



## Fall/Winter 2010 Newsletter

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### LETTER FROM THE EDITORS

The editors of Women in International Trade (WIIT) Newsletter welcome you to the fall 2010 issue. This newsletter is an important part of our efforts to inform you about WIIT's activities. It includes information about WIIT's many programs and projects, and recent and upcoming events.

In this issue, we are excited to include the winning essays from WIIT's Scholarship competition. We have also included articles from WIIT members on small developing countries and the WTO's dispute settlement mechanisms, export laws and regulations on military products, antidumping and countervailing duties, India's antidumping policy, international intellectual property rights and disputes and a book summary on *A Lawyer's Guide to Section 337 Investigations Before the U.S. International Trade Commission*.

Additionally, in this newsletter you can find the results of WIIT's recent membership survey, a listing of upcoming events, and summaries of past events. We encourage WIIT members to take advantage of events, as they provide important educational and professional development opportunities.

As always, we welcome your comments and suggestions.

Sincerely,  
[Manka Azefor and Kristin Wedding](#)  
WIIT Newsletter Editors

## **WIIT SURVEY RESULTS**

If you participated in our 2010 Member Survey, thank you so much! To see the results from the most recent WIIT survey, please click [here](#).

We want to take this opportunity to respond to a few of the concerns mentioned in the survey:

1. WIIT is the Washington-DC chapter of OWIT, the Organization of Women in International Trade. If you are located outside of the Washington, D.C. area, please visit [www.owit.org](http://www.owit.org) to locate your closest OWIT chapter.
2. WIIT hosts two separate email lists, one for members and one for non-members or friends. Both members and "friends" receive a weekly event update; members receive password reminders (located at the bottom of the email), while non-members do not.

Please don't hesitate to contact us at [info@wiit.org](mailto:info@wiit.org) if you have suggestions or concerns that you'd like to pass along.

Thank you!

## **WIIT CHARITABLE TRUST SCHOLARSHIP ESSAY CONTEST\***

*The WIIT Charitable Trust scholarship program is designed to provide financial assistance to further educational objectives of women who are interested in international development, international relations, international trade, international economics, or international business. The winners from the 2010 contest are Colleen Yeskovich and Jolene Wang.*

### **Graduate Student Essay Winner: Colleen Yeskovich**

#### ***Trade Ramifications and Conflict: Examining the Effects of Trade in Africa During the Global Economic Crisis***

The consequences of the global economic crisis have led to disruptions in normal trade activity that have affected all facets of fiscal behavior, ranging from the major international markets to the informal economic activity of developing nations. In 2009 alone, world trade decreased by a disconcerting 12 percent.<sup>[1]</sup> The resulting slump in global demand for goods and services provoked more stringent trade restrictions, contributed to the decline in investments, and led to an increase in unemployment. While the domestic implications of the global economic crisis have been broadly felt, little attention has been given to the impact of this crisis on countries that were economically fragile even before the crisis. In addition to exploring the economic consequences of this crisis in the African continent, this paper will also examine the security and stability issues that were also greatly impacted by the crisis.

Even before the economic crisis, Africa had great difficulty joining the globalized economy. Africa is the world's second most trade restrictive region and African economies are among the least exposed to the global financial system of any world region.<sup>[2]</sup> The region on average displays "the worst rankings in business environment, governance, logistics, and other trade facilitation indicators".<sup>[3]</sup> Despite the continent's inability to emerge as a full participant of the globalized market, many of the countries on the continent greatly benefitted from economic growth in other regions.

Before the global economic crisis, the Africa region experienced strong economic growth averaging 6.5 percent per year between 2002 and 2007.<sup>[4]</sup> Even more importantly, trade was reinforced by a steady growth in industrialized countries and an explosive growth in emerging economic powerhouses such as China and India. "Demand for African commodities drove an investment surge in many countries, with foreign direct investment (FDI) stocks nearly doubling between 2003 and 2007".<sup>[5]</sup> In other words, economic growth in Africa was driven by the global commodity boom. The resulting economic growth immensely benefited the region and the impoverished people across the continent. The new interest in Africa's economy led to improvements in living conditions, a rapid increase in new communication technologies, and an overall decline in poverty levels.

During the onset of the global economic crisis, Africa's exports to the United States decreased in value by about 57 percent in the first six months of 2009, in comparison to the same period in 2008.<sup>[6]</sup> African countries are exporting less frequently and at lower prices than in 2007. This decline in trade is in part caused by a lack of economically friendly institutions and a lack of a viable business environment. When globalization had increased global demand for goods, countries found themselves overlooking the hostile business environment in Africa. Along with a lower demand for goods, tougher economic times have forced countries to value stability over convenience. The consequence of this shift in global attitude has resulted in a steady decline in African Exports. As exports decline in Africa, nations with a more inviting trade facilitation environment meet the demand for missing African goods. As a result, the more stable nations experience less of a decline in their exports to the United States compared to those with a weaker trade facilitation environment.<sup>[7]</sup>

Further consequences of trade declines resulting in harsh economic conditions have also had dire consequences for individual securities. Several multilateral organizations project that "the economic crisis could increase poverty worldwide by at least 45 million people".<sup>[8]</sup> In Africa alone, the IMF estimated that the global economic crisis would "add seven million people to the ranks of those living below US \$1.25 a day in 2009, and three million people in 2010".<sup>[9]</sup> Additionally, a World Bank analysis estimates that the crisis alone will cause 30,000 - 50,000 excess deaths in Africa, and the majority of these additional deaths are likely to be children and women.<sup>[10]</sup>

With this decline in living conditions, access to opportunities that once existed such as employment are no longer available to the populations they once served. The resulting ramifications from a decline in trade during the global economic crisis could have implications for Africa's political stability. The Economist Intelligence Unit recently contended that "as people lose confidence in the ability of government to restore [economic] stability, protests look increasingly likely...There is growing concern about a possible global pandemic of unrest".<sup>[11]</sup> This is particularly important for post-conflict and fragile nations that have weak institutions, little trade and low levels of foreign direct investment. <sup>[12]</sup>

Often those most at risk during economic crisis are the same groups that drive the movements and political uprisings that lead to unrest, violence and coups d'état. The global food crisis in the recent history serves as a reminder of potential consequences of the economic crisis. The 2008 global food crisis caused prices for staple foods such as rice to rise to record levels that many lower income populations could not afford. This spike was, "partly due to high oil prices but also to other complex factors".<sup>[13]</sup> The crisis strained household budgets and brought on a new level of economic hardship for many regions globally. In addition, "The crisis fed high inflation and sparked food riots and political unrest in several countries".<sup>[14]</sup> During this time, the United Nations estimated that "the proportion of undernourished people in Africa's population rose to 29% in 2008, compared to 28% in 2004 - 2006".<sup>[15]</sup> Insulated African markets resulted in an inability for emerging industries to access lower domestic

prices and global markets.

Further correlations between the connection between reduced levels of trade and political instability and conflict can be examined through the Logistics performance index. The logistics performance index is a tool created by the World Bank to, "help countries identify the challenges and opportunities they face in their performance on trade logistics". After researching the top scoring countries and the lower scoring countries, regions with high results had less violent conflict and political instability than regions that have difficulty with trade facilitation. The lowest ranked region is Sub-Saharan Africa.

As the global economic crisis, through a decline in trade, increased the number of impoverished and unemployed individuals, long-standing potential instability may begin if "local populations identify their governments as the culprits of economic hardship, if political or military contenders for power use the economic crisis as a weapon against incumbents, or if observation of unrest in neighboring countries acts as a vector of contagion".<sup>[16]</sup> The resulting increased tensions from the global economic crisis may aggravate already existing instability in regions with recently resolved or ongoing conflicts including fragile institutions, and income inequality.

Many African economies rely on donors for budget support and are vulnerable to a downturn in foreign aid flows, particularly those that are not natural resource exporters.<sup>[17]</sup> According to the Organization for Economic Cooperation and Development (OECD), Africa currently receives the highest amount of development assistance and in 2007 received \$27.19 billion in foreign assistance. During the global economic crisis, aid levels declined as more developed nations experienced strains on their domestic budgets. At the same time, African governments requested increases in aid to compensate for their own budgetary shortfalls. Fulfilling this unmet demand is crucial to the restoration of proper liquidity markets.

