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WTO and South Asia

Post Cancun Agenda

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कट्स CUTS

SAWTEE

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Acronyms

ACIS	Advanced Cargo Information System
ACP	African, Caribbean and Pacific
ALM	Autonomous Liberalisation Measures
ANSAC	American Natural Soda Ash Corporation
AoA	Agreement on Agriculture
APEC	Asia Pacific Economic Cooperation
ASCM	Agreement on Subsidies and Countervailing Measures
ASEAN	Association for South East Asian Nations
ASYCUDA	Automated System of Customs Data
BoP	Balance of Payment
BPMS	Border Pass Monitoring System
CA	Competition Authority
CARICOM	Caribbean Community for Economic Cooperation
CBD	Convention on Biological Diversity
CCP	Community Competition Policy
CEMAC	Economic and Monetary Community of Central Africa
CGP	Code of Good Practice
CITES	Convention on International Trade in Endangered Species
COMESA	Common Market for Eastern and Southern Africa
COO	Certificate of Origin
CSO	Civil Society Organisation
CSR	Corporate Social Responsibility
CTD	Committee on Trade and Development
CTE	Committee on Trade and Environment
CTS	Committee on Trade in Services
CUTS	Consumer Unity & Trust Society

DDA	Doha Development Agenda
DDR	Doha Development Round
DoC	Department of Commerce
DSB	Dispute Settlement Body
DSU	Dispute Settlement Unit
DTIDTIOD	Domestic Trade Infrastructure Development and Trade Related International Organisation Division
EAC	East African Community
EC	European Community
EDI	Electronic Data Interchange
EDP	Essential Drugs Programme
ESM	Emergency Safeguard Measures
EU	European Union
FAO	Food and Agricultural Organisation
FDI	Foreign Direct Investment
FES	Friedrich Ebert Stiftung
FIPs	Five Interested Parties
FNCCI	Federation of Nepalese Chambers of Commerce and Industry
FTA	Free Trade Agreement
FTAA	Free Trade Area of the Americas
GAP	Good Agricultural Practice
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GC	General Council
GDP	Gross Domestic Product
GFC	Global Forum on Competition
GFPTT	Global Facilitation Partnership for Transportation and Trade
GHP	Good Hygienic Practice

GMP	Good Manufacturing Practice
GNI	Gross National Income
GPA	Government Procurement Agreement
HACCP	Hazard Analysis and Critical Control Point
HRD	Human Resource Development
ICD	Inland Container Depot
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICN	International Competition Network
ICT	Information and Communication Technology
IDMA	Indian Drug Manufacturers' Association
IFG	International Forum on Globalisation
IFI	International Financial Institution
ILO	International Labour Organisation
IMF	International Monetary Fund
ICJ	International Court of Justice
IPRs	Intellectual Property Rights
ISCO	International Standard Classification of Occupation
ISO	International Organisation for Standardisation
IT	Information Technology
ITO	International Trade Organisation
LCA	Life Cycle Analysis
LDCs	Least Developed Countries
M&A	Merger and Acquisition
MEAs	Multilateral Environment Agreements
Mercosur	Southern Common Market
MFA	Multi-fibre Agreement
MFN	Most Favoured Nation
MIL	Marine Insurance Legislation
MNCs	Multinational Corporations

MoF	Ministry of Finance
MoICS	Ministry of Industry, Commerce and Supplies
MRTP	Monopolies and Restrictive Trade Practices
MRTPC	Monopolies and Restrictive Trade Practices Commission
MTA	Multi-modal Transport Act
MTTFP	Multi-modal Transit and Trade Facilitation Project
NAFTA	North American Free Trade Agreement
NAMA	Non-agricultural Market Access
NCC	Nepal Chamber of Commerce
NFIDC	Net Food Importing Developing Countries
NGO	Non-governmental Organisation
NGMA	Negotiating Group on Market Access
NIB	National Insurance Board
NMTTFP	Nepal Multi-modal Transit and Trade Facilitation Project
NRB	Nepal Rastra Bank
NTB	Non-tariff Barrier
NTCS	Nepal Trade and Competitiveness Study
NTTFC	National Trade and Transport Facilitation Committee
ODI	Overseas Developing Institute
OECD	Organisation for Economic Cooperation and Development
OFP	Operation Flood Programme
PhRMA	Pharmaceutical Research and Manufacturers of America
PPM	Process and Production Methods
PTA	Preferential Trading Agreement
R&D	Research and Development
RBP	Restrictive Business Practice

ROO	Rules of Origin
RTA	Regional Trade Agreement
S&DT	Special and Different Treatment
SAARC	South Asian Association for Regional Cooperation
SADC	Southern African Development Community
SAP	Structural Adjustment Programme
SAWTEE	South Asia Watch on Trade, Economics & Environment
SEZ	Special Economic Zone
SP	Special Product
SSM	Special Safeguard Mechanism
SSOP	Sanitation Standard Operating Procedure
STO	Specific Trade Obligations
TA	Technical Assistance
TB	Tuberculosis
TBT	Technical Barriers to Trade
TFC	Trade Facilitation Cell
TGP	Transparency in Government Procurement
TIFA	Trade and Investment Framework Agreement
TNC	Trade Negotiation Committee
TRIMs	Trade Related Investment Measures
TRIPS	Trade Related Aspects of Intellectual Property Rights
TRQs	Tariff Rate Quotas
TRTA	Trade Related Technical Assistance
TWN	Third World Network
UDHR	United Nations Declaration on Human Rights
UN	United Nations
UNCESCR	United Nations Committee on Economic, Social and Cultural Rights

UNCTAD	United Nations Conference on Trade and Development
UNCTAD Set	The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNESCAP	United Nations Economic and Social Commission for the Asia and the Pacific
UNIDO	United Nations Industrial Development Programme
UNLK	United Nations Layout Key
UR	Uruguay Round
US	United States
USTR	United States Trade Representative
WCO	World Customs Organisation
WHO	World Health Organisation
WTO	World Trade Organisation

Preface

Failure of the Cancun Ministerial dealt a severe blow to the multilateral trading system. Despite all its shortcomings, smaller countries still feel that a multilateral trading system protects their interest better than a unilateral system, which is usually based on "might is right" principle. It is pertinent to note that the arrogance of rich countries and the defensive position of the poor ones led to the Cancun debacle. Developed countries did not realise that they were committing a mistake by taking developing countries for granted, despite the fact that developing countries have come up to age and have fully understood the implications of their past mistakes. This had led to considerable discontent amongst developing countries.

The first seed of discontent was sown during the Singapore Ministerial itself but it was manifested during the third Ministerial at Seattle in 1999. During this Ministerial, developing countries did not only prevent the United States (US) from including labour and environmental standards into the WTO system but also presented a united and cohesive front to fight the trade-distorting agricultural subsidies. However, developed countries remained adamantly opposed to the positions of developing countries. The Ministerial deservedly collapsed without making any decision.

Despite the realisation that Seattle was a wake up call for developed countries to accommodate the concerns of developing countries, they continued to turn deaf ear to the opposition expressed by the latter towards the expansionary agenda. Among them, the European Union (EU) in particular did not only continue to adamantly refuse to reduce trade-distorting subsidies and provide meaningful market access to developing countries, but rather insisted that negotiations be launched on new (Singapore) issues – which are of limited interest to developing countries. Developing countries considered this as an attempt to hijack the WTO agenda and opposed such a move, which resulted in the Cancun failure.

Following the collapsed third Ministerial, developed countries started a "patch work" in the run up to the fourth Ministerial held in Doha in November 2001 by successfully launching a new round of trade negotiations. The round that was launched during Doha was also given

a respectable name, i.e., Doha Development Round (DDR), with a deadline of 31 December 2004 set for its conclusion. However, until the Cancun Ministerial, which was considered an opportunity for conducting a mid-term review of the decisions made at Doha, many in-between deadlines set for achieving the objectives had already been missed.

After a series of diplomatic efforts and acrimonious negotiations, member countries of the WTO have finally succeeded in adopting what is known as "Oshima Text" on 31 July 2004, which provided a fresh lease of life to the DDR. Though the balance of the text is still tilted in favour of developed countries, certain portions of the text do protect the interest of developing countries. Since this text is a board framework and modalities are yet to be adopted, this should be considered a basis to move forward. All is not lost.

With a view to taking stock of the events that led to failure of the Cancun Ministerial and build the capacity of stakeholders to understand the issues at stake and make an informed intervention at the policy level, South Asia Watch on Trade, Economics & Environment (SAWTEE), together with Consumer Unity & Trust Society (CUTS) organised a three day conference cum training titled *Post Cancun Agenda for South Asia* from 30 November – 2 December 2003. This volume is a compilation of the papers presented during the conference. While some papers have been revised by our editors, where necessary, in order to reflect the new developments which have taken place in the post-Cancun period, others have been included in the volume without major changes.

I, on behalf of the publishers of this volume, would like to extend my gratitude to all those paper contributors, who not only presented the papers at the conference, but also undertook the task of revising their papers by incorporating the comments received during the conference and afterwards. I would like to express my gratitude to those contributors who did not present the paper in the conference but contributed later.

I would also like to thank the participants, who provided their invaluable comments and suggestions on the papers presented during the conference.

I would like to acknowledge the hard work put into the production of this volume by the editors duo Mr Navin Dahal and Mr Bhaskar Sharma. I am also thankful to Water Communication, which designed the cover page of the volume and Mr Krishna Subedi, who prepared the layout of the inner texts.

Last but not the least, neither the organisation of the conference, nor the publication of this volume would have been possible without the support of Novib (Oxfam), the Netherlands and Friedrich Ebert Stiftung (FES), Nepal. I am, therefore, tremendously grateful to these two organisations.

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Chapter - I

Introduction

Navin Dahal

The Cancun Ministerial of the World Trade Organisation (WTO) was unable to finalise even a Ministerial Resolution. One reason for such an outcome was the level of preparedness and steadfastness of the alliance of developing countries that was hitherto more or less missing in WTO negotiations. The failed Cancun Ministerial aptly demonstrated the complexities of international trade negotiations. It also taught developing countries to be well prepared for negotiations. One of the main aspects of preparedness is, of course, a thorough understanding of the issues being negotiated at the WTO.

Realising the need for the South Asian countries to prepare for further WTO negotiations, South Asia Watch on Trade, Economics & Environment (SAWTEE), Kathmandu, Nepal and Consumer Unity & Trust Society (CUTS), Jaipur, India, in association with Friedrich Ebert Stiftung (FES), Kathmandu, Nepal and Novib, The Hague, Netherlands organised a three-day regional conference cum training titled *Post Cancun Agenda for South Asia* from 30 November to 2 December 2003 in Kathmandu. This book is a compilation of the papers presented during the three-day event.

In between the conference and the publication of this book, WTO members on 31 July 2004 agreed on the 'Oshima Text' and gave new momentum to the Doha Development Agenda (DDA). Understandably, the papers presented in this book do not capture this latest development. The papers have been presented in their original form as many of the issues, including the three out of the four so-called 'Singapore Issues' are for the moment out of the negotiating agenda, but not dead as they can make a comeback in future negotiations. However, an attempt has been made to give a fuller picture to the reader by incorporating a chapter that analyses the 31 July package.

The 31 July text has been hailed by developing and least developed countries as a step forward towards the revival of the Doha Development Round (DDR). Mr Bhaskar Sharma and Mr Kamalesh Adhikari in their paper *A Critical Analysis of the July Text: South Asian Perspective* examine the 31 July package and look closely at the five areas on which framework agreement had been reached, namely agriculture, non-agricultural market access (NAMA), development issues, trade facilitation and services. They critically analyse the implications of this text and shed light on what it means to South Asia and what the countries in the region need to do to benefit from future trade negotiations at the WTO.

