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## Facts and Figures

- According to the latest UN figures, the human development index – a composite measure of life expectancy, schooling and income – has advanced 18 percent since 1990, and 41 percent since 1970. Many countries that have made the greatest strides in advancing the well-being of their citizens have done so by improving health and education rather than significant rises in incomes.

### Some HDI indicators in selected countries

Country	GDP <sup>1</sup>	Health <sup>2</sup>	Edu <sup>2</sup>	CO <sub>2</sub> <sup>3</sup>
(1) Norway	58,278	7.5	6.7	8.6
(4) US	46,653	7.1	5.5	19.9
(12) S.Korea	29,326	3.5	4.2	9.9
(62) Costa Rica	11,143	5.9	5.0	1.8
(73) Brazil	10,847	3.5	5.2	1.9
(89) China	7,206	1.9	2.3	4.6
(107) Maldives	5,721	6.4	8.1	2.9
(110) S. Africa	10,140	3.6	5.1	8.6
(119) India	3,354	1.1	3.2	1.3
(169) Zimbabwe	187	4.1	4.6	0.8

<sup>1</sup> Gross Domestic Product measured in US\$ per capita

<sup>2</sup> Spending on health and education as percentage of GDP

<sup>3</sup> Tonnes of carbon dioxide emitted per capita

Source: Human Development Report 2010: The Real Wealth of Nations. UNDP, November 2010

## Cancun Keeps Climate Talks Alive

Negotiators beat low expectations in Cancun by forging agreement on several steps that will advance international co-operation on climate change.

At the start of the negotiations, which ran from 29 November to 10 December, positions on future obligations were diametrically opposed. China and India said they would not endorse any agreement that did not commit developed countries to take on further greenhouse gas emission reductions under the Kyoto Protocol. The US – which is not a party to the treaty – wanted to replace Kyoto with a new agreement that would include binding commitments for all countries. The possibility of a compromise receded further when Canada, Japan and Russia announced that they would not sign up for a second phase of Kyoto commitments.

### Agreement by Consensus Minus One

That delegates managed to agree upon a final outcome at all was an impressive feat, skillfully steered by Mexico's foreign minister Patricia Espinosa, who took an inclusive approach in search for a solution that all countries could accept. Only Bolivia refused to endorse the final texts, arguing to the end that they could not be adopted due to lack of consensus. Doing so would set a dangerous precedent for exclusion, Bolivia said. Minister Espinosa responded that consensus did not mean unanimity, and one country could not exercise a veto power over 193 others. She gavelled the meeting to a close taking note of Bolivia's objections.

Many delegates hailed the return of multilateralism to the negotiations, and stressed that the agreement was just a first step toward a more detailed and comprehensive outcome they hope to reach next year in Durban, South Africa.

### Fate of Kyoto Still Unclear

For many developing countries, the 1997 Kyoto Protocol is the cornerstone for implementing the principle of 'common but differentiated responsibilities' in combating climate change. The treaty currently binds 37 developed nations to reduce greenhouse gas emissions by the end of 2012. New targets, covering the years 2013 to 2020, have been the subject of difficult negotiations over the past few years.

A two-page document adopted in Cancun directs Kyoto parties to complete their work "as early as possible and in time to ensure that there is no gap between the first and second commitment periods." It also urges participants to raise the level of ambition of their reduction targets. According to the Intergovernmental Panel on Climate Change, potential damage limitation would require Kyoto parties to bring their collective emissions to 25.4 percent below 1990 levels by 2020. However, the possible defection of Canada, Japan and Russia, as well as the absence of the United States and major developing country emitters, leave the protocol's future uncertain.

### All Countries Will Act to Prevent Dangerous Temperature Rise

The main Cancun outcome document focuses on long-term co-operative action under the Climate Change Convention itself. It emphasises a shared vision of climate change as one of the greatest challenges of our times, and recognises that deep cuts in global greenhouse gas emissions are required to ensure that the global average temperature rise is kept below 2°C above pre-industrial levels. Due to their historical responsibility for carbon emissions, devel-

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# Bridges

## Between Trade and Sustainable Development

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oped countries should take the lead in combating climate change, but developing countries will also take 'nationally appropriate mitigation actions' aimed at achieving lower emissions by 2020 than would be the case under a 'business as usual' scenario.

Over the coming year, governments will try to identify a global goal for emissions reductions by 2050, as well as set a timeframe for differentiated 'peaking' of global emissions. The outcome of those deliberations will be considered at the Durban conference of the parties.

### Financing for Developing Countries

On paper, at least, Cancun delivered more in terms of funding than many dared hope. It confirmed the Copenhagen Accord's collective commitment by developed countries to provide US\$30 billion in 'fast-start' financing between 2010 and 2012 to help developing countries deal with the impacts of climate change (adaptation) and curbing emissions (mitigation). Adaptation will be prioritised for least-developed countries, small-island developing states and Africa.

Longer term, developed countries committed to a goal of mobilising US\$100 billion a year by 2020 to address climate-change-related needs of developing countries. Much of the money is to flow through a new Green Climate Fund, the details of which will be elaborated by a committee where developing countries will hold more than half of 40 seats. The fund will operate under the auspices of the World Bank for at least the first three years, supervised by 24-member board comprising an equal number of developed and developing country representatives.

How the annual \$US100 billion would be raised remains sketchy (the decision on long-term co-operative action refers rather airily to a 'wide variety of sources, public and private, bilateral and multilateral, including alternative sources of finance').

### Transparency Required on Mitigation Action

Developing countries' access to international financing will be conditional to the recipients taking 'meaningful' action on mitigation and allowing their actions to be subjected to international measurement, reporting and verification (MRV).

The US in particular had insisted on independent verification of mitigation actions funded by international donors, while China was equally adamant that developing countries should only be subject to domestic MRV requirements. The Cancun text resolves this conflict by clarifying that international consultations and analysis of developing country reports will be "conducted in a manner that is non-intrusive, non-punitive and respectful of national sovereignty." The text further specifies that technical experts will carry out their analysis in consultation with the party concerned.

### Conserving Forests

Forests play a major role in absorbing carbon. Subject to adequate financial and technical support, developing countries are urged to take measures to reduce emissions from deforestation and forest degradation. As a first step, they should develop national strategies and 'robust and transparent' national forest monitoring systems. The national strategies should address a wide variety of issues, including drivers of deforestation and forest degradation, land tenure and forest governance. Forestry-related activities should be undertaken in accordance with national development priorities, and respect the rights of indigenous peoples and local communities.

### Difficult Trade Issues Dropped

Several key issues related to trade were dropped in order to reach consensus. For instance, all references to the use of unilateral response measures that could impact on international trade were removed, leaving a crucial element of enforcement and regulation unresolved. Many developing countries want such measures to be explicitly prohibited. Agriculture and bunker fuels used in shipping were also snipped from the text after the two issues became inextricably linked and parties could not agree on how to manage bunker fuels. They were also a casualty of the fundamental debate on whether climate change may be used as an excuse for discriminatory trade measures. Depending on how the fallout of the Cancun agreement settles, these thorny issues could regain prominence next year in Durban.

## Doha Gets Nod amidst Wider Economic Tensions

At back to back summits of the world's 20 leading economies and Pacific Rim countries held in November, world leaders called for the conclusion of the Doha Round in 2011, but failed to make significant progress on rebalancing global growth and trade.

Heads of state of the G-20 and the Asia-Pacific Economic Co-operation (APEC) recognised that next year offered a critical, if narrow, window of opportunity to bring the multilateral trade talks to a conclusion.

The G-20 welcomed the 'broader and more substantive engagement' of Geneva-based trade envoys over the past four months and said now was the time to 'complete the end-game'. Delegates should engage in across-the-board negotiations to promptly bring the round to a 'successful, ambitious, comprehensive and balanced conclusion', the final communiqué said. APEC leaders called upon their representatives "to engage in comprehensive negotiations with a sense of urgency in the end game, built on the progress achieved, including with regard to modalities, consistent with the Doha mandate."

The concluding statements of both gatherings appeared more resolute than previous declarations about securing parliamentary approval for an eventual Doha deal. The G-20 committed to seek ratification where necessary, and the 21 APEC members vowed to "win domestic support in our respective systems for a strong agreement."

While all this sounds like good news for the languishing Doha Round, it remains to be seen whether WTO Members can finally agree on what would constitute the 'successful, ambitious, comprehensive and balanced' outcome they have been chasing for nearly a decade. So far, little has transpired to indicate that compromise is within reach between Washington's insistence on greater access to emerging markets and the resistance of Brazil, China, India and South Africa to such demands (see page 4). Meanwhile, most G-20 and APEC countries are feverishly pursuing bilateral and regional trade pacts (see page 15).

Beyond the Doha Round, the summitters emphasised the importance of resisting protectionism. But where the G-20 reiterated the group's commitment to roll back any new protectionist measures that may have risen since the June Toronto summit, "including export restrictions and WTO-inconsistent measures to stimulate exports," APEC leaders promised to eschew such measures in *all* areas, as well as exercising 'maximum restraint' in taking action that might have significant protectionist effects even if the measure did not breach any WTO provisions (see related story on page 13).

### Balancing Growth: Maybe Later

The broader goal of rebalancing global growth and trade fared far less well. Against a backdrop of high unemployment in developed countries that import far more than they export, the G-20 summit in Seoul in particular was mired in acrimonious debate over who should act, and how, to reduce disparities.

The US wanted G-20 members to commit to keeping their current-account imbalances (trade surpluses or deficits) below 4 percent of GDP over the next few years. China and Germany – with trade surpluses of 4.7 and 6 percent respectively – firmly rejected the idea. Chancellor Angela Merkel objected to "politically imposed upper limits on trade surpluses or deficits that are neither economically justified nor politically appropriate." China's deputy foreign minister Cui Tiankai said the plan harked back "to the days of planned economies."

Faced with an impasse, the leaders promised to "reduce the reliance on external demand and focus more on domestic sources of growth in surplus countries while promoting higher national savings and enhancing export competitiveness in deficit countries." The Toronto G-20 summit had agreed to more or less identical language in June, but both China's and Germany's exports had galloped ahead regardless.

In a small step forward, the leaders set up a somewhat fuzzy process to address the problem of 'persistently large imbalances'. They directed finance ministers and central bank governors to develop, by the first half of 2011, a set of "indicative guidelines composed of a range of indicators that would serve as a mechanism to facilitate timely identification of large imbalances that require preventive and corrective actions to be taken." The International Monetary Fund was charged with "assessing progress toward external sustainability and the consistency of fiscal, monetary, financial sector, structural, exchange rate and other policies."

It is unclear whether G-20 members will agree on such guidelines, let alone enforce them rigorously. In a report submitted to the Seoul meeting, the IMF estimated that based on existing trends, current account deficits in advanced deficit economies would 'nearly double' by 2014.

### Stalemate on Currencies

Exchange rate policies were easily the most controversial topic in Seoul. In the build-up to the summit, the US led the push for a faster appreciation of the yuan, blaming China for deepening global imbalances by keeping the currency undervalued. China argued that the US trade deficit would not diminish significantly as a result of a more expensive yuan, and insisted that currency reform would be gradual and guided by national economic needs.

The pressure on China eased when, just days before the summit, the US Federal Reserve embarked on a second round of 'quantitative easing' (QE2), which made a number of countries in Seoul point the finger at Washington.

Fed chairman Ben Bernanke defended the injection of a further US\$600 billion into US capital markets as necessary to stimulate the economy and reduce high unemployment, but Brazil noted with concern that the policy would lead to a further

*Continued on page 4*

strengthening of the real, as well as other currencies such as the South Korean won, undercutting their competitiveness.

China and Germany were among those arguing that the Fed's decision amounted to a deliberate effort to weaken the dollar and thus gain an export advantage at the expense of other countries.

Treasury Secretary Tim Geithner vehemently denied the allegations. The US would "never seek to weaken our currency as a tool to gain competitive advantage or to grow the economy," he said. Beijing, however, remained unconvinced. "Don't make other people take the medicine for your disease," quipped Yu Jianhua of the Chinese commerce ministry. "Quantitative easing will have a very big impact on developing countries including China."

The arm-wrestling between the two giants resulted in a vague general commitment to "move toward more market-determined exchange rate systems and enhance exchange rate flexibility to reflect underlying economic fundamentals" with no timeline or details attached. The leaders also promised to "refrain from competitive devaluation of currencies." The language was reproduced verbatim in the APEC leaders' declaration a couple of days later.

### Uncertain Way Forward

Continuing divisions over imbalances and exchange rates may lead to an intensification of trade-related tensions, some experts warn.

Eswar Prasad, who teaches trade policy at Cornell University, sees a worrying potential that open conflicts on currencies will "feed into more explicit forms of protectionism, which could set back the global recovery."

University of Chicago finance professor Raghuram Rajan noted wryly that "it was always clear that the G-20 would be able to do little concrete on the imbalances... The reality is that every large country will do what it thinks is best for its own agenda."

The challenge for trade negotiators in Geneva will be to translate the Doha-friendly rhetoric of the two summits into reality against this backdrop.

