US Extends Preference Programmes

After months of debate, the last bill passed by the 109th Congress approved the extension of four preferential trade schemes, and granted permanent normal trade relations to Vietnam.

The US Generalised System of Preferences (GSP) was extended for two years with only one significant change from the regime in vigour until 31 December 2006. While the president is still authorised to waive the application of 'competitive needs limitations', i.e. the import thresholds above which a product is deemed too competitive to be eligible for GSP benefits, the 2007-2008 regime subjects the renewal of such waivers to new criteria. It provides that no later than 1 July each year, the president 'should revoke' any waiver in effect for five years or more if, during the preceding calendar year, imports of the product covered by the waiver (i) exceeded the maximum value set for GSP imports of a single product for that calendar year by 1.5 times, or (ii) exceeded 75 percent of the value of total US imports of the product during that calendar year.

For 2006, the ceiling for GSP imports of an individual product from a beneficiary country was US\$125,000,000. Under the new clause, any waiver in effect since 2002 or earlier will be terminated next July for a country whose exports of the product were worth more than US\$187,500,000 in 2006. Brazil stands to lose several waivers for auto parts, as does India for precious metal jewellery. Product-specific waivers could also be revoked for some other countries, but smaller GSP beneficiaries could gain new market access opportunities for products that currently cannot compete with those produced on a large scale in advanced developing countries.

Prior to the last-minute compromise, Congress had been divided over much more radical changes proposed in a draft bill that would have rendered ineligible for GSP benefits any developing country with a per capita GDP of US\$3,400 or more. That measure would have graduated Argentina, Brazil, Turkey and Venezuela out of the GSP altogether. The draft would also have required the termination of any waiver under which exports exceeded US\$1.5 billion in the previous calendar year.

Uncertain Future for Andean Countries

The legislation extends until 30 June 2007 existing benefits for Bolivia, Colombia, Ecuador and Peru under the Andean Trade Promotion and Drug Eradication Act (ATPDEA). However, only countries that have enacted implementing legislation for a free trade agreement with the US will be eligible for a further six-month extension. The provision is aimed at spurring congressional action on agreements the US has already signed with and Peru and Colombia. The additional six months would cover the time until those agreements' entry into force, but Congressional approval in the US is still uncertain due to Democrat demands that the treaties' labour provisions be strengthened (Bridges Year 10 no. 6, page 14).

Ecuador and Bolivia would almost certainly see their ATPDEA benefits terminated, as Ecuador's FTA negotiations are currently frozen and Bolivia's have not even started. Some analysts believe, however, that US legislators will ultimately refrain from abruptly cutting off preferential market access to the two poorest Andean Community members.

Extended Benefits for Africa and Haiti

Under the African Growth and Opportunity Act (AGOA), Sub-Saharan African countries will be able to export duty-free apparel made of fabric or yarn sourced outside the region or the US until 2012. In addition, 'lesser developed' AGOA countries were granted duty-free access for some non-apparel textiles made wholly with African fabric. Such countries include AGOA beneficiaries that had a per capita GDP under US\$1,500 in 1998, as well as Botswana and Namibia.

Third-country input provisions in the new Haitian Hemispheric Opportunity through Partnership Encouragement Act (HOPE) were bitterly opposed by several senators and congressmen from textiles districts (Bridges Year 10 No.6, page 14). HOPE grants duty-free access to Haitian textiles if at least half of the value of the finished product originates in the US, Haiti, another country benefiting from a preference programme, or a US FTA partner. This rule of origin will apply for the first three years of the programme. In year four, the percentage of input from these countries rises to 55 percent, ending with 60 percent in year five.

Incoming Senate Finance Committee Chair Max Baucus promised senators opposed to the bill to hold a hearing with representatives of the textiles industry before President Bush certifies that Haiti has fulfilled the eligibility criteria in the legislation. The hearing will focus on how Customs can enforce the legislation, which the opponents claim could open the door for duty-free Chinese transshipments.

Vietnam's WTO Status Cleared

Congress granted Vietnam permanent normal trade relations (PNTR), thus ending the annual evaluation the country had been subject to under the Jackson-Vanik amendment for non-market economies. Without PNTR, Vietnam would not have had to apply all of its accession concessions to the US upon its WTO accession on 11 January 2007. Congress did, however, establish a 'subsidies enforcement mechanism', which requires the government to take prompt and decisive action if Vietnam were to grant prohibited subsidies to its textiles and apparel industry.

Schwab: Bill Demonstrates Bipartisanship on Trade

US Trade Representative Susan Schwab lauded the 'strong bipartisan vote' in favour of these initiatives. She said the bill showed that "contrary to conventional wisdom, Democrats and Republicans, the Administration and Congress, can work together to further our vital trade agenda."

EU to Start FTA Talks with Asian, Latin American Countries

On 6 December, the European Commission formally requested mandates from EU member states to start trade bilateral or regional negotiations with a number of Latin American and Asian countries.

In its October 2006 Global Europe competition strategy, the Commission said that new ‘competitiveness-driven’ FTAs “would need to be comprehensive and ambitious in coverage, aiming at the highest possible degree of trade liberalisation, including far-reaching liberalisation of services and investment. [...] Where our partners have signed FTAs with other countries that are competitors to the EU, we should seek full parity at least. Quantitative import restrictions and all forms of duties, taxes, charges and restrictions on exports should be eliminated.”

Further, FTAs should “tackle non tariff barriers through regulatory convergence wherever possible and contain strong trade facilitation provisions.” They should include stronger provisions for intellectual property rights and competition, as well as seek to include provisions on good governance in financial, tax and judicial areas ‘where appropriate’.