A large portion of the cash flows in Africa come from migrant remittances. Migrant remittances are so significant that in 2007 formally recorded remittances are known to have totaled, \$18.59 billion, rivaling foreign aid flows. Before the onset of the global economic crisis "global remittance levels were projected to fall 5 - 8% in 2009, from an estimated \$305 billion in 2008".<sup>[18]</sup>

From this information on the various trade ramifications of the global economic crisis, in conclusion it is important to note the more overlooked impact of decreases in trade and its security implications. Assuming the notion that increased trade promotes deterrence from political unrest and violent conflict, the consequences of the global economic crisis resulted in increased violence in developing nations. From the information provided, trade is positively related to minimizing conflict. Less economically dependent states are more prone to conflict because they are less governed by the diplomatic principles and inter-cultural communications that exist for trade occur, and more governed by forces involving the use of weapons and violence to solve problems of scarcity.

Many project that the global economic crisis is nearing its end. Global growth from international trade has rebounded from 1.1% to 3.1% in 2010, and trade restrictions are beginning to lift.<sup>[19]</sup> African economies have just begun to benefit from the quickly recovering trade and investment climates of India, China and Russia. For Africa, the process of recovering from the financial insecurity, political unrest and poverty the global economic crisis has left will be difficult. The growth that the years of 2003-2005 experienced, will likely take a while to recover, even with a proper trade environment allowing African goods to fairly enter the market.

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- [2] Arieff, Alexis, Martin Weiss, and Vivian Jones. "The Global Economic Crisis: Impact on Sub-Saharan Africa and Economic Policy Responses." (2010).
- [3] Arieff, Alexis, Martin Weiss, and Vivian Jones, 11.
- [4] Ibid, 11.
- [5] Arieff, Alexis, Martin Weiss, and Vivian Jones, 9.
- [6] Ibid, 14.
- [7] Ibid, 11.
- [8] Ibid, 25.
- [9] "Sub-Saharan Africa. World Economic and Financial Surveys". *International Monetary Fund*. (2010).
- [10] Arieff, Alexis, Martin Weiss, and Vivian Jones, 25.
- [11] McGregor, Doug. "Raising Capital in a New Era." *Economist Intelligence Unit*. (2009).
- [12] Arieff, Alexis, Martin Weiss, and Vivian Jones, 11.
- [13] Ibid, 11.
- [14] Ibid, 11.
- [15] Arieff, Alexis, Martin Weiss, and Vivian Jones, 18.
- [16] Ibid, 26.
- [17] Ibid, 27.
- [18] Arieff, Alexis, Martin Weiss, and Vivian Jones, 18.
- [19] Ibid, 6.

### **Undergraduate Student Essay Winner: Jolene Wang** ***Trade Ramifications in the Economic Global Crisis***

The CEO of the Center for Economic and Policy Research (CEPR) stated that "trade is not the cause of the current economic crisis, but is likely to be one of its most important casualties."<sup>[1]</sup> Trade ramifications in the economic global crisis of the twenty-first century have been considerable and unprecedented in post-war history. Due to a sharp contraction in demand and consumer confidence along with the credit crunch and the spread of global supply chains, world trade experienced its sharpest decline in more than seventy years.<sup>[2]</sup> These factors were direct consequences of the global economic

crisis and as a result caused the world trade collapse and prompted trade policy responses.

Often compared to the Great Depression, the global economic crisis of this century reveals remarkable similarities of that era, particularly in the sector of world trade. As global demand imploded in the early 1930s, world trade declined as well.<sup>[3]</sup> Trade similarly fell in the fourth quarter of 2008 and continued to do so into 2009 at an even faster pace than that observed during the Depression.<sup>[4]</sup> The trade decline was so very large, at a drop of 12% in volume, primarily because of a sharp contraction in global demand.<sup>[5]</sup> According to the World Trade Organization, "sharp falls in wealth during the recession caused household firms to reduce their spending on all types of goods, especially consumer durable and investment goods"<sup>[6]</sup> which make up a large part of world trade. The reduction in demand for these products then "fed through to markets that supply inputs to their production"<sup>[7]</sup> and thus decreased supply and overall trade.

Moreover, the credit crunch added an additional squeeze as financial conditions tightened dramatically in the second half of 2008 when there was an estimated shortfall of \$100 billion in trade finance.<sup>[8]</sup> The squeeze seemed to have played a significant role in the trade collapse through both "restricting trade finance and reducing demand in trade-intensive sectors that are most credit-dependent".<sup>[9]</sup> Surveys such as the 2009 International Chamber of Commerce Global and the IMF *Survey of Private Sector Trade Credit Development* also suggest that the tightening of trade finance conditions resulted in "reduced availability and much higher cost."<sup>[10]</sup> As a consequence, part of the international response to the economic global crisis involved support to trade financing, which included the expansion of trade facilitation and credit programs run by regional development banks and export credit agencies, respectively.<sup>[11]</sup>

However, while it is certain that trade was a victim of the global crisis, its role in contributing to the recession is another matter entirely. Many experts believe that trade is not the cause of the current economic crisis<sup>[12]</sup>, but did indeed contribute importantly to the synchronization of the current recession. <sup>[13]</sup> According to William R. Cline of the Peterson Institute for International Economics, the global economic crisis is marked by a tighter synchronization or correlation of downswings across countries than ever before.<sup>[14]</sup> WTO furthermore concluded that this global-synchronized nature of the decline is "closely related to the spread of international supply chains and information technology, which allows producers in one region to respond almost instantly to market conditions in another part of the world."<sup>[15]</sup> This seemed to have accelerated the adjustment in trade flows relative to localized recessions<sup>[16]</sup> and reinforced the trade slump as exports and imports of all countries fell at the same time. <sup>[17]</sup>

In an economic global crisis, trade is inevitably affected. Being what some consider the principal generator of wealth and therefore responsible for hundreds of millions of jobs across the world, trade naturally seems to be the "lifeblood of the global economy."<sup>[18]</sup> While history has shown that a global financial crisis often results in a

global trade crisis where demand and consumer confidence declines and credit tightening only exacerbates the fall through trade finance restraints, it too has also taught us that "if goods don't cross borders, armies will."<sup>[19]</sup>

This comment made by the 19<sup>th</sup> century French economist Frédéric Bastiat precisely encapsulates one of trade's most valuable products-peace and prosperity. According to scholars, the creation of the European Common market after the Second World War helped bring European internal warfare to an end.<sup>[20]</sup> The expansion of the East Asian markets has also resulted in more peaceful and economically stable conditions for its populations. In fact, these emerging markets have become the driving force behind the current trade recovery with their imports approaching the 2008 peak after bottoming in the second quarter of 2009.<sup>[21]</sup> Thus, much discussion had occurred regarding how trade can contribute to a global economic recovery, particularly focusing on restoring confidence, avoiding protectionist measures, and keeping markets open.<sup>[22]</sup>

The consensus among trade experts and economists has been that changes in trade are not just blatant and unavoidable consequences of an economic global crisis, but can also be part of the solution to global recovery. Governments that can develop and implement effective trade policies in response to the crisis will succeed in restoring economic stability and avoiding a crisis of globalization with serious or permanent effects on future prosperity.<sup>[23]</sup> During the past few years alone, trade has drastically fallen, rebounded, and grown steadily, with momentum continuing into early 2010.<sup>[24]</sup> As long as government officials, policymakers, and trade ministers do as U.S. Trade Representative Ron Kirk once said and "always keep in mind the extraordinary benefit that has come to...the world, through the increased global trade liberalization over the last forty or fifty years,"<sup>[25]</sup> trade should only improve and recover all the faster. <sup>[26]</sup>

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<sup>[1]</sup> Stephen Yeo, foreword to *The Collapse of Global Trade, Murky Protectionism, and the Crisis: Recommendations for the G20*, ed. Richard Baldwin and Simon Evenett, VoxEU.org, 2009, vii, [http://www.voxeu.org/reports/Murky\\_Protectionism.pdf](http://www.voxeu.org/reports/Murky_Protectionism.pdf).

