



# Bridges Weekly Trade News Digest

*Weekly trade news from a sustainable development perspective*

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## LEAD STORIES

### 2010 Shaping Up as a Bad Year for Doha Deal, Climate Talks

2010 was the year in which two long-running sets of global negotiations were supposed to finally end in agreement: the WTO's Doha Round of trade talks and multilateral negotiations to secure a deal to curb emissions of greenhouse gases. But fewer than 10 weeks into the year, officials involved in both sets of talks are issuing gloomy predictions for the odds of deals being struck during the remainder of 2010.

Crawford Falconer of New Zealand, the former chair of the agriculture negotiations at the WTO, spoke frankly last week about the prospects for securing a global deal to slash tariffs and subsidies before the end of the year. Ministers and heads of state have called repeatedly over the past 12 months for the talks to be brought to a close in 2010, but that deadline appears to be slipping fast.

"Let's not kid ourselves," Falconer told a conference in Canberra. "The reality is that the way we are going [at WTO headquarters] in Geneva right now, we won't make" the 2010 deadline.

"We have not, since the failed July 2008 ministerial, made any material progress in bridging the gaps," Falconer added, referring to the meeting of ministers in Geneva that collapsed after an epic nine days of negotiations. "In fact, in at least my own judgement, the gaps on the big issues have actually got wider than they were in 2008."

US Trade Representative Ron Kirk offered a similar assessment when asked by a reporter on Tuesday whether he thought the 2010 goal was doable. "Well, considering that we have tried and failed three successive years, if past is prologue I

don't know if I would put too much stock in it," Kirk said, according to a report from Reuters.

However, Kirk – whose country has taken much of the blame for the lack of progress in the negotiations – added that the talks should not be abandoned. "We think it's worth staying at the table. ... I don't believe we should give up. A lot of good work has been done," Kirk said.

With the Doha talks foundering, however, many governments are increasingly turning to bilateral and regional free trade deals to secure improved market access for their products. Some observers have fretted that a bevy of new deals at the sub-global level could further marginalise the struggling WTO talks.

### **Climate prospects also grim**

Meanwhile, the climate talks may also achieve little forward movement in the remainder of 2010, according to Connie Hedegaard, the former Danish minister who spearheaded the major climate conference held in Copenhagen in December. She now serves as European Commissioner for Climate Action, a post she assumed last month.

"To get every detail set in the next nine months looks very difficult," Hedegaard said in an interview with The Financial Times. "Europe would love that to happen, and I would love that to happen...but my feeling is that it is going to be very difficult to get a treaty."

Prospects are dimming for the finalisation of a climate deal at a major summit in Cancun, Mexico at the end of this year, she said, noting that an agreement was more likely at a follow-up meeting in South Africa in 2011.

A major deadline for the climate talks looms the following year, as the first phase of the Kyoto Protocol is set to expire at the end of 2012.

ICTSD reporting; "Deal in WTO Doha round doubtful in 2010—USTR Kirk," REUTERS, 9 March 2010; "No treaty this year, fears EU climate chief," THE FINANCIAL TIMES, 9 March 2010.

## **OTHER NEWS**

### **Brazil Releases List of US Goods for Retaliation in Cotton Dispute**

Brazil has announced that it will impose retaliatory tariffs worth US\$591 million on 102 US products. The move is part of Brazil's retaliation against Washington for failing to bring its cotton subsidies into compliance with WTO rules.

The list of US goods exports, which was made public and notified to the WTO on Monday, mainly comprises luxury goods such as tyres, automobiles, cosmetics, toiletries, and certain foods. Brasilia's levies also include 14 percent duties on pharmaceuticals and 100 percent duties on cotton-based products. The new tariffs are set to take effect 30 days after they were announced.

The retaliation begins another sparring phase in the eight-year dispute over Washington's subsidies on cotton. The WTO's Dispute Settlement Body ruled in 2005 that the US' direct subsidies and a loan guarantee programme violate the country's commitments at the WTO. In response to Washington's failure to comply with the ruling, the WTO later awarded Brazil the right to retaliate with trade sanctions.

### **Goods for now, but more to come**

The list notified to the WTO this week focuses exclusively on retaliation against US goods. However, the global trade body has also given Brazil permission to impose sanctions on US intellectual property, and Brasilia has indicated that it intends to make use of that opportunity.

The WTO Dispute Settlement Understanding states that if it is not 'practical' or 'effective' for a complainant country to retaliate in the same sector or same agreement in which a violation occurred, the country can seek to retaliate under another agreement – or 'cross-retaliate'.

In August, a WTO arbitration panel authorised Brazil to cross-retaliate by suspending US intellectual property rights under the WTO's Agreement on Trade-Related Aspects of

Intellectual Property Rights (TRIPS). The panel also gave Brazil permission to withhold services concessions under the General Agreement on Trade in Services (GATS).

After a public consultation process starting March 23, Brasilia plans to release a list of intellectual property sanctions, which could amount to an additional US\$238 million.

Brazil's strategy of delaying both the implementation of this tariff list and the suspension of IP rights will keep US firms on their toes and could compel lobbies outside the cotton sector to push for the US to bring its cotton subsidies into compliance with WTO rules.