Agriculture has proved to be the *Achilles heel* of international trade negotiations. The Agreement on Agriculture (AoA) for the first time brought agriculture into the multilateral trade negotiation framework. The sensitive nature of agriculture trade has also been recognised in the DDA[1]. Prof. J George in his paper *Balancing the Livelihood Options with Three Pillars of AoA* looks at the proposals for agricultural trade liberalisation from a developing as well as developed country perspective.

The Doha Declaration in paragraph 13 had mandated that 'a programme of fundamental reform' be created 'in order to correct and prevent restrictions and distortions in world agricultural markets' and requested for 'modalities for further commitments' from members. In response, three new ideas as framework for establishing agriculture modalities for incorporation and consideration at the Cancun Ministerial were put forward by the European Union (EU) and the United States (US); a group of 17 developing countries – later known as G20; and a coalition of six Like-minded Group countries during mid-August 2003. Under Chair of the General Council (GC) Carlos Pérez del Castillo, a synthesis was attempted in the form of a revised draft text for the Cancun Ministerial on 24 August 2003. This synthesis mainly followed the pattern suggested in the EU-US paper. The Cancun Conference Chair Luis Ernesto Derbez tabled his revised draft text on agriculture on 13 September 2003. Prof. George uses the modalities proposed in the Derbez draft to analyse the impact on the final bound tariffs in the US, Australia, Brazil, Republic of Korea and India. In his paper, Prof. George analyses whether the application of this modality will help to enhance market access in developed countries for agricultural produce from developing countries.

Negotiations, including those on agriculture, continued in Geneva after the failed Cancun Ministerial. Dr Ananya Raihan in his paper *South Asian Strategy for Agricultural Negotiations* analyses different issues in the Cancun Ministerial draft text from the South Asian perspective. He also makes recommendations on the stand South Asia needs to take on these issues.

Services, which were earlier treated as non-tradable, were for the first time included in a multilateral trade agreement in the UR. Under the aegis of the General Agreement on Trade in Services (GATS), member countries made commitments in services liberalisation. Dr Upali Wickramasinghe in his paper *Post Cancun Services Trade Agenda for South Asia* looks at different issues related to services at the WTO and analyses what South Asia needs to do in this area. In his paper, Dr Wickramasinghe examines the services sectors that developed countries have liberalised and analyses whether these benefit developing countries. He also looks at the effect of tax measures, nationality requirements, residency requirements, registration and limits on ownership, etc. on the market access opportunities of developing countries. He also highlights the fact that developed countries have not made adequate commitments in mode 4 of services (temporary movement of natural persons), which is an area where the South Asian countries have main interest and comparative advantage. Dr Wickramasinghe sheds lights on the measures that the South Asian countries need to take to be able to benefit from services liberalisation.

Investment, competition, trade facilitation and transparency in government procurement (TGP) are called the 'Singapore Issues' because they were, for the first time, included in the agenda of the WTO during the first Ministerial held in Singapore in 1996. Members differ widely as to when and to what extent these issues need to be addressed in the WTO. Mr Nitya Nanda in his paper *The Mercantilist Game Plan to Wreck the Development Agenda* presents a brief analysis of four Singapore issues from the perspective of developing countries and discusses the possibility and implications of the so-called progress at the WTO with or without the Singapore issues.

Lack of efficient trade facilitation measures such as efficient transport and custom procedures cost small businesses in developing countries billions every year. However, it is not clear whether the benefits accruing to developing countries from trade facilitation will be commensurate to the costs involved. Mr Nanda highlights various

issues that need to be looked into before agreeing on any binding agreement on trade facilitation measures under the WTO. Is TGP a trade issue or not? Mr Nanda looks at different issues surrounding TGP. Besides, Mr Nanda also discusses the effectiveness of a multilateral agreement on investment to promote foreign direct investment (FDI) in developing countries and raises concerns as to how such an agreement will affect the behaviour of multinational corporations (MNCs).

Competition policy is widely recognised as a useful instrument to promote development in a market-oriented economy. However, developing countries are unable to control anti-competitive practices that affect them but have origins outside their borders. Some suggests that an international law on competition will be the best way to address this issue. Though Mr Nanda addressed these issues in his paper *The Mercantilist Game Plan to Wreck the Development Agenda*, he took competition into further detail in his second paper *Competition Agreement at the WTO.*

Mr Nitya Nanda in his second paper looks at how competition has been dealt with at the WTO and analyses if there is a case for multilateral agreement on competition. He discusses the sources and types of cross-border competition that affect developing countries and the difficulties these countries face in tackling competition problems having cross-border dimensions. Anti-competitive practices under this category are international cartels, export cartels and related arrangements, international mergers or mergers with international spill-over, abuse of dominance in overseas markets, cross-border predatory pricing and price discrimination. Mr Nanda also highlights the role of international cooperation in developing an effective competition regime in developing countries and the existing cooperation agreements/arrangements on competition at various levels. He finally examines the appropriateness of the WTO as a forum for dealing with competition issues.

Even though the WTO does not have any specific agreement dealing exclusively with environmental issues, a number of WTO agreements have provisions related to environmental concerns. The Committee on Trade and Environment (CTE) was created within the WTO to identify the relationship between trade and environmental measures in order to promote sustainable development and make appropriate

recommendations on whether any modification in the provisions of the multilateral trading system is required. Outside the WTO, there are more than 200 international agreements referred to as multilateral environmental agreements (MEAs), out of which some 20 odd MEAs contain specific trade provisions. The linkage between MEA trade obligations and WTO rules has been a controversial area. Mr James Nedumpara in his paper *Doha Round and Environmental Issues* sheds light on the controversies surrounding environmental issue at the WTO. In his paper, Mr Nedumpara also looks at the issue of eco-labelling and gives an account of how different members have addressed this issue at the WTO.

In the GC Decision of 31 July 2004, out of the four 'Singapore Issues', members agreed to continue negotiations only on trade facilitation. It is encouraging to note that the GC decision on trade facilitation includes the provision of technical assistance (TA) for capacity building to developing and least developed countries. In this light, it becomes important for developing and least developed countries to identify their TA requirements in this area. Prof. Bishwambher Pyakhuryal in his paper *Accessing Nepal's Status in Current International Trade Practices* uses the 'Step-by-Step Methodology' propounded by United Nations Economic and Social Commission for the Asia and the Pacific (UNESCAP) to identify problems related to trade facilitation and implementation of remedial action. In doing so, he looks at various measures taken by Nepal to facilitate trade.

Developing and least developed countries are worried about the impact of a strong intellectual protection of pharmaceuticals on public health. The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) requires all WTO members to have a 20-year patent protection period for pharmaceutical products. Ms Leena Chakravarti in her paper *Patent Rules and Access to Medicine* looks at the issue of drugs patenting from a developing country perspective. In her paper, Ms Chakravarti also raises the issue of the requirement of next generation drugs to cure old diseases and argues that the TRIPS Agreement will make these drugs prohibitively expensive for the poor in developing countries. She also looks at the possibilities of using compulsory licenses or parallel imports to ensure access to medicines in developing countries. Finally, Ms Chakravarti examines the difficulties developing and least developed countries face to use parallel imports and compulsory licenses provisions.

Likewise, Mr Shafqat Munir in his paper *TRIPS and Public Health: What Needs to be Done in a Human Rights Perspective?* discusses the TRIPS Agreement and its impact on public health. He looks at what governments can do to intervene in health and pharmaceutical sector to guarantee people's access to pharmaceutical products. The United Nations (UN) Charter and many international declarations have declared access to medicines and healthcare facilities as a basic human right. Mr Munir attempts to interpret the TRIPS Agreement in line with international human rights laws. He looks at the TRIPS issue and examines where it stands vis-à-vis other international declarations, including the UN Charter.

Endnote

1 Ministerial Declaration of the Fourth WTO Ministerial held in Doha is popularly known as the Doha Development Agenda or the DDA.

Chapter - II

A Critical Analysis of the July Text: South Asian Perspective

Bhaskar Sharma and Kamalesh Adhikari

2.1 Background

The fourth Ministerial of the World Trade Organisation (WTO) held in Qatar, Doha in November 2001 raised hopes among members that the WTO is truly meant to integrate their economies into the multilateral trading system in a fair, transparent and predictable manner. The Ministerial came up with a historic document, i.e., the Doha Declaration, outlining key guidelines for members to complete the Doha Development Round (DDR) of multilateral trade negotiations by 2005.

One of the major reasons why developing and least developed countries hailed the Doha Declaration was that the Declaration was able to put the issue of development at the centre of WTO negotiations. Many estimated that the DDR would accrue benefits to both the developing and developed countries. In fact, no sooner the DDR was launched, estimates were made by the World Bank that income gains for developing countries to the extent of US$ 400 billion by 2015 could be achieved if the Doha Mandate of removing distortions on agriculture is achieved. It was also estimated that if the negotiations collapse with backsliding on virtually every commitment, developing countries will see real income reduced by US$ 32 billion while developed countries will experience a decline of US$ 27 billion.

With these gains in mind, developing countries hoped that the DDR would contribute a lot to better integrate their economies into the multilateral trading system. However, their hopes dimmed after a series of deadlines for negotiations under the DDR were missed. At such a point in time, the only ray of hope for any major breakthrough to streamline the DDR negotiations was the fifth Ministerial held in Cancun, Mexico in September 2003. The Ministerial was supposed to

take stock of progress in the DDR negotiations, provide necessary political guidance, and take decisions as necessary.

Unfortunately, this did not happen because the Ministerial failed to come to any consensus. Subsequently, the Cancun fiasco compelled many to rethink of the possibilities of accomplishing the DDR within the stipulated deadline. The concern shifted from what would be the positive outcome of the DDR to whether or not the DDR would be accomplished so that one could see if there was any positive outcome. The concern became grave after the Cancun mandated deadline for agreeing on a negotiating framework package on 15 December 2015 failed inconclusively.

Consequently, the developing and least developed countries, which were already shattered due to missed deadlines and the Cancun fiasco, became more disappointed. In fact, the stakes had never been so high; the United States (US) and the European Union (EU) did not only become reluctant to revive the DDR but preferred to go with bilateral and regional free trade agreements. Such initiatives from the 'global giants' did not only contribute to stall the DDR but also cast down the prospects of a fair, transparent and predictable trade in a multilateral trading environment.

Amidst such a gloomy trading environment, it seemed that the DDR would not be able to establish clear negotiating priorities. But where there is a will, there must be a way. WTO members stepped for a historic move; the result was the 31 July framework package. The General Council (GC) came forward with a decision laying down the basic pillars and a framework for conducting future talks under the DDR.

Besides an overarching GC decision, the package includes annexes providing negotiation frameworks to push ahead DDR talks in five areas, namely agriculture, non-agricultural market access (NAMA), development issues, trade facilitation and services. There will, however, still be intense negotiations to finalise many binding agreements. Regarding existing commitments, the GC decision simply reaffirms continuing negotiations in other issues of the Doha Mandate *(as a reference for the Doha Mandate see Box 2.1)*, including intellectual property, dispute settlement rules and environment.

Besides, acknowledging the limited progress made so far in the DDR, members postponed the 1 January 2005 deadline for concluding the talks to an as-yet unspecified date, at least until the sixth Ministerial to be held in Hong Kong in December 2005.

