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Contents

1. AFTINET Annual General Meeting, 5:30pm 16 November 2005
2. High court ruling on copyright may be overturned to comply with USFTA
3. Update on GATS benchmarking proposals - the campaign continues
4. Civil society slams WTO's dodgy drafting process for WTO trade in services text
5. US agriculture proposals at WTO keeps unfair system intact
6. Report-back from conference: 'Piecing the Puzzle of the trade and aid jigsaw in the Pacific'
7. Melbourne Social Forum, 19 - 20 November

1. AFTINET Annual General Meeting: 5:30pm 16 November 2005

The AFTINET Annual General Meeting for 2004 / 2005 will be held at 5:30pm on Wednesday 16 November at the offices of the Public Interest Advocacy Centre, Level 9, 299 Elizabeth St, Sydney. AFTINET members should have received the notice of meeting and relevant documents.

Come along to discuss the work AFTINET has done this year and what we have planned. We also have a guest speaker at the AGM, May Miller-Dawkins from Oxfam International Youth Parliament and The Commons Institute. May will speak about the social impacts, both in Australia and in developing countries, of trade in intellectual property. May will touch on the latest development in the TRIPS negotiations and about the changes to Australian laws under the USFTA.

All welcome!

2. High court ruling on copyright may be overturned to comply with USFTA

A recent High Court decision against Sony in favour of protecting the rights of copyright users may be in contravention with the USFTA. The High Court found that the Copyright Act cannot be exploited by suppliers of computer software to carve up the world market to charge different prices according to ability to pay in different regions. It now appears that the Government may overturn this decision by amending the Copyright Act to comply with the requirements under the USFTA ...

Copyright ruling falls foul of free-trade pact

Australian Financial Review, 7 October 2005

By Marcus Priest and David Crowe

The federal government may be forced to rewrite copyright laws and overturn a landmark High Court decision on the use of Sony PlayStations if it wants to avoid a confrontation with the United States over the free-trade agreement.

The High Court ruled yesterday that devices installed in Sony PlayStation consoles, known as "mod chips", were legal. These devices allow a user to bypass Sony's copy-protection measures and use-copied games. But this may clash with provisions of the US FTA calling for stiffer protection of intellectual property rights.

Since signing the FTA, the government passed laws late last year which partially overtake the High Court decision and make it illegal to install such devices. The government is now considering new laws prohibiting their use. While allowing use of illegal copies, a mod chip also allows gamers to use legitimately acquired but cheaper copies of games purchased outside Australia.

As a result, yesterday's decision has renewed debate about whether copyright controls meant to protect technology companies should be used to restrict parallel importing and legitimate copying of copyright works by organisations such as libraries.

The High Court unanimously ruled technical measures used by Sony on its PlayStation games were not prohibited by the Copyright Act because they did not prevent or inhibit a copy being made; they only stopped an unauthorised copy being used. One judge of the High Court, Michael Kirby, even warned that attempts to push the provisions of Australian copyright legislation beyond the "legitimate purposes traditional to copyright protection at law" risked being unconstitutional.

Under the US FTA, Australia is required to legislate to give greater protection to devices used by copyright owners to control access to copyrighted work - known as technological protection measures (TPMs). The decision is a win for the Australian Competition and Consumer Commission, which argued that consumers should be able to use games legitimately bought overseas, despite attempts by software manufacturers to stop this occurring through use of different encryption coding in different countries.

A parliamentary committee is reviewing what exceptions to liability for circumventing TPMs should be allowed and will determine in what circumstances it is legal for a consumer to use a

TPM. Attorney-General Philip Ruddock said yesterday that the decision clarified the way the Copyright Act defined a technological protection measure and would be considered in drafting the new laws. "The High Court's interpretation of the current definition of a TPM does not weaken copyright owners' rights because it does not prevent them from using TPMs against copyright infringement," a spokeswoman for Mr Ruddock said.

"The decision simply shows that the Copyright Act is effective in giving copyright owners the right to protect against copyright infringement while allowing Australian consumers to use legitimately acquired products, irrespective of the country in which they were acquired."

3. Update on GATS benchmarking proposals – the campaign continues

The Australian government continues to play a leading role in proposals to radically change the GATS negotiating framework. As explained in previous AFTINET bulletins and publications, the proposed 'benchmarking' or 'complementary' approach will undermine the existing flexible structure of GATS and will force countries to make more and better quality offers in the GATS negotiations, including forcing offers on essential services. We sent out an alert about this issue in September, along with a draft lobbying letter to Trade Minister Vaile and the Australian negotiators in Geneva. Thank you to all members who wrote their own letter to Vaile! It is important that we keep the pressure on.

This debate about benchmarking proposals is gaining momentum in the lead-up to the WTO Ministerial in December. The most recent EU proposal sets a high target for developing countries to make "new or improved" commitments in 93 out of the total 163 sub-sectors in the GATS negotiations. Developed countries will have to make commitments in almost 140 of the GATS sub-sectors. We understand that the Government supports the EU proposal.