But Brasilia could stand to lose in a trade spat with the Washington. Because of perceived threats to US economic security, the Office of the US Trade Representative could return Brazil's IP classification from 'watch list' to 'priority watch list', say some Brazilian officials who fear that such a move could greatly deter investors. Additionally, some have speculated that the US could suspend the more than US\$2.5 billion in trade privileges that it offers Brazil under its Generalized System of Preferences (GSP).

But some analysts predict that the US – which was recently surpassed by China as Brazil's biggest trading partner – will not take any drastic measures, as Washington is keen not to lose its economic influence in South America.

### **Negotiated solution still a possibility**

Although negotiations have thus far failed to resolve the long-running dispute, some observers say that the looming spectre of potentially damaging trade restrictions could spur renewed engagement on the diplomatic front.

"We hope we can resolve this matter because retaliation creates distortions and that doesn't benefit anyone," Foreign Ministry Chief of Economic Affairs Carlos Márcio Cozendey told Reuters. But Cozendey added that he understands that the legislative process moves slowly in the US. Indeed, the next farm bill – the massive legislative package that sets out the structure and funding levels of US agriculture subsidies and

other support programmes – is not due until 2012. "We know this depends on Congress and can take time," Márcio Cozendey said.

The Obama administration also says it wants a swift resolution.

"We will be presenting ideas because...the Brazilian action doesn't come into effect for 30 days. So there is time for us to try to resolve this in a peaceful and productive way without any further action," Secretary of State Hillary Clinton said on visit to Brazil. She announced that the US would submit an alternative proposal.

Another possible route out of the dispute could take the form of financial compensation from the US. Potential examples include a US-supported fund for Brazilian producers to invest in technology, and eliminating US import restrictions on Brazilian meat, orange juice, and ethanol.

ICTSD reporting; "Brazil Details US Cotton Retaliation," REUTERS March 8, 2010.

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## **G20 Countries Largely Resisting Protectionism: Report**

The world's biggest economies introduced fewer measures to restrict trade flows in late 2009 and early 2010 than in the preceding year, according to a new report on trade and investment protectionism from the WTO, the United Nations, and the Organization for Economic Cooperation and Development (OECD).

But despite the "relatively muted" trade and investment policy response to the global recession, the report warned that the threat of increased protectionism remained very real, due to record unemployment levels and the uncertain economic recovery. It noted that "prolonged periods of job losses and unemployment" have driven protectionist measures in the past.

Released to governments and the public on 8 March, the report by officials from the WTO, the OECD, and the UN Conference on Trade and Development monitored the trade and investment

policies of members of the Group of 20 leading industrialised and developing nations from September 2009 to mid-February 2010. The first such report, released last fall, examined policies in the year to September 2009.

At summits in Pittsburgh and London last year, G-20 leaders pledged to refrain from raising new barriers to investment or to trade in goods and services. The report shows that several G-20 countries did so anyway. The policies ranged from run-of-the-mill tariff increases in some cases to the launching of several anti-dumping investigations (although fewer in 2009 than in 2008). A few governments introduced more restrictive procurement practices, such as 'buy domestic' requirements, and non-tariff barriers (some of them rather exotic, such as an Indonesian rule stipulating that only Indonesian citizens based in the country have the right to import and sell alcoholic beverages there). Some 1,489 notifications of non-tariff barriers under the Agreement on Technical Barriers on Trade were notified to the WTO secretariat in 2009, compared to 1,272 in 2008.

However, the report took pains to underline the limited scope of the trade-restricting measures. The WTO secretariat estimates that the import restrictions introduced between September 2009 and mid-February 2010 cover 0.7 percent of total imports by G-20 countries (0.4 percent if fuel was removed from the calculation), compared to 1.3 percent in the year to October 2009. The report emphasised that the resulting reduction in trade was "considerably less," apart from the case of some prohibitive restrictions. And many of the restrictions focused on minerals, metals, and textile products, sectors that tended to be relatively protected to begin with. The report noted that several governments took steps to increase openness to trade and investment flows.

The report also found no "open discrimination against foreign investors," and "no major measure" to reduce access to G-20 markets in terms of services trade. However, it pointed to potential discriminatory effects arising from emergency government support to the financial and automobile sectors. "Emergency measures have politicised processes of firm exit and restructuring, and government holdings acquired

as part of the crisis response may jeopardise governments' impartiality in policy making and law enforcement," it warned.

The previous edition of the report had also concluded that governments had been successful at containing protectionist pressures, but warned that crisis-related measure risked artificially altering market competition and investment decisions, with the threat of "chronic trade distortions."

The new report outlined a sequence for governments to begin unwinding crisis-related measures, "when it is judged timely to do so." Protectionist border measures should go first, ideally with multilateral coordination, followed by behind-the-border policies that discriminate between domestic and foreign goods or firms. Then, sector-specific measures should be tackled, particularly those that support capital rather than labour. Specific consumption subsidies should be next, with generic consumption measures like temporary cuts to value-added tax (VAT) rates last to go.

#### **Data: trade recovering, but joblessness casts shadow**

In addition to lengthy annexes detailing trade and investment measures taken by each country, along with descriptions of financial sector bailouts and general stimulus measures, the 85-page report provides data on trade volumes, GDP growth, and unemployment for G-20 members.

