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WORLD TRADE ORGANIZATION

New Farm Trade Proposals Reveal WTO Divide over Nairobi Ministerial

A slate of new agriculture proposals has revealed that WTO members have significantly different priorities for the organisation's ministerial conference in Nairobi, Kenya, which is scheduled to begin in just under three weeks.

The G-33 group of developing countries, including Indonesia, China, and India, have submitted draft decisions on a new agricultural [safeguard](#) and on public food [stockholding](#) in developing countries.

However, a number of other WTO members have focused their efforts on negotiating an outcome on agricultural export subsidies and similar measures, as part of a push to conclude an agreement on export competition in the Kenyan capital city.

The US has submitted new proposals on agricultural exporting state trading enterprises and on food aid, in the wake of a submission ten days ago by the EU, Brazil, and five other countries. (See Bridges Weekly, [19 November 2015](#))

Special safeguard mechanism

The chair of the agriculture negotiations, New Zealand Ambassador Vangelis Vitalis, convened small group discussions on Tuesday and Wednesday this week to discuss the new submissions from the G-33.

However, at the Tuesday discussion on the special safeguard mechanism, the US was reportedly among those members that rejected the issue for the Nairobi conference, along with Australia, the EU, and Brazil.

"Exporting countries keep trying to kill it in small-group meetings, but it's clear it's not going to go away," one developed country negotiator told Bridges.

However, one African trade official said he felt it was unlikely that the safeguard proposal would be adopted at the ministerial.

"That one will be very, very impossible," the source told Bridges.

"In its current form it's just too unacceptable to a lot of members," another official said.

The G-33 proposal sets out the conditions under which developing countries would be able to respond to a sudden surge in the volume of imports or price depression by raising tariffs on farm goods temporarily.

According to the proposal, some developing countries would be able to introduce safeguards when smaller import surges or price depressions occur and would also be able to increase duties more than their counterparts.

Least developed countries (LDCs) would be granted the most flexibility. Small, vulnerable economies which account for a minimal share of world trade would be accorded slightly less flexibility than the LDCs. Finally, if developing countries had already agreed to establish an average ceiling on their tariffs at the WTO of less than forty percent, they would be granted slightly less flexibility than the small economies.

Trade sources familiar with the proposal told Bridges that China and many other countries that have joined the WTO in recent years had agreed to a low ceiling on their tariffs as part of their accession negotiations.

Other developing countries with tariffs above forty percent, such as India, the Philippines or South Korea, would have slightly less flexibility than the groups described above.

The proposal includes a new clause that would also grant more flexible treatment to the ten countries that are most vulnerable to climate change, as determined in the United Nations.

Breaching WTO ceilings

Sources told Bridges that the proposal would allow countries to raise tariffs from their current applied rates, even if this would mean breaching the "bound" tariff or ceiling agreed at the WTO. However, another clause in the proposed decision would also set limits on their ability to exceed these current tariff bindings.

The proposal anticipates that WTO members will negotiate the extent to which different categories of countries would be allowed to exceed these existing ceilings.

One trade source told Bridges that the proposal may need further fine-tuning and that a revised version could be issued in the next few days.

However, agricultural exporting countries remained adamant that the issue would not be on the table for Nairobi.

"I think we're at the stage where drafting quirks don't really matter," one negotiator said.

Public stockholding

The G-33 yesterday also tabled a draft decision on public stockholding for food security purposes, which would allow developing countries to exclude food purchases at government-set prices from their calculation of trade-distorting farm subsidies at the WTO.

In the run-up to the Bali ministerial conference in 2013, India spearheaded a G-33 push to provide greater flexibility for developing countries to be able to procure food at minimum prices as part of these schemes – leading eventually to a temporary deal that would allow developing countries to do so without being challenged under WTO rules. (See Bridges Daily Update, [7 December 2013](#))

Subsequently, the G-33 sought an agreement for this "peace clause" to apply indefinitely while members negotiated a permanent solution to the issues that had been raised in the talks. At that time, members agreed to have such a permanent solution ready for end-December 2015. (See Bridges Weekly, [27 November 2014](#))

Many farm exporting countries remain wary of removing limits on the ability of developing countries to procure food at minimum prices, fearing that this could open the door for some of the larger developing economies to intervene in markets in ways that create significant trade distortions.

US proposals on food aid...

The US has tabled a new proposal on food aid which would remove the distinction in previous negotiating texts between emergency and non-emergency situations, as well as a general prohibition on the "monetisation" of food aid - in other words, the sale of aid as part of fundraising activities.

Previous WTO talks in this area have sought to maintain a "safe box" for food aid in humanitarian emergencies, while introducing new disciplines that would ensure that government provision of aid in non-emergency situations does not harm local producers or distort markets.

Selling in-kind food in aid-recipient countries to raise funds has long been criticised as one type of intervention that can harm local farmers and traders – as well as being a relatively inefficient way of delivering aid.

The US proposal, a copy of which has been seen by Bridges, includes "best endeavour" language that would be less legally constraining than text tabled ten days previously by the Brazil and the EU, and which was co-sponsored by Argentina, New Zealand, Paraguay, Peru, and Uruguay. (See Bridges Weekly, [19 November 2015](#))

"We are of the view that there shouldn't [be a] percentage of monetisation both inside or outside safe-box", one African delegate told Bridges.

Gawain Kripke, Oxfam America's Director for Policy and Research, told Bridges that although Washington had undertaken some reforms in its food aid provision, "the core programme is still effectively unreformed."

"It's the monetisation in particular that needs disciplining," Kripke added.

... and on exporting state trading enterprises

In contrast, the US proposal on agricultural exports of state trading enterprises would establish firm commitments that WTO members would need to respect.

"No Member shall create or maintain a state trading enterprise having export monopoly powers with respect to one or more agricultural products after [20XX]," the proposal states.

Negotiators would need to agree on the year for doing so – as well as a separate deadline for developing countries.

A special exemption would cover products representing less than 0.25 percent of total world trade, under certain conditions.

Another new proposal from Chile also focuses on state trading enterprises, which trade sources told Bridges relates to concerns over Zespri, a New Zealand state-owned company that exports kiwi fruit.