<sup>[2]</sup> World Trade Organization, "Trade to expand by 9.5% in 2010 after a dismal 2009, WTO reports," press release, March 26, 2010, [http://www.wto.org/english/news\\_e/pr598\\_e.htm](http://www.wto.org/english/news_e/pr598_e.htm).

<sup>[3]</sup> The Economist, "Briefing Globalization and Trade: The Nuts and Bolts Come Apart," *The Economist*, March 28, 2009.

<sup>[4]</sup> Calista Cheung and Stéphanie Guichard, "Understanding the World Trade Collapse," Economics Department Working Papers No. 729, Organisation for Economic Co-operation and Development, 2009, [http://www.oecd.org/olis/2009doc.nsf/linkto/eco-wkp\(2009\)70](http://www.oecd.org/olis/2009doc.nsf/linkto/eco-wkp(2009)70).

<sup>[5]</sup> World Trade Organization, 1.

<sup>[6]</sup> Ibid.

<sup>[7]</sup> Ibid.

<sup>[8]</sup> The Economist, 79.

<sup>[9]</sup> Cheung, 6.

<sup>[10]</sup> Ibid, 10.

<sup>[11]</sup> Ibid.

<sup>[12]</sup> Yeo, vii.

- [13] Cheung, 5.
- [14] William R Cline, "Trade, Finance, and the Global Recession," Peterson Institute for International Economics. (remarks presented to the V Symposium on International Trade, Brazil Institute, Woodrow Wilson International Center for Scholars, Washington DC, February 20, 2009).
- [15] World Trade Organization, 4.
- [16] Cheung, 12.
- [17] World Trade Organization, 3.
- [18] Jean-Pierre Lehmann, "If the Global Financial Crisis Becomes a Global Trade Crisis... The consequences will be disastrous," International Institute for Management Development, 2008, [http://www.imd.ch/research/challenges/upload/TC106\\_08\\_if\\_the\\_global\\_financial\\_crisis\\_becomes\\_a\\_global\\_trade\\_crisis.pdf](http://www.imd.ch/research/challenges/upload/TC106_08_if_the_global_financial_crisis_becomes_a_global_trade_crisis.pdf).
- [19] Lehmann, 2.
- [20] Ibid.
- [21] Nouriel Roubini and Arpitha Bykere, "Lackluster Global Trade Outlook," Forbes, May 27, 2010.
- [22] Organisation for Economic Co-operation and Development, "Trade and the road to economic recovery," [http://www.oecd.org/document/20/0,3343,en\\_2649\\_37431\\_43088148\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/20/0,3343,en_2649_37431_43088148_1_1_1_1,00.html).
- [23] Organisation for Economic Co-operation and Development, "Keeping Markets Open At Times Of Economic Crisis," <http://www.oecd.org/dataoecd/48/19/42459971.pdf>.
- [24] Roubini and Bykere.
- [25] OECD, "Keeping Markets Open At Times Of Economic Crisis."
- [26] The Economist, 81.

## ***Where Has the U.S. Gone?***

**by: Maja M. Stearns, Associate Academic Dean, Everest University - Largo Campus**

In today's complex international trade arena many items have to come into play. There are trade sanctions and barriers that block the U.S. from participating in some economies. There are duties and tariffs along with the fluctuating exchange rate that can make U.S. origin goods less attractive. And today more than ever are the U.S. export laws and regulations resulting primarily with munitions (military) products. These regulations which appear to be outdated are working against U.S. prime contractors to be able to supply competitive products based on U.S. technologies. While the U.S. may have some of the best technologies for defense products not (easily) making those products and technologies affordable and available to our allies may be hurting our chances to ensure we are actively working to prevent terrorism around the globe.

Many foreign military contractors have established a presence in the U.S. so that they can participate in a global environment and be able to make sure that everyone has the best technologies and products to ensure our borders are safe and that we all are winning the war on terrorism. Key to these activities and initiatives are ensuring that

everyone operates on a level playing field and those technologies and products that need to be controlled are indeed controlled and those that do not need to be controlled are made available to our allies across the globe.

Products for military or defense applications fall under either Commerce jurisdiction for dual-use products or State jurisdiction for munitions list (military designed) products. Each entity has its own set of regulations that U.S. corporations must abide by. There are also strict requirements and guidelines concerning exports of these goods outside the U.S. The regulations for ones products can potentially fall into numerous governing agencies and even within those agencies there can be discussions that further muddy the waters.

Each administration that has come into the White House has proposed regulations that would make U.S. products more attractive. However it appears that the current administration is working to really make U.S. products and technology much more attractive and able to be designed back "in." In recent years many countries have been designing out U.S. technology and products due to the cumbersome export regulations. The current administration now wants to make the U.S. much more competitive. Our administration today wants to partner with industry and make the U.S. more competitive in regards to export compliance. Programs under way include having one technology platform, one licensing regime and one enforcement group. By having these new cohesive work groups within the Government will ensure that we are looking at not just dual-use technology but military designed products as well. We are looking to see the U.S. cooperating more with foreign relations and while ultimately we want to protect our most critical technologies we can also start to be competitive with some of our older technologies and allow our allies to start receiving strategic products and technology that will help all the NATO countries be stronger against terrorism and nations that support terrorism.

Designing back in U.S. technologies and products will ensure that we work towards a balanced budget, support our allies and ensure jobs for the U.S.

### ***The U.S. Antidumping and Countervailing Duty System: Is Regime Change in the Offing?***

**by: Jill Cramer, partner at Mowry & Grimson, PLLC in Washington, D.C.**

The U.S. antidumping and countervailing duty regime has remained relatively static since 1994, when the United States implemented the World Trade Organization Uruguay Round Agreements and conducted a major overhaul of U.S. trade law. Now, the United States may be once again on the brink of major changes to its antidumping and countervailing duty regime. Why? The United States currently employs a broken system that leads to uncertainty, uncollected duties, prolonged court litigation and enormous costs to all the parties involved. Both the Administration and those on Capitol

Hill have taken notice and are proposing changes to the current system. Meanwhile, the courts are monitoring governmental efforts to address challenges in the current law.

### ***New Trade Enforcement Measures Proposed***

It is no secret that the U.S. government fails to collect millions of dollars in assessed antidumping and countervailing duties every year. In a 2008 report, the Government Accountability Office ("GAO") estimated that \$600 million in antidumping and countervailing duties went uncollected between 2001 and March 2008. The Department of Treasury has acknowledged that it is able to collect less than 50% of antidumping and countervailing duties assessed. There are numerous reasons for the failure to collect, some of which can be blamed on the government's own practices and others on private parties. By way of background, the U.S. Department of Commerce is the government agency charged with setting antidumping and countervailing duties while U.S. Customs and Border Protection ("CBP") has responsibility for actually collecting the duties assessed on imports.

Among the factors highlighted by the GAO and other observers as contributing to the failure of the government to collect all the antidumping and countervailing duties assessed are that (1) the amount of the bond required of importers by CBP to secure the ultimate payment of duties can prove inadequate to cover final duties assessed, (2) companies that did not previously export products subject to duties ("new shippers") can be assigned an antidumping or countervailing duty rate that may not truly reflect their rate of dumping or subsidization, (3) the final amount of duties an importer may ultimately owe can dwarf the initial deposit amounts paid upon import and (4) the time between entry of merchandise and its ultimate liquidation can take years, such that importers may be bankrupt or lack the funds to pay antidumping and countervailing duty bills once they come due.

In August 2010, reacting to continued issues regarding collectability, the Obama Administration announced 14 proposals for strengthening U.S. enforcement of its antidumping and countervailing duty laws. Many of the new proposals involve the Commerce Department's methodology for determining antidumping margins in cases against nonmarket economy ("NME") countries, such as China and Vietnam. Highlights of the proposed measures include:

- Ending Commerce's current practice of allowing bonds, as opposed to cash deposits, for entries of items subject to antidumping or countervailing duties.
- Ending the current practice of allowing individual companies to be excluded from an order by showing that they are not dumping for three years or receiving subsidies for five years.
- Strengthening Commerce's current practice regarding company-specific antidumping rates in NME cases.
- Strengthening the treatment of resellers and other non-reviewed parties in NME cases to ensure that these parties pay the full amount of duties.
- Adoption of a new methodology for valuing labor rates in NME cases by using

surrogate wage rates that more fully capture all labor costs (including benefits and taxes) in the NME country.