New Generation Asian FTAs

The Commission seeks such ‘competitiveness-driven’ FTAs with India, South Korea and the 10-member Association of Southeast Asian Nations (ASEAN). The new deals are to complement the EU’s “strong commitment to the WTO multilateral trading system with agreements that go further and faster in promoting openness and integration and tackle issues which are not yet ready for multilateral discussion and by preparing the ground for the next level of multilateral liberalisation.” Among such issues are environmental and labour standards, competition policy, investment, government procurement, deep liberalisation of services, enhanced provisions against intellectual property rights infringements and the removal of restrictions on energy trade.

Speaking at a conference on Trade and Decent Work on 5 December, Commissioner Mandelson said he would “like to see us make a step change in how we integrate decent work and the broader agenda of sustainable development into these bilateral agreements”. The approach would be based on dialogue rather than sanctions, he said, and additional concessions could be offered in bilateral deals linked to the ILO’s core labour conventions or environmental standards.

The EU’s Generalised System of Preferences (GSP) already uses this approach. All developing countries are eligible for a basic GSP package. A GSP-plus scheme, which more than doubles the number of products that can enter the EU free of duty, is available for ‘vulnerable’ developing countries that have ratified and are enforcing 16 core conventions on human and labour rights, as well as at least seven international treaties on good governance and the environment (Bridges Year 8 No.9, page 17). According to Commissioner Mandelson, such incentives have worked: all countries eligible for GSP-plus have signed the core ILO conventions.

The Commission hopes to begin negotiations on all three bilateral agreements early in 2007. Talks with South Korea are expected to conclude within a year, and those with India and ASEAN within two years.

Talks to Start with Andean, Central American Countries

The Commission also proposed that the EU start ‘region-to-region’ negotiations for Association Agreements with Central America¹ and the Andean Community² in 2007. Such agreements cover not only trade, but also development co-operation and political dialogue. According to the Commission, the agreements with the two Latin American groupings will set out the conditions for the gradual establishment of FTAs between the EU and the two regions, as well as provide further impetus to regional economic integration processes.

Like the Indian, South Korean and ASEAN FTAs, the Latin American Association Agreements will address non-trade issues. In a press release, the Commission said it aimed to “foster

a deeper political partnership with both regions based on promotion of human rights, democracy and good governance.” The agreements, it said, would “enhance bi-regional co-operation so as to reinforce political, social and economic stability, help to create conditions for reducing poverty, as well as ensure an appropriate balance between economic, social and environmental components in a sustainable development context.”

Details of the proposed negotiating mandates with either the Asian or the Latin American countries have not been made public. EU member states are expected to consider the directives early in 2007.

Trade Defences

Simultaneously with the trade negotiations mandate requests, the European Commission issued a ‘green paper’ to launch a three-month public consultation on the application of the EU’s trade defence instruments in a changing global economy.

One of the key questions raised in the paper was whether trade defence investigations should take into account consumer and importer interests, as well as the protection of European producers and workers. This is a recurring and divisive issue, pitting producers – particularly of footwear and apparel – against the interests of importers and retailers. EU countries with significant domestic industries in these sectors tend to favour the use of anti-dumping or countervailing measures to stem the flow of cheaper imports, while others lean towards the interests of consumers and retailers. For instance, it took weeks of acrimonious negotiations before member states approved anti-dumping duties on Chinese and Vietnamese leather shoes by the slimmest of margins in October 2006 (Bridges Year 10 No.6, page 6).

ENDNOTES

¹ Costa Rica, El Salvador, Guatemala, Honduras, Panama and Nicaragua

² Bolivia, Colombia, Ecuador and Peru

EU Adopts REACH

On 18 December 2006, EU member states approved a new regulation for chemicals after seven years of debate.

REACH (Registration, Evaluation and Authorisation of Chemicals) is the most ambitious and comprehensive chemicals legislation anywhere in the world. It requires both domestic and foreign producers to register all chemical substances produced or imported above a quantity of one tonne per year. Registration will affect about 30,000 substances found in a wide variety of everyday consumer products. REACH also transfers the burden of proof regarding safety data and risk assessment from authorities to industry.

Some 3,000 substances considered to be of 'very high concern' will require authorisation by the European Chemicals Agency. Chemicals in this category include those that can cause cancer, damage genes or affect fertility, and those that are persistent, bioaccumulative and toxic. In order to receive marketing authorisation, producers of these substances must present a plan for substituting the hazardous elements with safer alternatives, or a research plan aimed at finding less dangerous alternatives where none currently exist. Marketing authorisation will be granted for a limited period of time.

REACH will enter into force progressively from June 2007, and all chemicals under its scope must be registered by 2018. The calendar for registration depends on the risk of the substance and the quantity produced.

At the WTO Committee on Technical Barriers to Trade, several Members have repeatedly alleged that the legislation is more trade-restrictive than is necessary to ensure adequate levels of health and environmental protection. Concerns have been raised about small- and medium-sized enterprises' capacity to provide the required safety information, particularly in developing countries. EU representatives have countered that the chemicals under REACH are produced almost exclusively by large companies.

LDC Exports to Enter Brazil Duty-free

The Brazilian government plans to start granting duty- and quota-free market access to exports from 32 of the world poorest countries in early 2007.

The move would make Brazil the first developing country to accord unimpeded access to goods from the 32 least-developed country (LDC) Members of the WTO.