## Lamy: Doha Countdown Starts Now

WTO Members are set to launch the end-game of the Doha Round negotiations with a view to bringing the global trade talks to a close by the end of 2011.

In his address to the Trade Negotiations Committee meeting on 30 November, WTO Director-General Pascal Lamy outlined an intensive work programme for the months ahead. The push followed back-to-back G-20 and APEC summits, where heads of state recognised that 2011 presented a 'critical, albeit narrow' window of opportunity for concluding the talks (see page 3 for details).

"We have the political signal, we have the technical expertise and we have the work programme. We now need to translate these into a comprehensive deal which you can all take back home. The final countdown starts now," Mr Lamy told Geneva-based negotiators.

### The Process Ahead

The first objective is to update the 2008 draft agreements that would serve as the basis for hammering out a final accord. DG Lamy wants these for each area of the talks by the end of the first quarter of 2011. He urged Members to come forward with compromise proposals that would reduce the number of disagreements in the future texts.

The so-called 'cocktail approach' – consisting of meetings in various formats, including small groups, bilateral contacts, negotiating sessions and consultations led by the DG – is set to continue. From 10 January, negotiating groups on rules, trade facilitation, trade and environment, intellectual property rights, as well as development, will begin intensive sessions, to be joined a week later by agriculture, non-agricultural market access (NAMA), services and dispute settlement. Mr Lamy stressed that ambassadors and senior capital-based officials would play a key role in the discussions.

As the Director-General envisions it, this process will ultimately lead to tradeoffs across different negotiating areas: Members will have to "develop more of a global sense of what the final package will contain," he said.

But frequent meetings alone will not suffice to overcome the deep substantive divisions among major economies that have left the Doha Round deadlocked for the past two years. In particular, the US has clashed with China, India and Brazil over access to fast-growing emerging markets. Washington says that the deal currently on the table is insufficient. Many countries have rejected these demands as out of proportion to what the United States is being asked to do, particularly in terms of cutting farm tariffs and subsidies (see page 23).

### WTO G-20 Demand New Concessions on Agriculture

Comments at the TNC meeting underscored the difficulties in forging consensus. Brazil, speaking on behalf of the WTO G-20 developing country alliance on agriculture (not to be confused with the G-20 leading economies), warned that traditional providers of subsidies would have to make new concessions on agriculture if they hoped to get anything in return.

The US reiterated its view that China, India, Brazil and other large developing countries must provide greater access to their own markets. Chinese Ambassador Sun Zhenyu urged members to take a 'realistic and pragmatic approach' to the talks ahead. He noted that, in Seoul, G-20 leaders had also called for 'respecting' the Doha Round's development mandate and 'building on the progress already achieved'. Mr Sun warned that "any unilateral movement of the goal-post and change of the rules in the end-game would cause further delays to the negotiations."

DG Lamy reminded Members that even after basic agreement on a Doha package, it would take at least six to seven months for governments to schedule product-specific tariff and subsidy commitments and finish up the 'legal polishing' of the final accords. "We need to recall constantly that the clock is not our friend," he cautioned.



## Views Differ on WTO's Generics Solution, IPR Enforcement

A rarely-used system intended to help poor countries import generic versions of patent-protected drugs was the main focus of discussions at the October session of the TRIPS Council. Developing countries also raised serious concerns over the Anti-counterfeiting Trade Agreement.

With regard to access to generics, WTO Members reviewed how well the so-called 'paragraph 6 solution' was working. The term refers to a paragraph in the Doha Declaration on TRIPS and Public Health, which instructed the TRIPS Council to find an 'expeditious solution' to the problem faced by developing and least-developed countries lacking domestic capacity to manufacture generic versions of patented drugs under compulsory licence.

The solution, adopted by WTO Members in 2003, allows generics makers to export drugs under compulsory licence to developing countries without manufacturing capacity, but also imposes a complex web of requirements on both exporters and importers, mostly designed to ensure that the drugs are not re-exported to other countries, where they could threaten brand-name manufacturers' markets. The procedure has been used only once, for a shipment of HIV/AIDS drugs from Canada to Rwanda in 2008.

India, Brazil, China, South Africa and other developing countries argued that this infrequency implied that the system must be too complicated to use. Canada, backed by other developed countries such as the US, Australia, Japan and Switzerland, suggested that the system was fine, and that governments had not used it because they were able to negotiate better drug prices with patent-holders, or import cheap generics from countries where the drugs were not under patent.

Canada stressed that once Rwanda had formally signalled its intention to use the system, it took Canadian patent authorities just 15 days to grant a compulsory license to generics manufacturer Apotex in 2007. An eight-month-long public tender process in Rwanda then ensued, which Apotex won by beating out an Indian competitor on price (eventually selling at below cost). In September 2008, the company shipped 6,785,000 tablets to Rwanda. A second shipment followed a year later, completing the country's order.

India reported a much less positive experience. New Delhi's representative said that a least-developed country lacking adequate drug manufacturing capacity (believed to be Nepal) had sought to use the system to import three patented medicines under compulsory licence from India, but ultimately gave up, dissuaded by the various notification, packaging, labelling and website tracking requirements set out in the paragraph 6 solution.

The delegate reminded Members that while India was the source of the vast majority of donor-funded HIV/AIDS medication, it has been required by the TRIPS Agreement to provide patent protection to pharmaceutical products since 2005. Thus, while pre-2005 drugs were for the most part off-patent in India and thus easily available for generic production, post-2005 drugs – which include the newer, more expensive HIV/AIDS treatment regimes – are patent-protected there.

A representative from the World Health Organisation also made a distinction between pre- and post-2005 drugs. While the official argued that access to medicines had to do with more than just intellectual property, he did note that competition from generics had cut prices of first line HIV/AIDS medicines dramatically over the past decade, enabling a massive increase in the number of patients receiving treatment. It could become necessary to use the paragraph 6 solution to acquire post-2005 medicines at affordable prices in the future, he said.

### IP Enforcement Treaty under Fire

A number of developing countries issued stern warnings that the newly finalised Anti-counterfeiting Trade Agreement (ACTA) would undermine multilateral co-operation and global rules on intellectual property (see analysis on page 11).

India said that ACTA risked "completely upset[ting] the balance of rights and obligations of the TRIPS Agreement," and expressed concern that the treaty might subject non-parties to higher levels of intellectual property enforcement than those demanded under TRIPS, distorting the legitimate movement of traded goods in transit, and weakening the institutional status of the WTO and WIPO.

China called for scrutiny of the consistency and compatibility between ACTA and the WTO legal framework, particularly about whether it risked creating additional trade-restricting obligations for WTO Members. In addition, the Chinese delegate criticised the lack of transparency that characterised much of the ACTA negotiations.

Both China and India also evoked the possibility of trade disputes if non-parties to ACTA end up affected by the agreement's provisions.

Brazil expressed a strong preference for multilateral solutions and multilateral fora with legitimate credentials, such as the WTO and WIPO, "whose deliberations are not only open to more than 140 member countries, but are also conducted in as transparent a way as possible, including representatives from civil society and NGOs."

The Brazilian delegate also noted with concern that ACTA contained "the necessary ingredients that may convert it, over time, into a truly international organisation dealing with the enforcement of IP rights, a development whose impact on WIPO and the WTO, especially on capacity-building and technical assistance, are unpredictable at this stage."

ACTA participants (all but four of the 40 signatories are developed countries) reportedly rejected these allegations, arguing that the agreement would not affect TRIPS and was necessary to tackle counterfeiting, particularly for dangerous counterfeit medicines and spare parts.

## Seal Update

The EU's prohibition of trade in nearly all products derived from seals entered fully in force in late October after the European Court of Justice (ECJ) rejected a moratorium requested by Inuit organisations, as well as commercial sealers and meat and pelt traders in Canada and Norway.

The complainants had asked the EU to defer the ban's implementation until the ECJ rules on a broader challenge seeking to overturn the ban entirely. That case is expected to be tried next year.

As things stand, the EU prohibits virtually all trade in seal products, except those derived from traditional hunts conducted by indigenous people. Despite the exemption, Inuit groups have issued the loudest calls for the ban's repeal, claiming that it will cause the market for seal products to collapse.

In their moratorium request, they also argued that the Inuit exemption might not always be recognised. However, Judge Marc Jaeger found that the plaintiffs had "presented no concrete indication that would justify their fears in this regard."

"I am disappointed and angered that the suspension of the ban has been lifted," said Mary Simon, president of Canada's national Inuit organisation. "We plan to appeal the ruling as we believe the original seal ban was based on colonial perceptions of our sealing practices, and this week's ruling is a perfect illustration of this."

The seal ban, instituted on animal welfare rather than environmental grounds, could become a landmark case if it comes before a WTO dispute settlement panel (see Laura Nielsen's analysis on page 9).

In 2009, Canada and Norway requested dispute settlement consultations with the EU. The two countries are expected to decide before the end of the year whether to request the establishment of a panel.

## CTE Still Searching for a Way Forward

**WTO members agree that they need to revitalise sluggish negotiations on liberalising trade in environmental goods. They just do not seem to be able to agree on how to do so.**

Even before the broader stagnation in the Doha Round over the past two years, WTO negotiations on the liberalisation for goods with an environmental purpose were struggling. The discussions stem from the Doha Declaration's paragraph 31.iii, which calls for negotiations on "the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services."

Despite nearly a decade of negotiations, the membership is yet to agree on what constitutes an environmental good. More than 150 products – mostly air-pollution control, solid-waste management, wastewater treatment and renewable energy equipment – have been proposed, including 43 'climate-friendly' goods pushed by the EU and US as a matter of priority. Many developing countries complain that the list reflects industrialised country export interests. India advocates a different approach, under which a country would temporarily remove trade barriers to products and services needed for a specific environmental project, while Brazil has suggested that countries could engage in a request-offer process similar to that used in the services negotiations.

Delegates spared each other a review of these differences at the November negotiating session of the Committee on Trade and Environment. Some, such as Brazil, noted that a range of other issues needed to be discussed, including special and differential treatment for developing countries, technology transfer and non-tariff barriers. The US countered that these cross-cutting issues could not be addressed in the abstract; they needed to be examined in relation to specific products. China and other delegations emphasised that the environmental goods negotiations should produce a 'triple win' with economic, environmental and developmental benefits.

Saudi Arabia introduced a paper based on ideas it had raised in previous meetings, namely labelling requirements, standards and intellectual property-related policies that can act as non-tariff barriers (NTBs) to environmental goods. It did not identify specific examples, however. In July, Saudi Arabia requested the chair to revise the list of products to include NTBs.

Members also discussed a different aspect of the Doha mandate on trade and environment: the clarification of the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs).

In a new proposal (TN/TE/W/77) – the first on the subject in over two years – Switzerland called for a 'conciliatory and non-adjudicatory' process in which Members with different views on the relationship between existing WTO rules and MEA trade obligations could ask the CTE chair to facilitate discussions aimed at a solution, thus heading off controversial disputes. The paper, which included proposed potential text for a decision by the Ministerial Conference, the WTO's top decision-making body, also said that in the event of trade disputes involving tension between WTO and MEA rules, countries should be encouraged to draw on the expertise of relevant experts, and that dispute panels "shall possess or have available the necessary expertise regarding both the WTO rules and the multilateral environmental agreement in question."

Reacting to the proposal, several Members, including the US and New Zealand, stressed that the balance between WTO provisions and other sets of international rules should not be upset. The two countries are among those seeking to keep the mandate as narrow as possible, focusing on just a handful of MEAs and the specific trade obligations they contain.

In general, delegates agreed on the need to move to text-based negotiations, but were not sure how to get to that stage.

The next CTE meeting is tentatively scheduled for February 2011.

# The Race for Green Jobs: China's Incentives under Attack

Vying for a bigger slice of the clean technology pie and attendant domestic jobs, the US is looking into launching WTO complaints over China's green tech subsidies, export restrictions on raw materials and other measures Beijing says are necessary to put the country on a cleaner growth path.

On 15 October, US Trade Representative Ron Kirk announced that his office had initiated an “investigation under Section 301 of the 1974 Trade Act with respect to acts, policies and practices of the government of China affecting trade and investment in green technologies.”

The announcement followed a 5,800-page petition filed by United Steelworkers (USW) in September. According to the complaint, China's ‘illegal activities’ include an array of restrictions ranging from limiting access to critical materials, performance requirements for investors, discrimination against foreign firms and goods, prohibited export and domestic content subsidies, and trade-distorting domestic subsidies.

More than 180 members of Congress had called on President Obama to accept the petition, arguing that China had not followed through on many of its WTO accession commitments and had “developed a new generation of discriminatory and unfair trade practices designed to protect and promote its domestic industries as the expense of US jobs, commerce and know-how.”

Mr Kirk said the Obama administration was taking the union's claims ‘very seriously’. USTR staff is now examining them in detail, and a formal dispute will be initiated on those allegations that are supported by sufficient evidence and can be effectively addressed through the WTO. The result of the investigation will be revealed by mid-January.

Beijing has vigorously condemned the USTR move. A ministry of commerce statement called the union's complaint ‘groundless and irresponsible’, and the ministry's spokesman Yao Jian insisted that China's policies complied with WTO rules. It was contradictory, he said, to ask China to shoulder the responsibility of energy saving and cutting emissions on the one hand – effectively providing a public good – while criticising the country's national clean energy policies on the other.