- Tightening the rules for determining when the price of production inputs purchased from market economy countries will be substituted for Commerce's standard valuation for such inputs.
- Commerce intends to put forth specific proposals later this year or early in 2011 and to seek interested party comment.

The inadequacies in the current antidumping and countervailing duty system have not gone unnoticed on Capitol Hill. In August 2010, Senators Ron Wyden (D-OR) and Olympia Snowe (R-ME) introduced the Enforcing Orders and Reducing Circumvention and Evasion Act of 2010, S. 3725. The so-called EVASION Act would set up a dual track system for Commerce and CBP to investigate circumvention of antidumping and countervailing duties. Commerce would have enhanced ability to investigate circumvention of an order either on its own initiative, upon petition from private parties or upon recommendation from CBP. CBP, meanwhile, would be required to establish procedures for the filing of petitions by private parties alleging evasion of antidumping/countervailing orders and procedures for requiring a cash deposit for any entries found to have evaded an order. Both agencies would have tight timelines for making their determinations on evasion. Thus far, the bill remains in the Senate Finance Committee but its potential far-reaching implications warrant close monitoring of its progress.

### ***Will the United States Move to a Prospective Antidumping System?***

In April of this year the Department of Commerce announced that it was conducting a Congressionally mandated analysis that could ultimately transform the way antidumping and countervailing duties are calculated and collected in the United States. Commerce was directed pursuant to the 2010 Consolidated Appropriations Act to conduct this analysis to examine the advantages and disadvantages of a prospective and retrospective antidumping and countervailing duty system.

Currently, the United States utilizes a retrospective system, analyzing actual sales during a prior year to determine an antidumping or countervailing duty margin. The margin is then applied to past entries to determine an importer's ultimate liability. Under the alternative prospective system, which is used in Canada and the European Union, duties are updated regularly and apply to future importations. Under the prospective system importers know their liability before importing the subject merchandise. By contrast, under the retrospective system, an importer's liability may not be known for years after importation.

Those advocating a shift to a prospective duty regime - mainly importers and foreign companies - argue that the prospective system would enable the U.S. government to continue to remedy injurious dumping and subsidies while enhancing overall compliance. These gains in compliance, some assert, would minimize uncollected duties, effectively targeting high-risk importers. Moreover, some contend, a

change to a prospective regime would enhance the predictability of the current antidumping and countervailing duty system, which is fraught with unpredictability for all actors involved - particularly for U.S. importers, the domestic industry and the government itself. Greater predictability for importers could lead to fewer collectability issues. A move to a more reliable system would also be welcomed by importers at a time when they face increasingly rigorous import standards, such as the enhanced Importer Security Filing and Lacey Act amendment reporting requirements. These burdens can be especially challenging for small businesses. A prospective system would potentially preserve valuable government resources while helping to save U.S. jobs and minimizing bad actors.

Those opposed to the change - primarily U.S. manufacturers - argue that a change to a prospective system would reduce the effectiveness of current antidumping and subsidy laws and could lead to greater evasion. They assert that only the current system provides accuracy in addressing unfair trade practices and an ongoing incentive for foreign producers to charge and for importers to pay a fair price. Parties favoring the continuation of the status quo are concerned that the prospective system could allow foreign producers to increase their levels of dumping because the antidumping or countervailing duty rate is set in advance. They also argue that under the prospective system, domestic producers are unable to obtain a remedy for situations in which antidumping or countervailing duties are underpaid when dumping or subsidization has increased since the time the initial rate was set.

It remains to be seen how seriously Congress is considering a change to a prospective system. The Department of Commerce held a public hearing on the issue but has yet to give any real indication as to whether 2011 may bring proposals for an overhaul to the way in which the government calculates antidumping and countervailing duties.

### ***Monitoring by the Courts and the World Trade Organization***

The last several years brought significant U.S. court and WTO decisions on a range of trade-related issues from a challenge to the Commerce Department's "zeroing" methodology (in which it eliminates negative margins from an antidumping duty margin calculation), to the constitutionality of a Congressional attempt through the so-called Byrd Amendment to put antidumping and countervailing duties directly into the hands of certain domestic producers, to the legality of CBP's enhanced bonding requirements for importers. Each of these laws has been found to be inconsistent with U.S. WTO obligations. Nevertheless, zeroing and the Byrd Amendment continue to be part of the U.S. law. The enhanced bonding requirement, however, has been modified due to U.S. court and WTO decisions. As recently as October 21, 2010, the Court of International Trade issued an opinion monitoring CBP's termination of its attempt to deal with the collectability issues discussed above by increasing continuous bond amounts for importers of shrimp to many times what it was under long-established practice. Though each of these cases involves different aspects of U.S. trade law, they are united in echoing the necessity of reform to the current system.

## ***Small Developing Countries and the WTO Dispute Settlement Mechanism: The Case of Antigua and Barbuda***

by: **Sarita D. Jackson, Ph.D.**, assistant professor in the Department of Political Science and Criminal Justice at North Carolina A&T State University in Greensboro, NC.

*"The automaticity of the [disputes] procedure makes it more difficult for larger countries to bully smaller countries into giving up their legal complaints."*[\[1\]](#)

### ***Introduction***

Contrary to the idea that resource constraints and size may prevent small developing countries from having leverage within the World Trade Organization (WTO), some such countries have demonstrated opposite results. The twin island of Antigua and Barbuda, hereinafter referred to as Antigua, has shown that one of the smallest members of the WTO can effectively utilize WTO processes and procedures to induce a large developed countries to comply with multilateral trade rules.

### ***Antigua and Barbuda, the United States and Cross-border Gambling Dispute***

Antigua's population reached close to 80,000 and its GDP, over US\$700 million, according to 2003 World Bank figures. More than half of its GDP came from the tourism sector. In order to diversify its economy, Antigua began promoting internet gambling services. By 2000, Antigua's licensed gambling services drew in approximately US\$1 billion annually.[\[2\]](#) In 2001, Antigua's online gambling industry reportedly became the second leading employer following tourism.[\[3\]](#) Ninety-three licensed gambling operations employed 1,900 people.[\[4\]](#) The success of Antigua's online gambling industry did not come without consequences-prohibition by the United States.

In 1998, 21 U.S. citizens were charged with violating the Wire Act. This act, which took effect 37 years earlier, bans the use of telephone or wire communication to make wagers. However, Jay Cohen, co-founder of the Antigua-based World Sports Exchange, challenged his conviction in the U.S. courts. The other defendants plead guilty, failed to return to the United States and remained fugitives, or had their cases dismissed.[\[5\]](#)

The 2nd Circuit of the U.S. Court of Appeals upheld Cohen's conviction two years later. He was sentenced to a 21 month prison term and fined US\$5,000. Cohen became the first person convicted for off-shore gambling services. His indictment in U.S. courts was not the end of this issue. Rather, it became a significant case before the multilateral trading community between one of the smallest members and the largest member of the WTO.

In 2003, Antigua, with the help of U.S.-based lawyer Mark Mendel, challenged the U.S. ban on offshore internet gambling services by invoking the dispute settlement process. Antigua argued that casinos based in the Caribbean nation faced unfair discrimination. The United States maintained that US anti-offshore gambling laws provided moral protection for underage and other "vulnerable groups".

Antigua and the United States tried to negotiate a compromise deal, but the talks failed. Rather than agree to a compromise that it found unacceptable, Antigua moved forward with the dispute settlement process. In 2004, the WTO ruled in Antigua's favor and found that U.S. federal and state laws against cross-border internet gambling services violated its commitments under the General Agreement on Trade in Services (GATS). Furthermore, the United States permitted domestic online gambling, which contradicted its argument that its laws protected the morals of the public. The WTO upheld its ruling in 2005 and again in 2007.

Antigua took a huge gamble to challenge U.S. laws and their impact on international trade. Or did it really? The mechanisms were put in place to create opportunities for small developing countries to actually gain from the system, as the next section illustrates.