At the WTO's Hong Kong Ministerial Conference in December 2005, governments agreed that "developed-country Members shall, and developing-country Members declaring themselves in a position to do so should... provide duty-free and quota-free market access" to LDC exports." The commitment came with a caveat: countries were permitted to shield up to three percent of product types (tariff lines) from the duty- and quota-free obligation. Critics pointed out at the time that this exemption could potentially be enough to cover the handful of products that LDCs were able to export competitively.

The unrestricted market access was to enter into effect no later than the start of the Doha Round implementation period. With the Doha Round in a limbo, however, Members are not obliged to implement the Hong Kong decision. The US has explicitly linked extending duty- and quota-free access to LDC exports to the round's conclusion.

The International Food Policy Research Institute (IFPRI) has projected that LDCs, along with eight other low-income countries, would see a US\$7 billion rise in real income if all OECD countries extended duty- and quota-free access for all of their exports.

Coverage Still to Be Determined

Brazilian business groups – particularly from the textile, electronics, chemical and machine equipment sectors – have asked for some 1300 products to be designated as sensitive, while the government wants to accept no more than 900.

Many LDCs depend on foreign inputs in their production processes, and Brazilian industry groups are particularly concerned about an increase in imports from China, which is a major supplier of such inputs. According to the business newspaper *Valor Economico*, Brazilian business is lobbying the government to toughen the rules of origin requirements for the scheme, calling for at least 50 percent of the value of an eligible product to be added in an LDC, compared to the government's proposal of 40 percent. The Hong Kong Declaration commits Members to "ensure that preferential rules of origin applicable to imports from LDCs are transparent and simple, and contribute to facilitating market access."

A spokesperson for the Brazilian Ministry of Foreign Affairs pointed out that oil imports from Angola made up nearly 70 percent of all LDC imports, which accounted for only US\$500 million out of the country's total imports of US\$75 billion. He added that the beneficiary countries were very poor and unlikely to emerge as major export platforms.

Nevertheless, he did not rule out the possibility of exempting textiles from the removal of duties and quotas in response to industry demands, although he said that the government's intention was "to give preferential treatment to all products." Brazilian textiles manufacturers worry in particular about a sharp increase in imports from Bangladesh. Similar concerns led the US to insist on importing countries' right to exclude three percent of tariff lines from the obligation to provide duty- and quota-free access to all LDC products. The Brazilian government is still consulting with industry on its concerns about the initiative.

Celine Charveriat of Oxfam's Make Trade Fair campaign stressed that manufacturers in a relatively advanced country such as Brazil had little to fear from LDC exports. "With simple and transparent rules of origin, and a functioning customs system, abuse of the concessions can be easily avoided," she said.

Little Progress at Climate Meeting

Amid rising greenhouse gas emissions and a heightened focus on the economic costs of global warming, a two-week long UN climate change conference in Nairobi left both government delegates and civil society representatives with the feeling that they had accomplished little.

Much of the focus of the meeting was on adaptation and on the difficulties African countries already face as a result of climate change. Outgoing UN Secretary-General Kofi Annan put his weight behind calls for concrete action by announcing a new UN multi-agency Nairobi Framework to secure additional funding for clean energy in African countries.

Multi-track Approach for the Post-Kyoto Regime

Future action to combat climate change, especially after the Kyoto Protocol's emissions reduction requirements expire in 2012, was extensively discussed at the meeting.

The debate covered several tracks, the broadest being a 'dialogue on long-term co-operative action to address climate change by enhancing implementation of the Convention'. The second workshop of this ongoing dialogue consisted of presentations and discussions on market-based opportunities, adaptation and the effective use of technology. All parties to the UN Framework Convention on Climate Change participated in the dialogue, including countries that have rejected the Kyoto Protocol, such as the US and Australia.

A working group charged with negotiating new post-2012 commitments for Annex I countries – the developed countries that have committed to binding emissions reductions under the Kyoto Protocol – also continued talks in Nairobi. Participants agreed to a plan of work, but set no dates for wrapping up the talks as demanded by the developing countries. Instead, they simply underscored the need for an 'energetic and timely pursuit' of the work programme.

Among other things, parties could not agree on a suggestion by the EU and Norway to set an 'aspirational' long-term goal for the Kyoto Protocol as a whole, such as target ceilings for temperature increase or greenhouse gas concentrations in the atmosphere. Certain Annex I countries insisted that future targets needed to reflect the range of options available to parties in order to ensure that they were achievable. Furthermore, they argued that in order to be effective, a future regime would require a broad commitment to emissions reduction from developed and developing countries alike.

Future work in this group is set to focus on three aspects: analysis of mitigation potential and ranges of emission reduction objectives; analysis of possible means to achieve mitigation objectives, and; consideration of further commitments. In particular, work on mitigation could have crucial implications for how action under the climate regime could relate to initiatives in other policy fora that relate directly or indirectly to global production and competitiveness.

Also on the agenda was a review of the Protocol as mandated by Article 9. This issue was contentious because the review provides a signal for future action. It could, for instance, lead to the conclusion that in order for the Kyoto Protocol to be effective, all countries need to make emissions reduction commitments – something emerging developing countries are reluctant to do, especially until they see developed countries show leadership in terms of taking meaningful action. In the end, countries agreed to hold a second review in 2008, which they stressed "shall not lead to new commitments for any party."

Meanwhile, both environmental groups and the private sector are looking for speedier action. Industry groups, including the World Business Council for Sustainable Development (WBCSD), called upon governments to quickly agree on a policy framework for the post-2012 period, preferably by 2008, in order to give them longer-term certainty for investment decisions. Both carbon markets and projects to reduce emissions stand to expand with a clear framework for the years beyond 2012.