Zhang Guobao, head of China's National Energy Bureau, said that while Chinese subsidies to renewable energy companies were ‘very small’, the United States had “subsidised its new energy enterprises with US\$4.6 billion in cash in the first nine months of 2010, including US\$3 billion to wind power enterprises.” He added wryly that US politicians appeared keener on garnering votes than on fair trade.

## The Rare Earths Debate

China's export restrictions on rare earths – ‘access to critical materials’ in the Steelworkers' complaint – have hogged the media limelight in recent weeks. The US, Japan and the EU have reportedly started looking into the possibility of a WTO dispute on the issue.

Rare earths consist of a group of 17 minerals used in small but indispensable quantities in scores of high-tech products ranging from hybrid cars, wind turbines and catalysers to flat screen TVs, cell phones and guided missiles, to mention just a few. Demand for the materials has soared over recent years, and strong growth is expected for the foreseeable future.

Contrary to their appellation, most rare earths are not all that rare, but their extraction is difficult. China has about 31 percent of the earth's deposits, thought to be best in the world. The US has some 15 percent, and smaller quantities can be found in countries such as Australia, Brazil, Canada, India, Mongolia, Namibia, Russia and South Africa. Brazil, India, South Africa and the US have all been leading producers in the past.

However, most extracting operations around the world shut down in the 1990s when China emerged as the lowest cost supplier and massively ramped up production. Rare earth mining

is highly polluting, and a number of analysts point to lax environmental controls, and thus lower compliance costs, as one of the reasons for China's success.

China now supplies more than 90 percent global rare earth demand, with domestic consumption representing between 50 and 60 percent of production. When export restrictions (quotas and taxes) were put in place in 2006, major clients started to worry about Beijing's ‘stranglehold’ on the minerals. The quotas have been drastically reduced since then, standing at 8,000 metric tonnes for the second half of 2010 – down from 28.5 tonnes a year earlier. According to the Xinhua news agency, next year will see only a slight reduction.

In September, Japan claimed that China had suspended rare earth exports following an incident where Tokyo briefly detained the captain of a Chinese fishing boat that had collided with Japanese Coast Guard vessels in disputed territorial waters.

Importers' unease escalated when media reports surfaced in October about shipments to the US and the EU being disrupted as well. Beijing categorically denied all allegations of export embargoes, and by early November shipments appeared to have resumed.

Nevertheless, many governments and high tech manufacturers are worried about future shortages. They are now looking for alternative sources of supply, but it could take up to five years or more to get production on line on the necessary scale.

## WTO Challenge on Rare Earths Could Flounder

A WTO dispute on rare earth export controls would probably be harder to sustain than claims of illegal subsidisation of green technology industries.

First, export taxes are not prohibited by the WTO. (About one-third of the member-

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ship imposes such duties on a temporary or permanent basis on natural resource-based products ranging from agricultural goods and forestry and fisheries products to minerals and metals, as well as leather and skins.) Several regional and bilateral trade agreements, however, do prohibit export taxes.

Second, while WTO rules generally forbid export quotas (including bans), GATT Article XX(g) allows such measures when they relate to “the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.”

And that is precisely what Beijing says it is doing.

### **China Defends Restrictions on Environmental Grounds**

According to the Peoples’ Daily, “China now satisfies 90 percent of the world’s need with 30 percent of the world’s total reserves, which is not sustainable in the long term. The environmental problems inflicted by the exploration and utilisation at the early stage make regulating the industry an urgent task. Every country has the right to use its resources rationally. Having supplied a large amount of rare earth materials to the world at low prices, now it is time for China to consider the development of its rare earth industry.”

Lin Donghlu, Secretary General of the Chinese Society of Rare Earths, sounded a similar note: “The aim of our control of rare earth exports is to protect resources and the environment and promote sustainable development of green industries across the globe. The exhausting of these resources as a result of a lack of control would be a major blow to the world’s green resources. Now the time is right for other countries and regions to exploit their own resources again. Only establishing an international competition mechanism for the rare earth industry, instead of making China the only rare earth exporter, will promote the sustainable development of new energy technologies.”

In addition to curbing exports, China is imposing domestic production caps, cracking down on illegal mining and smuggling, and not issuing new mining licenses. The number of rare earth firms is to be cut from the current 90 to 20 in 2015.

## **Japan Protests Ontario’s Renewable Energy Subsidies**

*Japan has initiated a WTO challenge against Ontario’s green energy subsidies, alleging that they discriminate against foreign suppliers.*

At issue are stringent local content requirements in the province’s Feed-in Tariff Programme (FIT). FIT allows Ontario to subsidise electricity operators that use renewable energy if up to 60 percent of the inputs are manufactured in the province.

The motivation behind the disputed programme is two-fold: local job creation (50,000 by 2012) and the elimination of coal-fired power stations by 2014.

Foreign companies are eligible for the subsidy – the world’s highest at up to 80 cents per kilowatt hour of electricity produced – but only if they set up shop in Ontario and produce the electricity and equipment there, which a number of manufacturers have done. One deal stands out in particular: the C\$7 billion contract awarded to South Korea’s Samsung Group in January 2010 to build four huge wind and solar power clusters in the province with a combined generating capacity of 2,500 megawatts by 2016. In all, the deal is expected to create 16,000 local jobs.

Japan alleges that Ontario’s local content requirements breach the GATT principle of national treatment, as well as provisions expressly prohibiting such measures in the GATT, the Agreement on Subsidies and Countervailing Measures (SCM) and the Agreement on Trade-related Investment Measures. Tokyo also argues that the green energy benefit falls under the category of prohibited subsidy under Articles 3.1(b) and 3.2 of the SCM Agreement because it is “contingent upon the use of equipment for renewable energy generation facilities produced in Ontario over such equipment imported from countries such as Japan.” The EU and the US have joined the dispute as third parties.

So far, Canada’s federal government, which will defend the case at the WTO, has adopted a conciliatory tone. Trade minister Peter Van Loan said Canada “always wants to maintain good trading relationships with our major partners, and we always want to make sure that our actions are WTO compliant. In this case, we certainly encourage the Ontario government to take advantage of the consultations phase of this process to seek a satisfactory resolution.”

In contrast, civil society groups have expressed serious concern. Stuart Trew, trade campaigner at the Council of Canadians, wrote on [rabble.ca](http://rabble.ca) about the threat that the provincial government would eliminate the local preferences, but keep the high feed-in tariffs renewable projects, leaving companies free to import their solar panels and wind turbines from anywhere in the world and still profit from high renewable energy rates. “It’s an unacceptable compromise. We will need both green jobs and green energy to make a truly sustainable economy. If global trade rules threaten that goal – Japan’s WTO complaint suggests they do – we should be thinking about how to change those rules, not the policies that get us part way there,” he concluded.

Not all Ontarians believe in the subsidy policy, however. There is considerable opposition to wind turbine parks, which home-owners blame for lowering property prices, but the most vocal critics complain that companies, not consumers, are benefiting from the governmental manna. With projections showing that electricity bills will go up 46 percent over the next five years, the energy policy is shaping up as one of the key issues of next fall’s general election.

The ‘made in Ontario’ policy, as well provincial government procurement more broadly, are also among the hot topics of the free trade negotiations that Canada and the EU are hoping to finalise in the course of next year (see page 18).



# Emotional and Legal Stakes Are High in the Seals Dispute

Laura Nielsen

The emerging dispute on the European Union's import ban on seal products is likely to become a landmark case in WTO jurisdiction. It contains a mix of difficult policy issues, and may result in the first ever clarification of the relationship between animal welfare and international trade rules.

The dispute began in November 2009, when Canada and Norway launched a WTO challenge against the EU's Regulation 2009/1007 on trade in seal products. Although neither country has yet requested the establishment of a dispute settlement panel, they may do so in the near future (see related story on page 6).

## The Evolution of EU Seal Legislation

Regulation of trade in seal products in the EU dates back to the early 1970s and 1980s, when images of clubbed and bloody baby seals sparked a massive public outcry. With celebrities such as Brigitte Bardot shining a spotlight on the issue, the EU adopted a ban on trade in skins and fur derived from seal pups in 1983. Importantly, the so-called Brigitte Bardot Directive did not curb trade in products derived from adult seals, nor did it apply to products derived from seals hunted by the Inuit population (mostly due to a perception that Inuits do not kill pups).

The 2009 regulation goes much further. It no longer targets just the killing of pups, but the entire notion of sealing. In other words, the EU deems the killing and practices surrounding sealing inhumane under most circumstances and therefore essentially bans trade in all seal products, except those derived from Inuit hunts.

This is controversial for the sealing nations for at least three reasons. First, because sealing is used to manage wildlife (too many seals threaten the survival of other species, including fish and the birds that eat them). Second, sealing is politically important to governments whose rural coastal populations lack alternative sources of income. Third, sealing is considered a cultural heritage, with most of the nations concerned insisting on their right to manage their own resources.

While the economic value of seal trade is not very significant, non-economic factors (emotional and cultural) play the lead roles. The claimants' sensitivities over tradition and sovereignty are up against another highly charged value espoused by the EU: animal welfare. Regardless of what the panel and/or the Appellate Body decide, it's safe to bet that the reaction of the public will not go unnoticed.

But do the panels and/or the Appellate Body need to take account of the emotional character of the underlying policies? Is it not the beauty of the WTO system that Members are free to determine their own policies, and the WTO only addresses the trade-restrictiveness of implementing measures rather than the underlying policy? In order to answer these questions, we need to examine the important difference between policies on animal welfare and those on the environment (that have been the focus of past GATT/WTO cases).

## Animal Welfare Is Not Environmental Protection

The principles for protecting animal welfare are fundamentally different from those seeking to preserve animals for environmental reasons. The latter approach is primarily guided by a scientific determination of the extent to which biodiversity depends on the survival of a species, while animal welfare concerns focus on the well-being of individual specimens of the species independently of whether or not they are endangered.

There is no logic to animal welfare concerns. It is acceptable in Canada to club seals, in France to produce foie gras, and in China to eat dogs. The contradictory truth remains that marine mammals have a special standing amongst animals in many countries, while in others killing adult seals and even pups may be as morally acceptable as killing chickens.

There are very few international animal welfare standards and most experts would caution against concluding such agreements because experience tells us that they will be based on the lowest common denominator. However, without international standards, animal welfare will remain at the level of personal preference unless it concerns extreme acts of cruelty, such as hooking seals and skinning them alive.

## What about WTO Rules?

A WTO dispute is likely to include claims of violations of Article 4.2 of the Agreement on Agriculture (AoA), Articles 2.1 and 2.2 of the Agreement on Technical Barriers to Trade (TBT Agreement) and GATT Articles 1:1, III:4 and/or XI:1.

As the TBT Agreement is more specific than the GATT, the panel might choose to focus on its provisions rather than those of the GATT. In that case, the burden of proof would rest on the complaining parties. The panel could argue that the EU regulation violates the TBT Agreement's most-favoured-nation (MFN) and national-treatment principles because *identical* products are treated differently, distinguished only by whether or not they originated from Inuit hunting. The counter-argument, of course, is that the regulation does *not* discriminate because *all* seal products that originate from Inuit hunting are treated equally.

Article 2.2 of the TBT Agreement contains the notion that trade measures should not pose an 'unnecessary obstacle to international trade'. The protection of animal welfare would probably be considered a 'legitimate objective' because 'animal life and health' is included in the list of such objectives. It is unlikely that the panel and/or the Appellate Body would deviate from the textual interpretation of those phrases in previous analyses of GATT Article XX(b).

The national treatment and MFN principles are laid down in GATT Articles III and I.

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These provisions would be breached if the panel takes the view that the Inuit exception is discriminatory. The panel may, however, choose to consider the EU measure as a simple quantitative restriction on trade and hence, a violation of GATT Article XI:1, as well as AoA Article 4.2.

If the EU thinks that it may have breached substantive obligations under the GATT, it will most likely evoke GATT Article XX (general exceptions), in which case it will bear the burden of proof in establishing the grounds for this defence.

The first step of the Article XX analysis is to categorise the measure within the policy scope of one of the paragraphs. Animal welfare in the form of seal protection could fit within paragraphs (a) as ‘necessary to safeguard public morals’, (b) as ‘necessary to protect animal life or health’, or (g) as a measure ‘relating to the conservation of exhaustible natural resources’. The entire issue will boil down to which paragraph(s) the EU decides to invoke.

Although it is often said that panels and the AB will not second-guess the underlying policies, but merely test the trade restrictiveness of the measure, jurisprudence has evolved. Most recently, the AB in *China – Audiovisuals* held that the ‘necessity test’ was largely informed by the ‘importance of the interest or value at stake’. It will therefore become very important to evaluate the ‘relative importance’ of the EU’s seal welfare policy. In the absence of any international consensus on the matter, the panel and the AB may well resort to scientific evidence from veterinarians on the alleged cruelty of the killing method.

And finally, there is the so-called Article XX ‘chapeau analysis’ on whether the measure is applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination, or a disguised restriction on trade.