Box 2.1

Salient Features of DDR

- Carry forward the unfinished business of the Uruguay Round (UR), including services, agriculture, trade and environment, and bring about further liberalisation in NAMA;
- Rectify the imbalances in the UR multilateral trade agreements by addressing implementation related issues and making special and differential treatment (S&DT) provisions stronger, operational and effective;
- Work on new issues like investment, competition policy and transparency in government procurement subject to explicit consensus on modalities for negotiations at the fifth Ministerial of the WTO;
- Explore the two core issues of concern to developing countries relating to trade, debt and development; and trade, technology and development.
- Find a multilateral and legally secure solution to give effect to the Declaration on TRIPS and Public Health to ensure access to medicines.
- Possible negotiations on issues such as rules, particularly trade defence measures, dispute settlement and standards.

Source: Wadhva, Charan. 2003.

Here it becomes important to understand what actually the July package contains. Will it help members to move ahead and truly seize the spirit of the DDR? This is important at least for them who have much stakes in and around the WTO system, for example the developing and least developed countries.

The objective of this paper is to critically examine what transpired on 31 July and what would be the implications of the negotiations set

under the framework package for developing and least developed countries in general and South Asian countries in particular. The paper has four sections. The second section critically examines the negotiation process as well as the outcomes of the July text in each of the five areas on which negotiations are to take place. The third section highlights the major challenges that South Asia faces in the context of this new development. The fourth and the concluding section paves way forward for South Asia and makes recommendations on how South Asian countries could take strategic measures at national, regional and international levels to capitalise on the July pact.

2.2 A Critical Analysis

The introduction of the July package, amidst such a chaos where members, both developed and developing, were becoming increasingly indifferent to each other's position, is something that many had not expected. Therefore, such a move must be regarded as a historic move. However, at the same time, one should take into consideration what actually the framework package has to offer to WTO members, especially with regards to its contribution to the successful completion of the DDR.

Therefore, a critical analysis of the whole package is crucial, particularly for developing and least developed countries. However, before we critically analyse anything, let us examine the gains that the developing and least developed countries have made from the July pact.

Developing and least developed countries have, in general, identified two gains from the 31 July GC decision (Khor 2004). First is the placing of three Singapore issues, namely investment, competition and transparency in government procurement, outside the DDR and the second is the commitment of the developed countries to eliminate export subsidies.

But one has enough room to suspect whether or not they are gains in real terms. The ouster of the three Singapore issues from the DDR definitely comes as a relief to all developing and least developed countries but there is no explicit promise that they would not be pursued in rounds beyond Doha.

Similarly, commitment by developed countries to eliminate subsidies cannot be, in the true sense, perceived as a gain for all transition and developing economies. Net food exporting countries would definitely benefit from revocation of subsidies by developed countries as the competitiveness of their agri-produce in international markets will increase but net food importing countries will, however, confront higher food prices.

Let us now examine the shortcomings of the negotiation process as well as the text itself.

2.2.1 Negotiation process of the July Pact

It is pathetic to note that the process in which key decisions were taken for the finalisation of the July pact was not by participation of all members. The future of agriculture, the most important issue for the poor countries, was explicitly decided by a very small group touted the Five Interested Parties (FIPs), which included three developed countries - the EU, the US and Australia, and two developing countries - India and Brazil.

Furthermore, such a negotiation process, which excluded almost all developing countries, is also in contravention to what paragraph 49 of the Doha Declaration says: "The negotiations shall be conducted in a transparent manner among participants, in order to facilitate the effective participation of all."

Hence it may not come as a surprise if developed countries seek to carry out future negotiations with only Brazil and India, which have come to the forefront as the leaders of the developing country group.

2.2.2 Content of the July Pact

Many criticisms have been made in the content of the July pact. Among host of such criticisms, major ones include: unfair adoption of a damaging NAMA framework; failure to properly address the role of mode 4 negotiations under trade in services for developing countries; and the best endeavour nature of most provisions in the text (Khor 2004).

Moreover, it is disheartening that on some other important issues for developing and least developed countries, such as that of technical assistance, the 31 July text is even weaker than the Doha Declaration.

These and few other important issues concerning agriculture, NAMA, development issues, trade facilitation and services have been critically analysed in the following five sub-sections (*Also see Table 2.1*).

Table 2.1: Status of Doha Development Agenda

Negotiating Issues	Details	Key Deadlines/Comments	
		Doha Declaration	31 July Text
Agriculture	Formulas and other 'modalities' for further commitments	31 March 2003 (missed)	No explicit deadline
	Submission of members' comprehensive draft commitments	By Cancun (no progress)	No explicit deadline
	Stock taking	By Cancun (no progress)	No explicit deadline
	Concluding the negotiations as a part of single undertaking	1 January 2005	No deadline (indicated till Sixth Ministerial)
	Reduction in domestic support and elimination of export subsidies	No explicit deadline	No explicit deadline
NAMA	'Modalities' to be agreed on how tariffs should be reduced and how other market access issues should be handled.	31 May 2003 (missed)	No explicit deadline
	Stock taking	by Cancun (no progress)	No explicit deadline
	Concluding the negotiations as a part of single undertaking	1 January 2005	No explicit deadline
Development Issues	S&DT - Trade and Development Committee to make its recommendations to the GC	July 2002 (missed)	July 2005

Negotiating Issues	Details	Key Deadlines / Comments	
		Doha Declaration	**31 July Text**
	Implementation Issues – WTO Director General (DG) to continue consultative process and report to Trade Negotiation Committee (TNC) for action	December 2002 (missed)	May 2005 – DG to report to TNC July 2005 – GC to review progress
Singapore Issues	Negotiations on four Singapore issues	May 2003 (missed)	No explicit deadline (only trade facilitation taken up)
	Negotiating guidelines and procedures	March 2001 (established)	-
Services	Offers of market access	31 March 2003 (only 27 initial offers)	May 2005 (deadline for revised offers)
	Stock taking	by Cancun (no progress)	No date established
	Concluding the negotiations as a part of single undertaking	1 January 2005	No explicit deadline

Source: Compiled from the Doha Declaration and the 31 July text.

2.2.2.1 Agriculture

Agriculture has always been a 'bone of contention' in international trade negotiations. The 31 July text has adopted a framework for future agricultural negotiations.

Developing countries have perceived this framework as a considerable breakthrough. Within this framework, important new disciplines have been agreed to remove unfair and subsidised competition through government-supported export credit programmes and to set up new arrangements to manage food aid in ways that do not damage commercial trade.

Annex A of the 31 July text outlines a number of crucial understanding, particularly those relating to substantial reduction in domestic support and revocation of export subsidies. However, to what extent developing countries can gain out of this package is a subject of close scrutiny (SAWTEE 2004).

A critical look at the framework reveals that much still remains to be done. The framework contains vague and ambiguous language, and contains no timetable or amounts for reduction in domestic support in the agricultural sector of the developed countries.

With regards to reduction in domestic support, paragraph 6 of the framework states that members would 'make a substantial reduction in the overall level of their trade distorting support from bound levels'. However, since the nature and extent of reduction in domestic support are not 'properly' defined, it leaves enough room for developed and developing members to clash again and face another dead end in negotiations.

Likewise, paragraph 17 assures phasing out of all forms of export subsidies. Sweet as it may sound, and which is why developing countries hailed the 31 July text, the lack of a deadline to phase out all subsidies is completely a new ball game, where tough negotiations are likely to follow.

Besides, it has come as a surprise to close followers of multilateral trade issues that the apparent agreement by the EU and the US to cut domestic support and eliminate export subsidies did not snowball into political crises back in their respective countries. It is accepted that any move to significantly cut farm subsidies can be politically suicidal for the rich countries. The US President, Mr George Bush, would not even think of contesting election after agreeing to chop subsidies for farmers. Likewise, the European nations would have been in turmoil if the framework had meant any drastic cut in subsidies (Sharma 2004).

Moreover, the GC decision does not mandate any reduction in Green Box subsidies as they are not perceived to be trade distorting. The Green Box is already the category in which the US puts most of its domestic support, and the EU too is in the process of transferring much of its domestic support to the Green Box (Khor 2004).

It is unfortunate that the Geneva package does not place a cap on these subsidies, nor includes a reduction commitment. It only says the Green Box criteria will be reviewed and clarified to ensure that they have no or minimal trade distorting effects. In fact, such a review should lead to action to discipline and reduce Green Box subsidies, but there is no

mention in the text for such action to be taken or contemplated. The Geneva decision thus allows a big loophole, for domestic subsidies to be expanded under the Green Box, even if other subsidies are reduced.

In addition, the July pact leaves enough room for certain subsidies being offered by developed countries to be transferred to the Blue Box. In the case of the US, the text paves way for the transfer of counter-cyclical direct payments to farms under its Farm Bill to the Blue Box so that they could be maintained at the scheduled levels. Therefore, eventual accommodation of such subsidies in the Blue Box is not going to help reduce subsidies to the extent developing countries would like to see.

Though the Blue Box support is capped at 5 percent of agricultural production value of a period to be established, the US presently has virtually no Blue Box subsidies and hence can make use of the July text to increase such subsidies up to the 5 percent level. In the case of the EU, it makes significant use of the Blue Box subsidies, above the proposed limit, but has already planned to transfer a large part of these to the Green Box, and therefore should be able, without pain, to reduce to meet the target. Hence there remains a large possibility that developing countries would be confronted by a detrimental Blue Box (Sharma 2004).

An important achievement for developing countries, nonetheless, could be what is outlined in paragraph 41. Paragraph 41 allows developing countries to "designate an appropriate number of products as Special Products, based on criteria of food security, livelihood security and rural development needs". These products will be eligible for more flexible treatment. However, the extent of the flexible treatment remains undefined. Likewise, though paragraph 42 envisions the establishment of a special safeguard mechanism (SSM) for use by developing countries, it seems highly unlikely that developed countries would easily allow any major safeguard mechanism.

The market access part of the framework agreement provides for substantial tariff reductions leading to considerable market access improvements for all products. This will be negotiated through a tiered formula, which ensures that higher tariffs are subject to deeper cuts. There is a provision for designating some sensitive products, which will not be subject to the full effect of the tariff reductions. These will be designated using tariff lines and will still be subject to the requirement

of substantial improvement in market access, through a combination of tariff rate quota expansion and tariff reductions.

Though negotiations are still to be carried out, the agreement does set out a much stronger approach to tariff cuts and market opening. However, if the past experience is any guide, developed countries are likely to resort to mathematical wizardry and yet again dupe the developing countries.

2.2.2.2 Non-agricultural Market Access

As agriculture, NAMA has also been a very contentious issue under the WTO agenda. Although successive multilateral trade rounds have resulted in significant reductions of barriers to trade in non-agricultural products, the multilateral trading system is still characterised by tariff peaks and tariff escalation.

In addition, while a significant proportion of tariffs on industrial products have had binding WTO commitments made on them, this is not evenly spread across countries and products. There are also many instances where the WTO bound commitments are well above applied tariff rates, contributing to a lack of certainty on market access.

The Doha Mandate for NAMA, covering manufactures, forestry, fisheries and minerals, calls for the comprehensive reduction or elimination of tariffs, by addressing tariff peaks, high tariffs, tariff escalation and non-tariff barriers (NTBs). All products are to be covered with no exclusions.

Annex B of the 31 July text contains the framework for establishing modalities in market access of non-agricultural products. However, the annex contains only the initial elements for future work on modalities by the negotiating group on market access, which essentially is a copy of the Derbez text presented at Cancun.