Trade & Climate

"The hidden imperative behind Kyoto is the creation of an open global market in environmental technologies. One that allows green technology and investment to move freely. Wherever possible, restrictive national rules on investment or services trade that prevent this transfer of expertise and technology should be removed or reduced.

The most important way of achieving this is through the WTO. Negotiations on environmental goods in the Doha Round had faltered even before the talks as a whole were suspended last summer. Those negotiations must be revived. WTO members should agree a market opening deal for products specifically linked to addressing climate change. They should agree to eliminate tariffs for key climate change-related goods like European green technology, Indian energy-saving water heaters and Chinese wind power generators. Europe will also look for similar clauses in its next generation of bilateral trade agreements, alongside new commitments and incentives on sustainable environmental development.

Our response to climate change can be strengthened by the right trade policies. It can be weakened by the wrong ones. The idea of a special tariff on countries that have not ratified Kyoto is sometimes raised. Such a tariff would be problematic under current WTO rules, and almost impossible to implement in practice. Who would we target? China has ratified Kyoto but has no Kyoto targets because of its developing country status. The US has not ratified, but states like California have ambitious climate change policies.

It would also be bad politics. A punitive approach to international co-operation on climate change would be politically and strategically clumsy, igniting a carbon war. Dealing with climate change is an international challenge that requires international co-operation. Coercive policies will never achieve this. Collective responsibility will only be fostered by policies of dialogue, incentive and co-operation."

Excerpt from Peter Mandelson's comment on trade and climate change, 18 December 2006.

Bioenergy and Africa: Trade Opportunities and Challenges

Africa has significant bioenergy potential due to large areas of suitable crop- and pasture-land with low population density, but also faces many hurdles in turning that potential to a real development opportunity.

A range of crops produced on the continent could be used to make biofuels – sugar cane, sugar beet, maize, sorghum and cassava for ethanol production – while peanuts, jatropha and palm oil can be used to produce biodiesel.

The International Energy Agency has projected Africa's potential for the production of bioenergy on surplus agricultural land by 2050 to stand at around 317 exajoules of energy – roughly equivalent to 142 million barrels of oil equivalent per day – one of the highest in the world. This represents the potential under optimal conditions, meaning the maximum amount of bioenergy that could be produced without causing environmental damage or undermining food supplies for growing populations.

Tapping the potential for bioenergy could help decrease the heavy oil import dependence of many countries, contribute to rural electrification and development, and – given the high labour intensity of bioenergy – address Africa's unemployment problems.

Little surprise then that governments across the continent are implementing or planning several biofuel projects. In Southern Africa, sugar cane and sweet sorghum are the main crops considered for the production of biofuels, while the arid and semi-arid Western parts of Africa lean toward using jatropha and other drought-resistant crops. In October 2006, Senegal launched a biofuel initiative involving scientific and technical assistance from Brazil and capital investment from Indian entrepreneurs. The programme is set on 50,000 hectares of land, which will be used to grow different crops, including castor oil plants, sunflowers and jatropha. In drought-prone Mali, jatropha is being used to make biodiesel to run generators and water pumps.

South Africa has approved a plan to establish a biofuels industry financed by the government and private investors. A Task Team set up by the government is expected to propose obliging fuel retailers to blend

motor fuels with a certain proportion of biofuels or ethanol, and could propose subsidies if a fall in the crude oil price made the plants unprofitable.

Investment Challenges

African countries face a myriad of challenges in turning their potential in bioenergy into real development opportunities. Key among these is financing. Large scale farming and processing of energy crops requires significant amounts of capital investment. It is estimated that the establishment of a new estate and sugar factory capable of processing two million tonnes of cane per year would cost US\$200-300 million. Capital costs for an ethanol distillery range from US\$50 to US\$80 million, and the costs of a 70 megawatt co-generation plant amount to about US\$70-84 million. Most African countries would have difficulties in attracting such investment due to poor infrastructure and high interest rates.¹

A number of countries are trying to overcome these barriers by entering into joint ventures involving foreign investment, but in some cases local industry and businesses are paving the way. For instance, the Industrial Development Corporation of South Africa is considering investing US\$800 million to develop ethanol plants, while Ethanol Africa plans to spend US\$1 billion building maize-to-ethanol plants. Regional financial institutions have also started to get involved. The ECOWAS Bank for Investment and Development and the Ghanaian government have developed a national strategy to finance the whole supply chain of biodiesel production. Feasibility studies for an African Biofuels Fund will be carried out early next year and the launch of the fund is expected to take place by mid-2007.

Prospects for leveraging additional investment through the Clean Development Mechanism (CDM) of the Kyoto Protocol remain limited, at least for the near future. The CDM enables countries with greenhouse gas emissions reduction obligations to invest in the developing world to offset their own emissions. In Africa, however, there have been almost no CDM projects involving liquid biofuels in the transport sector, or the displacement of non-renewable energy in favour of renewable biofuels in the household sector.

Trade Opportunities and Challenges

As many African countries export only a few commodities, diversifying agricultural production into biofuels could help reduce commodity dependency. Current African production of ethanol is estimated at only 1.2 percent of the global total and exports remain very low. But prospects could be bright. For example, Johnson et al. have projected that ethanol production in the 14 member countries of the Southern African Development Community will reach 36996 million litres in 2025, while SADC petrol demand is expected to amount to 8195 million litres. This would leave an excess for export in the range of 28801 million litres.