It can be legitimately questioned whether allowing for morals-based trade measures would open the door for undermining the multilateral trading system. That could happen if Members started enacting numerous such measures with protectionist aims.

### Did the EU Have Alternatives?

The most important point to note is that the EU regulation does not aim to give seals a ‘right to life’. Rather, the policy is based on the rationale that although it may be possible to kill seals in a humane manner, most frequently this does not happen. The policy goal appears to be the avoidance of sponsoring inhumane sealing practices (primarily in commercial sealing) rather than the avoidance of seal products.

The EU could have chosen to tackle the problem through labelling. This option is specifically mentioned in the regulation as being insufficient to achieve the policy goal since it cannot be verified that seals are killed in a humane manner. In the *Shrimp-Turtle* case the AB appeared to recognise the need for a trade ban as opposed to merely labelling shrimp products as ‘turtle safe’. Whether the adjudicators will reason differently in this animal welfare dispute remains to be seen – if the complaining parties raise the issue.

It is more problematic to defend cases on the basis of the process and production methods (PPMs) involved than outright bans of the product itself. This is so because PPM requirements have to evaluate practices taking place *outside* the territory of the Member taking the measure – and this involves certification and verification of practices outside the jurisdiction of the Member taking the measure.

One issue that most likely will come up in this dispute is whether it is actually ‘less trade restrictive’ to just ban those products that do not live up to the PPM requirement (i.e. no inhumane killing method was used) than imposing an across-the-board ban on seal products. Given that the EU’s policy is not to target seal products, but the process in which they are produced, a PPM would actually correspond better to the policy goal – and therefore be considered less trade-restrictive because it would allow for trade in at least *some* seal products other than those derived from Inuit hunting practices.

### The Inuit Exception

The Inuit exception represents a real problem for the EU. A flat out prohibition of *all* seal products would probably be found to breach GATT Article XI:1 as a quantitative trade restriction, but it would be hard to argue an MFN or national treatment violation. GATT Article XX analysis would also be much more straight-forward as there would be no question of an available, less trade-restrictive measure since *all* seal products would be prohibited.

The current situation is much more complex. It seems that the EU implicitly states it is *obliged* to exclude Inuit-hunted seal products from the scope of the regulation, which references the UN Declaration on the Rights of Indigenous People, as well as economic and social interests. However, the regulation does *not* set out any thoughts of whether Inuit seal hunting is more humane or easier to verify than sealing by non-Inuit people. If it cannot be verified whether Inuits use cruel hunting methods, justifying a trade ban on the grounds of preventing cruelty toward animals becomes even more problematic.

### Repercussions on the Multilateral Trading System

One may speculate whether allowing for morally based trade measures would open the door for undermining the multilateral trading system. It would undoubtedly be so if Members started enacting numerous such measures with protectionist aims (this would also be the case if protectionist measures proliferated on human health grounds).

However, it is likely that the panel will end up deciding the matter on a purely technical trade law issue – staying well clear of any analyses of sensitive areas, such as the direct clash between animal welfare and biodiversity, or that between animal welfare and indigenous people. The real test in this dispute may well be whether the panel will dare rule that the EU regulation is – from a trade perspective – not designed in the least-trade restrictive manner possible. Just imagine the public outcry that would be sparked by news paper headlines reporting that the WTO approves of animal cruelty and the hooking and skinning of live seals!

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# ACTA: Original Expectations and Future Implications

Ahmed Abdel Latif

On 15 November, a group of forty mostly industrialised countries released the text of the Anti-Counterfeiting Trade Agreement (ACTA). This article looks at the treaty's possible implications for the global intellectual property system, as well as its backers and the developing countries hostile to it.

One way to determine the significance of ACTA is to assess whether it has lived up to the expectations expressed by the parties in 2007-2008 when it first came under consideration.

In an implicit reference to countries such as China and other developing economies, a 2007 discussion paper by the Australian Department of Foreign Affairs and Trade underlined that the “extent to which ACTA would attract support from countries where counterfeiting and piracy is more problematic would be critical in determining its real value.” The US said it expected other trading partners to “join in the emerging consensus for stronger IPR enforcement,” including developing countries, which also have “a major stake in fighting counterfeiting and piracy.”

On this count, not only did ACTA not attract support from emerging and developing countries, it has actually antagonised them. At recent TRIPS Council meetings, key developing countries, including China, India and Brazil, have come out in full swing against ACTA, even questioning its compatibility with WTO rules (see page 5). India indicated that “initiatives such as ACTA could short-change legal process, impede legitimate competition and shift the escalated costs of enforcing private commercial rights to governments, consumers and taxpayers” and thus have “the portents to completely upset the balance of rights and obligations of the TRIPS Agreement.”

Another objective originally pursued by ACTA promoters was to set a new, higher benchmark for enforcement. Hyperbolic references are often made to ACTA's ‘robust’ and ‘state-of-the-art’ enforcement standards. However, the most recent text pales in comparison to the original level of ambition of the treaty's promoters. Ottawa University's Michael Geist believes the ACTA Internet chapter “must be seen as failure by the US, which clearly envisioned using it to export its Digital Millennium Copyright Act (DMCA)-style approach.”

Despite the lack of meaningful engagement with developing countries, and the watered down agreement that emerged from the last round of negotiations, industrialised countries have nevertheless come close to their main objective: the establishment of a ‘new international framework’ on IPRs enforcement whose provisions go beyond those of the TRIPS Agreement.

## ACTA and the Global IP and Enforcement Landscape

Whether ‘light’ or not, ACTA is bound to have important repercussions on the global IP landscape as it is likely to become the ‘third pillar’ of the global IP and enforcement system alongside the WTO TRIPS Agreement and WIPO-administered IP treaties.

As noted with concern by Brazil at the October TRIPS Council session, ACTA contains the necessary ingredients that may over time convert it into “a truly international organisation dealing with the enforcement of IP rights, a development whose impact on WIPO and the WTO, especially on capacity-building and technical assistance, are unpredictable at this stage.”

ACTA promoters have repeatedly affirmed that it does not seek to replace or compete with existing international fora and agreements. The treaty's preamble indicates that it intends to provide effective and appropriate means to complement the TRIPS Agreement and to operate “in a manner mutually supportive of international enforcement work and co-operation conducted within relevant international organisations.” However, ensuring ‘mutual supportiveness’ in practice may not always be easy.

In terms of institutional arrangements, ACTA will establish a committee with broad powers not only to oversee its implementation, but also to “make recommendations regarding imple-

mentation and operation of the agreement, including endorsing best practice guidelines” (Article 5.1.3.c). The adoption of best practices clearly means that ACTA is likely to become the *de facto* locus for future international norm-setting on IPR enforcement, an objective constantly but unsuccessfully pursued by industrialised countries both at WIPO and the WTO over many years.

## ACTA and Developing Countries

A key objective of ACTA is to secure the participation of emerging and developing economies. Indeed, as originally envisioned, it would make little sense, in terms of combating piracy and counterfeiting, to have it confined to mainly industrialised countries, which already have strong enforcement standards.

In this regard, ACTA chapter 4 on international co-operation is of significance and has attracted relatively little attention in contrast to other parts of the agreement. Chapter 4 recognises that international co-operation is ‘vital’ to achieve effective IPR protection (Article 4.1.1). It also includes a section on capacity-building and technical assistance, which will be available not only to ACTA members, but also “where appropriate, for prospective parties” (Article 4.1.3).

A developing country interested in joining ACTA would thus be entitled to technical assistance aimed at ‘improving enforcement of intellectual property rights’ from other ACTA parties taking into consideration that it is ultimately the ACTA Committee which “shall decide upon the terms of accession for each applicant” (Article 6.5.2). This gives considerable leeway to ACTA parties to shape the IPR enforcement legislation and practices of prospective members in accordance with their own views and interpretations of what ACTA standards entail and how they are to be implemented.

While ACTA is likely to be presented to prospective developing countries as leaving

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significant ‘flexibility’ for domestic implementation, in practice, technical assistance and accession terms could be a means to bring ‘back in’ some of the standards and interpretation left out during the final stages of the negotiations. It is well documented that technical assistance provided to implement the TRIPS Agreement, in particular legislative advice, was in many cases an important vehicle for TRIPS-plus interpretations of the agreement, which often did not incorporate the flexibilities, limitations and exceptions most relevant to public policy objectives.

### Seeking a Modus Vivendi

Paradoxically, ACTA reflects the success of developing country resistance to attempts to achieve higher standards of IPR enforcement at the multilateral level. However, it also reflects their vulnerability vis-à-vis ‘forum shifting’ strategies deployed by industrialised countries and demands made in plurilateral and bilateral agreements.

So what is left for developing countries to do? Criticising ACTA at the TRIPS Council is likely to be of limited effectiveness as industrialised countries are represented there precisely by the same trade ministries and IP authorities that pushed for the treaty’s quick finalisation.

Although ACTA is often presented just as an agreement to combat counterfeiting and piracy through stronger intellectual property rights enforcement, through it, industrialised countries, and their IP-based industries, are seeking to amplify their competitive advantage over the emerging economies in a changing world economy where their manufacturing base has been considerably eroded to the benefit of these new players.

The debate about ACTA needs to be elevated from the self-contained and technical world of IP to the global policy debate about the future of the world economy. The G-20 framework might provide an opportunity to do so, despite doubts about its effectiveness and representative nature. Ultimately, whether at the G-20 or elsewhere, industrialised countries and emerging economies will need to agree on a ‘modus vivendi’ regarding the treaty between ACTA members and non-member countries.

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## ACTA: What Is In, What Is Out?

During the past year, the secrecy surrounding ACTA negotiations and the possible reach of some of its provisions had fuelled controversy and raised significant concerns among different stakeholders. Developing countries and public health groups, for example, had expressed worries about the inclusion of patent infringements in border measures in view of recent cases of detentions of generic medicines in transit. Digital rights activists feared that ACTA might curtail users’ rights in the digital environment and be a back door for the adoption of ‘three strikes’ type legislations cutting of internet access for serial copyright infringers.

Against this background, while the treaty’s scope still includes all intellectual property rights, the emphasis is more on trademark counterfeiting and copyright piracy, particularly with regard to criminal measures.

Patents have been explicitly excluded from the section on obligations related to border measures, and public interest-related safeguards have been added. The text refers to the Doha Declaration on TRIPS and Public Health, as well as invokes TRIPS Articles 7 and 8 on the objectives and principles of intellectual property protection (ACTA Article 1.2.3.)

Many substantive obligations are left to domestic implementation. Mirroring Article 1.1 of the TRIPS Agreement, ACTA Article 1.2 states that each participating country “shall be free to determine the appropriate method of implementing the provisions of this Agreement within its own legal system and practice.” The text also states explicitly that parties are free to implement “more extensive enforcement of intellectual property rights than is required by this agreement” in their domestic law. This means, for instance, that the EU may continue to apply border measures to shipments of generic medicines suspected of infringing patent rights, but other ACTA countries have no obligation to adopt similar policies.

With regard to enforcement in the digital environment, Article 2.18 stresses the importance of “preserving fundamental principles such as freedom of expression, fair process, and privacy.” However, countries are free to enforce laws that may result in cutting off Internet access for individuals who repeatedly download pirated music or films, although they have no obligation to adopt such an approach. Michael Geist of Ottawa University said the Internet chapter could best be viewed as ACTA Ultra-Lite with “the intermediary liability provisions largely removed and digital lock provisions much closer to the WIPO Internet treaties model.”

The tug of war over protection of geographic indications versus trademarks was resolved by language that directs parties to provide effective border enforcement of IPRs “in a manner that does not discriminate unreasonably between intellectual property rights and that avoids the creation of barriers to legitimate trade.”

Nevertheless, several ACTA provisions, including damages and injunctions in civil enforcement of patent protection, as well as its overall implications still give rise to concern.

### Next Steps

Differences in views on ACTA’s consistency with national legislation of member countries may play a key role in the next steps awaiting the treaty. The US administration considers ACTA an ‘executive agreement’ that does not require congressional approval on the premise that it would not require changes to US law. But critics, such as James Love of Knowledge Ecology International, contend that the ACTA obligations “do not incorporate many of the areas of limitations and exceptions to remedies found in US law”.

In the European Union, trade agreements must be approved and signed by member countries, as well as approved by the European Parliament.



## Exports Are Up, but Fears Linger over Protectionism

The WTO's latest report on developments in the international trading environment, released in November, warns that high unemployment in many countries is fuelling demand for protectionist measures, which could potentially threaten jobs and growth worldwide.

Trade has bounced back strongly this year, and the WTO now forecasts a 13.5-percent increase in volume (measured by exports) from last year's level. Developing countries, led by Asia, have been the main drivers of the recovery with exports rising by 16.5 percent, compared to 11.5 percent for industrialised countries.

World economic growth follows a similar pattern: while developing countries' total GDP is expected to rise by 7.1 percent in 2010, developed countries are likely to achieve just a 2.7-percent increase. Next year, GDP growth is expected to fall slightly for both groups.