It may be recalled that WTO members had failed to agree on the Derbez text, although NAMA *per se* was not the cause of the Cancun debacle. The text on NAMA had been strongly opposed by developing countries arguing that the NAMA text did not consider the specific vulnerabilities of their industries. Now the same text has been adopted.

Except for an extension of the deadline for the submission of notifications of NTBs, the text is same.

The text contains a non-linear formula approach to reducing tariffs across-the-board to a similar level, thereby reducing tariff peaks and tariff escalation as required under the Doha Mandate. There is also an option of supplementing the formula with sectoral initiatives. However, other provisions lessen the impact of the formula on tariff reductions, particularly through extensive flexibility provided to developing countries.

It should come as no surprise if developed countries push for forwarding negotiations in line with the Derbez text. Under such circumstances, any tangible progress on NAMA would be a far cry (SAWTEE 2004). The probability of not making any progress on NAMA negotiations is all the more since the text on NAMA was accepted with obvious pressure and unfair gaming of developed countries. The only concession that developed countries were apparently willing to make was to create a 'vehicle' to indicate that further negotiations were required on some aspects of the annex. It is improbable that the NAMA text would have been adopted, had their been a fair decision-making process in the WTO.

Besides, the NAMA text is full of vague and ambiguous provisions. Paragraph 2 of the Annex states – "We reaffirm that negotiations on market access for non-agricultural products shall aim to reduce or as appropriate eliminate tariffs, including the reduction or elimination of tariff peaks, high tariffs, and tariff escalation, as well as non-tariff barriers". However, there is no deadline on when such negotiations would begin or conclude. Under Annex B, there is only one deadline dealing with the notification of NTBs. As per paragraph 14, all WTO members would have to make notifications on NTBs by 31 October 2004.

The text affirms that additional negotiations would be required to reach an agreement on the specifics of some of the elements, such as the formula for tariff reduction, the issues concerning the treatment of unbound tariffs, the flexibilities for developing countries, the issue of participation in sectoral tariff components and trade preferences.

One of the issues of tremendous interest to least developed countries (LDCs), i.e. trade preferences, has been vaguely dealt with. Paragraph

10 of Annex B merely calls upon developed countries and others who so decide "to grant on an autonomous basis duty-free and quota-free market access for non-agricultural products" originating in LDCs. This provision clearly is of best endeavour in nature. Besides, it is a well established fact that stringent rules of origin (ROO) is a more important issue than just trade preferences (Purohit 2004).

2.2.2.3 Development Issues

The July text recognises the 'development dimension' of various negotiating issues. It deals with a number of pertinent issues such as special and differential treatment (S&DT), technical assistance to LDCs and implementation related issues and concerns, apart from the issues of livelihood and food security.

Notwithstanding the relative strength of the text on development issues vis-à-vis earlier texts, it has still failed to agree on measures to strengthen existing S&DT measures or to provide new measures as per the spirit of the Doha Mandate. Similarly, it has also failed to take decisions on resolving specific problems of implementation of the existing WTO rules. Since the GC decision merely sets new deadlines for the issues to be considered and for reports on these issues to be submitted, this, *per se*, cannot be viewed as an important achievement.

On S&DT, the Committee on Trade and Development (CTD) is merely asked to complete its review of the outstanding agreement-specific proposals and report by July 2005. Other outstanding works are to be reported 'as appropriate' and all WTO bodies dealing with Category II proposals are to report to the GC by July 2005. Agreement specific proposals put under Category I have not drawn much debate. Though a deadline has been set on S&DT, there is no guarantee that any tangible progress would be made on this front. It may be recalled that three deadlines on S&DT have already been missed in the past.

In the case of implementation issues, despite a July 2005 deadline, the text merely speaks of 'appropriateness', thus diluting the whole essence of the agreement. The text only requests the Director General to continue with his consultative process and report to the Trade Negotiating Committee (TNC) and GC by May 2005 for a decision by July 2005.

Likewise, in the case of technical assistance, the GC simply reaffirms that developing countries, and LDCs in particular, should be provided with enhanced trade related technical assistance. Unfortunately, the language is too weak to bind developed countries. All that the GC text states is that developing countries, in general, and LDCs, in particular, "should be provided with enhanced trade related technical assistance (TRTA) and capacity building, to increase their effective participation in the negotiations, to facilitate their implementation of WTO rules, and to enable them to adjust and diversify their economies". The language is non-binding in nature.

Similarly, the language concerning issues of developing countries such as food security, livelihood concerns, rural development, etc., is also of best endeavour in nature. It is stated that "special attention shall be given to the specific trade and development related needs and concerns of developing countries, including capacity constraints". However, further down, the paragraph dealing with these issues states: "These particular concerns…should be taken into consideration, as appropriate, in the course of…negotiations." Such language, regrettably, will again pave way for developed countries to wriggle out of their commitments.

With regards to the needs of LDCs, the text states that the GC "reaffirms the commitments made at Doha" and renews its determination to fulfil these commitments, which is again just non-binding and best endeavour in nature. We are aware of the fact that since the inception of the WTO, members have been continuing to take due account of the LDC concerns in the negotiations!

Moreover, the GC decision has marked another sad step in the steady decline in status and action on these 'development issues'. There has been hardly any concrete result on them. The Doha Declaration had accorded priority status for these issues, and deadlines for results on them were also given priority status. But now they are far behind the deadlines, whilst progress in other areas has been faster.

2.2.2.4 Trade Facilitation

In the July text, trade facilitation is the only Singapore issue taken up for further negotiations. This can be viewed as a big victory for developing countries. However, there are still causes to worry in terms

of both the dropped issues as well as the issue taken up for further negotiations.

On the three dropped Singapore issues, the GC decision merely states that "these issues…will not form a part of the Work Programme…and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round".

Therefore, it is not sure whether discussions (as contrasted to negotiations) would continue even now at the WTO, through a revival of a study process in the working groups. Besides, there is no guarantee that the dropped issues would not be brought back for negotiations beyond the DDR.

Let us examine what is in the July pact for trade facilitation. The focus of negotiations under trade facilitation, as is outlined in modalities for negotiations on trade facilitation in Annex D of the July text, is on the movement, release and clearance of goods, including goods in transit. Negotiations shall also aim at enhancing technical assistance and support for capacity building. However, here too, the July text fails to set the deadline and many of its provisions are non-binding.

Paragraph 2 of the Annex states that the extent and the timing of entering into commitments shall be related to the implementation capacities of developing countries and LDCs. Obviously, it would be difficult to determine the date and time for entering into such an agreement for each individual country when the same set of rules, based on the most favoured nation (MFN) and national treatment principles, applies to all.

Besides, it is a known fact that implementation of trade facilitation measures is a costly affair. And yet when developed countries are putting pressures on developing countries to forward negotiations on trade facilitation, there have been no binding commitments from their side to aid in the development of necessary institutional and human resource infrastructure.

Paragraph 4 of the Annex says that members shall "address the concerns of developing and least developed countries related to cost implications" of the proposed trade facilitation measures.

Also, paragraph 6 simply states that developed country members "will make every effort to ensure support and assistance" related to the nature and scope of the commitments made during negotiations on trade facilitation. The phrases 'address the concerns' and 'will make every effort' are only non-binding and will not mean anything significant for developing countries.

2.2.2.5 Services

One of the major criticisms of liberalisation of trade in services under the UR by developing countries was that developed countries made commitments to liberalise such sectors in which they had considerable amount of leverage (e.g., value added products in telecommunication and financial services) while they kept closed the sectors in which developing countries had comparative advantage.

The GATS commitments made by countries under the four 'modes of supply' also reflected countries' preferences, and to some extent, the extent of competitive advantages of services industries. For example, while the 'consumption abroad' mode received the highest share of full commitments, 'cross border', and 'commercial presence' modes received the second and third highest preferences, but the 'presence of natural persons' mode received the least amount of commitments. This is one of the most important areas where developing countries could make true gains because developing countries enjoy an abundance of cheap labour.

Annex C of the 31 July text outlines the actions necessary to take forward negotiations on trade in services. However, the text merely reaffirms that negotiations would be carried out to further liberalise trade in services. The annex states that members "shall aim to achieve progressively higher levels of liberalisation with no a priori exclusion of any service sector or mode of supply and shall give special attention to sectors and modes of supply of export interest to developing countries".

In the case of mode 4, the text says: "Members note the interest of developing countries...in Mode 4". But it does come as a question if the 'emphasis' being made in the case of mode 4 is really meant to address the concern of the developing and least developed countries.

Therefore, due to lack of specific guidelines and binding language, not much progress on mode 4 can be expected.

Annex C of the GC decision also notes the importance of targeted technical assistance to developing countries to enable them to effectively take part in services negotiations. However, as in other cases, there is no binding commitment made on this issue.

Besides, the main text of the GC decision calls members to table their revised offers by May 2005. This deadline for revised offers places heavy pressures on developing countries to submit commitments on opening up their services markets, on which many are reluctant to.

2.3 Challenges Confronting South Asia

After analysing the negotiation process followed for the finalisation of the July pact and the content of the pact itself, this section deals with specific challenges that the South Asian countries in particular are likely to face. There appear numerous challenges for these countries in terms of the nature of future negotiations that would be carried out within the WTO and the agreed frameworks in areas such as agriculture, NAMA, development issues, trade facilitation and services. The major challenges are dealt in brief below.

First, the negotiation process followed for the finalisation of the July framework indicates to a possibility that a majority of WTO member South Asian countries would be excluded from the future negotiations under the July framework. The July framework negotiations were highly dominated by FIPs, in which only India was included from South Asia. The inclusion of India in FIPs was also not because India is a South Asian country but because it is one of the largest and leading developing countries in the world. Therefore, in this context, besides India, other South Asian countries have two major challenges - how to discourage such negotiation processes, which do not involve all members, and if such processes continue, how to take into confidence the Indian trade negotiators to speak for them during negotiations?

Second, in the case of agriculture, though the text asks developed members to substantially reduce domestic support and eliminate export subsidies, lack of a specific timeframe for any reduction or elimination

makes it unlikely that anything significant would happen. This means that there is every possibility that South Asian agricultural exports will continue to face unfair competition in the global agricultural market.

Third, the text on NAMA has clearly failed to accentuate the issue of trade preferences to the extent developing countries would have desired. Due to this, along with many other developing countries, South Asian countries will also face stiff competition in the global market if they are forced to expose their infant industries and small firms. Further liberalisation could deepen the crisis of de-industrialisation and complicate the poverty reduction and employment generation efforts, which are the major development bottlenecks of these countries. Future negotiations on NAMA would lead to removal of all tariff and non-tariff barriers in developing countries but if the developed countries pursue their own mechanisms to restrict the flow of non-agricultural products into their markets, it could render the South Asian economies more vulnerable and susceptible.

Fourth, in the case of development issues, since the text has failed to agree on measures to strengthen existing S&DT measures or to provide new measures as per the spirit of the Doha Mandate, South Asian countries will face problems in reaping benefits from S&DT. Similar is the case in terms of resolving specific problems relating to implementation of the existing WTO rules. In the case of technical assistance, due to the fact that the text simply reaffirms without any binding provisions that developing countries, and LDCs in particular, should be provided with enhanced trade related technical assistance, the South Asian countries would not be able to capitalise on the July pact for getting technical assistance.