In theory, most African countries should be competitive producers and exporters of biofuels. In addition, they should be able to overcome market access barriers in the form of tariffs given that many of them benefit from preferential market access under developed countries' Generalised Systems of Preferences, as well as more specific schemes, such as the EU's 'Everything but Arms' initiative, the Cotonou Agreement or the US African Growth and Opportunity Act.

However, African exports of biofuels will face challenges related to non-tariff measures, such as sustainability criteria and quality standards, as well as domestic support in major markets.

ENDNOTES

¹ See F. Johnson et al in *Linking Trade, Climate Change and Energy*, 2006, ICSTD, Geneva

Public Participation Brings a Fresh Approach to WIPO

Nick Ashton-Hart

Backed by many member states, a broad civil society–industry coalition built over the last five years has helped to change the direction of the negotiations on a new broadcasting treaty at the World Intellectual Property Organisation.

WIPO negotiations were until relatively recently largely invisible at the level of public comment. In truth, even some of the stakeholders in the intellectual property system were not aware of the agency's activities. This has changed dramatically since the mid-1990s, thanks in no small measure to the increase in the number of states that are parties to IP treaties largely brought about by their adhesion to the WTO Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS).

The arrival of a considerable number of consumer and other civil society NGOs, combined with the increasing participation of a much broader set of industrial stakeholders, has fractured old alliances and created new ones. It has broadened the debate on the broadcasting treaty in many ways. Indeed – although many might find it hard to believe – civil society groups have often been the ones asking broader industrial interests to get involved in the negotiations – with considerable success.

A constellation of some of the largest information technology companies, world-famous brands and telecommunications giants – representing just under half a trillion US dollars in annual turnover – now publicly agree with civil society to a degree that any veteran of multilateral negotiations would have to consider unusual. Both sets of stakeholders intend work together to the maximum extent possible for the remainder of these negotiations.

Many member states suggest that the concerted civil society–industry effort allows them to see a comprehensive approach – both narratively and in corresponding treaty provisions – that would be much more difficult to discern if they had to absorb 'non-papers' from individual stakeholders. The constituencies have also taken a very proactive approach characterised by continuous and sustained inter-sessional consultations with member states and with one another. It would be easy to argue that the working coalition of industry and civil society has become the most significant – and effective – group of non-state actors operating in the process.

The WIPO Secretariat has facilitated wide participation of NGOs in a way that should be emulated by all other multilateral negotiations. It has granted routine opportunities to address formal negotiations, access to staff, and openness to new ideas and approaches even when they are critical of WIPO itself. The result is a much richer and more open debate than many other multilateral fora permit. Many, including myself, are grateful; undoubtedly we would have had a much more difficult time participating in these negotiations if they were part of an agency with a less enlightened approach to NGO participation. It goes without saying that WIPO would be unable to be so enlightened if its member states were not in favour of it – for which they, too, should be congratulated.

The discussions between industry and civil society have had some interesting and I believe valuable 'by-products' that were not expected when the effort began. The changed dynamic of working together so closely on a sustained basis has allowed the same co-operative spirit to 'infect' discussions in other areas of policy, such as a recent collaboration between musical performers' representatives and civil society groups related to digital rights management and technical protection measures – a collaboration which would have been largely unthinkable even a short time ago. Similar efforts are actively being contemplated in other areas. A number of corporations and trade associations have started internal discussions on how to engage with WIPO's copyright and related rights processes on a long-term basis, and have become interested in the agency's agenda to a much greater degree.

The position of the working coalition on the proposed treaty can be distilled essentially into the following three points:

- The need for a treaty has not been proven. Despite years of asking, the broadcasters have yet to provide any real details of an epidemic of signal piracy, let alone an epidemic that requires international norm-setting. Instead, they have proposed scenarios, such as the downloading of television programmes and feature films, as evidence of the need for greater protection for broadcasting. The problem with these examples is that they are not really examples of broadcast signal infringements – they are examples of copyright infringements in the programmes that are being broadcast. If the broadcasters wanted to be able to prosecute infringement of unauthorised uses of recorded broadcasts, all they need to do is get the agreement of the programme owners to pursue the infringements; they don't need an overlapping right.
- Copyright is meant to protect the expression of an idea. A broadcast signal is not an idea, or the expression of one; it is a stream of electromagnetic waves. It is not necessary to have rights of authorisation in relation to electromagnetic waves to protect them from theft or misuse; in fact, rights are an inefficient and expensive means to do so. Granting rights creates the necessity for clearing those rights – an expensive and complex proposition at best.
- Just because the Rome Convention used rights to protect broadcasts in 1961 does not mean that we should, in 2006, ignore the last 40 years of treaty-making in this field and simply extend Rome's provisions for broadcasters. On the contrary, whenever broadcasting has been reviewed in international copyright norms since the Rome Convention was negotiated, gov-

Continued on page 16

ernments have declined to add further rights. Instead, in the most trenchant examples, they have chosen to protect signals against piracy without adding rights, or to give limited prohibitions against misuse of broadcast signals.

The broadcasters and their allies have attempted to suggest for years that the only possible outcome of these negotiations is a treaty which grants them greater rights over both the transmission and the artistic content of their transmissions. While this argument may once have appeared to be persuasive, that time has come and gone. Indeed, at the recent WIPO General Assembly member states made clear that they were not prepared to proceed on the basis of any formulation that was not limited to the protection of signals (Bridges Year 10 No.7, page 21).

Of course, this process has at least a year to run and much can happen in that time in any multilateral process. However, after nine years of trying to agree a rights-based framework – and being unable to reach consensus on such an approach – it would be difficult to imagine a return to such unfruitful discussions. In my judgment, if no consensus on a signal-based approach is reached this year, the entire topic is likely to be set aside and work on other areas of copyright pursued for the medium term at least.