### Unemployment, Imbalances Erode Confidence in Trade

Most governments will continue to struggle with high unemployment for the foreseeable future. The ILO estimates that it will take high-income economies until 2015 to reach the pre-crisis level of employment. In contrast, some emerging economies have already returned to 2008 levels. Globally, however, thirty million more people are estimated to be jobless than two years ago, with youth unemployment twice the aggregate rate in most countries.

The report noted with concern that global imbalances – huge trade surpluses in some economies and large deficits in others – were driving up protectionist pressures “at a time when the political consensus in favour of open trade and investment is already under strain from stubbornly high levels of unemployment in many countries.” Such pressures are particularly acute in the US, where the House of Representatives has already passed legislation that would allow the imposition of countervailing duties on Chinese goods on the grounds that the low value of the yuan acts as an illegal subsidy. However, the WTO strongly stressed that the causes of large trade imbalances, high levels of unemployment and disorderly movements in currencies could not be addressed by restricting trade. Instead, such moves “could easily provoke retaliation, which would seriously threaten jobs and growth worldwide,” the report said.

Another issue picked up in the report was that the value of imports from a given country may be overestimated since customs statistics are based on where the goods are shipped from, even if the final product is only assembled in that country from components manufactured elsewhere. For instance, it was widely reported in the media that every Apple iPad imported to the United States from China worsened the US trade deficit by some US\$287, while in fact only about US\$12 of value is added to each unit in China.

### Members Should Wind down Crisis Response Measures

The WTO also expressed concern over “the danger of a steady accumulation over time of measures that restrict or distort trade and investment.” Over the last two years, new trade restrictions have built up to cover 1.9 percent of total imports, while only 15 percent of the temporary crisis response measures introduced since the outbreak of the crisis have been removed so far.

Like previous protectionism updates, the November report urged Members to prepare exit strategies to unwind stimulus and bailout measures taken in response to the crisis. The effects of those measures on trade and competition will be examined by the Trade Policy Review Body early next spring. In the meantime, the schemes should not be used as a pretext to discriminate, directly or indirectly, against foreign traders or investors.

### New Trade Restrictions

WTO Members introduced more than 200 new import restrictions between November 2009 and October 2010. Around 1.2 percent of total world imports were covered by these measures in mid-October 2010, up from 1 percent in the previous twelve-month

period. Trade remedy investigations that may lead to the imposition of anti-dumping or countervailing duties represent the biggest chunk of the restrictions, followed by tariff increases, export restrictions (on grains and rare earth minerals) and non-tariff barriers. The report noted that just three measures accounted for almost half of the 1.2 percent trade coverage for 2009-2010: the EU's renewal of its prior surveillance system on steel imports, China's temporary tariff hike on fuel oil and jet fuel, and Beijing's initiation of a countervailing duty investigation on imports of wireless wide-area networking modems.

The sectors most frequently targeted by import-restrictive measures in 2010 were machinery and mechanical appliances (19 measures); iron and steel (18 measures); articles of iron and steel (17 measures); organic chemicals (14 measures); electrical machinery and equipment (14 measures); cereals (13 measures); and plastic products. In terms of the share of world trade covered by the new measures, base metals (iron and steel) lead the field, followed by machinery, minerals and vehicles (see table below).

Many countries, including developing nations, liberalised services trade in 2010. Among restrictive measures was a substantial increase in US visa application fees for companies that employ more than 50 workers, more than half of whom are foreigners. India contends that the measure unfairly targets the US operations of its IT sector.

Trade coverage of import-restrictive measures, November 2009–October 2010

HS Section	Share in total world imports	Share in total restrictions
<b>Total imports affected</b>	<b>1.2%</b>	<b>100%</b>
<b>Agriculture</b>	<b>0.05%</b>	<b>4.5%</b>
<b>Industrial goods</b>	<b>1.15%</b>	<b>95.5%</b>
– Minerals	0.20%	16.8%
– Chemicals	0.06%	4.8%
– Plastics/rubber	0.03%	2.1%
– Textiles & clothing	0.03%	2.1%
– Base metals	0.40%	33.3%
– Machinery	0.24%	20.1%
– Transport equipment	0.15%	12.7%

Source: WTO

## Conflicting Rules & Clashing Courts: What Role for the WTO?

Pieter Kuijper

With the proliferation of multilateral environmental agreements, as well as free trade pacts, how can we avoid conflicts and promote coherence in the highly complex relationship between global trade and environmental governance?

The dense web of global trade regulation is complemented by other international regimes addressing issues as diverse as labour standards, trade in diamonds from conflict regions and trade in counterfeit products. All these legal galaxies are criss-crossing outwards in the universe of international governance, leading to a possible loss of cohesion and an increased potential for collisions: conflicts of norms set out in substantive rules, or conflicts of jurisdiction between different courts and tribunals.

### Potential Consequences of Conflict

If the proliferation of rules in international agreements leads to clashes between different regimes, and there is no clarity under international law, or the specific agreements in question, on how to solve such conflicts, the authority and effectiveness of the law are in danger of being undermined. If, moreover, the courts and tribunals created under the agreements are involved in clashes over the competence and scope of their jurisdiction, the authority and the effectiveness of both the law *and* the courts themselves will suffer. These are big ifs, and they may not come to pass. If they do, however, all the great strides forward in international trade and environmental law that have been made over the last quarter century risk being undermined.

When jurisdictions clash, the law of the strongest dispute settlement system prevails. Strength is measured in such cases primarily in terms of whether the system is compulsory and binding, as is the case of the WTO system.

Imagine, for example, that a regional trade agreement (RTA) contains norms that largely parallel WTO rules, but its provisions on the treatment of tradeable waste within national jurisdictions are more advanced and detailed. Suppose further that the RTA's dispute settlement system is not fully compulsory, but all of its members belong to the WTO. Inevitably, tradeable

waste cases will end up in the WTO with the consequence that the detailed rules laid down in the RTA will seldom be used and will atrophy.

In practice such problems seem to be most relevant to 'second generation' multilateral environmental agreements (MEAs), such as the Convention on Biological Diversity and its progeny (the biosafety protocol and the recent protocol on access and benefit-sharing), as well as the UN Framework Convention on Climate Change and its offspring (the Kyoto protocol). More traditional MEAs, such as the Basel Convention, seem to be safe from legal challenge.

### Tools to Address the Problem

In principle, an extensive tool box is available to treaty-makers, as well as to courts and litigants to solve such conflicts. One important tool is provided by principles of treaty interpretation. It starts with the general assumption that if treaties allow various interpretations, the one most compatible with other international norms should be taken as one cannot assume that countries meant to enter into conflicting obligations.

Recent agreements include a concept that appears to reach even further: the principle of 'mutual supportiveness'. Many of the treaties have preambular and/or substantial clauses that evoke mutual supportiveness between two or more agreements, which could be considered as conflicting, at least in policy terms.

Although ambiguity currently prevails over what 'mutual supportiveness' really means, it is a potentially useful principle that could promote balanced co-existence between the WTO and a large number of framework MEAs and other agreements. Without such a balance, the law of the strongest dispute settlement system risks working to the detriment of weaker agreements, potentially hurting sustainable development concerns that are traditionally less institutionally supported. Fortunately, there are no examples of this so far.

Closely linked with this principle are procedural rules available to courts when they determine their jurisdiction, i.e. their authority over a specific case. The application of the principle of mutual supportiveness between two agreements should lead to an outcome where a court ruling under Agreement A does not harm to the object and purpose of Agreement B.

This understanding is also a clear expression of procedural rules such as *comity*. This is the notion that, even in the absence of clear rules determining which court has jurisdiction in a particular international case, there are certain principles that should lead a court to cede jurisdiction to another tribunal rather than accept competing jurisdictions. In the Sellafield nuclear processing plant dispute between Ireland and the UK, the arbitral tribunal referred *inter alia* to "considerations of mutual respect and comity which should prevail between judicial institutions" and recalled that "a procedure that might result in two conflicting decisions on the same issue would not be helpful to the resolution of the dispute between the parties."

In the interest of the stability of international rule-making and governance, international courts and tribunals in neighbouring fields, like trade, investment, the environment, etc. need to develop a doctrine of 'forum non conveniens' between themselves, or at the very least use their inherent powers to abstain from exercising jurisdiction or rule on admissibility if there are serious reasons for doing so.

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# A New Growth Industry: Trade Pacts Outside the WTO

It is virtually impossible to keep track of the myriad bilateral and regional free trade negotiations taking place around the globe. The summary below provides a small sample of recent developments.

By mid-October 2010, nearly 200 regional trade agreements currently in force had been notified to the WTO, and another hundred were under negotiation. While older agreements by and large bind the existing level of market openness (and thus do not create significant new trade at the expense of other countries), new generation of FTAs tend to be much broader in scope, exceeding what is available to other WTO Members on an MFN-basis.

## Asia Leads the Way

It is difficult to evaluate the economic value of the Trans-Pacific Partnership Agreement (TPP) being negotiated between Australia, Brunei Darussalam, Chile, Malaysia, New Zealand, Singapore, Peru, the United States and Vietnam since most of the participants already have overlapping trade treaties with one another (Canada and Japan are still hedging their bets about joining the enterprise due to stiff resistance from their farm lobbies). Nevertheless, the process is gaining momentum, and a deal could be reached as early as next year.

At the APEC summit held in November, leaders of the 21 member countries – which include China, Japan, Russia, South Korea and the US – promised to “take concrete steps toward the realisation of a Free Trade Area of the Asia-Pacific.” While this is a distant goal, the TTP is considered as a key building-block towards that aim. Another stepping stone could be provided by the China, Japan and South Korea free trade talks that may start as early as next year.

India, which has already inked an agreement with the Association of Southeast Asian nations, has an impressive number of bilateral irons in the fire. Talks with Malaysia, Thailand and Japan could conclude before the end of the year, with New Zealand following in 2011. Negotiations continue with Sri Lanka, Israel and the four EFTA countries (Iceland, Liechtenstein, Norway and Switzerland), and feasibility studies are being carried out with Australia, Indonesia and Turkey. Canada and India have agreed to launch FTA negotiations, but no timetable has been set.

Meanwhile, the India-EU FTA may not make its unofficial end-2010 deadline due to New Delhi's reservations about Brussels' demands on IPR protection, as well as environmental and human rights commitments in the chapter on sustainable development. The EU is also negotiating with Singapore and Malaysia.

## Latin America Looks across the Pacific

Peruvian president Alan Garcia has proposed that Latin American Pacific Rim countries Colombia, Chile, Ecuador and Peru embark on a process of ‘deep integration’ with free movement of goods, services, capital and people. The bloc would work toward a closer relationship with “the other side of the Pacific through these new universal systems, such as APEC.”

Peru is one of the most active countries in Latin America when it comes to trade opening. It has already signed free trade agreements with the US, the EU, China, Japan, South Korea and Thailand. Negotiations are underway with Costa Rica, El Salvador, Guatemala and Honduras. Chile, which also has numerous agreements with partners in the Americas and Asia, signed its latest deal with Malaysia in November.

Region-to-region talks between the European Union and Mercosur – resumed in May 2010 after a six-year hiatus – are progressing, but suspicion on both sides is slowing the pace. Mercosur members (Argentina, Brazil, Paraguay and Uruguay) fear for their manufacturing and services industries, while the Europeans worry about the competitiveness of their farmers. Ten EU countries, led by France and Ireland, have stated that no deal can be struck with the South American bloc before the conclusion of the Doha Round, and that EU concessions on agriculture in those negotiations must not be exceeded.

The EU Parliament supports the Mercosur talks, albeit with strong ‘red lines’ with regard to food safety, the protection of small farmers and high environmental standards.

## Russia and Mongolia Courted

Envisaging export gains in the region of US\$20 billion, particularly for the meat and dairy sectors, New Zealand will start free trade negotiations in 2011 with the customs union recently formed between Russia, Belarus and Kazakhstan. According to think tank estimates, the gains could be much larger if services and investment were substantially liberalised as well. Wellington hopes to clinch a deal in 2012.

The EFTA bloc has also announced the launch of negotiations with the customs union in January 2011. According to Swiss sources, the talks will initially centre on trade in goods and services, investment, competition, facilitation of exchanges and protection of intellectual property rights, as well as government procurement.

In related news, Russian Prime Minister Vladimir Putin has proposed a free trade zone between his country and the European Union. German Chancellor Angela Merkel, however, said the idea was premature. She called Russia's high tariffs, as well as its customs union with Belarus and Kazakhstan problematic, adding that Mr Putin's proposal could not even be considered before Russia joins the WTO.

And finally, Japan is likely to start FTA negotiations with natural resources-rich Mongolia next spring. Unlike New Zealand or EFTA keen to expand export markets, Japan is principally seeking a steady source of rare earth imports following China's recent tightening of supplies. The minerals are vital components of high-tech products, such as hybrid cars (see related story on page 7).

Mongolia has promised to proactively support Japanese companies in developing the country's natural resources, while Japan has committed to providing the necessary advanced technologies.

## US Update

In the wake of the November mid-term elections, a more bipartisan approach to trade may be emerging in Washington. Republican Kevin Brady, who is likely to head the House Ways and Means trade subcommittee come January, has singled out commerce as one of the few areas of opportunity for a 'fresh start' between President Obama and the GOP.