Chile's submission states that the government is "strongly concerned" about the possibility of including a footnote with the exemption for products representing less than 0.25 percent of total world trade, which was included in both the new US proposal and the Brazil-EU proposal tabled ten days ago.

The US proposal also anticipates that least developed countries would be allowed to use export monopoly powers "with respect to one or more agricultural products," again under certain conditions.

Another negotiator expressed concern that there was still no clarity on what the US could accept on export credits – which several countries have said they think should be a key issue at the ministerial.

Other WTO members, such as the EU, are keen to see that different types of measures with similar effects to export subsidies are disciplined in parallel with moves to eliminate export subsidies.

"Everything is up for grabs"

Negotiators told Bridges that the talks were still very much in flux.

"Everything is up for grabs," one source told Bridges, who added that in his view the SSM proposal was about "creating the space for the G-33 and its allies to manoeuvre".

Developing countries have expressed concern that the US and other developed countries have said they would not join a consensus on a Nairobi declaration that reaffirms the Doha declaration or subsequent ministerial communiques that mention the ongoing Doha Round of talks.

However, trade sources said that Washington has indicated it would be willing to identify issues on which it would support future work – including agriculture, special and differential treatment, and "less than full reciprocity" for developing countries.

Other sources were more downbeat about the prospects for progress in the talks.

"It strikes me that people are hardening their positions instead of softening them," one official said.

"Real negotiations have not yet begun," said another.

ICTSD reporting.

CLIMATE CHANGE

OECD Members Reach Deal to Limit Coal Technology Export Finance

Several of the world's richest economies clinched a deal last week to restrict government support for technology exports for coal-fired power plants during a meeting of the Organisation for Economic Co-operation and Development (OECD) that concluded on 17 November in Paris, France. The new rules should help curb official export credits for least efficient coal-fired power plants – a first for international arrangements in this area.

According to a senior OECD official, historically countries have not sought to restrict the types of technologies or sectors to which [export credits](#) can be provided, focusing instead on providing a level playing field and setting common terms and conditions for these in order to limit potential trade distortions.

The deal concludes two years of behind-the-scenes negotiations by participants of the "Arrangement on Export Credits," an informal body under the umbrella of the broader 34-member OECD. Participants to the arrangement – representing the majority of OECD export credit providers – include the US, Canada, Japan, New Zealand, Norway, Switzerland, South Korea, Australia, and the 28-member states of the EU as one.

Various EU nations, the US, and several multilateral development banks have already taken measures to limit financing of inefficient coal-fired power plants. However, the OECD decision is significant as it solidifies the participation of countries such as Japan and Korea that continue to provide significant export financing to coal technologies, including to some energy-hungry developing regions.

This signals to some observers an acceptance among the world's wealthiest countries that financing inefficient, high-emission coal plants stands in stark contrast with international efforts to combat climate change, with nearly 200 governments looking to seal a new climate pact at UN talks due to be held in Paris, France, next month.

"The agreement represents a first important step towards aligning export credit policies with climate change objectives to achieve lower emissions," said Pekka Karkovirta, chairman of the participants to the arrangement, upon the OECD's announcement.

Export credit agencies in OECD countries provided US\$34 billion to finance coal projects between 2007 and 2014, according to a [report](#) spearheaded by the World Wildlife Fund for Nature (WWF), which also claimed that none of this was directed at low income countries where energy access needs are acute.

Efficiency focus

National export credit agencies typically help lower the risk for investors of making deals abroad, specifically by providing guarantees, government-backed loans, and insurance coverage under certain conditions.

The newly agreed OECD rules restrict participating countries' export credit agencies from supporting the construction of certain coal plants based on criteria related to plant size, technology type and corresponding level of efficiency, and level of development of the project host country.

"The agreement negotiated at the OECD encourages both exporters and buyers of coal-fired power plants to move away from low efficiency towards high efficiency technologies," reads a [statement](#) released by the OECD at the conclusion of the meet.

The agreement removes support for large, less technologically efficient "super" and "sub-critical" coal-fired power plants, which have greater than 500-megawatt (MW) capacity.

The decision does, however, support the use of export credits for smaller, "sub-critical" plants of less than 300 MW in poorer developing countries, and the construction of medium coal plants of 300-500 MW in countries where ten percent or more of the population lacks access to electricity. The most-efficient "ultra-supercritical" coal-fired power plants will still be eligible for export credit backing.

These exemption provisions were reportedly included to appease concerns voiced by South Korea and Australia. Nevertheless, the policy would still eliminate public financing for 85 percent of currently proposed coal plant projects, according to a senior official involved in the talks.

The rules are scheduled to go into effect from 1 January 2017 and are up for a mandatory review in 2019; however, they may be strengthened sooner based on the release of new climate science and policy development in both importing and exporting countries.

The agreement must still pass through the EU's internal decision-making process before being treated as final by participants to the OECD Arrangement on Export Credits.

Japan, US compromise

According to media reports, an unexpected agreement between the US and Japan in late October helped make a compromise on these OECD rules feasible.

Japan had previously resisted any measure to limit the export of coal technologies, given concerns over competition with China. However, the tide turned in late September when China and the US reinforced their bilateral efforts to combat climate change and announced several new initiatives, including a call for Beijing to reconsider the financing of high emissions projects. (See Bridges Weekly, [1 October 2015](#))

"China will strengthen green and low-carbon policies and regulations with a view to strictly controlling public investment flowing into projects with high pollution and carbon emissions both domestically and internationally," [reads](#) the US-China joint presidential statement.

This statement alludes to China regulating export credits for coal in the near future, therefore putting political pressure on Japan to reach a compromise with the US ahead of the OECD meet, according to experts closely involved in these developments. The precise implications of the US-China statement, meanwhile, remain to be seen and officials hope that the new rules under the OECD arrangement might offer a standard for Beijing to follow.

Over the eight years analysed in the WWF report, Japan provided over US\$20 billion to coal projects in developing countries, while Chinese and Russian public finance for coal in the same period was roughly estimated at around US\$17 billion, though with the caveat that finance data from Beijing is difficult to obtain.