From a broader perspective, it is becoming increasingly clear that WIPO negotiations can no longer assume that the starting position of any discussion is a grant of greater rights. The time has ended when a small cross-section of the entire rightsholders community, representing a rather narrow and economically limited set of interests, could have the debate about development of international copyright norms to themselves and shape the debate on such critical matters unobserved by anyone but other member states. Civil society, and an increasingly broad cross-section of the private sector, are watching and participating.

Copyright norm-setting at the international level will never be the same.

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Thailand Issues Compulsory Drug License

Thailand's Ministry of Public Health announced on 29 November the grant of a compulsory license for the production or import of the anti-retroviral AIDS drug efavirenz.

Efavirenz – the generic name of a patented medicine marketed by Merck & Co as Stocrin – is 'highly effective and safe', the ministry said, but too costly for the country's national health system to supply it to all those in need. According to Médecins sans Frontières, at least 12,000 HIV/AIDS patients in Thailand currently require efavirenz due to an intolerance to one of the components in the generic triple drug cocktail produced by the domestic Government Pharmaceutical Organisation (GPO). That number is expected to rise sharply as patients now treated with generics already off-patent will start requiring second-line medicines such as efavirenz to survive.

Over the next two years, the GPO plans to double its capacity to supply standard generic triple-drug treatments to 150,000 people a year, as well as start producing efavirenz sometime in 2007. Until the company can meet domestic needs, the government will import the generic from India. While Merck's Stocrin treatment currently costs 1,500 bahts or US\$41 a month in Thailand, Indian manufacturers can supply generic efavirenz for half the price.

According to patent rights expert Frederick Abbott of Florida State University, Bangkok's decision appears to comply fully with WTO rules. Existing flexibilities in the TRIPS Agreement, confirmed in the 2001 Doha Declaration on TRIPS and Public Health, affirm Thailand's right to issue compulsory licenses for emergencies and public uses, as well as the import of medicines such as efavirenz from countries that have not granted patent protection for them (India, for instance). The stringent requirements of the December 2005 amendment to the WTO TRIPS Agreement, which requires complex authorisations and notifications from both importers and exporters of generics manufactured under compulsory license (Bridges Year 10 No.1, page 22), thus do not apply to the new Thai legislation.

Some 600,000 people are estimated infected with HIV/AIDS in Thailand. In 2003, the government adopted a policy of universal access to anti-retrovirals for those who need them. Domestic generic production HIV/AIDS triple therapy (based on drugs no longer under patent) has already reduced the cost of treatment 18-fold, and made Thailand the only Southeast Asian country to offer treatment to more than half of the patients who need it.

The compulsory license for efavirenz took effect on 29 November and will be valid until 31 December 2011. Its use will be limited to the provision of efavirenz to no more than 200,000 people a year, and the GPO will pay the patent holder a royalty fee of 0.5 percent of the total sale value of the imported or locally-produced generic.

Praise from Civil Society, Concern from Industry

Médecins sans Frontières (MSF) warmly welcomed the move, and urged the government to "issue such licenses for the production of other essential medicines." MSF's David Wilson said that Thailand's new policy needed to "be expanded to essential drugs that are expensive and in short supply, such as the AIDS drug lopinavir/ritonavir, which currently costs over 7,000 baht a month (US\$194) and is far too expensive for Thailand."

Merck said it was not consulted prior to the announcement of the compulsory license, and was seeking meetings with the ministries of health and commerce "to better understand the decision that has been taken and to explore ways in which MSD can assist the Royal Thai government in improving the treatment available to HIV/AIDS patients in Thailand." Pharmaceutical Research and Manufacturers of America President and CEO Billy Tauzin said in a statement that the announcement to issue a compulsory license "without any attempt to negotiate with the patent owner [was] of grave concern" and appeared "to be inconsistent with the procedures in Thailand's own patent statute."

Exceptions to Patent Rights

Christopher Garrison

Many WTO Members believe that patents are essential to encourage research and development. Others, however, are concerned about the impact of intellectual property rights systems on their economic and social welfare.

Where the line is drawn between the areas controlled by the patent holder and those which the patent holder may not control is an important policy issue for WTO Members. One aspect of this question pertains to exceptions to patent rights or ‘safe harbour’ areas of activity where the rights of a patent holder do not extend.

Exceptions Pre-dating the TRIPS Agreements

Although the Agreement on Trade-related Aspects of Intellectual Property Rights (the TRIPS Agreement) generally strengthened the international patent regime, its Article 30 also introduced some criteria for acceptable exceptions.

Prior to the agreement’s entry into force in 1995, countries were largely free to adopt exceptions to patent rights as they saw fit, and even after the TRIPS Agreement took effect exceptions that had been well-known before its negotiation continued to be regarded as valid. The table below outlines these exceptions in terms of the nature of the policy problem that they were intended to address.

Exceptions under the TRIPS Agreement

Following the adoption of the TRIPS Agreement, the validity or otherwise of exceptions falls to be determined under Article 30, which states:

Members may provide *limited* exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with the normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties (editor’s italics).

If a policy-maker wishes to craft a new exception, it must meet all the conditions in Article 30. How these conditions are to be understood is a critical question.

In 2000, two exceptions – the known ‘regulatory review’ exception and a new ‘stockpiling’ exception – were tested at the WTO in the *Canada-Generics* dispute. The first of these made it possible for manufacturers to use an invention still under patent to conduct tests required

for marketing approval for a generic version of that invention. The ‘stockpiling’ exception allowed companies to start actually manufacturing generic versions six months prior to the expiry of a patent for sale afterward. Both measures were aimed at bringing forward the day when generic versions of a patented medicine could be marketed so that competition could lower the price of the drug as soon as possible.