World merchandise trade is recovering from a 12 percent drop in 2009 that returned trade volumes to levels last seen in 2006, it shows, attributing much of the improvement to China and other East Asian countries. In December, world merchandise trade rose by 4.8 percent over the preceding month.

In the last quarter of 2009, developing countries in Asia, including China, enjoyed fast export and import growth, of 10 percent and 9.1 percent, respectively. Industrialised countries saw imports rise by 3.9 percent, while exports rose by 4.1 percent. But their export performance was variable: US and Japanese exports increased by around 8 to 9 percent, while Europe's grew by

only 2 percent. Africa – which was hit especially hard in 2009 by the drop in prices of the commodities that make up the bulk of its exports – saw both imports and exports decline in the final quarter of the year.

While the report concluded that G-20 governments' attempts to catalyse more trade finance had met with considerable success, with the cost of trade finance in China, India, and Brazil almost half of what it was a year ago, credit remained hard to come by for small traders, particularly in Africa.

As for investment, foreign direct investment flows fell from US\$1.7 trillion in 2008 to US\$1 trillion in 2009, although there was a moderate pickup in the second and third quarters of the year.

Despite the positive developments, the WTO, the OECD, and UNCTAD stressed that there were clouds on the horizon. The economic recovery was fragile, and that large-scale unemployment could give rise to protectionist pressures. Some 27 million people around the world lost their jobs in 2009, taking the number of jobless to over 200 million and the global unemployment rate to its "highest level ever."

They urged G-20 governments to "remain vigilant in opposing protectionism," to devise exit strategies from crisis-related measures that had potential to distort trade, and to "work diligently and quickly" to conclude the long-struggling Doha Round trade talks. A Doha agreement, they suggested, would "strengthen the multilateral trading system and to improve multilateral market access."

### **Levels of concern vary**

Despite its warnings about the future, the WTO-OECD-UNCTAD report was fairly relaxed about the extent of protectionism that governments have introduced thus far. This view is shared by some analysts who believe that the current level of protectionism is modest, and that excessive warnings about it would weaken economists' credence in the event of a serious trade war.

Simon Evenett, the director of Global Trade Alert, a service that provides real-time monitoring of protectionist policies along with their likely

victims, is considerably less sanguine. He argues that the report's assessment did not adequately reflect a wide range of government measures, often falling outside the jurisdiction of WTO rules, that served to distort production and trade.

These include subsidies to manufacturing industry and government procurement. The most recent report by the Global Trade Alert, released last month, noted that since September 2009, several major trading nations had taken "taken far-reaching measures that discriminate against foreign commercial interests," often slipping unnoticed under the media radar screen. China, for example, had introduced a new accreditation procedure for firms wanting to bid for high-tech state contracts, and the US House of Representatives had approved further 'Buy America' provisions. Russia, a G-20 country that is not part of the WTO, has introduced a raft of tariff increases and industrial support measures.

According to the Global Trade Alert report, discriminatory measures against foreign commercial interests are above even generously defined historical trends (though below 1930s levels) in every major trading nation except Brazil and Canada.

Evenett, a professor of economics at the University of St. Gallen in Switzerland, told Bridges that while trade remedies such as anti-dumping duties lapse after a certain time period, procurement policies, subsidies, and other industrial policy measures tend not to – unless governments choose to unravel them.

Asked about the report's estimate that a mere 0.7 percent of G-20 imports stood to be affected by increased protection, he said "They've looked at a small number of measures and got a small number. No surprise."

ICTSD reporting.

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## **Doha Limbo Stymies Progress on Ag Market Access**

A crisis of political leadership has undermined any hopes of rapid progress in the WTO's Doha Round of trade talks, negotiators said - despite a raft of new submissions from developing countries on ways to safeguard their domestic producers from import surges and price drops.

Several Geneva-based delegates who spoke to Bridges this week acknowledged that little progress may be made in the negotiations over the course of this year (see related article, this issue). The pervasive sense of inertia has not helped countries to overcome polarised positions on the controversial 'special safeguard mechanism' – a tool that would allow developing countries to impose additional duties on goods to tackle surges in import volumes or price depressions.

Trade officials expressed little surprise that no progress was emerging from informal consultations being held this week by the chair of the agriculture talks, Ambassador David Walker (New Zealand). “Negotiations are stalled,” observed one delegate, who told Bridges that countries were simply repeating their established positions.

The informal talks come two weeks ahead of a “stock-taking exercise” in Geneva, which will involve senior officials and not ministers, as some had speculated. With the WTO keen to avoid another high-profile failure, a decision was taken to hold a low-key event, trade sources said.

Pascal Lamy, the WTO Director-General, has reportedly asked the chairs of key negotiating groups to prepare reports on progress ahead of the 'stock-taking', which will take place the week of 22 March. One delegate observed that these reports, as much as the chances of achieving progress, may be the real objective of the chair's recent informal meetings.

### **Special safeguard mechanism still deadlocked**

The G-33 developing country group that favours a strong special safeguard mechanism (SSM) has recently circulated five technical notes on the tool, along with a 'political' paper – although these, and related talks, have done little to break the deadlock on the issue, sources said.