Stakeholder reactions

The new OECD official export credit rules have drawn mixed reactions from observers. The World Coal Association welcomed the recognition by the OECD countries that financing needs to continue so that coal power plants can swiftly and affordably tackle energy poverty concerns in developing countries.

On the other hand, some experts are more sceptical of the continued support for coal since firms in developed countries will still benefit from selling technologies for coal-fired power plants abroad, with several analysts suggesting the new rules' formulation may allow a lot of coal finance to slip through.

For other experts the decision is a step forward, albeit a limited one, for developed countries to shift away from supporting high-emitting energy sources.

"This agreement is a sign that using scarce public financing to support overseas coal expansion is coming to an end," Jake Schmidt from the Natural Resources Defense Council told The Washington Post. "It will help spur more renewable energy opportunities by redirecting this financing towards climate solutions instead of climate destruction," he continued.

Schmidt added that although coal-fired power plant project developers and technology exporters could still seek backing from private sources, many banks follow the government-led OECD guidelines a benchmark for their own lending rules, suggesting the move could have a "ripple effect."

UN talks ahead, climate finance

For some climate observers, the decision to phase out some financing mechanisms for coal sends a burst of momentum for the upcoming UN climate talks in Paris, scheduled from 30 November to 11 December.

Countries are aiming to clinch a new, universal deal that would help prevent global temperature rises from exceeding two degrees Celsius relative to pre-industrial levels, in order to stave off the worst consequences of climate change. In order to reach this temperature threshold, more than 80 percent of the world's known coal reserves need to stay in the ground, according to a recent scientific [report](#) by the journal Nature.

Some observers have pointed to the potential implications of the new OECD rules on the Paris negotiations, as developing countries look to secure a significant amount of funding for clean energy technologies in order to achieve low-emissions economic transformations.

Removing sources of support for future coal projects, including in developing countries, could add pressure on developed nations to deliver support for cleaner energy initiatives in a world where around 1.3 billion people continue to lack access to electricity. Many poorer governments face the twin challenges of decoupling planetary-warming emissions from economic growth and ensuring modern, safe energy for all.

Nonetheless talks on both climate finance – and, to a degree, related discussions on technology transfer and deployment – remain a tremendous point of contention between parties to the UN Framework Convention on Climate Change (UNFCCC). These divisions touch on differences over responsibility for climate action, ensuing moral obligations, shifting geo-economics and capacity, as well as competitiveness in a global economy mindful of energy prices, among other issues.

Developed countries are under pressure in Paris to clearly outline a roadmap for meeting an international promise to provide US\$100 billion in climate financing annually by 2020 and potentially boosting this figure in the following decade. Such funds could be used on energy projects but will also likely have a wider reach. Developing nations, meanwhile, have warned that financial support will be essential to help them tackle climate change.

Developed countries need to fill an approximate US\$40 billion annual gap, according to an OECD report [released](#) in October, which estimates an annual average of US\$57 billion was provided in climate financing in 2013 and 2014.

The removal of fossil fuel subsidies, [estimated](#) at some US\$600 billion a year globally, and the diversion of export credits away from fossil fuels towards renewable energy sources have been slated by some policy advisors as two mostly untapped areas of potential to channel much-needed finance into building low carbon energy systems. (See BioRes, [29 September 2015](#))

ICTSD reporting; "In a major step on the road to Paris countries agree to slash export subsidies for coal plants," THE WASHINGTON POST, 17 November 2015; "US and Japan strike deal to cut coal finance," CLIMATE HOME, 27 October 2015; "Export Subsidies for coal power stations reined in by OECD," FINANCIAL TIMES, 18 November 2015; "OECD agrees deal to restrict financing for coal technology," REUTERS, 17 November 2015.

DISPUTES

WTO Appellate Body: Revised US Tuna Labelling Regime Violates Trade Rules

The WTO's highest court ruled last Friday that the revised version of the US' dolphin-safe labelling regime for tuna products is still in violation of the organisation's rules, granting victory to Mexico in the long-running case ([DS381](#)).

The Appellate Body finding comes following several years of proceedings under the WTO's dispute settlement system, following Mexico's request for consultations in October 2008 which first launched the high-profile case. Disagreements between the two sides over tuna, however, long predate these proceedings. (See Bridges Weekly, [6 November 2008](#))

During the proceedings involving the original labelling regime, the Appellate Body in May 2012 had found that the US scheme violated core trade rules and discriminated unfairly against Mexican tuna products. (See Bridges Weekly, [16 May 2012](#))

According to the Appellate Body's ruling at the time, while the original US measure fully addressed the adverse effects on dolphins – both observed and unobserved – resulting from setting on dolphins in the Eastern Tropical Pacific (ETP) area, it did not address mortality arising from other fishing methods in other parts of the ocean.

The method of setting involves purposely encircling dolphins under purse-seine nets in order to reach the tuna that swim below.

The amended measure

Given the 2012 ruling, the US introduced changes to the labelling scheme the following year, claiming that these revisions brought the measure into compliance with the Appellate Body's findings.

The amended tuna measure consists of the revised version of the US Dolphin Protection Consumer Information Act, together with its implementation regulations and a court decision.

Under the amended tuna measure, relative to the original version, the disqualification of tuna caught by setting on dolphins remains unchanged. However, a new substantive requirement was introduced allowing other tuna products – that is, those containing tuna harvested by all other fishing methods – to be eligible for the label so long as no dolphins were killed or seriously injured in the set in which the tuna were caught.

The amended tuna measure also prescribes a number of certification requirements, as well as tracking and verification requirements, relating to the substantive conditions.

Access to the label is conditional upon the provision of a certification by the vessel captain and an approved observer that there were "no dolphins killed or seriously injured" and that there was "no setting on dolphins" for tuna caught by a large purse-seine vessel in the ETP.

The tuna caught outside the ETP large purse-seine fishery would just need captain certification. Observer certification in those cases is required only if an assistant administrator from the National Marine Fisheries Service (NMFS) has determined that there is a regular and significant association between dolphins and tuna in a non-ETP purse-seine

fishery, similar to that in the ETP; or that there is a regular and significant mortality or serious injury of dolphins within “all other fisheries.”