The *Canada-Generics* panel introduced an important legal test through its interpretation of what constitutes a ‘limited’ exception. Under this test the panel determined that the stockpiling exception was not ‘limited’ and was therefore inconsistent with Article 30. In contrast, the panel concluded that the regulatory review exception was ‘limited’. The regulatory review exception also passed the other tests of Article 30, at least so far as the panel needed to interpret them. It is tremendously important from a public health point of view that this exception was found to be, in a manner of speaking, ‘WTO-approved’. Countries can adopt a regulatory review exception with a high degree of confidence that the measure will not be challenged through dispute settlement.

However, a future panel’s approach to the exceptions under Article 30 can be expected to be different from that taken back in 2000. Among other things, it is argued that the *Canada-Generics* panel erred in its interpretation of ‘limited’ in not systematically taking account of all the pre-existing exceptions that were known to be valid at the time of the TRIPS Agreement’s entry into force. To take two examples that provide broad exceptions to the rights of patent holders, the Foreign Vessels exception is mandatory for all WTO Members and the Chicago exception is mandatory for all parties to the International Civil Aviation Convention (nearly all countries in the world). When interpreting ‘limited’ in accordance with the rules of the Vienna Convention on the Law of Treaties, any mean-

Continued on page 18

Table 1: Exceptions to patent rights known prior to the TRIPS Agreement

Exceptions to Patent Rights	Nature of Policy Problem Addressed
Private and Non-commercial Use	De minimis activity should be shielded from patent infringement.
Experimental Use	Scientific and technical progress must not be hindered by the patent system.
Prior Use	Prior users must be treated fairly vis-à-vis patent holders.
Pharmacy	Pharmacists should be free to make medicines for supply to patients on the basis of individual medical prescriptions submitted to them by doctors without fear of patent infringement.
Foreign Vessels	Freedom of international movement of foreign vessels must not be hindered by patents.
International Civil Aviation (Chicago)	Freedom of international movement (and maintenance) of foreign aircraft must not be hindered by patents.
Regulatory Review (Bolar)	Competition between patented and generic medicines must be enabled as swiftly as possible after the expiry of the patent.
National Exhaustion	Once a patent holder has sold a patented product, the patent holder should not be able to control subsequent actions regarding the product, such as resale or repair.
European Regional Exhaustion	Once a patented product has been sold on the European market, freedom of movement of goods throughout the rest of the market must not be hindered by patents.

ing of the term must embrace both the Foreign Vessels and Chicago exceptions. However, the panel's interpretation of 'limited' arguably excludes both. The same consideration applies to all the other terms in TRIPS Article 30.

It is also true, of course, that much has happened since 2000, including the Doha Declaration on TRIPS and Public Health. An 'evolutionary' approach to the interpretation of the provisions of the TRIPS Agreement is certainly to be expected. Caution must therefore be counselled against relying too heavily on *Canada - Generics* as a precedent when considering the design of new patent exceptions.

State Practice on TRIPS Exceptions

A review of recent changes in patent rights exceptions in more than 30 countries reveals a rich variety of developments. In some cases the scope of an exception has been:

- narrowed (or confirmed to be narrow) through judicial decisions such as that on experimental use in the US.
- forced to become narrower/remained narrow as a result of bilateral disputes or trade agreements. For instance, under the US-Morocco FTA, Morocco may only maintain narrow regulatory review and international exhaustion exceptions.
- broadened (or confirmed to be broad) through judicial decisions, as happened in the case of the US regulatory review exception.
- broadened through legislation to address economic policy issues, as India and Kenya have done with regard to the international exhaustion exception.
- broadened through legislation to embrace continuing technological change. For example, spacecraft were included in the US foreign vessels exception so that US patents would not interfere with the launching of foreign satellites.

In terms of other developments, following the Union's eastward expansion, the EU adopted a regulatory review exception based on a foreign model in line with the *Canada-Generics* ruling. In addition, an exception thought no longer to have much practical utility may become useful again due to technological changes, such as the pharmacy exception with regard to somatic genetic/cell therapies.

Uncertainty over the scope of an exception, whether pre-existing or new, is likely to have a negative impact. This may be particularly so where patent infringement is criminalised. In an optimal case, patent legislation would be periodically reviewed to ensure that it continues to serve the best interests of the country as is, for example, the case in China. Discrete policy review processes may also be undertaken to address just one problematic area, as the Australian Law Reform Commission did with regard to the experimental use and medical practitioner exceptions.

Monitoring the incidence of use of patent right exceptions may be expected to yield interesting insights into underlying economic and technological changes in developing countries and would assist such a review process. However, this is difficult at present given the lack of systematic empirical data.

New exceptions, to solve new policy problems, typically resulting from the expansion of patentability into a new field, have also been adopted. These are summarised below.

Table 2: New Exceptions to Patent Rights

Exceptions to Patent Rights	Nature of Policy Problem Addressed
Business Method Prior Use	Prior users of business methods should be treated fairly vis-à-vis patent holders.
Medical Practitioner	Medical practitioners' freedom to carry out medical treatments.
Farmers' Privilege	Farmers' need to be able to harvest and re-sow their own seeds.
Breeding of New Varieties	Breeder's need to be able to use present varieties as a basis from which to breed new plant varieties.
Teaching	Freedom to teach students.

It is particularly interesting that the European implementation of the farmers' privilege exception includes an element of compensation.