### ***The Dispute Settlement Mechanism and Leverage for Small Developing Countries***

The Dispute Settlement Body (DSB) was created under the Dispute Settlement Understanding (DSU) in 1994. The DSB sets up panels and evaluates panel decisions pertaining to trade disputes. In addition, the DSB authorizes the "suspension of concessions and other obligations under the covered agreements" (Art. 2 DSU). In short, the DSB is designed to ensure compliance with multilateral trading rules. Antigua utilized the various mechanisms within the dispute settlement process-legal framework, appellate body, cross-retaliation-so that the United States would comply with its GATS obligations.

Legal Framework. Antigua was able to take advantage of the DSB to challenge U.S. federal and state laws banning cross-border internet gambling. Mendel, the lawyer hired by the Antigua government, reviewed the United States v. Cohen case. He found that the federal court ruling violated the principles established under the WTO. As a result, Antigua moved forward with the dispute resolution process in March 2003. A dispute panel formed three months later. Using the WTO legal framework, Antigua asserted that U.S. federal laws-Wire Act, Travel Act, and Illegal Gambling Business Act-and state-level statutes in Louisiana, Massachusetts, South Dakota and Utah failed to comply with GATS obligations.

Article XIV of the GATS also provides for certain exceptions to WTO obligations. It states that "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures necessary to protect public morals or to maintain public order." The United States tried to invoke the moral protection clause, but this argument was struck down by the panel. The WTO found that the operations of

U.S.-based online casinos contradicted claims of a threat to public morals. Albeit, Antigua is not strong economically compared to the United States, its strong legal case based on WTO rules worked in its favor.

Appellate Body. The DSB consists of an Appellate Body to review appeals by any party. The seven members of the appellate body are appointed to a four year term and "may not be connected with any government."<sup>[6]</sup> Appellate decisions are made in private and are confidential.

Antigua took advantage of the appeals process. The tiny nation presented a cross-appeal to the US appeal against the DSB panel's ruling. Again, the WTO upheld its ruling on the basis that the United States violated its commitments under GATS and did not satisfy the exception clause regarding public morals. The aforementioned U.S. laws indeed were discriminatory due to the fact that while internet gambling from Antigua-based and other foreign-based operations was banned, U.S.-based internet gambling services were allowed under the Interstate Horseracing Act.

Additionally, the Appellate Body maintained that the U.S. made a commitment to liberal trade in gambling services in GATS Schedule Subsection 10.D. titled, "Other Recreational Services (Excluding Sporting)." The United States argued that gambling falls under "sporting", and thus, is exempt from a commitment to free trade. Upon reviewing the definition of "sporting", the WTO ruled that the term does not include gambling.

Cross-retaliation. The United States sought to withdraw its commitments pertaining to internet gambling as allowed under Article XXI of GATS in order to comply. However, Antigua expressed its discontent with the US proposal. As a result, Antigua turned towards Article XXII of the DSU, which allows the country "having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the member concerned of concessions or other obligations under the covered agreements." In other words, Antigua took advantage of the retaliation mechanism as the last step to get the United States to comply with the binding GATS rules.

Hudec (2002, 84) purports that smaller countries are not able to effectively retaliate.<sup>[7]</sup> Antigua still pursued retaliatory measures since the United States continued to fail to comply with the DSB panel's rulings. It sought permission to suspend its commitments under the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). The request to suspend intellectual property rights on U.S. companies worth US\$3.4 billion per annum were designed to compensate Antigua for its revenue loss resulting from the U.S. ban on off-shore internet gambling. According to Antigua's estimates, the licensed gambling services lost about US\$24 billion from 2000 to 2006 resulting partly from U.S. bans.<sup>[8]</sup>

In the end, the WTO supported Antigua's request for a suspension but reduced the value of that suspension to US\$21 million each year. This means that Antigua is allowed to ignore intellectual property rights on up to US\$21 million worth of software,

music or movies from US companies each year. This amount cannot be appealed. It must be noted that although the WTO ruled in Antigua's favor, the gains are limited. According to a 2008 report, Mendel found the retaliation amount to be very low and that it lessens the opportunity for small states to receive any significant trade concessions from the United States.<sup>[9]</sup> At the same time, it does provide some leverage for Antigua when entering into discussions with the United States regarding allowing the nation to maintain some access to the U.S. internet gambling market.<sup>[10]</sup>

### ***Implications for Other Small Developing Countries***

Small developing countries still face numerous financial and human resource constraints that would make it difficult to engage in a lengthy dispute settlement process. However, Antigua shows that the WTO framework itself creates opportunities for small countries to overcome their deficiencies, albeit to a certain extent. The system does not simply favor large countries or provide mechanisms where they can buy or bully their way out of compliance with multilateral trade rules.

Thus, the dispute settlement process is not a zero-sum game for small developing countries. For example, Ecuador also demonstrates a smaller country's ability to challenge the EU regarding its banana regime, which favored African-Caribbean-Pacific (ACP) producers. (This case began prior to Antigua's dispute settlement process.) Ecuador followed the dispute settlement process and became the first developing country to receive permission from the WTO to cross-retaliate by suspending some of its TRIPS commitments. Ecuador used this authorization as leverage to reach a compromise with the EU, thus making it unnecessary to actually follow through with cross-retaliation.<sup>[11]</sup>

### ***Conclusion***

This piece challenges assumptions that small states do not gain within the WTO. The article shows that the institutional mechanisms under the WTO provide an opportunity for small developing countries to gain. Antigua's dispute settlement case against the United States surrounding off-shore internet gambling operations has been described as a battle between David and Goliath. Even with differences in economic sizes and resources, Antigua was able to declare some kind of victory in its battle to induce the United States to comply with its GATS commitments. The aspects of the institution that were useful were the legal framework itself, the appellate body and the cross-retaliation mechanism.

This case shows small states that the dispute settlement process is not a zero-sum game, in which they are automatically destined to lose. Therefore, a gamble on the WTO dispute settlement process, even against a large, developed country, may be worth a try.

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<sup>[1]</sup> Robert E. Hudec, "The Adequacy of WTO Dispute Settlement Remedies: A Developing

Country Perspective," in Bernard Hoekman, Aaditya Mattoo and Philip English, eds., *Development, Trade, and the WTO: A Handbook*, Washington, D.C.: World Bank, 2002, pp. 83. Brackets added by author.

[2] Jeffrey Sparshott, "Antigua gambles on trade case with U.S.; Tiny Caribbean nation contests laws regulating online gambling," *The Washington Times*, July 5, 2006, p. C07.

[3] Isaac Wohl, "The Antigua-United States Online Gambling Dispute," *Journal of International Commerce and Economics*, July 2009, pp. 1-22; available from [www.usitc.gov/publications/332/journals/online\\_gambling\\_dispute.pdf](http://www.usitc.gov/publications/332/journals/online_gambling_dispute.pdf), accessed September 28, 2010.

[4] *Ibid.*

[5] Wohl, p. 5; Tom Lowry, "Lawmakers, enforcers target on-line gambling," *USA Today*, April 26, 1999, p. 1B.

[6] Valentina Delich, "Developing Countries and the WTO Dispute Settlement System," in Bernard Hoekman, Aaditya Mattoo and Philip English, eds., *Development, Trade, and the WTO: A Handbook*, Washington, D.C.: World Bank, 2002, pp. 72.

[7] Hudec, p. 81-91

[8] Sparshott, p. C07.

[9] "WTO Compliance Panel Awards Antigua \$21 Million in Retaliation," *Inside US Trade*, January 4, 2008.

[10] *Ibid.*

[11] Wohl, p. 11.

## ***Anti-Dumping Duties as a Means of Protection: Is it worth it? India's Recent Protection of the Polypropylene Industry Triggers Criticism***

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Last summer, the World Trade Organization (WTO) Secretariat released a report on the increase of anti-dumping investigations from July to December 2008. Of the 208 investigations initiated in the second half of 2008, India initiated 42, the highest of any WTO member. One-hundred thirty eight of the 208 investigations created new final measures with India in second place, only to the United States, for reporting 13 new measures. India is not a member for the coalition against anti-dumping duty abuses, "Friends of Anti-Dumping Negotiations," and continues to use anti-dumping duties as a barrier to trade; however, potential consequences may arise with India's actions.