Moreover, the amended tuna measure extends the same basic condition to separate “dolphin-safe” from “non-dolphin-safe” tuna across fisheries in all ocean areas. Specific documentation requirements in the form of Tuna Tracking Forms (TTF), however, exist only for products derived from tuna caught in the ETP large purse-seine fishery.

Mexico disagreed with the US' claim of compliance, asking that a panel be established to review the WTO-consistency of the 2013 version.

The compliance panel found this past April that the Appellate Body had confirmed Washington's right to ban tuna that has been caught through “setting” on dolphins from being eligible for the “dolphin-safe” label. However, the panel made discrete findings that other elements of the amended tuna measure – specifically, the certification, tracking, and verification requirements – still violated the non-discrimination requirements under the WTO agreements. (See Bridges Weekly, [16 April 2015](#))

Mexico and the US each appealed in June 2015 certain aspects of the compliance panel's reasoning and findings. (See Bridges Weekly, [16 July 2015](#) and [18 June 2015](#), respectively)

Article 2.1 of the TBT Agreement

Article 2.1 of the WTO's Technical Barriers to Trade (TBT) Agreement is the core legal provision raised in the two members' appeals.

In order to establish that a measure is inconsistent with Article 2.1 of the TBT Agreement, the following elements must be shown: firstly, that the measure constitutes a technical regulation within the meaning of Annex 1.1; secondly, that the imported products are “like” the domestic products and products of other origins; and lastly that the treatment accorded to imported products is “less favourable” than that accorded to like domestic products and/or like products from any other country.

The compliance panel had earlier accepted that the first two elements had been established, which was not appealed by the participants.

An analysis of “treatment no less favourable” under Article 2.1 consists of two steps: whether the technical regulation at issue modifies the conditions of competition to the detriment of imported products relative to like products of domestic or foreign origin; and, if so, whether such detrimental impact stems exclusively from a legitimate regulatory distinction.

Detrimental impact, even-handedness

In addressing Mexico's non-discrimination claims, the Appellate Body found that the compliance panel failed to conduct a holistic assessment of how those various labelling conditions adversely affect the competitiveness conditions for Mexican tuna products in the US market relative to like products from other sources – and, in turn, how the detrimental impact from the original measure has changed as a result of the 2013 revisions.

After disagreeing with other elements of the panel's analysis, the Appellate Body deemed that Washington's exclusion of most Mexican tuna products from access to the dolphin-safe label while granting conditional access to like US and foreign products meant that the revised tuna measure modifies competition conditions to the detriment of Mexican tuna products in the US market.

The Appellate Body also found that the panel erred in applying the legal test under TBT Article 2.1 regarding whether the detrimental impact on Mexican tuna products stems exclusively from a legitimate regulatory distinction.

This test involves an examination of whether the technical regulation at issue is even-handed in its design, architecture, revealing structure, operation, and application in the light of the particular circumstances of the case.

The Appellate Body clarified that, contrary to what the panel supposed, there was no statement in the 2012 Appellate Body report saying that the US is entitled to disqualify tuna caught by setting from ever being labelled as dolphin-safe, much less that the eligibility criteria are even-handed.

For this test, the Appellate Body said that the panel should have conducted an assessment of whether, under the amended tuna measure, the differences in labelling conditions are calibrated to the likelihood that dolphins would be adversely affected in the course of tuna fishing operations in different fisheries – something that the panel did not do.

Absent a proper assessment by the panel of the overall relative risks posed to dolphins inside and outside the ETP large purse-seine fishery, the Appellate Body was unable to assess fully whether all of the regulatory distinctions drawn under the amended tuna measure can be explained and justified in the light of differences in the relative risks to dolphins in those various fisheries.

Observer certification

As outlined previously, for tuna products derived from tuna caught anywhere other than the ETP large purse-seine fishery, the requirement that there be observer certification in order to receive the dolphin-safe label depends on a determination made by the NMFS Assistant Administrator.

In its review, the Appellate Body referred back to earlier panel findings. For instance, it cited the finding that a determination of regular and significant mortality cannot be made regarding purse-seine fisheries outside the ETP, and a determination of regular and significant tuna-dolphin association cannot be made with respect to non-purse-seine fisheries. The WTO judges also referred to the panel's finding that captains do not necessarily have the technical skills as observers to certify that no dolphins were killed or seriously injured.

The WTO judges found that the "determination provisions" – in other words, the criteria that would be need to be met for the NMFS official to deem that observer certification is required – do not appear to address some scenarios in which there may be heightened risks of harm to dolphins associated with particular fishing methods other than the ETP large purse-seine fishery.

For the Appellate Body, the determination provisions do not provide for the substantive conditions enabling access to the dolphin-safe label to be reinforced by observer certification in all cases where risk is comparably high. This may also entail different tracking and verification requirements than those that apply inside the ETP large purse-seine fishery.

For this reason, the Appellate Body said that it has not been shown that the differences in the dolphin-safe labelling conditions under the revised tuna measure match up with the risks to dolphins that arise from various fishing methods in different areas of the oceans.

GATT findings

In completing the legal analysis under the General Agreement on Tariffs and Trade (GATT) 1994, the Appellate Body found that the amended measure modifies the competitive conditions to the detriment of Mexican tuna products, inconsistent with Articles I:1 and III:4, which deal with most-favoured nation and national treatment, respectively, and also cannot be justified under the general exception provision under Article XX of the GATT 1994.

The GATT Article XX exceptions outline a set of justifications under which WTO members may enact measures that would otherwise be illegal under international trade rules so long as these are used to fulfil greater public policy objectives, such as natural resource conservation or the protection of human, animal, or plant life or health.

Next steps

Under a bilateral understanding between the two countries, Mexico may request authorisation to suspend concessions or other obligations under the covered agreements to the US, in line with Article 22 of the Dispute Settlement Understanding. This same understanding says that the US cannot object against Mexico asking for such authorisation should the request be made outside the 30-day window specified under WTO rules.