Fifth, in the case of trade facilitation, though the text states that negotiations shall aim at facilitating trade through enhanced technical assistance and support for capacity building, there seems no binding commitment from developed countries to aid in the development of necessary institutional and human resource infrastructure in developing countries. Since the pact simply states that developed country members "will make every effort to ensure support and assistance" related to the nature and scope of the commitments made during negotiations on trade facilitation, it seems that South Asian countries will have to come up with concrete and unified positions to compel developed countries to work on their commitments.

Sixth, in the case of services, the July text has seriously undermined the importance of mode 4 in the sense that developed countries have hardly made any offer except for the offer to negotiate on them. South Asia is a powerhouse of skilled, semi-skilled as well as unskilled labour, but since the July pact does not mean any concrete negotiations and has just laid an emphasis to negotiate, it seems that the South Asian countries will not be able to utilise mode 4 to their benefit if developed countries do not negotiate. Importantly, remittances from workers of their countries have a significant role to play in their economy *(See Box: 2.2)*.

Box 2.2

Contribution of Remittance in South Asian Economy

Remittance forms a significant chunk of South Asian income. Remittance inflow for Nepal for the year 2002/03 (year ends 15 July) stood at over US$ 460 million. In the case of Pakistan, the flow of remittance during July-April 2003-04 was US$ 3.2 billion (CBSL 2004), while in the case of Sri Lanka remittance inflow touched US$ 1.29 billion in 2002.

Likewise, in the case of India, inward remittance from Indians working abroad touched US$ 19.2 billion in 2003-04 (year ending 31 March), maintaining India's position as the leading recipient of remittances in the world.

In fact, in the Indian case, a gradual shift has occurred in the sources of remittances from oil producing countries of Asia to Europe and America, thus depicting the potential benefits that liberalisation of mode 4 could bring. During 2003-04, remittances from its workers remained the mainstay of India's current account.

Compiled from NRB 2004; MoF 2004; RBI 2004

2.4 The Way Forward for South Asia

At a time when there was not any hope among members that the stalled DDR negotiations would be revived, the July pact has appeared as a historic agreement and salvaged the stalled negotiations through

frameworks for furt her negotiations in key areas such as agriculture, NAMA, development issues, trade facilitation and services.

Since the agreed frameworks for further negotiations in key areas hold significant importance in the integration process of the developing and least developed countries, South Asian countries must capitalise on its positive aspects. At the same time, they should put their heads together to prevent its negative aspects from bringing any harm in their economies.

In this process, there are numerous challenges South Asian countries are likely to face in further negotiations, particularly due to the fact that many provisions of the agreed frameworks under the July pact are vague, non-binding and best endeavour in nature.

In light of these complexities, it is better if South Asian countries prepare their strategic measures at three important levels – national, regional and international.

2.4.1 Measures at the national level

At the national level, the first step would be to enhance the capacity of their trade negotiators to critically understand the frameworks for further negotiations. This would enable them to identify their priorities for negotiations and ways to capitalise on the July pact.

The second step would be to develop country positions on each negotiating issues so that they could defend their national interests in future negotiations. However, in the process of preparing country positions, they must do consultations with a wider range of stakeholders so that they could properly address the challenges in light of latest developments within the multilateral trading system.

The third step would be to tactfully implement agreed frameworks in their benefits. While implementing agreed frameworks, they must be able to interface national interests with WTO commitments. Their consultations with the concerned stakeholders would certainly help in this process. Besides, they should also take lessons from the experiences of other countries. This would help them to prepare safety nets so that they could protect their stakeholders from negative consequences.

2.4.2 Measures at the regional level

At the regional level, the first step would be to develop a sense of mutual cooperation. The South Asian Association for Regional Cooperation (SAARC) forum could be instrumental in this process. SAARC forum could also be instrumental in the second step, i.e., the development of common positions to defend their interests during future negotiations under the July pact.

In case these countries fail to utilise SAARC forum for developing common positions, they could also seek help from India and Bangladesh. As one of the leaders of developing countries, India is already in a position to influence the negotiation process at the WTO. Similarly, as a leader of LDCs, Bangladesh is also in a position to represent other South Asian LDCs in the WTO. Therefore, other South Asian countries can take India and Bangladesh into their confidence so that their concerns could be addressed during future negotiations.

The third step could be to maintain regional unity, remaining aware of the divide-and-rule tactic of the developed countries, mainly the US and the EU. At this critical point in time, when these global giants are offering bilateral and regional trading pacts to lure developing and least developed countries, where South Asia is not an exception *(See Box: 2.3)*, it is important that they give priority to regional interests rather than their individual interests.

Box 2.3

Divide and Rule in South Asia

Sri Lanka, which depends heavily on the US for its garments exports, is currently insecure of the post-2004 scenario when the Multi-fibre Agreement (MFA) will expire. In July 2002, Sri Lanka signed a Trade and Investment Framework Agreement (TIFA) with the US with the objective of converting it to a bilateral FTA by mid-2004 before the MFA comes to an end. However, no progress has been reported on this so far.

Now the US has selected a number of Islamic countries to offer TIFAs, including Bangladesh and Pakistan. Bangladesh's situation is not much different to Sri Lanka since it is quite concerned about the post-2004 period. Likewise, the EU has offered preferential treatment to Pakistani textiles, which was disputed by India and the WTO ruled

in India's favour. Similarly, a bill proposing duty-free and quota-free market access to the Nepalese garments is already in the US Senate.

The point being made here is that the global giants are now embarking on a mission of politicising the global trading system by linking market access in exchange for political allegiances – a clear departure from the declared goals of the WTO to put in a rules-based system for global trade.

Source: Kelegama and Mukherj. 2003.

2.4.3 Measures at the international level

At the international level, the first step would be to join alliances of other like-minded countries so that their concerns could not be undermined during further negotiations under the July pact. The unity maintained by the like-minded developing countries during the Cancun Ministerial negotiations was able to thwart the undue pressures of developed countries to negotiate and come to consensus on Singapore issues.

The second step would be to discourage any negotiation process, such as followed by FIPs. Such negotiation processes exclude them and other like-minded countries and pose a threat that their concerns would not be addressed. Therefore, the third step would be to negotiate as a group and compel the developed countries to work on their commitments in the true spirit of the DDR.

Therefore, before it is too late, South Asian countries must start doing necessary homework at national, regional and international levels. Failing to do so would mean that they would lose much and gain little or perhaps nothing.

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Chapter - III

Balancing the Livelihood Options with Three Pillars of AoA

Prof. J George

3.1 Introduction

The Doha Development Agenda (DDA) appropriately recognised the sensitive nature of agricultural trade negotiations in the multilateral framework. As three-fourth of the members of the World Trade Organisation (WTO) have a major chunk of their population depending on agriculture for livelihood, trade negotiations on agriculture have to be carried out with great care.

We also need to consider the contemporary trade patterns emerging in the global arena. The remarkable and characteristic feature of merchandise trade during the last decade clearly documented in the WTO's World Trade Report 2003 is the growth in the share of South-South trade. A strong spurt in export share up to 1996 and a strong yet steady import share thereafter in the case of South-South trade were fashioned by the relative strength of demand growth in developing countries. In this milieu, developing Asia accounted for more than two-third of South-South trade and there is a need to contextualise the South Asian perspective. Since trade in agricultural produce in the intra-South countries expanded at nearly half the rate recorded for manufactured goods trade, a desegregated analysis has become imminent.

We know that South Asian agriculture is rooted in small holder farming system, thereby, giving it a distinct landscape. In addition, agriculture in these countries engages over 75 percent of their respective population and accounts for nearly 24-40 percent of the gross domestic product (GDP). Though South Asia accounts for 22 percent of the global population and 45 percent of the world's poor, it is still the second fastest growing region in the world. Hence, agricultural negotiations at the apex trade organisation have utmost significance for South Asia.

The process of negotiations initiated in 2000 on agriculture, however, witnessed a turning point around mid-August 2003 during a series of meetings of the heads of delegation. The despair following the tale of missed deadlines and elusiveness to reach an understanding to carry forward the process on some agreed modalities for negotiations was seen to be turning into hope. Three new ideas as framework for establishing agriculture modalities for incorporation and consideration at the Cancun Ministerial came in quick succession within a span of about five days.

These frameworks need to be examined with a set of probing questions. Admittedly, all three submissions have had benefit of the Committee on Agriculture, Special Session Chairman's draft revised modalities (WTO TN/AG/W/1/Rev.1 dated 18 March 2003) as well as his report (WTO (2003) TN/AG/10 dated 7 July) to the General Council (GC). The GC Chairman along with the WTO Director General, WTO made a synthesis of all these documents in their revised draft Cancun Ministerial text (JOB (03)/150/Rev.1 dated 24 August 2003).

In this paper, section 3.2 is an analysis of the three pillars of Agreement on Agriculture (AoA) as they emerge from the Harbinson draft of March 2003 to the Derbez draft of September 2003. The market access scenarios as contained in these drafts have been a contentious area and have been specially examined in section 3.3 with reference to future development options within the mandate in paragraph 14 of the Doha Declaration. In section 3.4, some lessons have been drawn with respect to the primary and processed food segments. Section 3.5 puts together some broad contours in an attempt to balance the livelihood options with the three pillars of AoA.

3.2 Pathways in Agriculture Negotiation

The AoA formulated during the Uruguay Round (UR) for the first time brought agriculture into the multilateral trade negotiation framework. Agricultural negotiations have the attention of all members. Stakes are indeed high, for both developing and developed countries. AoA in its Preamble reiterates that commitments under the reform programme for trade in agriculture should be made in an equitable way among all members, having regard to non-trade concerns including food security.

The Doha Declaration in paragraph 12, while dealing with the implementation related issues and concerns, identified four broad areas in the field of agriculture that have been of serious concern to a majority of members.[1] However, Article 20 of AoA has mandated negotiations for continuation of the reform process including non-trade concerns.[2] Towards this end, paragraphs 13 and 14 of the Doha Declaration are very instructive.

> Paragraph 13: "We recognize the work already undertaken in the negotiations initiated in early 2000 under Article 20 of the Agreement on Agriculture, including the large number of negotiating proposals submitted on behalf of a total of 121 Members. We recall the long-term objective referred to in the Agreement to establish a fair and market-oriented trading system through a programme of fundamental reform encompassing strengthened rules and specific commitments on support and protection in order to correct and prevent restrictions and distortions in world agricultural markets. We reconfirm our commitment to this programme. Building on the work carried out to date and without prejudging the outcome of the negotiations we commit ourselves to comprehensive negotiations aimed at: substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support. We agree that special and differential treatment for developing countries shall be an integral part of all elements of the negotiations and shall be embodied in the Schedules of concessions and commitments and as appropriate in the rules and disciplines to be negotiated, so as to be operationally effective and to enable developing countries to effectively take account of their development needs, including food security and rural development. We take note of the non-trade concerns reflected in the negotiating proposals submitted by Members and confirm that non-trade concerns will be taken into account in the negotiations as provided for in the Agreement on Agriculture."
>
> Paragraph 14: "Modalities for the further commitments, including provisions for special and differential treatment, shall be established no later than 31 March 2003. Participants shall submit their comprehensive draft Schedules based on these modalities no later than the date of the Fifth Session of the Ministerial Conference. The negotiations, including with respect to rules and disciplines and related legal texts, shall be concluded as part and at the date of conclusion of the negotiating agenda as a whole."

It may be recalled that negotiations involve dealing with hard issues, many of which are leftovers from earlier rounds. These issues generally relate to protection of particular interests of some countries at the expense of others' development. Most importantly, barriers in agricultural trade have been known while poor farmers in the world are still expecting the promise of enhanced market access to their labours' output. These issues are of paramount significance since they affect developing countries most profoundly. It may be argued that a trade round that does not make progress in these areas cannot legitimately claim to improve the lives of the world's poor.