India's recent foray in anti-dumping measures involves a duty for Saudi Arabian exports of Polypropylene (PP), a resilient plastic with a wide range of use. The duty for PP imports from Saudi Arabia stopped in October 2010 due to increased pressure from the Ministry of Commerce and Industry of Saudi Arabia and has not moved into the WTO Dispute Settlement Body to date.

India halted its pursuit of anti-dumping duties for PP imports from Saudi Arabia after diplomatic tensions threatened bilateral trade this past summer. Speculation of a future WTO case with India as the complainant was put to rest with the halting of the duties; however, Saudi Arabia could potentially act as the complainant to recover anti-dumping duties from India. The two large developing countries sparked international

interest in India's anti-dumping duty abuses as the Saudi Arabian delegations put pressure on India to relinquish duties. The worldwide attention to the dispute suggests the best practice to preserve Indo-Saudi relations would be a quiet recovery of duties. Even a quiet end to the dispute would develop implications for future WTO negotiations, specifically accession processes for other PP producing countries and Doha round tensions.

According to India's *The Business Standard*, India decided to implement an anti-dumping duty on the PP imports from Saudi Arabia, Oman and Singapore in response to pressure from domestic PP producers in mid-2009. The two Indian PP manufacturers lobbied to justify "significant loss" of revenue due to imports from Saudi Arabia, Oman and Singapore. The Indian PP producers suggested the Saudi Arabian PP imports were cheaper domestically when adjusted through an international pricing mechanism for feedstock and propane. Indian PP manufacturers believed the pricing mechanism inhibited fair competition and a duty was necessary to recuperate the lost revenue. India adjusted the Saudi Arabian pricing for feedstock and propane to international levels and taxed the PP imports the price difference, approximately 22 percent according to *Arab News*. Prior to the anti-dumping allegations, imports of PP had a 5 percent duty, similar to the United States and Saudi Arabian duty.

Saudi Arabia responded to India's tariff increase negatively and proceeded to justify the prices for feedstock and propane. The terms of agreement for Saudi Arabia's membership into the WTO allowed a specialized pricing mechanism intended for goods such as PP, therefore Saudi Arabia believes India is in violation of WTO law for creating barriers to trade and neglecting the anti-dumping duties laws.

After months of tension, India decided this October to halt the 22 percent tariff on PP products from Saudi Arabia with pressure from the Saudi Arabian Ministry of Commerce and Industry. The Indo-Saudi debate over PP anti-dumping duties stopped due to diplomatic and political interests between the two countries. *The Business Standard* explains, "India believes that King Abdullah's enormous influence in Pakistan, cutting across political lines as well as across the army and civil society, can only positively impact ties between India and Pakistan...". India and Saudi Arabia ramped up diplomatic visits in the past two years as political tensions arose in their respective regions. The President of Saudi Export Development Center, Abdul Rahman Al-zamil, suggests the Saudi market for Indian commodities is fair and the Indo-Saudi trade relationship is balanced by India's reliance on Saudi Arabian crude oil, which supplies 20 percent of India's needs.

The Ministry of Commerce and Industry of Saudi Arabia responded to the anti-dumping duties with threats of trade barriers as a means of retaliation. The halting of the measures and the recovery of damages to Saudi Arabian PP exporters can hopefully smooth over any damages; however, the dispute has implications for future WTO accessions given the nature of the dispute.

Saudi Arabia completed a 12-year accession process in 2005, with the majority of the time spent on negotiations. Saudi Arabia negotiated large concessions in order to join the WTO by binding tariffs on goods for both agriculture and non-agriculture industries. Saudi Arabia did negotiate the pricing mechanism for PP products as part of the WTO package to preserve the industry. Alternatively, India joined the WTO in 1995 as it was a signatory for GATT in 1948 and merged into the WTO without making large concessions.

Saudi Arabia sought to protect the energy sector's byproducts, such as PP, over the course of uncharacteristically long accession period. The current accession processes underway will potentially negotiate without the protection that Saudi Arabia established resulting in an increase of chemical disputes from energy sector actors. Disputes between WTO members concerning oil byproducts could force the WTO to take a closer look at refining the laws for the energy sector. The acceding countries with large oil reserves must prepare negotiations involving pricing mechanisms for PP among other oil byproducts in order to protect their commodities. Currently, Algeria, Iran, Iraq, Kazakhstan, Libya, Russia and Ukraine are large energy actors that are going through the accession process. Saudi Arabia largely represents the energy sector faction of the Middle East in WTO.

As WTO members, both Saudi Arabia and India are developing countries in the Doha development round; however, many WTO members are working to negotiate down India's large tariffs in response to recent growth and protected markets. India is a powerful player in the Doha Round as a developing country with massive growth in the past decade. India's negotiation strategy in the Doha Round is characterized by protecting markets while pressuring the developed countries to open their markets more. The developed countries can use Saudi Arabia as a partner to combat the developing country stigma of high protection. Saudi Arabia's recent membership demonstrates how a developing country can maintain low tariffs and cooperation in other Doha agenda items. Saudi Arabia could join Brazil and the other members of the, "Friends for Anti-Dumping Negotiations" to work towards eliminating the abuse of anti-dumping measures as a means of import duties.

Saudi Arabia's resilience throughout a PP anti-dumping duty dispute with India suggests a strong player in the WTO in future negotiations and a partner for the soon-to-be members of the WTO who have energy concerns. Director General-Pascal Lamy in 2007 suggested energy regulations are an inevitable topic for the WTO to regulate given the international trade world's involvement in the energy sector. As the dispute with Saudi Arabia ends, India launched new anti-dumping investigations for polypropylene for Korea, Taiwan and the United States in the past week. The outcome of the PP dispute suggests that India will need to be more delicate with choosing the commodities and countries to apply anti-dumping duty measures. If India is indiscreet, larger consequences in WTO negotiations and bi-lateral diplomacy will affect more than two domestic, non-competitive, PP producers.

## ***History Repeating Itself: The Use of Bilateral Agreements to Establish International Intellectual Property Law***

**by: Manka Azefor, attorney specializing in international development law and co-editor of the WIIT Newsletter**

### ***Introduction***

A recent study in the Journal of the International AIDS Society warns that India's ability to supply low-cost generic medicines to the poor may be obstructed by Free Trade Agreements (FTAs).<sup>[1]</sup> The study highlights the important role Indian manufacturers of generic antiretroviral drugs play in the global fight to overcome the HIV/AIDS pandemic. The study identifies current FTA negotiations between the European Union (EU) and India as a threat due to provisions that exceed the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement.<sup>[2]</sup> India currently supplies more than eighty percent of the donor-funded AIDS medications to developing countries. Groups such as, UNITAID, are warning the international community that altering existing international IP laws through FTAs will hurt AIDS treatment in poor countries.<sup>[3]</sup>

The current deadlock at the World Trade Organization (WTO) Doha Development Round has led to an increase of smaller bilateral agreements addressing trade issues including intellectual property rights (IPRs). The use of trade and investment agreements may have unintended negative consequences for agriculture, food, labor and IPRs in developing countries, including those referenced by the abovementioned study. First, the utilization of investment treaties to enforce IPRs presents foreign investors, with intellectual property, an "investor-friendly" investor-state regime to adjudicate IP claims. Second, developed countries used similar methods to create an international investment regime that developing countries, once, collectively fought to change. These agreements will lock developing countries into strict IP regulations, thus creating a path to make them international norms. The current international investment regime should serve as a warning sign to developing countries about the legal realities of signing bilateral trade and investment treaties. Finally, a cohesive global IP system can be achieved by allowing all countries to develop national IP policies instead of forcing a strict IP regime that poorer countries may resist.