Topping Mr Brady's 'aggressive' new agenda is the ratification of free trade agreements with Colombia, Panama and South Korea (see opposite), which he wants to see sent up to Congress early next year. Several other newly elected Republicans are also in favour, including senators-elect Rob Portman (former US Trade Representative) and tea party-backed Pat Toomey and Marco Rubio.

According to a recent Pew Research Center poll, however, most Republicans and Republican-leaning independents who agree with the tea party have a "particularly negative view of the impacts of free trade agreements." Only 24 percent believe that NAFTA and WTO membership have been good for the US.

But Mr Brady appears confident that freshman members will rally around the pro-trade consensus. "Trade has been in a lockdown in Congress for far too long," he said. "The trade subcommittee is going to open it up, because the more we do that, the more likelihood there will be for a consensus among Republicans and Democrats on trade."

Representative Brady also plans hearings on a wide range of other trade issues, including opening new markets through the Doha Round and the Trans-Pacific Partnership, as well as taking on protectionist measures such as Buy America and the ban on Mexican truck crossings.

While Mr Brady favours a multilateral approach to pressuring China on the yuan exchange rate, he intends to take a 'broader view' of the bilateral trade relationship, including China's innovation policy, intellectual property rights and raw material export restrictions.

## US-Korea Trade Deal Concluded

Following the partial renegotiation of the 2007 US-South Korea free trade agreement in early December, political support is growing in Washington, but so is opposition in Seoul.

The reason behind the amendment negotiations was Washington's need to obtain enough new concessions from Seoul to overcome persistent opposition from the US automobile and beef industries to the agreement concluded by the Bush administration in 2007.

The new deal allows the US to keep its 2.5-percent tariff on passenger cars in place until the fifth year of the treaty's implementation, instead of eliminating it upon the treaty's entry into force. Korea, which was to eliminate its 8-percent auto tariff immediately, will now halve it for the first four years, and fully eliminate it in the fifth year. Both countries will eliminate tariffs on electric cars within five years, half the period envisaged in the original agreement. The US also managed to delay the reduction of its 25-percent duty on trucks by eight years, but will still need to cut it to zero by the tenth year. South Korea will stand by its 2007 commitment to eliminate its 10-percent truck tariff as soon as the FTA takes effect. Seoul also consented to a special safeguard that will protect American car-makers against import surges for ten years after the full elimination of tariffs on Korean cars.

In a significant concession to Detroit car-makers, which have long complained that Korea's safety and environmental standards unfairly impede imports, Seoul agreed to an annual quota of 250,000 cars per US manufacturer that will be considered safety-compliant if they meet US federal safety standards (rather than Korean ones). Similarly, under the 2010 agreement, US autos will be considered compliant with Korean fuel economy and greenhouse gas emissions standards (developed since the 2007 FTA) if they achieve targets within 19 percent of those in Korea's new regulations. The 2010 agreement also gives US manufacturers at least a year to adjust to any new automotive regulation.

### Korea Stands Firm on Beef, Obtains Generics Concession

While accommodating many of the key demands of the US car industry, Seoul drew the line on allowing in more beef from the United States. Korea will retain its current import ban on US beef from cattle less than 30 months old. Big riots, fuelled by fear of mad cow disease, occurred across the country when Seoul tentatively accepted US demands for broader market opening in an attempt to move the stalled treaty in 2008.

Seoul also negotiated a three-year postponement of the implementation of a provision under which authorities cannot grant marketing approval for a generic drug until any related patent challenges are resolved. Under the original agreement, the provision would have gone into effect after 18 months.

### Bipartisan Support in US Contrasts with Stark Divisions in Seoul

In the US, the changes to the FTA won plaudits from leading lawmakers from both parties and a wide spectrum of industry groups, including former opponents of the accord, such as the United Autoworkers union and auto manufacturers GM and Ford.

A number of influential senators – including Republicans Orrin Hatch and Chuck Grassley, Independent Joe Lieberman, as well Democrats John Kerry and Maria Cantwell – have thrown their weight behind the renegotiated agreement, but not everyone is convinced. Sen. Max Baucus has expressed 'deep disappointment' over the lack of more access for US beef, and Sen. Sherrod Brown, an Ohio Democrat, has said he will not vote for the pact.

On the other side of the Pacific, the differences are much starker. While President Lee Myung-bak has forcefully defended the auto trade concessions as necessary to reap far greater long-term benefits, the Democratic Party – allied with four other opposition parties and supported by demonstrating farmers – has repeatedly vowed to combat what it terms as a 'humiliating, under-the-table' deal.



# EU Trade Concessions to Pakistan Fail to Obtain WTO Waiver

Two months after member states of the European Union decided to grant flood-hit Pakistan temporary trade concessions, market access for the most commercially important items was considerably narrowed. Not enough, however, to convince all WTO Members to support the package.

Pakistan's July 2010 monsoon floods covered an area larger than England, displaced some 20 million people and caused damage estimated at nearly US\$10 billion.

In September, the European Council agreed "to grant exclusively to Pakistan increased market access to the EU through the immediate and time-limited reduction of duties on key imports" to be implemented as soon as possible. It asked the European Commission, the EU's executive body, to present a proposal for specific concessions in October.

In identifying the coverage and depth of possible trade preferences, the commission had to navigate between the concerns of import-sensitive industries in EU member states, as well as think about the likely reaction of other WTO Members: since Brussels wanted to cut tariffs on products from Pakistan, but not on those from other developing countries, the concessions need a 'waiver' allowing the EU to deviate from the multilateral trading system's core principle of non-discrimination.

## The Commission's Proposal

In mid-October, the commission came out with a proposal covering 75 tariff lines for three years, starting from 1 January 2011. The EU estimated that the preferences – notably duty-free access granted to several textiles products (64 by some accounts) – would boost Pakistan's exports to the EU by €100 million. The EU was also to drop its high tariff on ethanol from Pakistan, subject to an annual import quota of 100,000 tonnes.

Although a €100 million increase in exports would undoubtedly have been welcome, the amount pales in comparison to the EU's current level of Pakistani imports – €15 billion – of the products in question.

According to EU sources, the commission also took into account the priorities of least-developed countries (LDCs), which may have been concerned that Pakistani competition would erode the trade preferences they currently enjoy in the EU market. That led to the exclusion of a number of items – including certain fish products, textiles and apparel – from the list of temporary trade concessions offered to Pakistan.

Even so, the commission's proposal ran into opposition from France, Italy, Portugal and Spain, which have significant textiles sectors. South Asia News quoted unnamed EU sources as reporting that Portugal and Italy were pushing to change nearly all items on the tentative list of concessions, and UK Foreign Secretary William Hague expressed concern over 'some countries' wanting to dilute the council's commitment. "We want the decision made last month to be clearly implemented, for it to be a substantial package that gives material help to Pakistan," Mr Hague said. Germany and Sweden also strongly supported a meaningful outcome.

## Quotas and Conditionalities Added to Final Package

On 11 November, the EU member states approved a significantly weaker final package than the one originally proposed by the commission.

While it still covers 75 products, the tariff suspensions will apply for just two years, with a third year granted only after an assessment. In addition, duty-free access for the most sensitive products will be limited by annual quotas: a 20-percent rise in Pakistani exports of certain fabrics, towels, women's jeans and socks will lead to the loss of the preferential tariff.

Furthermore, an import surge in any of the remaining items may also cause the termination of the preference under a yet-to-be-defined safeguard mechanism. And finally, the quota for duty-free ethanol was slashed from 100,000 to 80,000 tonnes.

Due to opposition from EU member states, duties will not be cut on bed linen, Pakistan's main export product. This omission, coupled with the duty-free quota restrictions on other key export items meant that "our exports to Europe will not boost by more than a few million euros," said Shahid Soorty, chairman of the Pakistan Denim Manufacturers and Exporters Association. He added that exporters of the quota-restricted items would achieve the permitted 20-percent growth in less than six months.

In contrast, EU trade spokesman John Clancy maintained that the adjustments would not "lower considerably the expected benefits for Pakistan's flood-stricken economy." An EU diplomat, who regretted the down-scaling of the concessions, nevertheless noted that, on the plus-side, "at least we have a deal that we can put to the WTO."

## No WTO Waiver for Now

On 30 November, the Council for Trade in Goods considered the EU's request for an exemption from the most-favoured-nation obligation (GATT Article I) for the concessions package. Without such a waiver, the EU cannot treat Pakistan more favourably than other WTO Members.

While most countries had no objections, some with competing export interests in the EU textiles market raised serious concerns, which they said required more bilateral consultations. Bangladesh, for instance, is seeking changes with regard to eight items on the concessions list, including leather goods, shoes, knitwear, jeans, home textiles and ready-made garments. Brazil, Peru and Vietnam reportedly also sought further consultations on certain products on the EU list.

Citing trade diversion and negative impacts on workers in LDCs among potential 'collateral damage', India's ambassador said the concessions package required "deeper analysis regarding its impact on the multilateral trade regime and competing economies."

The Goods Council will reconsider the waiver request at its April 2011 session.

## Time to Address Tough Issues in EU-Canada Trade Talks

With negotiations on a 'comprehensive economic and trade agreement' – CETA for short – between the EU and Canada nearing the end-game, several flash points have come into sharper focus, including intellectual property rights, public procurement and farmers' rights.

So far, opposition to the treaty has been more vocal on the Canadian side, where labour unions, farmers and several other citizens' groups have joined forces to campaign against the CETA, at least as it currently stands.

### Generics Producers Alarmed

While manufacturers of brand-name medicines on both sides of the Atlantic are in favour of stronger protections for patented drugs, Canada's generics companies are crying foul over proposals to extend the standard 20-year patent period to compensate for delays in the approval process for a new drug, as well as lengthening the clinical data protection period by about two years.

"We have to move away from a policy that discourages innovation and encourages copying," said Russell Williams of Canada's Research-based Pharmaceutical Companies. "That is not an environment that is going to encourage global industry to invest research dollars in Canada."

Larry Brown of the National Union of Public and General Employees, however, called the brand-name industry's demands a case of 'excessive and crass self-interest' that would drive up drug costs by as much as 30 percent a year. Richard Gold, an intellectual property expert at McGill University, said there was little evidence that bolstering patent protection in Canada would lead to more R&D investment. "Is this going to be a substantial benefit to Canadian companies, the Canadian economy, access to medicine? ... No," he concluded.

### Public Purchases

Prising open the lucrative Canadian government procurement market is one of the EU's key priorities in the negotiations. This is particularly so at the sub-federal level as many provinces and municipalities restrict foreign bidding or have other clauses that favour local businesses and workers.

In October, the EU complained that Quebec's decision to shut out foreign compa-

nies from a large subway car contract sent the wrong signal to the CETA talks. The European Commission is also unhappy with Ontario's local content requirements for renewable energy equipment, which is generously subsidised by the province. Japan has challenged the policy at the WTO and the EU has joined the complaint as a third party (for more details, see page 8).

But many Canadians strongly support the leeway enjoyed by their provincial authorities. "Government procurement at the sub-federal level is one of the few remaining areas of significant policy flexibility under Canada's international trade treaties. Provincial, territorial and municipal governments should not discard this important policy tool simply because the EU and the federal government demand it," said Scott Sinclair, senior research fellow with the Canadian Centre for Policy Alternatives (CCPA).

### Farmers' Rights

In October, the Canadian National Farmers Union launched a petition calling for citizens and the parliament to reject any agreement that would include the International Convention for the Protection of New Varieties of Plants, which it described as "a draconian form of Plant Breeders' Rights legislation that will effectively eliminate a farmer's or citizen's ability to save, reuse, exchange and sell seed." In addition, the NFU called for "the outright rejection of any provisions which would allow for the judicial precautionary seizure of crops, homes, land, equipment and the freezing of bank accounts for alleged infringement of intellectual property."

### Boom or Bust for the Canadian Economy?

In their 2008 joint assessment of the costs and benefits of the CETA, the Canadian government and the European Commission estimated that, by the year 2014, the agreement would yield an annual real income gain of €11.6 billion for the EU, and a €8.2 billion (C\$12 billion) boost for Canada. Services liberalisation was expected to represent about half of the overall gains, with tariff reductions contributing 25 percent of the total for the EU and 33.3 percent for Canada.

In October 2010, another study on the economic impacts of the CETA, written by Canadian Auto Workers economist Jim Stanford for the CCPA, came to a very different conclusion. Mr Stanford modelled three possible outcomes, the best of which – based on tariff elimination only – could lead to a loss of 28,000 jobs, while the worst case scenario could cost 150,000 jobs, mostly in the machinery, chemicals, electronic, food-processing, apparel-making and auto industries. In addition, the author warned that the CETA would further widen Canada's bilateral trade deficit with the EU, which currently stands at C\$15 billion in goods and nearly C\$4 billion in services.

Canada's international trade minister Peter Van Loan said the report reflected the autoworkers' and the CCPA's "ideological opposition to an agreement that hasn't even been completed yet. I have no difficulty dismissing that and focusing on the fact that this is a free trade deal that offers enormous upside potential for Canadian jobs." Should the CETA go ahead, he added, Canada would be the only developed economy to have trade agreements with both the US and the EU, giving Canadian companies "a tremendous platform for from which to compete."