If Mexico requests this authorisation, the US may object under DSU Article 22.6 to the level of suspended concessions or other obligations and/or claim that the principles and procedures set forth in DSU Article 22.3 have not been followed, thereby referring the matter to arbitration.

The two parties have agreed, if the matter is referred to arbitration, to help enable this arbitrator to circulate its decision within 60 days.

ICTSD reporting.

WORLD TRADE ORGANIZATION

WTO Members Approve TRIPS Non-Violation Extension, Debate E-commerce Language

WTO negotiators have agreed to extend a moratorium on “non-violation and situation” complaints under the organisation’s intellectual property rules for an additional two years, forwarding the planned decision to the global trade body’s upcoming ministerial conference for adoption.

The news comes as WTO members continue discussing the extension of another moratorium on customs duties on electronic commerce, as well as a decision regarding next steps for an ongoing, related e-commerce work programme. These are also being eyed as outcomes for the ministerial, scheduled for 15-18 December in Nairobi, Kenya.

Both the “non-violation” moratorium and e-commerce areas have long been standing items on ministerial conference agendas. Meanwhile, with the Nairobi meet just weeks away, WTO members are looking to see what other deliverables they will be able to put together for their highest-level meeting, as well as how to structure their future work.

TRIPS non-violation

Under the current “non-violation and situation complaints” moratorium, WTO members are only allowed to file a complaint about an intellectual property issue if the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) has allegedly been breached.

In other words, the moratorium is designed to prevent members from suing each other over damage arising from alleged violations of the spirit – but not the letter – of the organisation’s intellectual property rules, such as through an action that a government takes or another situation that arises.

Non-violation complaints are permitted under WTO rules in other trade areas, such as goods and services. Under these complaints, it is considered valid for one member to challenge another member’s domestic measure under the organisation’s dispute settlement mechanism, should such policy deprive the former of a legitimately expected benefit.

Whether such a remedy can be applied to intellectual property rights, however, was debated extensively ahead of the WTO’s establishment two decades ago under the Uruguay Round negotiations. Ultimately, the TRIPS Agreement established that non-violation complaints would not apply for a period of five years from when the overall WTO Agreement entered into force – in other words, not until the year 2000.

During this period, the TRIPS Council was instructed to make recommendations to the WTO’s ministerial conferences regarding the scope and modalities for addressing non-violation and situation complaints under the organisation’s intellectual property rules. The moratorium has been extended repeatedly since.

Whether the moratorium would indeed be renewed for another two years at the Nairobi ministerial had earlier been in question, given that [both the US](#) and Switzerland had again argued for lifting the moratorium on the grounds that there could be a place for such complaints under the TRIPS Agreement.

Some other members had reportedly argued that allowing for such non-violation and situation complaints would still require developing modalities for their inclusion. An October meeting of the TRIPS Council had been suspended in order to reach agreement on this item, given the disagreement over whether to end the moratorium or to extend it indefinitely.

At a [meeting](#) on 23 November of the WTO's Council on Trade-Related Aspects of Intellectual Property (TRIPS), members ultimately agreed to forward to Nairobi a draft decision extending for two years the moratorium on non-violation and situation complaints, with various members saying at the meeting that talks on a permanent solution should begin following the ministerial.

According to [an addendum](#) to the TRIPS Council's annual report issued following this meeting, the recommended language for the ministerial decision would take note of the Council's work in this area since the last extension, which was approved at the 2013 ministerial conference in Bali, Indonesia.

The language then directs the TRIPS Council "to continue its examination of the scope and modalities for complaints of the types provided for under subparagraphs 1(b) and 1(c) of [Article XXIII](#) of [the General Agreement on Tariffs and Trade, or GATT]1994 and make recommendations to our next Session, which we have decided to hold in 2017. It is agreed that, in the meantime, members will not initiate such complaints under the TRIPS Agreement."

E-commerce discussions ongoing

The news on the non-violation moratorium may bode well for the extension of the moratorium on e-commerce duties, sources say, given that the two have traditionally been linked, albeit informally.

Under the e-commerce moratorium currently in place, WTO members have agreed not to impose customs duties on electronic transactions, with the existing moratorium set to end in Nairobi unless ministers agree to extend it.

The original moratorium dates back nearly two decades, when members [agreed](#) during the WTO's May 1998 ministerial conference to "continue their current practice of not imposing customs duties on electronic transmissions," with this commitment being renewed repeatedly at subsequent ministerials.

In September 1998, following the direction given by ministers earlier that same year, the General Council agreed on a [work programme](#) on e-commerce, launching discussions on the subject under certain WTO bodies – specifically, the Council for Trade in Services, the TRIPS Council, and the Committee on Trade and Development, which would then report back to the General Council.

The [2001 Doha Declaration](#) then featured an agreement to continue the work programme and moratorium through the next ministerial, given the "importance of creating and maintaining an environment which is favourable to the future development of electronic commerce."

More recent ministerial conferences, along with renewing the moratorium on e-commerce duties, have also included language on how to reinvigorate the work programme itself, both in terms of approach as well as with any institutional steps.

Compromise proposal

In this context, members are currently negotiating the language for a planned Nairobi ministerial decision regarding the e-commerce work programme. Earlier on Wednesday, a

compromise proposal was circulated by various countries at an informal meeting convened by Ambassador Alfredo Suescum of Panama, who chairs the e-commerce talks, regarding a draft decision on the work programme.

This new proposal is now under discussion, with another informal open-ended meeting on the e-commerce negotiations currently slated for Friday.

The compromise document melds together two previous proposals from different groups, though it has dropped various elements from each in a bid to gain consensus. One of these earlier proposals was being backed by Chile, while the other had been submitted jointly by Brazil, Egypt, India, South Africa, and Turkey.

The compromise proposal has the support of all six countries – Brazil, Chile, Egypt, India, South Africa, and Turkey – sources say.

Both of the earlier proposals had included an extension of the moratorium on customs duties on electronic transmissions through to the next ministerial conference, expected in 2017, which has been maintained in the compromise proposal. The two differed, however, in their language regarding the work programme itself.