Most recently at an informal GATS consultation from 27 – 28 October, a wide range of developing countries strongly opposed the benchmarking proposals. Brazil has described the EU proposal as incompatible (with the flexibilities and architecture of GATS), imbalanced, inappropriate and unrealistic. At this meeting, 14 developing countries coordinated by Brazil issued a joint paper objecting to any reference to 'benchmarking' or 'targets' as a negotiating approach in the GATS text.

4. Civil society slams dodgy drafting process for WTO trade in services text

The draft text for the GATS section of the WTO Ministerial Declaration for Hong Kong was recently released. The process of formulating this draft text has been highly undemocratic and has redefined the WTO's "consensus" mode of decision-making. Rather than gaining consensus on an item before it is included in the draft text, the Chair of the GATS negotiations has included items in the draft despite very clear statements of opposition from some countries. In particular, the draft text includes the benchmarking proposals, which many developing countries have openly objected to.

AFTINET have joined with over 60 civil society organisations around the world to object to the draft GATS text and to the undemocratic way in which the text was formulated. These concerns have been forwarded in an open letter to the WTO Director-General and to Trade Minister Mark Vaile. This letter is below.

Redefining what 'consensus' means at the WTO

Dear Mr Lamy

The undersigned trade unions and civil society organisations from around the world, are appalled by the highly undemocratic and deceptive process used to manufacture the draft services ministerial statement, which essentially brushes aside the concerns of the majority. This process also completely redefines the “consensus” mode of decision making: rather than having a consensus before an item is included in a negotiating text, it now appears that, at least in the case of the Council for Trade in Services, the Chair can include items from demandeurs that he deems appropriate, even if there is no agreement amongst the membership, and these can only be removed if there is complete consensus amongst 148 Member states.

On 13 October, the Chair of the Council for Trade in Services (CTS), Mexican Ambassador Fernando de Mateo circulated a first “Note by the Chairman” on “Possible Elements for a Draft Ministerial Text on Services” (JOB(05)/234. Under “Objectives” to the negotiations, Ambassador Mateo included:

- Modal or other specific multilateral objectives
- Sectoral and modal objectives as individually expressed by Members
- Plurilateral approaches, sectoral – and/or mode-specific
- Multilateral approaches (e.g. measure specific)
- Numerical targets and indicators.

These elements however do not have the support of the whole membership. In particular, benchmarks, modal specific approaches or numerical targets to speed up the GATS negotiations have been intensely rejected by a large number of developing countries including LDCs. The many statements made by countries and coalitions in the various CTS meetings prove this. In the CTS, many delegations therefore requested that these issues be removed or bracketed, given the lack of consensus. They also pointed out the double standard: that the section on “Rules”, referring to the emergency safeguard mechanism (ESM) negotiations, was placed in brackets even though it was agreed to be negotiated. It was also repeatedly stated that a new paragraph on Principles should reinforce the current architecture of the GATS.

Despite these objections, the new proposals regarding new approaches again reappeared - unbracketed - in Ambassador Mateo’s second draft elements dated 20 October (JOB(05)/234/Rev.1), and have been further elaborated upon in the draft Ministerial Text on Services released on 26 October (JOB(05)/262). A second draft of the text will be released by 3rd November – the text the Chair aims to bring to Hong Kong. Whilst the Chair is putting into the text elements that clearly do *not* have consensus, elements to be taken out, according to him, require the complete consensus of members! At the same time, what has already been agreed upon for negotiations, the ESM, a promise made since the Uruguay Round as reflected in Article X.1 of the GATS, but where the developed countries have been dragging their feet – was not elaborated upon by the Chair in the draft Ministerial text. The draft Ministerial text also failed to reinforce the current architecture of the GATS.

There are two issues here that are particularly worrying:

First, having multilateral approaches such as numerical targets and indicators – essentially compelling countries to open up a specified number of sectors – will contravene the built-in flexibilities of the GATS and put developing countries’ development objectives and policy space in jeopardy. Even plurilateral approaches are problematic since these negotiations will be driven by those with the biggest export capacity. Those who are party to the negotiations will determine critical issues such as “classification issues” within the sector, as well as be the

players drawing together the regulatory standards for what is acceptable within such plurilateral agreements. These standards will be those in harmony with the interests of the major corporations. Based on past experience with the financial services and telecoms agreements, there is no guarantee that Members will not be intensely pressured to join in these plurilateral agreements. Those who may want to join in later, will find the rules of the sector already pre-determined, in line with certain corporate interests.