Policy Process for Considering New Exceptions?

What is the policy space still available for Members to adopt new exceptions in light of the arguments presented in *Canada-Generics* and the review of the practice of Members? A factor that might be expected to increase policy flexibility is the possibility of providing compensation under an exception, as the European farmers' privilege exception does. However, there are also factors that will decrease policy space, including bilateral or multilateral TRIPS-plus agreements. This is most particularly the case with the current round of US free trade agreements. An attempt to solve the 'paragraph six' problem¹ of the Doha Declaration on TRIPS and Public Health with a new Article 30 exception was rebuffed, although the possibility remains if the solution now adopted does not work effectively.

By way of conclusion, a number of options are open to policy-makers considering a solution to a present or future policy problem with an Article 30 exception. These include:

- operationalising or modifying an exception already present in national law;
- adopting a new exception, either on the basis of a foreign model or by analogy; and
- adopting a wholly new exception, either within the bounds of the *Canada-Generics* tests, or, for example, with justification based on a comparative and international law study (with the possible inclusion of compensation) beyond the *Canada-Generics* tests.

Christopher Garrison is an independent consultant on international property law and policy. This article is based on his ICTSD-commissioned study entitled Exceptions to Patent Rights in Developing Countries.

ENDNOTE

¹ Exportation of generic medicines produced under compulsory license to countries with insufficient domestic manufacturing capacity.

Building African Leadership in Services

Trade in services as a proportion of total trade of developing countries has increased consistently albeit gradually over the last 25 years. From just over 11 percent in 1980, this proportion grew to nearly 16 per cent in 2003. Sub-Saharan African countries, however, saw their share of world services exports shrink by half, from just 1.5 percent to a meagre 0.7 percent, during the same period. Given the significant opportunities that many other developing countries have been able to seize in services trade – and the tremendous potential that the services sector offers in providing economies with employment and the necessary infrastructure to ensure efficient production and distribution of goods, as well as access to information and resources – many trade experts believe that African countries would be well-served to accord this sector the policy focus that it deserves.

As a contribution to the objective of fostering better understanding on how trade in services can be used as a tool for sustainable development by countries in Eastern and Southern Africa, ICTSD, in collaboration with the African Economic Research Consortium and the Economic and Social Research Consortium, recently held a regional dialogue in Dar es Salaam, Tanzania. The region faces considerable challenges in optimising opportunities arising from services trade while at the same time guarding against risks from liberalisation and reform. There is also an urgent need for inputs to the positions being developed by African countries in their Economic Partnership Agreement (EPA) negotiations with the European Union. In addition, the impasse on the Doha Round's market access negotiations in services likewise presented an opportune moment for policy-makers and influencers from the region to better define current knowledge and identify research gaps, as well as explore how the delivery of knowledge could build greater intellectual leadership in services trade throughout the region.

Traditionally, the region's labour surplus and tourist attractions have been seen as the main areas that Africa could use to tap services trade as a tool for sustainable development. To optimise the potential benefits from this competitive advantage in labour, however, decision-makers must be able to identify with sufficient specificity the sectors they wish trading partners to liberalise. Further, they must identify those domestic regulatory requirements and procedures imposed by trading partners that hinder their ability to supply the type of labour that they have in abundance. Knowledge and research in these areas needs to be enhanced.

The tourism sector also stands to benefit further from the implementation of appropriate structural and policy reform in flanking services sectors such as transportation, construction, communications and logistics. However, such complementary reforms still need to be fleshed out through research, analysis and inter-agency and multi-stakeholder consultative mechanisms.

Countries in the region also need to continue evolving the regulatory frameworks and institutions required to ensure the orderly functioning of services sectors. In this regard, due caution must be exercised in negotiations, especially in the EPAs with the EU, to ensure that African governments are allowed the space to put in place or develop their regulatory frameworks prior to allowing full entry of foreign services suppliers.

Most critically, the market and policy reform, including the liberalisation of trade in services through negotiations, must be directed in a way that allows benefits to reach the population at large. The increased array of choices and quality of services must be harnessed to lead to an actual increase in their incomes.

Indeed, while Africa's intellectual resources in the trade realm have been historically devoted to other highly-politicised sectors of the economy, such as agriculture and mining, many see services as the primary source of growth and sustainable development for Africa in the future. To achieve this, however, intellectual leadership must be developed and focused on a new paradigm – one that thinks outside the box and certainly beyond the confines of the present constraints of African economies.

The International Centre for Trade and Sustainable Development (ICTSD) is an independent non-profit organisation that upholds sustainable development as the goal of international trade and promotes participatory decision-making in the design of trade policy.

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WTO Meetings

Feb. 7-8	General Council
Feb. 13-14	Council for Trade-related Aspects of Intellectual Property Rights
Feb. 20	Dispute Settlement Body
Feb. 28	Committee on Sanitary and Phytosanitary Measures
Mar. 1-2	Committee on Trade and Development
Mar. 12	Working Group on Trade and Transfer of Technology
Mar. 20	Dispute Settlement Body

Doha Round negotiating groups are also expected to meet, but no schedule was available at the time of publication.

Other Meetings

Jan. 30-31 Geneva	Third Global Congress on Combating Counterfeiting and Piracy http://www.ccapcongress.net
Jan. 31 to Feb. 1 Geneva	Exploratory Dialogue on Promoting Sustainable Land Management through Trade http://www.global-mechanism.org/
Feb. 5 to Feb. 24 Nairobi	UNEP Governing Council Meeting and Global Ministerial Environment Forum http://www.unep.org/

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