The earlier communication backed by Brazil, Egypt, India, South Africa, and Turkey recalled both the 1998 e-commerce work programme and subsequent ministerial declarations and decisions. Meanwhile, the Chilean proposal referred both to the 1998 decision and also highlighted specifically the [mandate assigned](#) at the 2013 ministerial conference in Bali, Indonesia, to “continue the reinvigoration of that work” on the e-commerce work programme, with the aim of adopting decisions this year.

The compromise version keeps the language from Brazil and others regarding previous decisions and declarations, which sources note does still in effect cover the e-commerce outcomes from the Bali ministerial conference.

The proposal by Brazil and others had reiterated the importance of WTO principles such as non-discrimination, predictability, transparency, and development. Chile's proposal also referred to such principles, while then going on to outline specific areas for examination by the work programme, such as how e-commerce can support small and medium-sized enterprises and traditional industries, among various others. Both of those respective paragraphs are not included in the compromise version.

Another area where the two sides differed and which ultimately was dropped from the compromise proposal was language in the two earlier proposals regarding what particular developing country needs should be given “special consideration.”

The proposal put forward by Brazil and others had referred to special consideration to “the economic, financial, and development” needs of such countries, while the Chilean proposal had mentioned “special consideration of the situation” in developing countries, referring in particular to those countries that are least developed or least connected. Neither paragraph is in the compromise proposal.

Regarding institutional framework, the proposal from Brazil, Egypt, India, South Africa, and Turkey would direct the General Council to hold periodic reviews using those reports provided by the WTO bodies charged with implementing the work programme, with a view to providing an update for the next ministerial.

The Chilean proposal, for its part, would similarly direct the General Council to hold periodic reviews, along with considering possible recommendations for the next ministerial. It also featured additional language regarding certain institutional steps, such as encouraging the WTO's secretariat to provide reports on the activities of other international organisations in this area.

The compromise proposal includes the language on periodic reviews by the General Council and includes dates for such reviews to take place, specifically for July and December of next year as well as July of the following. While much of the additional institutional language from the Chilean proposal is not included in the compromise version on the table, sources familiar with the discussions note that this does not preclude any of those institutional suggestions from being put in place in practice, should members so choose.

Members are reportedly aiming to finalise the language on the e-commerce work programme and moratorium in time for the upcoming meeting of the WTO's General Council – the highest decision-making body outside of the ministerial conference – currently slated for Monday 30 November.

While sources were optimistic over reaching an agreed outcome, they cautioned that it is not yet clear whether that Monday target will be met. Some members, reportedly the African Group and the Africa, Caribbean, and Pacific country (ACP) Group, are said to have indicated an interest in re-inserting the paragraph referring to “special considerations” of economic, financial, and development needs that was in the earlier proposal by Brazil and others.

ICTSD reporting; “WTO Committee Agrees to Keep IP From Non-Violation Complaints Until 2017,” IP-WATCH, 23 November 2015.

AGRICULTURE

Argentina: Major Grain Stock Release Expected Following Macri Election Win

Argentine farmers are set to ship billions of dollars in stored crops abroad if new president-elect Mauricio Macri succeeds in his plans to eliminate existing constraints on agricultural production and exports.

Macri won the South American country's run-off elections this past weekend, beating out ruling party candidate Daniel Scioli and marking the first change in government Buenos Aires will have seen in over a decade. The president-elect has already pledged a series of reforms to the policies implemented by the leftist government of outgoing president Cristina Fernández de Kirchner.

Currently, [private sector estimates](#) indicate that Argentine exporters are stocking about 13 million tonnes of soybeans, or about US\$4 billion. In the coming days, exporters are expected to meet with the finance team of the incoming government to examine possible next steps.

News of these expected policy changes has sparked immediate reactions in international markets. Kevin Van Trump, a leading expert in agricultural marketing and analysis and author of the Van Trump Report, [affirmed](#) earlier this week that "Argentine elections move[d] soybeans [price] close to the abyss."

Farm production, exports

According to the [Argentine Rural Society](#) (SRA), which represents the country's biggest farms, Argentina could produce food for 680 million people in five years, 50 percent more than it currently produces, if farm policy reforms are implemented by the new government.

According to estimates cited by Reuters, within the next few years Argentina is set to double wheat shipments and surpass Russia and Brazil as a corn exporter, unleashing the full potential of the country's agricultural sector.

Moreover, farmers are likely to rotate planting more often between soybeans and other crops, particularly wheat and corn.

Statistics from the Buenos Aires Grain Exchange shows that the cultivated area is expected to decline by 1.3 million hectares in 2015/2016, a 4.2 percent decline compared with the previous year. However, various analysts suggest that from the 2016/2017 harvesting season onward additional land will be cultivated in response to the new market-oriented context.

Big policy changes on the horizon

The Argentine farming sector has largely welcomed Macri's win this past weekend over Scioli. The president-elect has already elaborated an ambitious programme in [thirteen points](#) to reform Argentina's farm policy, to be implemented within his first term, which would last four years.

Among other pledges, Macri has promised to eliminate export taxes and the quota system that controls farm exports, reduce the tax burden, and liberalise the exchange rate, a clear shift from the farm policy seen over the last eight years.

Overall, the incoming president is expected to adopt a new economic strategy that aims to integrate Argentina more in international markets through trade, investment, and a lighter role of the state in the economy.

Despite the fact that Macri was running behind Scioli after the earlier round of elections held on 25 October, markets had already anticipated a policy change. Indeed, Argentine cereals futures prices declined and aligned with international cereal futures prices and the differential has remained low since then, Ramiro Costa, Chief Economist at the Buenos Aires Grain Exchange, explained to Bridges.

"Previous farm policies will be reformulated on the base of a dialogue with various economic sectors," Marcelo Regúnaga, formerly Argentina's Secretary of Agriculture, Livestock, Fisheries and Food and currently professor in Agribusiness at the University of San Andrés, told Bridges.