On Monday, Walker hosted informal small-group discussions on whether safeguard duties should be made conditional on the co-existence of both a surge in import volumes and a price depression, following a G-33 paper on the issue. Further talks on Wednesday morning examined the group's new submission on the price-based safeguard – although these only accorded cursory attention to two more recent G-33 papers, on special flexibilities for small, vulnerable economies, and on the question of 'pro-rating' the calculation of average import volumes so as to discount months in which safeguards had been imposed.

The consultations follow discussion one month ago of a G-33 paper examining whether the safeguard should accommodate seasonal variations in trade.

Delegates from exporting countries nonetheless dismissed the G-33 submissions as being essentially “political” documents that offered “nothing new” to the discussion. They queried G-33 claims that developing countries would find it too difficult to monitor both price and volume data to verify the co-existence of import surges and price depressions, claiming that this would be necessary in any case if countries wished to use the two types of safeguard mechanisms. They also sought clarification on why the group considered that a volume surge could cause injury to domestic producers in the absence of a price depression.

While the G-33 had sought to relax conditions on using the safeguard for small, vulnerable economies (SVEs), exporting countries argued that this discussion should take place only after there was greater clarity on the flexibilities that would be provided to developing countries as a whole. The paper reiterates calls for SVEs to be allowed to impose safeguard duties when average import levels are lower than for other developing countries (10 percent above historical averages); to impose heavier duties (75 percentage points or 75 percent of the maximum permitted 'bound' ceiling, whichever is higher); and to apply safeguard duties that exceed bound rates on a larger share of a country's imports (on 30 percent of tariff lines). “Developing countries, and in particular those that are small and vulnerable, need a simple and effective SSM mechanism,” the G-33 paper argues.



Another new G-33 proposal on 'pro-rating' calculations of average import volumes by excluding months in which safeguard duties were applied seeks to address exporters' calls for the mechanism to protect 'normal trade', by underscoring the role of the rolling three-year average and the related but higher 'trigger' threshold that must be breached before additional duties can be imposed. These conditions, the group says, would themselves allow for trade to grow while providing a means to tackle sudden import surges or a drop in prices. The group also argues that the exporters' focus on a limited number of "hyper growth" products is misleading, claiming instead that "double or triple digit growth rate products are not the norm, but the exception."

### **Sensitive products: Japan, Canada, US anger developing countries**

In informal talks on Tuesday, Japan and Canada reiterated their request to be allowed to designate an additional two percent of tariff lines as 'sensitive' – a category of products that would be allowed to undertake a gentler tariff cut in exchange for expanded tariff quotas. In response, the US repeated its suggestion that, if this should be granted, all countries should be allowed to benefit from an additional 2 percent allocation. Developing countries such as China, India and Brazil opposed any such move, arguing that developed countries should not be allowed to take advantage of additional flexibility.

One observer speculated that the US suggestion could be a tactical move aimed at dissuading Canada from seeking extra sensitive product tariff lines. As trade between the two countries is significant, US exports could be significantly affected by their trading partner's sensitive product allocation. However, one source noted that the proposal sat uneasily with the US's continued insistence on expanding developing country market access.

Other import-sensitive countries such as Switzerland were reportedly happy with the existing draft text.

### **Cotton**

The chair was expected to hold informal consultations on cotton with key countries on Wednesday afternoon, although delegates expected little progress to be achieved. The talks will be held in the shadow of recently announced penalties that Brazil intends to impose on the US following a panel decision on the cotton dispute between the two countries (see related article, this issue).

### **Subsidies**

Aside from the negotiations, the regular committee on agriculture was also due to meet on Wednesday, with several countries submitting written questions in advance. Several countries had questions for the European Union, which recently submitted new data on subsidy spending to the WTO, with members such as Australia and Canada querying how spending related to the WTO's criteria for green box support – payments exempt from any cuts or an overall ceiling, on the basis that they cause not more than minimal trade distortion.

Australia also questioned a number of countries about the reasons for substantial delays in officially notifying their subsidy spending to the WTO. These included China, Egypt, India, Korea, Turkey and Venezuela. Backlogs amounted to eight years' delay or longer for many countries, Australia noted.

### **Looking for political leadership**

Several delegates commented on the need for ministerial engagement and clear signs of political will at a senior level if the talks are to emerge from the current stalemate. One source reported that the EU, India and Australia were contemplating holding a ministerial meeting at some point between the stock-taking exercise later this month and the G-20 meeting of finance ministers in June. However, many officials remain sceptical about the chances of achieving progress in the near future.

ICTSD reporting.

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## TRIPS Council Debates Access to Medicines, Biodiversity

Delegates discussed long-standing concerns about public health and biodiversity at a 2 March meeting of the Council of the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). At the close of the one-day session, they expressed support for continued review of a six-year-old initiative intended to help poor countries access affordable medicines.

### TRIPS and public health

The Council's public health discussions centred on the '30 August decision', a 2003 deal among WTO members that allows developing countries that lack the capacity to manufacture drugs themselves to acquire lower-cost imports of essential medicines from rich countries. Specifically, the decision – which is also known as the 'Paragraph 6' agreement, referring to that section of the 2001 WTO Doha Declaration on TRIPS and Public Health – established terms for waiving the requirement that generic drugs that are produced without patent-holders' consent must be 'predominantly' for the producing country's domestic market.