### ***International Trade of Intellectual Property***

Several international documents and legal systems regulate the rights of companies and individuals holding intellectual property in order to encourage innovation. The agreement on TRIPS standardized IP law for WTO member-states during the Uruguay Round of negotiations. Building on the World Intellectual Property Organization's mission of promoting global IPRs for the United Nations, the international trade regime established IP laws with some teeth. The TRIPS Agreement covers five

broad issues: 1) the application of international IP and trade agreements; 2) agreeable IPRs protection; 3) national enforcement of IPRs; 4) the WTO IPRs dispute settlement system; and 5) special transitional arrangements during the introductory period of the new system.<sup>[4]</sup> TRIPS provided developing countries with some flexibility in the application of IPRs while developed countries benefited from the establishment of global IP laws.

In the late 1990s, the international IP regime clashed with efforts to solve the growing HIV/AIDS epidemic in developing countries. Brazil, India and South Africa based efforts to reproduce antiretroviral medicines on Article 31 of TRIPS, which addresses compulsory licensing. The HIV/AIDS epidemic in poorer countries increased tensions between the developed and developing world. In November 2001, members of the WTO negotiated the Doha Declaration on TRIPS and Public Health.<sup>[5]</sup> The declaration was an attempt to establish a middle ground between developed and developing countries' views on IPRs: patent protections for the development of new drugs and the availability of essential drugs for the sick.

### ***International Investment Agreements and Intellectual Property Rights***

International investment law has been established through customary international law and a number of treaties that provide foreign investors with various rights and protections. International investment treaties come in the form of bilateral and multilateral agreements. Some regional free trade agreements have special sections dedicated to foreign investment such as, Chapter 11 of the North American Free Trade Agreement (NAFTA).<sup>[6]</sup> Generally, international investment treaties address entry issues, free transfer of money, and encourage the use of modern regulatory systems.<sup>[7]</sup> Protections for investments and obligations of host countries include: national treatment, most favored nation treatment (MFN), fair and equitable treatment, and prohibitions on illegal expropriation.<sup>[8]</sup> It remains to be seen how the MFN treatment in smaller trade and investment treaties with TRIPS-plus requirements may impact other trade agreements. It is also unclear how the issue of expropriation and compulsory licensing under Article 31 of TRIPS will be reconciled.<sup>[9]</sup>

Perhaps the most significant characteristic of investment treaties is the dispute settlement mechanism allowing foreign investors to file arbitration claims against sovereign States. Investment treaties allow investors to file arbitration claims at facilities such as the International Centre for Settlement of Investment Disputes (ICSID), the International Chamber of Commerce (ICC) and/or allow for the establishment of an ad hoc arbitration using UNCITRAL rules.<sup>[10]</sup> This system is successful because States submit to the tribunal's jurisdiction before the initiation of arbitration through bilateral trade agreements (BITs) and other multilateral investment treaties. This right is extremely important because it allows private parties to file claims against a sovereign States, a right that does not exist in any other international legal forum.<sup>[11]</sup> Private investors benefit the most from this system because it allows them to file claims without going through their national governments.

## ***The Path to Current International Investment Law***

When international multilateral negotiations fail, developed countries use bilateral agreements as a pathway to create international norms. This method is successful because poor countries believe the theory that signing such agreements increase foreign direct investment; a theory which studies have shown not to be the case.<sup>[12]</sup> The use of bilateral treaties by wealthy nations to establish strong IPRs when studied in a historical context reveals a premeditated policy of developed countries to establish international investment norms when multilateral negotiations failed. After the colonial era many European powers sought to protect investments in countries hitherto former European colonies.<sup>[13]</sup> The first BIT was signed by former West Germany and Pakistan in 1959 followed by Switzerland and other European countries.<sup>[14]</sup> European countries preferred one-on-one negotiations with developing countries because they resulted in preferential treaty language.<sup>[15]</sup> The United States followed suit and signed its first BIT in 1981.<sup>[16]</sup> Newly independent countries clashed with developed countries about international investment laws that are still perceived as biased against poorer countries.<sup>[17]</sup> As these disputes evolved in the 1970s, the United Nations General Assembly (UNGA) became the developing world's apparatus for initiating changes to international economic legal theory and policy.<sup>[18]</sup> The passing of resolutions by the UNGA underscored the seriousness of these countries to change what was labeled as customary international investment law.<sup>[19]</sup>

After the Second World War, there were several failed attempts to create a cohesive global investment legal regime. The Havana Charter setting out to establish the International Trade Organization and the Organization for Economic Co-Operation and Development's Multilateral Agreement on Investment all failed to establish one global investment regime. Attempts to include an investment regime at the WTO, the Agreement on Trade Related Investment Measures (TRIMS), were also unsuccessful.<sup>[20]</sup> TRIMS discussions ended because it is unclear whether an investment regime is compatible with the WTO.<sup>[21]</sup>

While attempts for a broader investment regime failed, BITs solidified current international investment law. The international investment system today is heavily in favor of foreign investors. Today, a system has been created where investors receive most of the benefits and no responsibility. Current international investment law gives a "blank check to foreigners" by making it relatively simple for investors to file arbitration claims against a sovereign nation.<sup>[22]</sup> This one-sided approach to international investment policy has led to severe criticism of the system. Bolivia and Ecuador pulled out of the investment regime because the investor-bias makes it difficult to see how the system benefits poorer countries whose responsibilities to their citizens must take precedence over the needs of foreign investors.

## ***IPRs Beyond the TRIPS Agreement***

Post-TRIPS investment treaties include provisions on regulating the IPRs of foreign investors. International investment treaties give the term "investment" an

expansive definition, which includes intellectual property. For example, the U.S.-Uruguay BIT states that intellectual property rights are forms of investment.<sup>[23]</sup> Canada's BITs with Venezuela and Costa Rica specifically name copyrights, trademark, patent and other IP as investments.<sup>[24]</sup> Some investment treaties have IPRs that exceed what is required by the TRIPS Agreement. These standards are in the best interest of citizens of the EU zone and the US.<sup>[25]</sup> Many EU and U.S. treaties request *highest international standards* for IPRs. The problem with this concept is that there are no international standards for IPRs and they will not exist until the global community comes together to set such standards. This language is used because it suits IP holders in developed countries. However, the policy of using investment treaties to establish high IPRs will lead to increased bloc-opposition that may hinder global cooperation in the future.<sup>[26]</sup>

The dispute settlement system of the international investment regime will expose countries to added pressures. However, current BITs and regional or multilateral investment and trade agreements have implications that are contrary to the individual and collective efforts of developing countries. This trend also negates the work that developing countries have done to slow the progression of global intellectual property policies that do not benefit poorer countries. Collectively, the process of engaging in one-on-one treaty negotiations that guarantee stronger IP protections negates efforts for a more balanced system.

## **Conclusion**

The use of bilateral agreements by developed countries to set global agendas contrary to collective bargaining efforts of developing countries is not a new trend. The failure of the Doha Development Round to reach new agreements on trade regulations has led to an increase of smaller trade and investment agreements to set IP law where the WTO as an organization has left a void. However, developing countries should be wary about signing too many bilateral agreements not only because they undermine the role of developing countries in international organizations, but because of unintended effects on their economies. Developed countries should focus on building IP policies in developing countries that highlight the economic benefits of such policies. If these agreements have negative impact on the global fight on HIV/AIDS and other problems, the bloc resistance to other systems will continue; or worse, developing countries will pull out all together.

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- [17] *See for further discussion* Guzman, *supra* note 13, at 644.
- [18] Ibironke Odumosu, *The Antinomies of the (Continued) Relevance of ICSID to the Third World*, 8 SAN DIEGO INT'L L.J. 345, 353 (2007).
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- [21] *See generally* Martin Roy, *Implications for the GATS of Negotiations on a Multilateral Investment Framework*, 4 J. WORLD INVESTMENT 963 (2003) (discussing the challenges of integrating an investment framework into GATS).
- [22] Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 VAND. J. TRANSNAT'L L. 775, 781-782 (2008).
- [23] Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Uru., art 1, Nov. 4, 2005, S. TREATY DOC NO 109-9 (2006).
- [24] DAVID VIVAS-EUGUL REGIONAL AND BILATERAL AGREEMENTS AND A TRIPS-PLUS WORLD: FREE TRADE AREA OF THE AMERICAS (FTAA) 7-8 (Geoff Tansey ed., 2003).
- [25] Anderson & Razavi, *supra* note 9, at 284.
- [26] *Id.*, at 283.