Over the last few years, Regúnaga explained, the government put in place several obstacles to farm exports and has adopted an import substitution strategy aimed at containing domestic food prices and generating tax revenues. However, Argentina's inflation rate is in the double digits, at about 30-40 percent, with the national budget facing a severe deficit.

Macri is expected to eliminate or drastically reduce the current taxes and tariffs on farm productivity within the first few months of his mandate. He has promised to eliminate concurrently the 20 percent export tax on wheat and 23 percent export tax on corn, along with lowering by five percent annually the 35 percent export tax on soybeans. Moreover, the quota system will also be eliminated fairly quickly and the Argentine peso is expected to be devalued.

Enhancing farm competitiveness

These reforms will not have any significant fiscal impact and will stimulate private investment, according to Luis Miguel Etchevehere, the president of the Argentine Rural Society.

Other analysts share similar views. Some of the reforms announced can be adopted relatively easily and quickly and will make Argentina's farm exports more competitive in international markets, Costa told Bridges.

Other reforms, to be implemented in the medium term, are expected to increase farm productivity and facilitate exports. These include, for instance, a simplification of the taxation system, investment in infrastructure, and the adoption of new policies and laws to develop the agro-industry sector, Costa continued.

Yet some analysts predict that the elected president could face difficulties in implementing its ambitious reform plan. "The change is going to create some serious hiccups and ripples in the months ahead," Kevin Van Trump observed in a recent [article](#). By reducing taxes and tariffs, he says, the government may have to decrease government spending and halt some social welfare programmes, which could create social unrest.

ICTSD reporting; "Argentina in for a radical post-election grains output increase," REUTERS, 23 November 2015; "Argentine Elections Move Soybeans Closer To The Abyss," VAN TRUMP REPORT, 23 November 2015; "What Does A New Argentine President Mean For U.S. Ag?," VAN TRUMP REPORT, 23 November 2015; "Macri y los 13 puntos para el campo," REVISTA CHACRA, November 2015.

SERVICES

EU Notifies Preferential Treatment to LDC Services Exports

On 18 November, the EU notified the WTO Council for Trade in Services (CTS) of the preferential treatment which it intends to make available to services and service suppliers of the global trade body's poorest members. In doing so, the 28-nation bloc joins other WTO members who have responded to the commitments made at the organisation's 2013 Ministerial Conference in Bali related to the least developed country (LDC) services waiver.

To date, 18 other WTO members – Canada, Australia, Norway, Korea, China, Hong Kong, Chinese Taipei, Singapore, New Zealand, Switzerland, Japan, Mexico, Turkey, the US, India, Chile, Iceland, and Brazil – have submitted notifications. The notification from South Africa is reported to be underway and is likely to be submitted soon.

Making "signals" concrete

"The EU attaches great importance to helping the least developed countries better integrate into the world trading system," said Cecilia Malmström, EU Commissioner for Trade.

"I hope this will encourage all developed and developing WTO members, who have not yet given preferential treatment to these countries, to do so without delay," she added.

In July 2014, the group submitted a collective request regarding the preferential treatment it wanted to see for LDC services exports. At a high-level meeting in February, 22 WTO members responded to the collective request made by the LDC Group for preferential treatment for the services sector by indicating sectors and modes where they were considering providing preferences as well as support for projects on technical cooperation.

Earlier this year, the EU signalled various areas in which it could provide LDCs with preferential access to their services markets. (See Bridges Weekly, [12 February 2015](#))

Since then, the LDC Group has been encouraging WTO members to formally notify the CTS of their actual preferences, including detailed information regarding the sectors or sub-sectors concerned and the period of time during which the member plans to maintain those preferences.

Nature of commitments

The EU notification contains, among other elements, various commitments related to commercial presence (Mode 3) and cross border supply of services (Mode 1).

Some obligations concerning the temporary presence of natural persons for business purposes are also described, including provisions regarding business visitors for establishment purposes, intra-corporate transferees, and services sellers.

For example, the EU commitment would allow LDCs to transfer management trainees to affiliated companies in the 28-nation bloc in about 30 sectors or sub-sectors for a maximum duration of one year of experience.

Companies from least developed contraries with a contract to provide services in the EU will be able to send skilled professionals to Europe to for this purpose.

As per the terms of the notification, 37 sectors of interest for contractual service suppliers and independent professionals from LDCs are liberalised. The sectors referred to in the "schedule," a term used in this context to refer to the listing of preferences as contained in the notification, cover a wide range of professional activities including legal advisory services, accounting and bookkeeping services, architectural services, engineering services, medical and dental services, midwifery services, educational services, travel agencies and tour operators' services, and technological services, to name a few.

In all cases, a certificate of higher education or qualification of an equivalent level is required for the supply of the service which is expected to take place on a "temporary basis."

A number of country-specific reservations are detailed in the document regarding most commitments.

The "schedule" indicates that it does not contain any commitment on audio visual services.

Additionally, according to some specialists, the document contains strict language with regard to the movement of natural persons (Mode 4) specifying that the schedule "does not apply to measures affecting natural persons seeking access to the employment market of the EU, nor shall it apply to measures regarding citizenship, residence, or employment on a permanent basis."

One developed country delegate indicated that the challenge for LDCs is to now build capacity to be able to export in these sectors and effectively make use of these preferences.

Duration of the preferences

According to the EU, the preferences it has tabled will last for the waiver's duration and until a country is no longer on the UN list of least-developed countries.

The timing of the operationalisation of the waiver has often been referred to as crucial in past discussions and has received more attention lately in the run-up to the WTO's ministerial conference this December in Nairobi, Kenya. LDCs now seek a modification of the duration of the services waiver – potentially through a ministerial decision in Nairobi – so that notified preferences can apply for 15 years from the date that a member submits its notification.

ICTSD reporting.

EVENTS & RESOURCES

Events

Coming Soon

30 November – 11 December, Paris, France. ICTSD AT THE TWENTY-FIRST CONFERENCE OF THE PARTIES TO THE UNFCCC. During this year's UN Framework Convention on Climate Change's (UNFCCC) Annual Conference of the Parties (COP), the International Centre for Trade and Sustainable Development (ICTSD) will be hosting a series of side events addressing a wide range of issues at the intersection of trade and climate change, such as on carbon markets, the climate contribution of the planned Environmental Goods Agreement (EGA), consumption-based accounting and policies, and many more. For additional details on ICTSD's activities at the Paris meet, visit the event [webpage](#).