The decision was seen as a major breakthrough when it was announced in 2003, even as some public health advocates warned that its technical requirements would render it too burdensome to be effective. Such criticisms are still on target, some say. Six and a half years after the decision was finalised, the provision has only been used once, when Canadian drug maker Apotex shipped two loads of compulsory-licensed HIV/AIDS drugs to Rwanda in 2008 and 2009.

Delegates attending Tuesday's TRIPS Council meeting continued the debate over the August 2003 decision. Discussions on this followed up on an informal consultation led by Singaporean Ambassador Karen Tan, the outgoing chair of the TRIPS Council, on 12 February.

During that meeting, Tan reported to the Council on Tuesday, several developing countries expressed their fears that the system might not be up to the task of helping them get access to the

medicines they need, given that it has only been used once. But several developed countries argued that how many times the system has been used is not a good indicator of the usefulness of the system. Such countries also pointed out, Tan reported, that there are other ways that poor nations can gain affordable access to patented drugs.

Representatives from Canada who attended Tan's informal consultation shared their experiences with the group, providing a detailed timeline of the various events that took place between the finalisation of the 30 August decision and the delivery of the first batch of drugs just over five years later. Most of that time was taken up with bureaucratic hang-ups, the Canadians explained, including identifying a country to receive the drugs and complying with Rwanda's procurement regulations, which require a competitive tendering process. But such steps are not written into the system outlined in the decision, the Canadian delegation said, and could be avoided in future initiatives.

Looking ahead, Tan continued, delegations at the 12 February meeting expressed support for the idea of annual reviews of the system's functioning. They also said they would like to continue consultations with the incoming chair of the TRIPS Council, Martin Glass of Hong Kong, to consider how their various concerns might best be addressed.

Also on the public health front, India and Brazil repeated their calls at Tuesday's meeting for the EU to reform its customs procedures so as to ensure that legitimate generic medicines in transit to the developing world are not unrightfully detained or confiscated at the European border (for background, see [here](#)). The two countries have raised this accusation several times in the TRIPS Council, although they have never gone so far as to publicly threaten to bring a WTO suit against the EU. This meeting was no exception.

A representative from the EU noted that the bloc has responded to the countries' concerns in bilateral meetings, adding that it is imperative that customs officials be able to inspect shipments that enter European harbours.



## Bolivia proposal on TRIPS and biodiversity

Turning to questions of biodiversity protection, Bolivia introduced a document (IP/C/W/545) that urges WTO members to amend the TRIPS Agreement so as to ban the patenting of all life forms. More broadly, the Bolivian submission calls for a review of TRIPS' Article 27.3(b), the section that covers the patenting of plant and animal inventions and the protection of plant varieties. The article – which broadly outlines the inventions that governments can exclude from patenting, as well as the inventions for which they are required to make patenting an obligation – was slated for review more than ten years ago, but the review has been repeatedly pushed back.

In its submission, Bolivia described several IP-related reforms that it implemented under its new constitution, which took effect in January 2009. The changes included a new requirement that the “negotiation, signature and ratification of treaties” will be governed by principles that include a “respect for the rights of indigenous peoples and peasants,” as well as a “harmony with nature, protection of biodiversity and prohibition of private appropriation of plants, animals, micro-organisms and any living matter for exclusive use and exploitation.”

The Bolivian submission also cites the United Nations Declaration on the Rights of Indigenous Peoples, which, among other things, stipulates that the traditional knowledge of such communities should not be taken “without their free, prior and informed consent or in violation of their laws, traditions and customs.”

By adopting a ban on the patenting of all life forms, the Bolivian delegation explained, the WTO could further the rights of indigenous communities and ensure that their ‘traditional knowledge’ is not pirated by corporations from the developed world.

Currently, patent ownership is concentrated “in a few entities (largely based in developed countries),” Bolivia said in its submission, adding that this situation has “detrimental effects on competition and on social and economic situation (including food sovereignty and livelihood of farmers) that most affects the vulnerable and

poor, including indigenous peoples in developing countries.”

Representatives from Cuba, Ecuador, Guatemala and Nicaragua reportedly voiced their support for Bolivia's submission.

In other business, delegates discussed the ‘priority needs’ of Least Developed Countries, or LDCs, with regards to technical and financial cooperation on intellectual property. A TRIPS Council decision in 2005 asked the WTO's poorest members to outline the specific types of support that they would need in order to be adequately prepared to implement a future TRIPS Agreement. Bangladesh announced at Tuesday's meeting that it has submitted its needs assessment to the WTO. So far Uganda and Sierra Leone are the only other LDCs to have made similar submissions.

ICTSD reporting.

## IN BRIEF

### US Senator's Remarks Cast Doubt on Cap-and-Trade

The shape of potential US climate and energy legislation remains uncertain, as remarks by influential lawmakers have called into question whether a future Senate bill will include a cap-and-trade system for curbing greenhouse gas emissions.

“Cap-and-trade is dead,” Senator Lindsey Graham told a group of environmental leaders in a private -meeting last week, the Washington Post reported Saturday.