Ottawa and Brussels aim to conclude the negotiations in the course of next year.

In related news, the EU recently awarded Ottawa a 20,000-tonne duty-free quota for prime beef reared without growth hormones. The quota compensates Canada for economic damage caused by the EU's import ban on hormone-fed beef. The United States negotiated a similar deal in 2009.

# Agreement Reached on Access and Benefit-sharing

After ten years of difficult negotiations, parties to the Convention on Biological Diversity have agreed on a treaty aimed at helping countries that provide genetic resources capture a share of the benefits arising from their use.

The Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits was finally concluded in Nagoya on 29 October after three weeks of tense negotiations. The result has been characterised as a ‘masterpiece of ambiguity’.

## Ambiguities Puzzle Experts

While a certain degree of creative ambiguity is a hallmark of international accords, the text of the ABS protocol has left many puzzled about what exactly has been agreed upon, including on the substantive and temporal scope of the agreement, as well as derivatives.

According to experts, some 90 percent of all biopiracy is related to derivatives – defined as “naturally occurring biochemical compounds resulting from the genetic expression of metabolism of biological or genetic resources” – i.e. biochemical compounds (such as proteins or metabolites) that do not contain functional units of heredity.

While the inclusion of derivatives in the treaty was a victory for developing countries, the protocol’s treatment of these compounds is far from straightforward.

Article 2 of the accord includes far-reaching definitions of ‘derivatives’ and the ‘utilisation’ of genetic resources. However, Article 3, which sets out the scope of the treaty, makes no explicit mention of derivatives, although it does refer to benefits arising from the utilisation of genetic resources, which could be interpreted to cover derivatives.

The status of genetic resources taken out of their place of origin prior to the entry into force of the ABS protocol is also unclear. Fearing that a large number of cases could fall outside the protocol’s scope, many developing countries pushed for some form of retroactive protection for resources accessed prior to the treaty’s entry into force.

The finally agreed Article 3 remains silent on this issue, thus sidestepping any clear decision on the matter. Instead, a new Article 7bis calls upon parties to consider a ‘global multilateral benefit-sharing mechanism’ to address transboundary situations and “situations for which it is not possible to grant or obtain prior informed consent.” This could in theory apply to the use of genetic resources obtained *ex situ* (outside of their place of origin), or in a manner not compliant with the Convention on Biological Diversity (CBD). The benefits shared by users of the potential future mechanism “shall be used to support the conservation of biological diversity and the sustainable use of its components globally.”

All this, however, will depend on further negotiations. Public international law set out in the Vienna Convention on the Law of Treaties prohibits retrospective effect unless parties to a treaty agree otherwise. However, it does allow new agreements to apply to certain types of existing situations, which could potentially cover instances where resources were accessed (or were being used) before the treaty entered into effect.

Some observers have expressed disappointment over the ABS protocol’s provisions on indigenous communities’ traditional knowledge (TK) associated with genetic resources (Article 9). All benefits accruing from the accord will go to governments, which only need to ‘endeavour to support’ indigenous communities efforts to develop TK-related access protocols, minimum requirements and model contractual clauses for benefit-sharing.

## National Implementation Efforts Will Be Critical

Other vague provisions leave much to be addressed by domestic processes. This is particularly true for compliance mechanisms.

In order to prevent biopiracy, many governments and experts wanted the protocol to include a provision requiring patent applicants to disclose any traditional knowledge or genetic resources used in their invention (a demand to insert such a requirement in the TRIPS Agreement is now supported by several countries – including some developed nations – at the WTO).

The demand for a disclosure requirement, as well as other issues relating to compliance, are now covered by an obligation to take ‘appropriate, effective and proportionate’ measures to address situations of non-compliance and to establish one or more ‘effective checkpoints’ with functions relevant to the utilisation of genetic resources, including the collection of ‘appropriate, relevant information’. However, what constitutes ‘appropriate, effective and proportionate’ is left to national authorities to decide. Therefore, the international regime alone will not provide legal certainty; its success will hinge on national implementation efforts.

## Other International Organisations and Ongoing Practices

Similar language underpins a compromise on how to deal with emergency situations that threaten human, animal or plant health. Novel language now states that “parties may take into consideration the need for expeditious access to genetic resources and expeditious fair and equitable sharing of benefits, including access to affordable treatments by those in need, especially in developing countries.” This provision would be directly relevant to ongoing negotiations at the World Health Organisation, where governments are debating whether countries should be obliged to share genetic material relating to human pathogens (such as the avian flu virus), and whether they could expect to receive benefits for doing so.

Also ambiguous is the relationship between the new ABS protocol and talks on traditional knowledge at the World Intellectual Property Organisation (WIPO). Following

*Continued on page 20*

an explicit request from the European Union, the Nagoya decision adopting the ABS protocol provides that the first assessment of parties' compliance with domestic legislation related to access and benefit-sharing for TK – due to be held four years after the protocol's entry into force – shall be reviewed “in the light of developments in other international organisations, *inter alia*, WIPO.” The protocol itself also calls for ‘due regard’ to be paid to ‘useful and relevant ongoing work or practices’ under other international instruments and organisations. These provisions create uncertainty over the extent to which TK will be protected by the scope of the ABS treaty.

### No Agreement ‘Not an Option’

Most delegates acknowledged that the ABS protocol was far from perfect, but they also emphasised that it represented only a first step for eventually achieving the objective of fair and equitable sharing of the benefits arising out of the utilisation of genetic resources. “It was momentum we had to make use of. Not agreeing was not an option. It would have squashed whatever we had achieved by now,” a government official said.

Papering over differences seems indeed to have been the only way in which governments could find a compromise on the ABS protocol. Observers have argued that this would have not changed in the coming years, since differences were simply too stark on the various core issues. In that light, the adoption of the protocol, whatever its shortcomings, can be welcomed – so long as policymakers (and those who hold them accountable) bear in mind that much depends on the eventual domestic implementation, future review processes and, in some cases, other negotiating fora. Considering that the US is not a party to the CBD, the importance given to other institutions, such as the WTO, could enhance the effectiveness of some of the treaty's provisions.

The ABS protocol will take effect 90 days after the fiftieth party has ratified it. The first meeting of the Intergovernmental Committee of the protocol is scheduled for June 2011. The meeting is expected to focus on the ‘global multilateral benefit-sharing mechanism’, which could cover benefits arising from genetic resources obtained *ex situ*, or accessed outside the CBD framework (see box opposite).

## Lessons from the ‘Rooibos Robbery’

A controversy between Nestlé, the world's largest food company, and the South African government illustrates the need for clear rules with regard to when the obligation to share the benefits arising from the utilisation of genetic resources starts, and what that obligation covers.

At issue are two plants found in South Africa, rooibos and honeybush, both of which are commonly used to make herbal teas. Both species also have well-known medicinal uses.

In May 2010, Nestec, a Nestlé subsidiary, filed four international patent applications for using rooibos and honeybush or extracts from them (i.e. ‘derivatives’) to treat hair and skin conditions such as acne, wrinkles and hair loss. A fifth application sought patent protection for using rooibos as an anti-inflammatory. Nestec is seeking patent protection in a large number of countries around the world, including South Africa, which accuses the company of biopiracy.

The South African Biodiversity Act requires companies to get a permit from the government if they intend to use South African genetic resources for research or patenting. These permits can only be obtained with a benefit-sharing agreement. According to the country's environmental affairs department, Nestlé never received permits to use rooibos and honeybush.

Nestlé maintains that any biopiracy claims are baseless since it neither sourced the plants in South Africa nor did research on them there. Rooibos and honeybush extracts and material were provided by South African suppliers to two Nestlé research facilities in Switzerland and France, which used them for basic research on active ingredients.

The company's spokesman Ravi Pillay said the patents were filed to protect Nestec's research results, which showed potential benefits for consumers. “Nestec has not filed any patent relating to the plants themselves, or extracts of the plants. Nestlé has not made any commercial use of these patents, and has no plans to do so in the near future,” he added.

According to Mr Pillay, Nestlé would comply fully with the benefit-sharing provisions in South African law if the company decided to use the patents commercially. However, Johanna von Braun of Natural Justice noted that under the country's Biodiversity Act, the commercial phase of bioprospecting begins once a patent application has been filed. The terms under which the South African suppliers provided the plants to Nestlé also mattered, she explained. “If they are exporting rooibos to make tea, they don't need a permit. But if they were going to be used for research, the suppliers would have needed an export permit, including a bioprospecting application from Nestlé.”

### ABS Protocol Only Partially Helpful

Despite its ambiguities, the newly agreed ABS protocol could be helpful in cases such as the rooibos/honeybush controversy. Article 2 of the treaty states that “utilisation of genetic resources means to conduct research and development on the genetic and/or biochemical composition of genetic resources.” It also contains a definition of derivatives, implying that benefit-sharing obligations would extend to research conducted on extracts of genetic resources.

However, it should be kept in mind that the ABS protocol only regulates state-to-state relations, which will make each and every member's domestic implementation of the treaty's obligations crucial. Unfortunately, the protocol's provisions on enforcement and compliance – i.e. governments' obligations to ensure that their companies comply with the treaty – emerged from Nagoya far weaker than experts had called for.



# Searching for Transparency: Improving Patent Information to Increase Access to Medicines

Tahir Amin

The ability of developing and least-developed countries to procure affordable generic medicines continues to be hampered by a lack of transparency in patent information. While there has been an increase in electronic patent information since TRIPS, much more still needs to be done.

The globalisation of patent protection for medical products has meant changes for public health actors seeking to sustain and improve access to medicines. Under the WTO Agreement on Trade-related Aspects of Intellectual Property rights (TRIPS), member states that did not make available patent protection for pharmaceuticals when the treaty came into force were required to provide means for applicants to file such patents. WTO members with developing country status were subsequently required to start examining patent applications and providing patent protection on medicines either by 1 January 2000 or by 1 January 2005. Many developing countries implemented patent protection for medicines significantly earlier than required under the transitional provisions of TRIPS. Today, patents on medicines are being granted in developing and least-developed countries (LDCs).

Whereas previously health authorities and procurement bodies could make the decision to purchase more cost-effective generic versions of medicines without having to consider the question of patents, this is no longer the case. Procurement bodies must now establish in advance of purchasing decisions whether patents on a particular medicine have been applied for, granted or expired.

Aside from being able to monitor the status of patents for procurement purposes, relevant actors must also keep abreast of this information in order to determine suitable strategies and policy choices. This can include whether a country government should use TRIPS flexibilities, NGOs (and generic companies) raising concerns through patent oppositions, or generic companies deciding if they have the freedom to operate.

In order for organisations to tackle these issues, there is a critical need for transparent patent information. The question remains, however, whether enough is being done to accommodate this need.

## A Decade of Searching for Transparency

Following the inception of TRIPS, very little attention was paid to the role played by patent information in ensuring continued access to affordable generic versions of medicines for developing countries and LDCs. As efforts to increase the procurement of generic antiretrovirals and related medicines began around 2000, the realisation set in that the lack of information on the status of patents would be an obstacle to increasing access. Indeed, the outbreak of avian flu in 2005 showed how farcical the situation could become without patent information: facing uncertainty about whether they could stockpile generic versions of oseltamivir, some developing countries began to consider voluntary and compulsory licenses – only to eventually be told by Roche that in some cases there were no patents.

Nevertheless, during the last ten years useful contributions have been made to improve transparency by landscaping the patent status of medicines (see box opposite).

Most of the efforts have concentrated on the area of antiretrovirals and are limited in the countries they cover. This is due to a number of factors, including: ongoing difficulties in obtaining patent information from developing country and LDC patent offices; the lack of human and capital resources to ensure continuity for keeping patent landscapes up to date; and indecision amongst some organisations as to whether there could be unforeseeable consequences to having transparent patent information. These reasons, and a lack of political will, partly explain why the WHO Patent Project appears to have stalled. This is despite Resolution

61.21 of the 2008 World Health Assembly, which urged the WHO to:

“compile, maintain and update a user-friendly global database which contains public information on the administrative status of health-related patents, including supporting the existing efforts for determining the patent status of health products in order to strengthen national capacities for analysis of the information contained in those databases and improve the quality of patents.”

Despite such setbacks, in the past two years patent information in an electronically searchable format has become increasingly available. More and more national patent offices are providing searchable databases, albeit with some providing more information than others.

*Continued on page 22*

## Patent Landscape Milestones: 2000–2010

- Patent Situation of HIV/AIDS-related Drugs in 80 Countries (UNAIDS/WHO, 2000)
- Patent Protection and Access to HIV/AIDS Pharmaceuticals in Sub-Saharan Africa (IIP/WHO, 2000)
- Do Patents for Antiretroviral Drugs Constrain Access to AIDS Treatment in Africa? (Attaran and Gillespie White, 2001)
- Drug Patents under the Spotlight (MSF, 2003)
- WHO Patent Project: Determining the Patent Landscape of Essential Medicines in Developing Countries (UNDP/UNAIDS/WHO/ European Patent Office, 2005–2008; unpublished)
- Some Intellectual Property Issues Related to H5N1 Influenza Viruses, Research and Vaccines (Edward Hammond, The Sunshine Project and TWN, 2007)
- Patent Landscaping Report on Neglected Human Diseases (WIPO/CSIR, 2008)
- UNITAID Patent Pool Implementation Plan (UNITAID, 2009; unpublished)
- HIV Drug Patents in China (I-MAK, 2010)

Examples include Argentina, Brazil, China, Colombia, Egypt, India, Malaysia, Mexico, Philippines and Thailand. In the case of the Indian Patent Office, it was only after much public pressure that the database provided the full text of published and granted patents, as well as the status of applications.