The Doha Declaration in paragraph 13 clearly mandated that 'a programme of fundamental reform' be created 'in order to correct and prevent restrictions and distortions in world agricultural markets'. In this respect, the operating clause is to be found in paragraph 14 that mandates for 'modalities for further commitments'. The Harbinson's revised draft offered modalities approach based on formulas, for instance, tariff reductions in bands separately for developing and developed countries. However, absence of consensus among members though disturbing, involved serious informal attempts during the run up to the Cancun Ministerial. The outcome was a series of 'framework paper' during mid-August 2003 that gave a rough idea about the approach without specifying any numbers. The first in the series was put on the table jointly by the European Union (EU) and the United States (US), followed by another joint proposal by a group of 17 developing countries – later known as G20 – and a proposal by the coalition of six Like-minded Group countries. In the same vein, countries from amongst the newly acceded members and members of the multi-functionality group tabled their framework papers as well.

Under Chair of the GC Carlos Pérez del Castillo, a synthesis was attempted in the form of a revised draft text for the Cancun Ministerial on 24 August 2003. However, the synthesis mainly followed the pattern suggested in the EU-US paper and hence did not redeem the situation

despite incorporation of sections on special and differential treatment (S&DT) for developing countries. The position of members in the final analysis remained unaltered even after Cancun Conference Chair Luis Ernesto Derbez tabled his revised draft text on agriculture on 13 September 2003. Why the position of members remained unchanged can be assessed by a brief look at the following summary.

The subsidies on agriculture given by Organisation for Economic Cooperation and Development (OECD) countries increased to US$ 266 billion during 1997-99 that works out to the equivalent of 60 percent of total world trade in agriculture and double the value of agricultural exports from developing countries. The farm support in OECD countries increased to US$ 311 billion in 2001 and dropped to US$ 235 billion in 2002. This subsidy in 2001-02 accounted for 31 percent of total farm receipt in OECD countries, 59 percent in Japan, 36 percent in the EU and about 22 percent in the US (OECD 2003).

The EU, Switzerland, Norway and the US collectively account for 97 percent of all export subsidy expenditures. Many developed countries circumvent export subsidy commitments through dubious means as the main gainers are a few large companies, often four or five, which control more than 50 percent export share in these countries. Trade distortions are immediately manifested, *inter alia*, into depressed and more volatile world prices, and lower imports by subsidising countries leading to poor market for developing exporting countries. The major gainers are the food processing majors in developed countries.

The market access scenario is beset with tariff escalation, tariff peaks and persisting menace of specific duties. Alongside, we can witness a widening gap between consumer prices and producer prices for especially the tropical products.[3]

Against this backdrop, we need to situate the alliance of developing countries at Cancun and appreciate the fact that they were able to hold together against the EU-US combine. Increased market access for agricultural products as is clearly articulated in the G20+ submissions to the GC is indeed conditioned by trade distortions and protectionist policies of the developed North. Non-tariff barriers (NTBs) like sanitary and phytosanitary (SPS) measures are very frequently being used to impede agricultural exports from developing countries.

Interestingly, the Chair in preparing the Ministerial draft text at Cancun relied upon the EU-US framework to a large measure. The unmistakable emphasis on tariff reduction and underplaying the damages brought about by domestic support and export subsidy in the draft text brought about a reinforced resolve to demand for time bound drastic reduction in subsidies of various hues. What is it in the tariff that has become sacrosanct for the EU-US combine to convince the Conference Chair to uphold is an important question that needs to be examined.

3.3 Tariffs Fixation Modalities

The revised version of the 'First Draft of Modalities for Further Commitments' with respect to tariffs proposed a core modality of differing sets of tariff reduction based on a Linear Reduction Formula along with slabs, one for developed countries and the other for developing countries (WTO 2003a).

The final Cancun Ministerial draft text, called the Derbez draft, can thus be properly situated and examined for future implications. We need to be fully conscious of the fact that tariff fixing process is indeed linked to other two pillars of AoA, namely domestic support and export subsidy issues. All future negotiations and engagements with imbalances in the three-some, however, need to be viewed from the perspective of market access if trade liberalisation has to have any significance for developing countries like India. The primary aim is to illuminate the process of market access alone. Hopefully, it would lead us to examine the possible factors and situate the case of India and perhaps other South Asian countries in this discussion. This section, therefore, is concentrating on the limited issue of tariff fixation as it has emerged at the base of all discussions both during and after the UR negotiations on AoA.

The major stipulations with respect to type of tariffs, base period and timeframe can be summarised as follows:

- tariffs, except in-quota tariffs, to be reduced by a simple average for all agricultural products subject to a minimum reduction per tariff line;

- base for the reductions to be the final bound tariffs as specified in the schedules of members; and
- time period for tariff reduction, except for preferential schemes to be implemented in equal annual instalments over a period of five years for developed countries and 10 years for developing countries.

The core modality formula for developed countries stated in the revised 'First Draft of Modalities' can be mathematically denoted in the following way:

T1 = T0*(1-A/100) [equation 1], where A denotes the simple average reduction rate, T0 denotes the *ad valorem* tariff, and where,

A=60, if T0>90

A=50, if 15<T0≤ 90

A=40, if T0≤ 15

A clear indication is also provided for processed products. Here, the rate of tariff reduction for processed products is expected to be equivalent to that for the relevant product in its primary form multiplied at a minimum by a factor of 1.3. The scope for raising this factor, we suppose, could be available. The proposal by Chairman, Stuart Harbinson, however, is silent on it.

Similarly, paragraph 12 of the revised 'First Draft of Modalities' elaborates on the formula for reduction commitments by developing countries except semi-processed products. The formula is mathematically presented below:

T1 = T0 *(1-A/100), where

A=40 if, T0>120

A=35 if, 60<T0≤ 120

A=30 if, 20<T0≤ 60

A=25 if, T0≤ 20

Besides, for all semi-processed products, simple average reduction of 10 percent subject to a minimum cut of five percent per tariff line has also been envisaged. Remarkably, three slabs for developed North and

four slabs for the developing South were purported to address all the pointed submissions by member countries.

A close look at these slabs and examination of minutes of the Special Session of Committee on Agriculture reveals the issues at stake. The issue is whether or not the primary premise of the core method, namely 'the higher the tariff the greater the required average reduction rate' serves the greater interests of the developing member countries (WTO 2003b). There have been repeated articulations in these sessions to the effect of developed countries getting to over exploit the inherent market access clause in S&DT, especially with respect to lower tariff reduction targets and a longer implementation period.

Why is there a strong reservation to the revised formula? This is an important query that will arise as a natural corollary. We have attempted to examine this query after applying the minimum simple average reduction stipulated to different slab specific averages to a few select countries that represent both developed and developing countries. The select countries are Brazil, South Korea, India, Australia and the US. These countries have been selected for the ease in data availability and handling since what we attempted to do is a test case. In this regard, it is worth mentioning that due to unavailability of bound *ad valorem* equivalents of developed countries, our exercise became all the more difficult. This itself is a proof that developed countries practice non-transparency despite clear instructions of the WTO Secretariat. Also, since the base year is not very clear in the draft modalities, we faced many problems while converting specific duties into their *ad valorem* equivalents.

3.3.1 Methodology

Calculations of the reduction in final bound averages are based on the formula stated in the Draft of Modalities, "TN/AG/W/1/Rev.1". The data on bound rates for the selected countries has been taken from www.amad.org. For the US, the bound rates, which were stated in the form of specific duties, were converted into their *ad valorem* equivalents using the following formula:

Final ad valorem equivalence = [(ad valorem equivalence of 1999/specific duty of 1999) * Final specific duty]

For developed countries, i.e., the US and Australia, the simple bound average is estimated separately for all commodities and three slabs as given in the above mentioned equation T1=T0*(1-A/100). The three slabs for agricultural tariffs are as follows: (i) greater than 90 percent *ad valorem;* (ii) lower than or equal to 90 percent *ad valorem* and greater than 15 percent *ad valorem;* and (iii) lower than or equal to 15 percent *ad valorem*. This was done after excluding in-quota tariffs. Then we arrived at three averages for these slabs, which were subject to reduction by 60 percent, 50 percent and 40 percent respectively, which gave us three post-millennium average values for developed countries.

Similarly, for developing countries, the simple bound average is calculated for all commodities and four slabs separately. The categories for agricultural tariffs are as follows: (i) greater than 120 percent *ad valorem;* (ii) lower than or equal to 120 percent *ad valorem* and greater than 60 percent *ad valorem;* (iii) lower than or equal to 60 percent *ad valorem* and greater than 20 percent *ad valorem;* and (iv) lower or equal to 20 percent *ad valorem*. Then we arrived at four averages for these slabs that were subject to reduction by 40 percent, 35 percent, 30 percent and 25 percent respectively, which gave us four post-millennium average values in the case of developing countries.

Later we found out the weighted average of these averages, i.e., three averages in case of developed countries and four averages in case of developing countries, by multiplying the average values with the number of commodities falling in that slab. This weighted average is our final bound average for the post-millennium round negotiations of all agricultural commodities. This value is used to find out percentage point decline in final bound averages.

It is now apparent that developing country negotiators were able to crack the 'mathematical wizardry' of the revised modality formula and see through the game plan for agricultural products. For example, in our limited test case using Brazil, Republic of Korea and India, the highest (43) percentage point decline in average bound rates from the base year is expected to be made by India in the post-millennium round. The Republic of Korea and Brazil follow in that order with about 23 and 11 percentage point decline respectively.

That US with a token five percentage point and a mere 1.6 percentage point decline from the base year by Australia in their respective

agricultural commodities' average bound rates in the post-millennium round stand in stark comparison. The irony of this lopsided implication of the modalities is highlighted when we consider the myriad agricultural landscape prevailing in developing countries and compare them with the precision farming system of the developed North.

Notwithstanding the low base year tariff values in countries with high merchandise trade, another elaboration of a 'bad deal' for developing countries in the revised modalities framework can be provided by looking at the estimated percentage decline in the average bound rates during pre- and post-millennium rounds.

Table 3.1 presents the case to illustrate that the averages of decline, though more in the case of developed countries (USA and Australia) as compared to developing countries (Brazil, South Korea and India) are, in fact, an easy way to camouflage the reductions across tariff lines. This means that the formula is more favourable to developed countries despite more number of bands/slabs for developing countries. It needs to be recalled that a group of developing countries, including India, in their joint submission did point this out very clearly (WTO 2000).

Table 3.1: Percentage Decline in Pre and Post Millennium Bound Tariff Averages

Countries	Number of tariff lines	Percentage decline
US	1,611	52.6
Australia	780	42.1
Brazil	1,423	29.8
Korea	1,307	36.1
India	666	37.5

Source: Calculated by author. Based on data from www.amad.org

This is yet another instance that highlights the 'unfairness' of a global trading system that favours a few members' access at the cost of excluding a large number of developing countries. The overall balance in terms of trade not only gets disturbed, but for many first time players in the world market, an exclusive regime makes it very difficult to gain any meaningful entry. The message that needs to be highlighted

here is that tariffs undoubtedly play a much wider and significant role in developing countries and, therefore, the significance of the bound rates is heightened in the absence of other horizontal as well as vertical trade instruments, including institutional arrangements.