Coming as it did from Graham, the South Carolina Republican who has been working across party lines with two colleagues to put together a Senate climate bill, the comment prompted speculation that Congress would abandon requirements for major emitters to buy and sell emissions allowances.

While analysts parse the senator's words - some suggest that he is in fact not opposed to placing a price on carbon - it is clear that the agonies over cap-and-trade are occurring against the backdrop of declining support among US voters for taking strong action against climate change.

Researchers at Yale and George Mason universities reported in January that only 50 percent of Americans now say they are "somewhat" or "very worried" about global warming, a 13-point decrease since fall 2008. Doubts about the scientific basis of climate change have also deepened: the percentages who think that global warming is mostly attributable to human activities, or even happening at all, have dropped by more than 10 percent over the same period. Surveys by the Pew Research Center have consistently placed climate change at the bottom of a list of Americans' 20 top priorities for their government, although energy policy ranked significantly higher.

A cap-and-trade approach to curbing the emissions responsible for climate change was at the centre of an energy bill narrowly passed by the House of Representatives in June 2009. The legislation that Graham has been working on with Senators John Kerry, a Democrat from Massachusetts, and Joe Lieberman, an Independent from Connecticut, aims to win the support that a previous Senate bill failed to garner last fall. The provisions of that earlier Senate bill were broadly similar to the House-passed 'Waxman-Markey' legislation.

Critics of a cap-and-trade system have dubbed it 'cap-and-tax', making its supporters in Congress wary of putting it to recession-weary, tax-averse US voters ahead of Congressional elections in November.

More details about the Graham-Kerry-Lieberman bill are expected to be released in the coming weeks. News reports suggest that the bill may include a more limited cap-and-trade system, one that applies to electricity utilities, and possibly to manufacturers in the future.

A report on The New York Times website suggests that oil refiners might face a 'carbon fee'

instead of being folded into a broader cap-and-trade system.

An alternative approach, called 'cap and dividend', would place a cap on emissions, and return revenues to consumers in the form of cheques that they could put towards higher energy costs.

Public scepticism about the science underlying climate change has increased in recent months, following the high-profile leaks of emails among climate scientists at the University of East Anglia in the UK, and the acknowledgement by the UN Intergovernmental Panel on Climate Change (IPCC) that a handful of findings in its voluminous reports were inaccurate.

ICTSD Reporting; "Senators to propose abandoning cap-and-trade," THE WASHINGTON POST, 27 February 2010; "Public's Priorities for 2010: Economy, Jobs, Terrorism: Energy Concerns Fall, Deficit Concerns Rise," PEW RESEARCH CENTER, 25 January 2010; "US climate change bill options for senators," REUTERS, 1 March 2010; "Senate Trio Hopes to Hit Pay Dirt With Carbon 'Fee' on Fuels," THE NEW YORK TIMES, 3 March 2010.

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### **Tobacco Company Files Claim against Uruguay over Labelling Laws**

Measures taken by Uruguay to deter smokers have drawn a legal challenge by one of the world's largest tobacco companies under a treaty designed to protect foreign investors.

Philip Morris, the maker of Marlboro cigarettes, objects to three recent regulations enacted by Uruguay that restrict the branding that can be featured on cigarette packages. Under Uruguayan law, health warnings must cover 80 percent of each cigarette package. The company argues that this restriction prevents it from effectively displaying its trademarks.

Tobacco companies have complained in the past that cigarette-labelling measures violate international law. In 2001, for instance, Philip

Morris argued that Canada's proposal to prohibit the descriptors 'light' and 'mild' were in breach of certain investment provisions in the North American Free Trade Agreement.

While health warnings on cigarette packages are commonplace today, Philip Morris charges that Uruguay's measures are 'extreme' and 'unprecedented', going beyond what is necessary to reduce the harm caused by smoking. The rules have required it to withdraw several brands of its Marlboro cigarettes, leading to a "very substantial loss of market share," a spokesperson for the company told Bridges.

The rules "won't stop people from smoking; it just makes people switch brands," said the Philip Morris spokesperson.

In response, three subsidiaries of the Swiss-headquartered company filed for arbitration on 19 February with the World Bank's International Centre for the Settlement of Investment Disputes, claiming violations of the Switzerland-Uruguay bilateral investment treaty.

Bilateral investment treaties provide a range of guarantees to foreign investors, typically including protection against expropriation and guarantees that investors will be treated fairly and not discriminated against vis-à-vis domestic investors. The definition given to 'investment' also tends to be broad, encompassing intangible rights like trademarks.

In this case, Philip Morris argues that Uruguay has expropriated its intellectual property without compensation; has failed to treat its investment fairly and equitably; and has unreasonably impaired the use of its investment.

Philip Morris declined to estimate the damages it seeks in its claim, remarking only that they are 'substantial'.

### **A TRIP to the WTO?**

Philip Morris has long contested that so-called 'plain-packaging legislation' – regulations that prohibit branding on cigarette packages – run afoul of international trade and investment rules.

Last year Philip Morris commissioned an opinion from the law firm Lalive, which concluded that requiring cigarettes to be sold in generic packages would breach several obligations under the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

The law firm points out that TRIPS prevents governments from discriminating against trademarks based on the nature of a particular good or service.