The second issue of concern is that of process. As we questioned the process in the run up to the Cancun WTO Ministerial Conference whereby the Chair of the General Council drafted the Ministerial Text on his “own responsibility” without the consensus of the Membership, we again question the similar process that is occurring today. This process clearly lacks inclusiveness and transparency. We must ask you, Mr. Lamy, if Ambassador Mateo’s approach represents a new way of defining and practicing consensus in the WTO? Can the Chair table draft elements that do not represent consensus and then require consensus for any amendments to the text?

As Chair of the Trade Negotiating Committee you have indicated that you might be tabling a draft Ministerial Text by mid November based on the draft texts received from the Chairs of the various negotiating committees. Will you present a consolidated draft Ministerial Text based on submissions from negotiating committees that have been questionably crafted, as we have seen, for example, in the case of the Chair of the Council for Trade in Services?

We look forward to your clarification on this matter and to ensure that – as in previous years – a draft Ministerial Text will be presented to Ministers of WTO Members, which includes within brackets the positions of all Members on matters where consensus does not exist. Civil society organisations in WTO Member states will hold you accountable on your responsibility to ensure that the draft Ministerial Text delivered to Ministers before Hong Kong reflects the consensus interests and positions of WTO Members and, in particular, in this Doha Development Round, of developing countries. Failure to do so only makes a mockery of the “multilateral”, “rules-based” trading system.

A complete list of signatories is available at <http://www.ourworldisnotforsale.org/showarticle.asp?search=891>.

5. US agriculture proposal at WTO keeps unfair system intact

There has been a considerable amount of media coverage of the deadlock in the WTO agriculture negotiations. Trade Minister Mark Vaile has welcomed a US proposal to cut farm subsidies. The Institute of Agriculture and Trade Policy (IATP) has analysed the latest US proposal and argues that the US proposal will only keep the WTO’s unfair system intact. IATP notes that:

- The US proposal ignores a number of the most sensitive issues. Most glaring is the lack of acknowledgement of differentiated responsibility among WTO members for building a more transparent and fair global trade system for agriculture. This round was supposed to focus on development and on righting the perverse imbalances of the Uruguay Round Agreement on Agriculture that allowed rich countries to increase their spending on support to agriculture and to maintain their ability to dump unmanaged production in world markets. The US proposal fails to even go as far as the 2004 July Framework in acknowledging the need for effective special and differential measures for developing countries.
- The US offer is conditional on a number of unlikely trade-offs. The offer only stands if

countries make commitments they have already explicitly rejected. For example, both Japan and the EU have said they cannot cut their domestic support by 83 percent.

- The US does not address its lack of timely notifications of domestic support (their last notification was in 2001). Without these numbers, it is impossible to fully understand the impact of the proposal made to cut US spending. Any new agriculture agreement must require complete and independently audited annual notifications.
- The US is refusing to acknowledge widespread criticism of existing WTO categories for domestic support, particularly the lack of effective criteria to define legitimate Green Box spending. Moreover, although the US has offered to reduce the cap on Blue Box spending by half from what was agreed in the July Framework of 2004, it is refusing to consider criteria to restrict the kind of payments that would be eligible for inclusion in the Blue Box.
- The US suggests it is in favour of a zero-tariff, zero-trade-distorting support model of agriculture. This model also leaves food production to be driven by import and export commercial interests rather than by public interest priorities, such as food security, jobs and the need to protect an already stretched and damaged natural resource base.
- The US continues to ignore dumping, which is the single most damaging aspect of agricultural trade today. Under the US proposal, dumping by US-based multinational corporations will continue and could even accelerate.

IATP's full report can be found at <http://www.iatp.org>.

6. Report-back from conference: 'Piecing the Puzzle of the trade and aid jigsaw in the Pacific'

AFTINET and AID/WATCH held a 1 ½ day conference on 20 – 21 October: 'Piecing the puzzle on the trade and aid jigsaw in the Pacific.' The conference discussed the trend to 'free-trade led development' in the Pacific, the role of the Australian government in setting this agenda and the impact on communities in the Pacific. The conference was attended by over 30 organisations and individuals across the trade, aid and development sector. A network has been formed out of this meeting to help strengthen our research and campaigns in the Pacific. We will keep you informed as this network gets off the ground.

Australia is a signatory to the Pacific Agreement on Closer Economic Relations (PACER). PACER is not a free trade agreement, but is a framework for the negotiation a future agreement between Australia, New Zealand and Pacific Island countries. Negotiations are scheduled to commence in 2011, but may be brought forward in line with European Union negotiations with Pacific Island countries. Civil society groups in the Pacific warn that PACER will lock Pacific Islands into an unjust trade regime that forces open Pacific economies to suppliers of goods, services and investment.

Thank you to all AFTINET members who were able to attend the conference!

7. Melbourne Social Forum, 19 – 20 November

The Melbourne Social Forum is an annual open space event to discuss, learn and strategise on issues of social, environmental and global justice. It is from 19 – 20 November at CERES Environmental Park, 8 Lee St, Brunswick East. For more information, visit <http://www.melbournesocialforum.org>.