Therefore, the suggestion that developing countries should follow and accept the formula suggested by either the modalities or the series of framework papers culminating into the Derbez draft is too far fetched. It is based on a tenuous premise that binding rates be committed at levels that are currently applied.

3.3.2 Minimum Reduction in Stipulated Tariff Rates Across Different Slabs

The application of formula on developed countries indeed is a cause of serious concern to developing countries, since many other important issues of tariff rates quota, domestic support and export subsidy weave around this reduction commitment. While the three slabs are prominently captured, the concentration of tariff lines in the second slab especially is expected to occupy a wide range of tariff, say 13-60 percent in the case of the Draft of Modalities coming into operation in the near future.

The point to be noted here is that against the backdrop of experience gained during the implementation period, the new round is not expected to show a marked decline in minimum cuts for developed countries in general. This, in fact, reinforces the practices of OECD countries that during the pre-millennium round reduced high tariffs on products which they produced by a smaller percentage on one hand, and reduced low tariffs by a larger percentage on the other. Such mathematical jugglery with tariff lines and percentage cuts gets compounded when non-*ad valorem* tariff forms are frequently used. The net result that could be expected under this scenario is extremely limited market access to agricultural exports of developing countries.

For developing countries, the middle two slabs could be expected to have a minimum cut in the new round that would range between 20-40 percent and 40-85 percent respectively. This is tantamount to developing countries losing the flexibility of the bound rates available during the pre-millennium round. Developing countries being small players in international trade in

agricultural products do require special safeguards towards market access before getting fully integrated into the world market machinations. Therefore, the delicate overall balance of the package appears to get distorted in this suggested formula.[4]

3.3.2.1 Peak Bound Rates

Peak tariffs, on the contrary, are indeed a major concern. We have examined the sensitivity of the new formula. We find that peak tariff in the case of the US drops down from 822.9 percent to 452.6 percent using the new formula stipulating a minimum 60 percent cut. The other test country, Australia, being part of the Cairns group, already maintains its peak tariff at a low of 29 percent and is expected to decline to about 19 percent in the new round. Thus, we see that although the cut is large, i.e., 60 percent in the case of developed countries, the 'peakedness' problem would still persist.

Hence, the market access issues from a developing country's perspective become pivotal here since agricultural tariffs in OECD countries are expected to remain several times higher than those falling in the category 'manufactured' despite big reductions. Such peak tariffs are also used as important leverage to dispense preferential market access schemes at a lower level of tariffs for exports from developed countries. Such allurements are definitely neither fair nor transparent and have even failed to score brownie points at innumerable discussions and consultations.

In contrast, India's peak rate is expected to decline to about 210 percent in the new round from about 300 percent in the pre-millennium round. Notably, this is when there is a 30 percent reduction. In the same category, Brazil's peak rate is expected to come down to 44 percent from the previous peak of 55 percent. The South Korean case, however, is a unique instance and requires further investigation to determine the influence of Japanes e peak rates.

Table 3.2: Average MFN Tariff Equivalent for Peak Tariff Products (With tariff>15%)

Items	Canada	EU	Japan	US
Live animals	199	38		
Meat	110	71	39	19
Fish		19	15	
Dairy	198	59	29	21
Cut flowers	15	17		
Vegetables		25	16	21
Fruits	17	20	20	17
Coffee		16	18	
Cereals	70	76	63	
Starch malt	85	38	23	16
Oil seed	18	74	19	78
Gum, resins	74	18		
Fats and oil	28	56	27	20
Prep. meat/fish	69	24	21	
Sugar, confectionery	17	38	71	
Cocoa	86	24	23	
Flour	55	34	22	17
Vegetable fruit	19	26	23	29
Miscellaneous edible items	49	19	22	20
Beverages	27	36	39	
Food residue	30	71		
Tobacco	18	56	19	74

Source: Haddad, Mona. 2002. Market access barriers to agricultural exports of developing Asia, The World Bank, www.worldbank.org

The practice of tariff peaks in agricultural products is a common occurrence in Quad group of countries. In Table 3.2, we can see that across a wide range of agricultural products, tariff alone is higher than 15 percent. It needs to be pointed out here that these countries do have stringent food quality norms for farm produce and that is a severe NTB. For instance, Japan was the single largest importer of fish from

India. However, focussing on peak tariff incidence, it is important to remind that a clear-cut definition is not available.

Be that as it may, the expected scenario is, indeed, not bright for developing countries. Whereas, exporters from developed countries may be able to overcome peak tariffs instances in developing countries as they have deeper pockets and stronger government treasuries, developing countries have neither.

3.3.2.2 Specific Duties

The proposed formulas are applied only on the *ad valorem* bound rates of the countries. This gives an opportunity to developed countries to somehow protect certain sectors by imposing specific duties that may have high *ad valorem* equivalents. This easily helps them conceal their high tariffs. Our estimates with limited data accessibility show that the US has imposed specific duties on 30.8 percent of its total agricultural products. Not far behind are the EU and Canada wherein percentage of bound lines with specific duties are 26.4 and 28.7 percent respectively of total agricultural products. Australia comes out to be a unique case in this regard with only 1.3 percent of its agricultural lines facing specific duties. On the contrary, developing countries like India, Brazil and South Korea have hardly imposed any specific duties. Table 3.2 elucidates this fact further.

The WTO Negotiating Group on Market Access (NGMA) is seized with this dilemma (WTO 2003c). Their analyses show that the incidence of non *ad valorem* duties is highest for agricultural products, namely, about one-fifth of the total agricultural tariff lines, compared to only 4 percent for industrial products. Interestingly, Switzerland is reported to have 83 percent of its tariff lines on non *ad valorem* duties. This revelation has further elaborated that developed country members are the main practitioners of non *ad valorem* duties in agriculture. For instance, Canada (26 percent), the US (43 percent), Norway (63 percent), the EU (45 percent) and Iceland (25 percent) are the top-ranking users of non *ad valorem* tariffs in agricultural product trade.

Table 3.3: Percentage of Bound Lines Subject to Specific Duties on Agriculture

Country	Number of lines	Lines subject to specific duties	Percentage share
USA	2,800	861	30.8
Canada	1,977	568	28.7
EU	2,981	788	26.4
Japan	2,125	265	12.5
Australia	1,061	14	1.3
Korea	1,888	63	1.9
India	669	2	0.3
Brazil	2,078	0	0

Source: www.amad.org Note: Quota tariffs included in estimates.

It has already been demonstrated that any specific duty when converted to *ad valorem* equivalents results into a higher *ad valorem* (Mehta & Rajesh 2003). In our estimates, we have tried to convert *ad valorem* duties of the US into their *ad valorem* equivalents according to the method stated before. An interesting outcome of this exercise was that the average of specific duties when converted into *ad valorem* equivalents came out to be 9.7 percent, which is higher than that of rate already specified at 9.4 percent in the form of *ad valorem*. As the converted peak rate in the US is 822.9 percent (*See Table 3.4*), a very high value indeed, this goes to prove the misleading mechanism adopted by developed countries.

Table 3.4: Final Bound Averages of the US

	Number of tariff lines	Average percentage	Peak rates (percentage)
Ad valorem equivalents of specific duties	737	9.7	822.9
Ad valorem duties	874	9.4	350

The conversion has other complexities in terms of data availability and tariff line specifications that put developing and least developed countries into multiple disadvantages. Restricted access to the integrated database and the consolidated tariff schedules database for

researchers is indeed remarkable. This wide divergence between the words of the Ministerial Declaration *per se* and Draft of Modalities document on one hand and the actual practice of levying specific duties at the border on the other is worth thinking over.

3.4 Standards and Processing Sector: A Synthesis Based on Evidence

Food processing industries are characterised by small scale operations and have been found to be eager to move up the value chain to meet international demand for high value output. However, domestic processors face many challenges of NTBs, in particular, the international food safety regulations. Most of the countries with an elastic demand for such high value processed food products have made it mandatory for all suppliers to follow a standards regime, say Hazard Analysis and Critical Control Points (HACCP), in order to fulfil the expected quality.

This quest for quality following a system primarily designed for large scale production may not be entirely suitable to developing countries' small holder producers' system in general and the Indian peasants' livelihood strategies in particular. The compliance cost to be borne by these producers is going to be very heavy. Since available evidence seems to suggest that profit per unit of small holder producer's output is relatively higher than large farm holder, we need to design strategies to first neutralise the scale dilemma.

While many strategies have been suggested, the scale neutralising dimensions, unfortunately, appear to have been ignored at best. The dominant strategies among these are vertical integration of production and processing activities with a marketing domain. In this approach, the onus of quality concerns conveniently shifts to the producers of raw materials that pose a greater challenge to the production landscape in comparison to the processor or integrator in the agri-business. The cost burden particularly on agri-business players is most likely to be transferred on to producers. This would aggravate when other related industries experience falling revenues due to declining commodity prices in the market. Since these players operate in an information asymmetry environment, producers' welfare is not the prime concern.

Producers of primary raw material on farms are expected to invest in capacity to conform with good agricultural practices.[5] The compliance costs to meet the standards are not the same. These costs differ according to the level of strictness of the regulation and the type of crops grown, and the region where the norms are to be adopted.

It is estimated that for a daily production capacity of five tons of fruits and vegetables or 10 tons of flower, the compliance cost burden amounts to US$ 2,000 per month. This is to be followed by investment to ensure quality controls while transferring goods from farm to ports. This is estimated to cost about US$ 123,000 for the same quantity (Wilson & Abiola 2003). This volume of investment is not possible for a large number of farmers in developing countries. The role of integrators, therefore, becomes crucial here.

The way to ensure quality product is by following the HACCP system. Both the EU and the US have made it mandatory for all food exports to follow the HACCP regime. The Codex General Principles of Food Hygiene has recommended HACCP based approach to ensure food safety. India too is implementing HACCP initiatives in various food processing units, though most of them are exporting units. The need for an appropriate system, tailor-made for the food processing units in the unorganised sector cannot be over emphasised.

This has become imminent for a variety of reasons. The dominant amongst them is the structure of the food processing industry in India and other developing countries. The other reasons include the issue of investment and the cost of enforcement of HACCP compliance. A candid discussion on these two issues is required primarily to determine whether or not the adoption of HACCP by the food processing units would provide any real competitive advantage in the global trade front.[6] Given the preponderance of small and less developed business enterprises in food processing sectors, the issue of 'economies of scale' bears added significance.

It has been noted that HACCP implementation is not neutral to scale. Large companies adopt HACCP at a higher rate than smaller firms, as small firms cannot afford to undertake significant changes in plants to implement HACCP (Martin & Anderson). These costs ultimately pass on to consumers.

Consumers are not a homogenous entity and their perceptions about risk differ as well. Then the premise that consumer safety is paramount leaves many grey areas. The scientific basis of risk assessment, therefore, brings to fore the importance of information about risky and unsafe food processing techniques or about the raw material itself. The assessment of costs and benefits from the consumers' perspective hence is determined under information asymmetry or some severe assumptions. Here, one could see a distinct dichotomy between the EU and the US approaches to food safety.

The EU markets appear to give more emphasis on toxic residues and additives while the US markets emphasis on pathogen reduction. Interestingly, both markets primarily aim to protect the health and life of consumers along with those of animals and plants. Thus, consumers in the Northern markets pay for the protectionist measures, while on the other hand, producers in the Southern countries are denied access to markets in the former. Alongside, the opportunities to value add to the raw agricultural produce is also denied through technological upgradation and income enhancement.