"A plain packaging measure would ... create a two-tier system: one which severely restricts the use of trademarks and is only applicable to tobacco companies, and another which affords the minimum standards of protection to all other products," argues the firm.

While TRIPS allows measures to protect public health, Lalive argues that plain packaging "goes overboard." It is "clearly not the least restrictive measure available to protect public health."

### **Why investment arbitration?**

Philip Morris's decision to challenge Uruguay under an international investment agreement highlights the different methods for settling investment and trade disputes. A WTO dispute would need to be taken up by a member government, while the Switzerland-Uruguay bilateral investment treaty, like many international investment agreements, permits the foreign investor to arbitrate directly with the host government.

In effect, the investor-to-state dispute mechanism extinguishes the political considerations inherent in the WTO's government-to-government procedure.

Indeed, a WTO challenge by Switzerland, home of Philip Morris International, seems highly unlikely given that the Swiss also introduced health warnings on cigarette packages in 2010. In Switzerland, 56 percent of the package must be covered by health warnings, and labels such as 'light' and 'mild' are prohibited.

ICTSD reporting.

## EVENTS & RESOURCES

### Events

#### Coming up this week

15-17 March, Amsterdam, Netherlands. **WORLD BIOFUELS MARKETS**. Over 230 leaders of the biofuels industry will share their expertise on all aspects of the biofuels value chain during three days of interactive conference sessions. In addition, time will be provided for networking. Sessions will be held on: Biofuels and Developing Countries; Biofuels Standards; Biofuels, Downstream and Trading; and Biofuels Adoption, among other topics. Keynote speakers will include Gro Harlem Brundtland, former Prime Minister of Norway and UN Special Envoy for Climate Change; Philip New, CEO of BP Biofuels; and Nobua Tanuko, Executive Director of the International Energy Agency. For more information, please see <http://www.worldbiofuelsmarkets.com/index.html>.

#### WTO Events

An updated list of forthcoming WTO meetings is posted at [http://www.wto.org/meets\\_public/meets\\_e.pdf](http://www.wto.org/meets_public/meets_e.pdf). Please bear in mind that dates and times of WTO meetings are often changed, and that the WTO does not always announce the important informal meetings of the different bodies. Unless otherwise indicated, all WTO meetings are held at the WTO, Centre William Rappard, rue de Lausanne 154, 1211 Geneva, Switzerland, and are open to WTO Members and accredited observers only.

12 March: Sub-Committee on Least Developed Countries

15-16 March: Committee on Regional Trade Agreements

17-18 March: Committee on Sanitary and Phytosanitary Measures

17 March: Workshop on Aid for Trade and Agriculture

17 March: Committee on Trade and Development – Session on Aid for Trade

#### Other upcoming events

18 March, London, UK. **GLOBAL FINANCIAL SERVICES: THE IMPACT OF REGULATION ON COMPETITIVENESS**. As the global financial crisis shows early signs of receding, this is a key moment to ask what will be the likely future shape and structure of financial services firms. If moves to regulate the industry more tightly are successful, what impact will this have on financial firms' ability to do business? At this event sponsored by Chatham House, policymakers and financial services industry leaders from the major economies will discuss the role, structure and regulation of the financial services industry, and which forums, mechanisms and institutions will be effective in restoring confidence in its activities. For more information, please see <http://www.chathamhouse.org.uk/gfs/>.

23 March, Geneva, Switzerland. **UNECE/FAO WORKSHOP ON EMERGING TRADE MEASURES IN TIMBER MARKETS**. Workshop participants will discuss the economic impacts of trade and trade-related measures on timber markets, taking into account the role of trade in timber markets and the link between trade liberalisation and key challenges facing the forest-based sector. The programme will allow ample time for discussion and frank exchanges of views, aiming at a broader appreciation of the situation. For more information, please see <http://timber.unece.org/index.php?id=270>

23-24 March, New York City, US. **HIGH-LEVEL DIALOGUE ON FINANCING FOR DEVELOPMENT**. This year's dialogue, which will be held at UN headquarters, will focus on the theme "The Monterrey Consensus and Doha Declaration on Financing for Development: status of implementation and tasks ahead." The first day of the Dialogue will consist of plenary meetings chaired by the President of the General Assembly, and the second day will be devoted to three interactive multi-stakeholder round tables followed by an informal interactive dialogue with the participation of all relevant stakeholders. The

dialogue will result in a summary by the President of the General Assembly. For more information please see <http://www.un.org/esa/ffd/hld/HLD2010/index.htm>

26-28 March, Brussels, Belgium. BRUSSELS FORUM 2010. Brussels Forum is an annual high-level meeting of the most influential North American and European political, corporate, and intellectual leaders to address pressing challenges currently facing both sides of the Atlantic. The Brussels Forum agenda reflects the growing diversity of issues at the core of the transatlantic relationship, as well as the increasing geographic reach of transatlantic cooperation. It includes discussion sessions on broad themes, such as the global financial crisis, Russia, Afghanistan, and NATO at 60. Breakout sessions held under the Chatham House Rule explore challenges like Asia, the Middle East, and climate change. Keynote addresses by senior officials punctuate a gathering heavily tilted toward intimate exchange of dialogue among panellists and participants. For more information, please see <http://www.gmfus.org/brusselsforum/2009/agenda2010.html>