WIPO's database, Patentscope, allows users to search for international patents using 11 different search fields, including the full text of patents. Working with national patent offices, Patentscope provides the national phase status of international applications in countries or regions including Argentina, the African Regional Intellectual Property Organisation, Cuba, Kenya, Mexico, Philippines, South Africa and Vietnam.

The European Patent Office (EPO) has also been adding information from developing country patent offices to its database Esp@cenet. It is understood that the EPO is considering tagging pharmaceutical patents to marketed products listed on the US Food and Drug Administration's Electronic Orange Book.

While the last decade has seen improvements in access to patent information and more detailed patent landscapes on medicines, there still remains a considerable lack of transparency. This is particularly so for civil society users not familiar with how to navigate the various sources of patent information.

It is unfortunate that where patent information on medicines has been gathered by organisations – such as UNITAID, the WHO and the Drugs for Neglected Diseases Initiative – they have not made the research available for public viewing. It would seem logical that by making such information available, other organisations across the world would be able maintain the data and even build upon it. Such information could also improve research in the area, and thus help understand the role patents play in access to medicines.

### Improving Patent Transparency

The obvious solution to the transparency problem is to have patent owners disclose the relevant patents they have on medicines. However, in most cases, pharmaceutical companies are unwilling to share this information, preferring to play a game of hide-

and-seek. This strategy gives originator companies an advantage and creates uncertainty in the marketplace for competitors.

Peter Drahos in his recent book *The Global Governance of Knowledge – Patent Offices and their Clients* rightly points out that patent offices have a greater obligation to diffuse information on inventions as a public good. Simply publishing patent information and offering databases for searching is not the same as actively promoting transparency.

Ideally, patent offices would make the information more easily accessible. For example, their databases could be linked to pre-searched company patent portfolios for active pharmaceutical ingredients. Such lists could be compiled and automatically updated by the relevant patent office through programmed algorithms combining all the various search techniques, including compound structure(s), compound names, keywords and citations. The list would also include details of patents that have expired or lapsed – information not so readily transparent in current databases.

Access to such information would help give more clarity to freedom-to-operate decisions and save considerable time now spent on repeat searches by organisations with limited resources.

Information of this nature would make transparent the patenting strategies of companies, such as the filing of patent clusters in order to deter competitors and prolong patent protection on existing medicines. This could lead to a better understanding of the type of innovation and patenting behaviour that is taking place, helping contribute to more solid evidence-based policies. It would also reduce unnecessary legal fees that lawyers and commercial patent database providers charge for repeating patent searches, which often return the same results.

Changing the pedagogy in IP education and training can also improve transparency. Current initiatives by WIPO and other institutions are either directed to patent office personnel only or provide a theoretical brand of teaching. However, experience in the field has shown that practical tools that relevant actors, in particular civil society, can use to help demystify the patent system can go long way to creating more transparency. Such tools can help build awareness of patent information systems and create a new network of users outside of the lawyers and search providers that currently monopolise the space. It is only by expanding knowledge and awareness outside of existing establishments that the patent system can truly serve the public.

A recent publication by the WHO offices of South-East Asia and Western Pacific Region on *How to Conduct Patent Searches for Medicines – A Step by Step Guide* is a useful starting point in this direction.<sup>1</sup> The guide, written primarily for beginners, provides various techniques on how to search for patents on medicines, including finding US patents listed in the US FDA Orange Book and tracing the corresponding and related patents in developing country patent offices. The guide also sets out the useful methodology adopted by the WHO Patent Project and UNITAID for their landscaping of patents on antiretroviral medicines.

Information asymmetry in the patent system makes procurement decisions for medicines inefficient. It also makes for blind policy decisions when implementing patent laws. The modern patent social contract, which was partly defined on the exchange and dissemination of the knowledge of inventions claimed in patent specifications, currently disproportionately favours patent holders. Much more needs to be done if we do not want another decade to go by in the dark.

*Tahir Amin is the Co-founder and Director of IP for the Initiative for Medicines, Access & Knowledge (I-MAK, New York), and author of the WHO guide 'How to Conduct Patent Searches for Medicines – A Step-by-Step Guide'.*

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### ENDNOTE

<sup>1</sup> [http://www.wpro.who.int/publications/PUB\\_9789290223757.htm](http://www.wpro.who.int/publications/PUB_9789290223757.htm)

# What Gains from a Doha Agreement?

The biggest gains from a Doha Round agreement would come from locking in reforms governments have already undertaken rather than new trade-opening, trade experts say.

In early November the WTO, the World Bank and ICTSD brought together several prominent trade economists to compare estimates for what a Doha Round agreement would be worth, both in terms of liberalisation obtained and potential protectionism avoided.

Estimating the value of binding existing tariff liberalisation is not easy, Aaditya Mattoo, a senior World Bank researcher, acknowledged at the outset. “The value of bindings depends on the probability of reversal,” he said. Although most countries could raise their current tariff or subsidy levels considerably without running up against their legally binding limits, they have by and large resisted the temptation during the financial and economic crisis. This restraint suggests that the probability of reversal is low, which diminishes the value of binding tariffs at their present applied levels.

David Laborde, an economist with the International Food Policy Research Institute in Washington, tried to quantify the value of binding tariffs on the basis of the terms outlined in the 2008 draft texts on agriculture and non-agricultural market access (NAMA). He estimated that if countries were to raise tariffs to the maximum level possible under their existing WTO commitments, the losses to the world economy would amount to some US\$350 billion. Two-thirds of this loss would be offset if governments were constrained by the ceilings likely to arise from a Doha Round accord. In a more plausible scenario, in which governments would raise tariffs not to the maximum level possible, but the highest levels they had actually applied during the past 13 years, the losses would be over US\$100 billion, but a Doha agreement would offset the lion's share of these losses.

Jeffrey Schott of the Peterson Institute of International Economics estimated that as things stand, a Doha Round agreement would produce global welfare gains of the order of US\$60 billion – not enough, he argued, to secure legislative ratification of the deal. He called for substantially more market access in services – an area in which Mr Mattoo demonstrated that government offers of binding market-opening fell well short of their existing levels of openness – along with co-operation in other areas such as trade facilitation to smooth access to merchandise markets.

## Ambassadors: What Is Needed to Bring the Doha Round to a Close?

US Ambassador Michael Punke complained that the current Doha Round deal would be impossible to sell in Congress because the ‘pain’ – concessions demanded of the US, such as farm subsidy reform and cuts to tariff peaks on textiles – was clear, while the ‘gain’ were obscured by unclear flexibilities for developing countries. Mr Punke called for increased liberalisation, particularly from fast-growing developing countries, in agriculture, NAMA and services, with cuts to applied levels of market-opening.

Brazilian Ambassador Roberto Azevedo countered that the United States was hardly alone in not knowing where it stood to gain: Brazilian farmers did not know whether farm subsidy spending in competing countries would actually be reduced as a result of the round, nor did they know whether they would still be facing three-digit tariffs after an agreement. He pointed out that Brazil, too, had a Congress – and one that would not accept excessive liberalisation demands.

Developing country ambassadors were unanimous that the negotiations must be based on the 2008 deal on the table. Mr Azevedo warned that the US could not change the expected results ‘by several orders of magnitude’ at this point in the negotiations, while Ambassador Sun Zhenyu of China urged developed countries to be ‘realistic’ and not seek further concessions. India could offer only incremental changes to its position as New Delhi had “already emptied its pockets,” Ambassador Jayant Dasgupta said.

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.

### BRIDGES Regional Editions

#### MOSTI

Bridges regional edition in Russian

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Web: <http://www.enda.sn>

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Web: <http://cinpe.una.ac.cr>

### Other ICTSD Periodicals

#### BRIDGES Weekly Trade News Digest

A weekly electronic news service on trade, sustainable development and the WTO.

#### BRIDGES Trade BioRes

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#### BRIDGES Trade BioRes Review

Quarterly analytical review of trade-related issues of concern to biological resources.

#### TRADE NEGOTIATION INSIGHTS/ ECLAIRAGE SUR LES NEGOCIATIONS

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### WTO Meetings

- Jan. 10 Start of intensive negotiating sessions on rules, trade facilitation, trade and environment, intellectual property rights, and development
- Jan. 17 Start of intensive negotiating sessions on agriculture, non-agricultural market access, services and dispute settlement

### Other Meetings

- Jan. 11-12 First Sustainable Infrastructure Financing Summit  
Basel [www.globalenergybasel.com](http://www.globalenergybasel.com)
- Jan. 17-19 Global Poverty Summit  
Johannesburg [www.worldpovertyportal.org](http://www.worldpovertyportal.org)

### New Publications from ICTSD

- De Beer, Jeremy and Oguamanam, Chidi. November 2010. [Intellectual Property Training and Education: A Development Perspective](#). Issue Paper No.31 in the Intellectual Property and Sustainable Development Series
- Díaz-Bonilla, Eugenio and Ron, Juan. November 2010. [Food Security, Price Volatility and Trade: Some Reflections for Developing Countries](#). Issue Paper No. 28. ICTSD Project on Farmers' Livelihoods and Food Security
- Janssen, Rod. September 2010. [Harmonising Energy Efficiency Requirements: Building Foundations for Co-operative Action](#). Issue Paper No. 14 in the Environmental Goods and Services Series
- Matthews, Alan. December 2010. [How Might the EU's Common Agricultural Policy Affect Trade and Development After 2013?](#) Issue Paper No. 29. ICTSD Programme on Agricultural Trade and Sustainable Development
- Persson, Sofia. November 2010. [Practical Aspects of Border Carbon Adjustment Measures](#). Issue Paper No.13 in the Trade-Supported Strategies for Sustainable Development Series
- Vossenaar, René. September 2010. [Climate-related Single-use Environmental Goods](#). Issue Paper No. 13 in the Environmental Goods and Services Series
- ICTSD. November 2010. [Cotton: What Would a Doha Deal Mean for Trade?](#) Issue Paper No. 11. ICTSD Programme on Agricultural Trade and Sustainable Development
- ICTSD, the European Patent Office and UNEP. September 2010. [Patents and Clean Energy: Bridging the Gap between Evidence and Policy](#).

### Selected Documents Circulated at the WTO

- Council for Trade in Goods. 19 November 2010. [Request for a WTO Waiver – Additional Autonomous Trade Preferences Granted by the European Union to Pakistan](#). Request by the EU. (G/C/W/640)
- Dispute Settlement. 29 November 2010. [Australia – Measures Affecting the Importation of Apples from New Zealand](#). Report of the Appellate Body. (WT/DS367/AB/R)
- Trade Policy Review Body. 24 November 2010. [Overview of Developments in the International Trading Environment](#). Annual Report by the Director-General. (WT/TPR/OV/13)

### Other Selected Resources

- African Union, United Nations and OECD. October 2010. [Economic Diversification in Africa: A Review of Selected Countries](#). AU/UN/OECD. New York
- Cotula, Lorenzo and Leonard, Rebeca. November 2010. [Alternatives to Land Acquisitions: Agricultural Investment and Collaborative Business Models](#). International Institute for Environment and Development. London
- Foundation for International Environmental Law and Development. October 2010. [International Climate Change Litigation and the Negotiations Process](#). FIELD. London
- Khor, Martin. November 2010. [The Equitable Sharing of Atmospheric and Development Space: Some Critical Aspects](#). South Centre. Geneva
- Murphy, Sophia. September 2010. [Trade and Food Reserves: What Role Does the WTO Play?](#) Institute for Agriculture and Trade Policy. Minneapolis
- Sumaila, Rashid et al. September 2010. [A Bottom-up Re-estimation of Global Fisheries Subsidies](#). Published in a special issue of the *Journal of Bioethics*
- United Nations. November 2010. [Human Development Report 2010: The Real Wealth of Nations](#). UNDP. New York
- Vibe Christensen, Benedicte. November 2010. [China in Africa: A Macroeconomic Perspective](#). Center for Global Development. Washington
- Waning, Brenda; Diedrichsen, Ellen and Moon, Suerie. September 2010. [A Lifeline to Treatment: The Role of Indian Generic Manufacturers in Supplying Antiretroviral Medicines to Developing Countries](#). Published in the *Journal of the International AIDS Society* Volume 13.
- World Health Organisation. September 2010. [How to Conduct Patent Searches for Medicines: A Step-by-Step Guide](#). WHO. Geneva
- World Trade Organisation. 2010. [Governments, Non-state Actors and Trade Policy-making: Negotiating Preferentially or Multilaterally?](#) WTO. Geneva