1 December, London, UK. US CLIMATE ACTION ON THE ROAD TO PARIS. Organised by Chatham House, this event will address the recent commitments made by the US – both at a domestic level and in a recent deal with China – toward slashing greenhouse gas emissions. Along with outlining recent and expected policy actions and regulations, the speaker will also address the current political context in the United States. Please note that attendance is by invitation-only. More details are available [here](#).

3 December, Tokyo, Japan. ADBI ANNUAL CONFERENCE 2015: GLOBAL UNCERTAINTY, MACROECONOMIC SHOCKS AND GROWTH IN ASIA. This conference, held by the Asian Development Bank Institute (ADBI) will address the economic outlook for the Asia-Pacific region, in light of recent developments such as the growth slowdown being seen in China. Along with analysing the implications of that particular development, the meeting will also address some of the uncertainties on the international stage, particularly with regards to monetary policy in major economies. Additional information is available at the ADBI [website](#).

WTO Events

An updated list of forthcoming WTO meetings is posted [here](#). 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.

2 + 4 December: Trade Policy Review Body – Haiti

9 December: Trade Policy Review Body – Overview of Developments in the International Trading Environment

15-18 December: Tenth Ministerial Conference

Other Upcoming Events

7 December, Washington, US. A DISCUSSION OF THE KEY ECONOMIC ISSUES IN ELECTION 2016. This event, organised by the Economic Studies programme at the Brookings Institution, will feature a panel discussion on the economic issues being raised in the context of the US general election, scheduled for November 2016. Speakers on the panel include some of the advisers to current presidential candidates from both parties. More information on this event, which will be webcast, can be found on the Brookings [website](#).

14-15 December, Paris, France. OECD GREEN GROWTH AND SUSTAINABLE DEVELOPMENT FORUM. The Organisation for Economic Co-operation and Development (OECD) is hosting this year's forum, with the theme of "Enabling the Next Industrial Revolution: The role of systems thinking and innovation policy in promoting green growth." Topics for discussion include, among others, how to facilitate and encourage the "next industrial innovation," building upon the work conducted by the organisation's various committees. More information is available on the OECD [website](#).

14-17 December, Nairobi, Kenya. TRADE AND DEVELOPMENT SYMPOSIUM. This biennial event, regularly organised by the International Centre for Trade and Sustainable Development (ICTSD), is being held this year in partnership with the government of Kenya. The event will be held in parallel with the WTO's Tenth Ministerial Conference. The four-day event will include various high-level plenaries, press events, and private roundtables, among other features. Further details, including the confirmed speakers for the various sessions, can be found on the official event [website](#).

15-18 December, Nairobi, Kenya. WORLD TRADE ORGANIZATION – TENTH MINISTERIAL CONFERENCE. The World Trade Organization will be holding its Tenth Ministerial Conference (MC10) at year's end, with Kenya serving as this year's host. These ministerial gatherings are the highest-level meeting of the global trade body, with members able to take decisions on any matters relating to any of the multilateral trade agreements. These meetings are usually held biennially. More information will be made available through both the WTO [website](#), as well as the Kenyan government's dedicated MC10 [website](#).

Resources

WORLD INTELLECTUAL PROPERTY REPORT 2015. Published by the World Intellectual Property Organization (WIPO) (November 2015). This latest edition of the World Intellectual Property Report (WIPR) explores how intellectual property affects both innovation and economic growth, with this year's report highlighting three key innovations – airplanes, antibiotics, and semiconductors – and examining their impact on business activity. The authors then examine 3D printing, nanotechnology, and robotics, choosing these for their "breakthrough potential," while also considering what may be coming next for innovation-driven growth. The report is available online [here](#).

WORLD TARIFF POLICIES 2015. Published by the International Trade Centre (ITC), the World Trade Organization (WTO), and the UN Conference on Trade and Development (UNCTAD) (6 November 2015). This annual report reviews goods import tariffs for all WTO members as well as other countries and territories, together with trade remedy information, specifically regarding anti-dumping measures. The authors place a particular emphasis on the role tariffs play in today's trade reality, given the various cuts in tariffs seen in global, regional, and bilateral forums. The authors tie in this topic to the fragmentation of global value chains and trade in "intermediate" goods. The report is available at the following [website](#).

SME COMPETITIVENESS OUTLOOK 2015. Published by the International Trade Centre (ITC) (14 October 2015). This edition of the SME Competitiveness Outlook suggests that small and medium-sized enterprises (SMEs) can play a key role in ensuring to inclusive growth. The report has as its theme "Connect, Compete, Change for Inclusive Growth," with the authors comparing the productivity of SMEs with that of larger firms, as well as analysing whether this gap and that of wages varies between developed and developing economies. The report features analysis, insights from key experts, and case stories about developing country SMEs in international markets, together with several country profiles. The Outlook is available [here](#).

OECD ECONOMIC OUTLOOK, VOL 2015 ISSUE NO 2. Published by the Organisation for Economic Co-operation and Development (OECD) (9 November 2015). This report analyses the current state of the global economy as well as which policies may be best for ensuring that OECD members be able to sustain their respective economic recoveries. The present edition covers the years up to end-2017 for both OECD countries and selected non-OECD economies. The publication is available online [here](#).

INTEGRATING TRADE INTO NATIONAL DEVELOPMENT STRATEGIES AND PLANS: THE EXPERIENCE OF AFRICAN LDCs. Published by Amelia U. Santos-Paulino and Carolina Urrego-Sandoval for the United Nations Conference on Trade and Development (UNCTAD) (24 November 2015). This paper examines how three African least developed countries (LDCs) – Ethiopia, Lesotho, and Senegal – have mainstreamed trade into their respective national development strategies, noting both the successes and challenges, along with providing related recommendations. The paper also outlines what lessons these three countries' experiences may provide for other least developed countries. The paper is available in PDF form [here](#).

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