## BOOK REVIEW

### ***A Lawyers Guide to Section 337 Investigations Before the U.S. International Trade Commission***

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As practice under Section 337 of the Tariff Act of 1930 has grown, so has development of the law. Many precepts once taken for granted have been overruled and others have arisen that will survive until challenged in the future. Once little known as a statute affecting intellectual property practice, Section 337 has become mainstream as imports have come to play an ever-more significant role in the U.S. economy. The following excerpt from ***A Lawyers Guide to Section 337 Investigations Before the U.S. International Trade Commission*** will, hopefully, assist those who wish to learn more about the use of Section 337 and practice before an active administrative agency entrusted with its administration.

Published with permission by the American Bar Association. Copies of ***A Lawyers Guide to Section 337 Investigations Before the U.S. International Trade Commission*** may be obtained from the ABA Bookstore at <http://www.ababooks.org/> (search by keywords 'Section 337' or call 800.285.2221). ABA Product Code 5370171.

A primary concern for intellectual property rights holders is protection from unfair foreign competition. Since the advent of the patent as a method of publicly disclosing novel inventions, it has been imperative that those inventions, and thus those patents, be protected during their period of exclusivity. This is no different in the United States from anywhere else in the world. Indeed, globalization of the marketplace has made intellectual property protection and international trade inextricably linked. Critically then, enforcing U.S. patent and other IPR is one way of protecting domestic industry from unfair competition emanating from outside the United States.

In the United States, owners of U.S. IPR, primarily patent owners, have used Section 337 of the Tariff Act of 1930 to protect their rights against infringing imported products. While originally written to prevent "unfair methods of competition and unfair acts," this statute now also makes it specifically unlawful to import into the United States any article that infringes a patent, trademark or copyright that is valid and enforceable in the United States. Although not widely used at its inception, over the past 30 years Section 337 has become increasingly popular, as rights holders have learned how to take advantage of the protection afforded by the statute. The United States International Trade Commission has sole authority to investigate alleged Section 337 violations. The ITC is becoming an increasingly popular forum for a multitude of reasons: the effective remedies it offers IPR holders, its ability to conduct expedited hearings, the forum's broad jurisdiction and the Commission's specialized knowledge of

patent law. The number of complaints filed increased from an annual average of twelve investigations during the years 1990 to 2000 to 28 investigations for the years 2001 through 2008.

Under the statute, the ITC has the power to exclude infringing products from entry into the United States. This exclusion is based on the existence of an unfair method of competition, which is either presumed or proven to cause injury to a domestic industry. Traditionally, the "domestic industry" criterion was satisfied by demonstrating that facilities, equipment and labor in the United States were utilized to produce a patented item. However, in 1988, amendments to the law relaxed the domestic industry requirement. As the law stands now, importing infringing articles is unlawful if "an industry in the United States" exists "relating to" articles protected by the patent, trademark or copyright. That industry is defined to "exist" if there is: (i) significant investment in plant and equipment; (ii) significant employment of labor or capital; or (iii) substantial investment in the exploitation of the patent, trademark or copyright as evidenced by expenditures on research, development or licensing. The third prong of this definition means it is no longer necessary that the complainant have production facilities located in the United States. However, the meaning of "significant" and "substantial" is not apparent from the statute itself or its legislative history and is being developed on a case-by-case basis.

The 1988 amendments also eliminated the need to show injury to a domestic industry in patent, trademark or copyright cases. Seeking to make Section 337 "a more effective remedy for the protection of U.S. intellectual property rights," Congress determined that requiring proof of injury beyond that presumed by proof of the infringement itself was not necessary. The elimination of this requirement has had an important practical effect: prior to the amendment, over half of the total expense litigating a Section 337 case was incurred in establishing injury, making such claims inaccessible to many prospective complainants. Without the burden of proving injury, many more IPR owners can afford to bring a claim.

The speed at which Section 337 investigations are heard is remarkably expeditious-an important advantage for companies seeking immediate relief. The actual hearing generally occurs seven to nine months from the date of institution of the investigation, as opposed to the typical two to three years in federal district court. The majority of Section 337 investigations are completed in approximately twelve to sixteen months, which is quicker than even the fastest dockets in the Eastern District of Virginia and the Eastern District of Texas. A Section 337 investigation involves six main players: the Commission itself, the Administrative Law Judge, an investigative attorney from the Office of Unfair Import Investigations, the complainant(s), the respondent(s), and possible third parties. The arguments and decisions of these players ultimately determine the outcome of a case.

Although the ITC offers complainants a number of distinct advantages over a federal district court, there are a few drawbacks. First, a prospective complainant must make extensive preparations before filing a Section 337 complaint, as it requires more

documentation than does notice pleading in federal district court. Secondly, there is a public interest aspect resulting from Section 337's origin as a trade statute. Perhaps most importantly, a Section 337 investigation cannot result in a monetary award, whereas an infringement action in federal court can. However, a monetary award may not be critical to the IPR owner, particularly when the infringing goods have just begun entering the market and protection of the market is the owner's paramount concern. Nevertheless, the options need not be mutually exclusive, since an IPR owner may seek institution of a Section 337 investigation in conjunction with initiating an infringement action in federal court. That is, parallel litigation is possible. However, 28 U.S.C. § 1659(a) gives the district court defendant a right to a stay if it is also named as a respondent in a Section 337 investigation.

During the period between 2000 and 2008, forty-six percent of investigations were settled before the case proceeded to trial. Of the cases that went to trial during this period, as might be expected in proceedings governed by due process, a violation was found about half the time; in the other half, there was either no violation found, or the complaint was withdrawn.

There are four primary remedies available under the statute: temporary exclusion order, general exclusion order, limited exclusion order and a cease and desist order. When an exclusion order becomes effective, United States Customs and Border Protection, which is part of the Department of Homeland Security, will bar the infringing products from entering the country. If there is evidence that infringing products are still entering the United States in violation of an exclusion order, an enforcement proceeding with monetary penalties may take place at the ITC. Any party adversely affected by a Commission decision under Section 337 may appeal the decision to the U.S. Court of Appeals for the Federal Circuit.

## **Recent Events**

### **WIIT Happy Hour**

October 7, 2010

WIIT hosted a happy hour on October 7. In an effort to get the word out about WIIT and WIIT programs, and have more opportunities for members to network, we are having free, open to all, happy hours. About 40 people attended and half of those were non-members that are considering becoming members. It was a fun night out at PS 7. We are now planning the next happy hour and welcome everyone to come by, have a drink and meet your WIIT colleagues.

## Latest Developments on ACTA

November 2, 2010

WIIT's International Agreements/WTO and Intellectual Property sections hosted a sold-out luncheon on the Anti-Counterfeiting Trade Agreement (ACTA) on November 2, 2010. The off-the-record event featured high-profile speakers exceptionally familiar with the agreement and its related issues: Kira Alvarez, ACTA Negotiator and Deputy Assistant U.S. Trade Representative; Matthew Schruers, Counsel at the Computer and Communications Industry Association; and Eric Smith, President of International Intellectual Property Alliance (IIPA). Moderated by Eric Solovy of Sidley Austin, the speakers had a lively debate about the controversial agreement, and provided the audience with a unique understanding of the issues.

## TRIPS and Terroir

November 3, 2010

On November 3, 2010, the newly created Intellectual Property section hosted a WIIT-wide wine tasting, *TRIPS and Terroir*, featuring wines from regions around the world. Over samples of Champagne, pinot grigio, merlot, and port, guests learned about the intellectual property agreement (TRIPS) at the WTO, which includes provisions designed to protect geographical indications, or "GIs." Sonia Smith, sommelier and Managing Director of the Center for Wine Origins, also spoke about the importance of trade agreements to certain wine regions, and how trade politics have shaped winemaking practices through history. Even for guests unfamiliar with GIs, everyone enjoyed the opportunity to conduct "research" on this particular trade topic. The Intellectual Property section plans to host a similar event again, given the huge success of *TRIPS and Terroir*.

\*The views expressed by the essays and articles are those of the author and do not necessarily represent the views of WIIT.

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