30-31 March, New Delhi, India. TRADE AND CLIMATE CHANGE IN EMERGING ECONOMIES: THE COMPETITIVENESS, TECHNOLOGY, AND INTELLECTUAL PROPERTY RIGHTS DIMENSIONS. The objectives of the dialogue, which is hosted by ICTSD and the Research and Information System for Developing Countries (RIS), are to explore issues at the interface of trade and climate change that are of concern and interest to the emerging economies; to identify a positive agenda to help developing countries engage in the climate change negotiations in light of developments at Copenhagen; and to provide a platform for interaction among key players in a non-negotiating setting. Thematic subjects for the day will be competitiveness and border measures, technology transfer and intellectual property rights issues and the diffusion of environmental goods and services. Presentations on these subjects will be followed by open discussions. For more information, please email Mahesh Sugathan at [smahesh@ictsd.ch](mailto:smahesh@ictsd.ch).

13 April, Washington DC, US. THE 2010 CONGRESSIONAL TRADE AGENDA. At this annual event hosted by the Washington International Trade Association, prominent US Congressional trade leaders will share their views on trade issues. This is an off-the-record discussion of the trade issues which Congress may address in the upcoming year. Speakers will include Viji Rangaswami, Staff Director, Trade Subcommittee (Majority), House Ways and Means Committee; Angela Ellard, Chief Trade Counsel (Republican), House Ways and Means Committee; Amber Cottle, International Trade Counsel (Majority), Senate Finance Committee; and Stephen Schaefer, Chief International Trade Counsel (Republican), Senate Finance Committee. For further information, please visit <http://www.wita.org/ht/display/EventDetails/i/41264/pid/317> or contact: tel.: +1 202 312 1600 or email: [events@wita.org](mailto:events@wita.org).

26 April, New York City, US. GLOBAL FINANCIAL FORUM: BUILDING A NEW FINANCIAL ORDER. Hosted by Chatham House, BritishAmerican Business and the Foreign Policy Association, this forum examines what is necessary to create a new, more stable global financial order. This conference will examine the impact of the proposed regulatory measures on the financial markets, consider the outlook for the global economy, discuss if new financial regulatory rules will contain excessive risk-taking, and debate the extent to which it is possible to prevent future financial crises. The conference will take place in three sessions: Rebalancing the Global Economy, Restructuring the Financial Sector, and Restoring Financial Stability. For more information, please see <http://www.chathamhouse.org.uk/NY2010/> or contact Chatham House at: email [conferences@chathamhouse.org.uk](mailto:conferences@chathamhouse.org.uk); tel. +44 (0)20 7957 5753; or fax +44 (0)20 7321 2045.

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## Resources

BEYOND BARRIERS: THE GENDER IMPLICATIONS OF TRADE LIBERALIZATION. Trade Knowledge Network, 2010. Although trade can be a catalyst for greater gender equality, the effects of trade liberalisation and economic globalisation on women have been

mixed. While trade has provided new livelihoods and empowered women, the benefits that women have gained from trade liberalisation have often been marginal, relatively lower than those accruing to men. In some cases, trade liberalisation may have exacerbated gender inequalities and worsened women's economic and social status. The Trade Knowledge Network has completed a multi-regional research project that attempts to provide better understanding on the trade-gender nexus in our three focus regions: Latin America, Southeast Asia and Southern Africa. To download the reports, please see <http://www.tradeknowledgenetwork.net/>.

The report is available at <http://www.mdgasiapacific.org/regional-report-2009-10/>.

SCENAR 2020-II – UPDATE OF SCENARIO STUDY ON AGRICULTURE AND THE RURAL WORLD. European Commission for Agriculture and Rural Development, December 2009. The objective of this study is to refine and improve the identification of major future trends and driving factors for the future of European agriculture and the rural world. The study, which builds on a similar report produced in 2006, does not aim to evaluate the impact of potential policy changes but to compare how the agricultural sector might evolve under different, and somewhat extreme, pathways. The Scenar 2020-II study was carried out by ECNC-European Centre for Nature Conservation, Landbouw-Economisch Instituut (LEI) and Leibniz-Zentrum für Agrarlandschaftsforschung e.V. (ZALF). The report is available at [http://ec.europa.eu/agriculture/analysis/external/scenar2020ii/index\\_en.htm](http://ec.europa.eu/agriculture/analysis/external/scenar2020ii/index_en.htm)

ACHIEVING THE MILLENNIUM DEVELOPMENT GOALS IN AN ERA OF GLOBAL UNCERTAINTY: ASIA-PACIFIC REGIONAL REPORT 2009/10. UN Economic and Social Commission for Asia and the Pacific, the Asian Development Bank, and the UN Development Programme, February 2010. This report takes stock of the status of achievement of the Millennium Development Goals in the Asia-Pacific region. It then goes on to discuss the possible policy responses that may guide the region in its efforts to meet the challenges. In particular, it emphasises the role of social protection as well as regional and South-South cooperation for addressing some of the key challenges while strengthening global partnership.