The domestic markets in developing countries do not show a distinct preference for processed food products, though it is emerging in certain pockets in bits and pieces. For a steady growth in the demand for processed food products, other factors remaining unchanged, income must increase. Under trade liberalisation framework, income enhancement, especially in developing countries, can accrue only if market access is ensured. And within the WTO framework, market access is to be determined by tariff, while all quantitative restrictions (QRs) stand removed.

Developing countries, in this milieu, face tariff peaks and tariff escalation, especially in trade of agricultural products. It can be demonstrated that agricultural negotiations formula evolved during the journey from Doha to Cancun does not favour developing countries, thereby impeding value-addition opportunities.

A quick summary of major points in this context, however, can be provided for discussion. First, since the semi-processed and finished products in developed countries already enjoy tariff that is significantly higher than the raw/primary agricultural products, any multiple reductions with a factor of 1.3 is not expected to make any dent that

could be in the benefit of developing countries. The recent long-term trend of decline in process of primary commodities and increasing cost of processing technology acquisition are issues that have created crisis, especially in developing countries that are heavily dependent on primary commodity exports.

Secondly, the processed product lines in developed country markets are beset with tariff peaks and non-transparent administration of tariff restricted quotas (TRQs). Tariff escalation along with blending of commodities of different origins also creates new problems.

Thirdly, food security and, therefore, self-sufficiency in food have explicit social welfare enhancing attributes.

Fourthly, with a narrow export base in the manufacturing sector and developing countries being the net importers of most subsidised products of industrial countries, a net transfer to developing country consumers does not fructify into production enhancements. Further any associated marketable surplus that could be tapped by value-adding processing units does not exist. Therefore, it is needless to emphasise that this leads to the ratcheting effect of tariff escalation in developed countries.

Fifthly, consumers and producers in developing countries do not, rather cannot, maintain separate identities, thus limiting the scope for generating domestic demand of processed food products. The livelihood concerns, indeed, are paramount. However, this provides opportunities to food processing units in developing countries, provided market access possibilities are created by way of tariff facilitation.

Sixthly, processed value-added agricultural products in developed countries have the distinction of proliferating NTBs that many developing countries are not at all equipped to address and derive benefits.

Seventhly, since AoA came into force, the growth in value of exports of value-added agricultural products, both at the world level and at the level of developing countries, have witnessed sharp declines. For instance, against the average annual export growth of 7.5 percent at the world level during 1990-94 in processed agro-products, developing

countries witnessed 8.6 percent growth. During 1994-98, this declined to 4.1 percent annually at the world level and to 4.3 percent at the developing countries' level (WTO 2000).

Eighthly, border measures consisting of import tariffs, export subsidies and NTBs are the main instruments of market price support in developed countries. These market price supports accounted for 68 percent of OECD agricultural production. As a result, market for both temperate and tropical products gets highly distorted and developing countries suffer this disadvantage without any safeguard mechanism.[7]

Ninthly, a rising trend in the ratio of the total value of food imports to the total value of primary agricultural exports in developing countries do not augur well for the suggested initiatives in the value-added processing sector. The revised modality could have provided the required impetus to tilt this balance in favour of developing countries.

Finally, without adequate market preparation and protection in developing countries, the danger of domestic product being completely displaced and 'ship to mouth' syndrome becoming real threats are indeed being experienced by many developing countries (FAO 2000; FAO 2003).

Against this backdrop, the relevant provision in the revised modified method of tariff fixation requires to be examined for the number of opportunities that should be available to developing countries to get into the value-added agricultural products of the developed market segments during the post-millennium round. Hence, the suggested formula that tariff reduction in the processed products should be at a minimum by a factor of 1.3 of its primary product appears to be a pittance.

In the final analysis, the myriad challenges to be faced by food processing industry can be viewed into broad groups of markets, namely domestic and international. In both markets, food safety aspects are supreme. However, the types of food safety measures should be country and food processing industry specific. In making it industry specific, the key issue is of scale and degree of processing. If good hygienic practices (GHPs) and good manufacturing practices (GMPs) along with good agricultural practices (GAPs) are able to deliver food safety objectives, the scale bias of HACCP definitely

should be negotiated. For instance, in an Indian case study, it has been shown that the critical control points in the mushroom processing units were the food handler's personal hygiene (ICMR 2000).[8] Thus, a proper sanitation standard operating procedure (SSOP) by every processing unit is expected to bring in a marked improvement in pathogen content. There exists abundant scientific talent in the country to develop appropriate industry specific SSOP in a cost-effective manner.

On the issue of traceability and residue limits, emphasis has to be shifted away from highly sensitive test methods and testing capabilities. The primary focus needs to be food trade enhancement as most developing countries have a major proportion of their population depending on agricultural products for livelihood.

3.5 Balancing the Livelihood Options

South Asian agriculture as alluded earlier is unique and has a characteristic that is growth-oriented as well as evolving itself. However, it would be a fallacy to view the region for any application of the 'one size fits all' prescription of the Derbez draft presented at Cancun. Let us examine the landscape for a quick recap. Tables 3.5 and 3.6 in Annex 3.1 would indicate that small farms dominate agricultural activities and the quantum of marketable surplus is too meagre for any substantial value addition in the household income. It may be recalled that the emphasis all these while in South Asia had been to enhance agricultural production. In fact, it continues to be so in many instances and many product specific production systems. The complex nature of resources flow in the agricultural production system can be appreciated from the flow chart 1 in Annex 3.1.

The UR gave small holder producers a sense of competition. Theoretically speaking, and following the famous 'farm size productivity' discourse, these small farms are indeed competitive in many respects. Therefore, they stand to gain in a free trade environment but get crushed in an unfair trade regime, as currently practiced. These producers require access to markets that have reasonably higher prices as the ruling price. This is made possible because the producers and the consumers are clearly separable. A case in point is the dwindling farm population in both the EU and the US.

In addition, the major source of income of these farm holds in industrialised countries is derived from non-farm income.

There are enough studies to convince that small holder producers do tend to derive economies of scale with an active state support as also in the absence of NTBs. The profit per unit of product output expectedly is higher in small holder than the large holder farms. The prescription to separate the production and consumption domains, in this instance, of the South Asian landscape is suicidal.

The point can be well appreciated by a look at flow chart 2 in Annex 3.1 depicting the livelihood options of a typical small holder farmer in this region. The saying, 'give opportunities to the small producers instead of protection', has, therefore, some element of action orientation in terms of the three pillars of AoA. The large numbers of livelihood options that have succeeded in this region are living examples. For instance, joint forest management, self-help groups system, Operation Flood Programme (OFP), small and marginal farmers development programme, the fisheries sector initiatives, etc., have wealth of lessons for devising balancing strategies. They could help address the highly ambitious and exclusionary prescriptions on the three pillars that have been put forth by the EU-US combine. Unfortunately, this framework has been relied upon in both Castillo as well as the Derbez drafts.

The strategic economic management initiatives flowing out from the past on livelihood options do provide a cue towards efficiency parameters that favour small holder producers. The 'slow food movement' in recent times in the Western countries is yet another case in point. The catch, however, is volume. Since small holders by themselves are not able to generate this 'critical mass' to compete in the market place, the scale dilemma needs to be appropriately addressed, albeit on a priority basis. The broad contours could be drawn out for different product lines that may be either staple dietary product or price elastic products after some degree of processing. An example of OFP can be recalled here. OFP, among other things, set priority to remove the existing asymmetries in access to resource like assets base, technical assistance (TA) and information sharing, and over and above assuring sustained market access to their products. It is 'here and now' that alternative pathways are discovered in a participatory manner instead of forced authoritative adoption.

Endnotes

1 These areas of concern are: Rural development and food security for developing countries; Least developed and net food-importing developing countries; export credits, export credit guarantee or insurance programmes and tariff rate quotas.

2 Reference to AoA's Article 20 would indicate the all-pervasive four sub-sections especially for determining required further commitments to achieve the long-term objectives.

3 The producers' price share in the consumers' price is estimated to be very low ranging from 48 percent for raw cotton and tobacco to 11-24 percent for jute and coffee.

4 These and other serious concerns were communicated to all participating members by a joint submission made by 27 countries. For details, see WTO (2003). The Doha Agenda: Towards Cancun, Trade Negotiations Committee, TN/C/W/13 6 June (03-2980), Geneva.

5 In fact EU has finalised a new food safety and hygiene rules that will come into force on 1 January 2004 replacing 17 old council directives. See www.foodlaw.rdg.ac.un for details.

6 Henson, Spencer, Georgina Holt and James Northern (1998) 'Costs and Benefits of Implementing HACCP in the UK Dairy Processing Sector', infer that no real competitive advantage are feasible). In fact, 78 percent of respondents from 43 states in US opined that no benefits on account of price increase or profit margin increase consequent to HACCP is visualised.

7 See IMF/WB (2002), *ibid*.

8 Details can be found in ICMR (2000) 'Application of Hazard Analysis and Critical Control Point for Improvement of Quality of Processed Foods', ICMR Bulletin, Vol.30,No.5, May, New Delhi.

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Annex 3.1

Table 3.5: Basic Economic Indicators of SAARC Countries (1999)

Particulars	Bangladesh	Bhutan	India	Maldives	Nepal	Pakistan	Sri Lanka
Population (million in 2000)	137.4	2.1	1008.9	0.3	23.0	141.3	18.9
Annual Population growth (percent during 1975-2000)	2.4	2.3	1.9	2.9	2.8	2.8	1.3
Population density (2000)	1,007	--	342	--	161	179	300
Labour force in agriculture Rural population (per cent in 2000)	76	--	72	--	88	63	76
Undernourished population (per cent in 1997/99)	33	--	23	--	23	18	23
Population below poverty line (head count index in per cent latest year available)	35.6	--	35.0	--	42.0	34.0	25.0

Source: *World Bank, World Development Report 2002, UNDP, Human Development Report 2002.*

Table 3.6: Land Use and Agriculture Productivity of SAARC Countries (1999)

Particulars	Bangladesh	India	Nepal	Pakistan	Sri Lanka
Land area (thousand square km.)	130	2973	143	771	65
Arable land (percentage of land area 1999)	62.2	54.4	20.3	27.5	7.0
Permanent cropland (percentage of land area 1999)	2.6	2.7	0.5	0.8	15.8
Crop production index 1998-2000 (1989-91=100)	117.4	123.3	120.9	125.6	114.3
Food production index 1998-2000 (1989-91=100)	119.8	125.7	121.5	144.4	115.9
Cereal yield (kg. per hectare) 1998-2000	2927	2299	2007	2261	318
Agriculture value added (per worker in 1995 $) 1998-2000	296	397	188	630	753

Source: *World Bank Economic and Social Indicators 2002.*

Chapte r - IV

South Asian Strategy for Agricultural Negotiations

Dr Ananya Raihan

4.1 Options for Strategy Building

Although there is a debate on who gained out of the failure of the Cancun Ministerial, Cancun showed that sufficient homework and unity of countries on the basis of common interest are useful in negotiating among unequals. Cancun gives developing countries the following lessons:

- It is important to identify areas of common interest for the purpose of trade negotiations;
- It is important to actively support the negotiating positions of alliance members, which may not necessarily be important for supporting countries, but not against their interests as well; and
- It is important to identify areas and issues that can be traded-off to gain concessions in other areas and issues of concern and interest.

These lessons are particularly important for South Asia, where countries are diverse in many terms, including the size of the economy, economic strength, sectoral interests in negotiations and negotiating strength and skills. Prior to Cancun, the issues of divergence of South Asian countries had been discussed elaborately at the regional level by some non-governmental organisations (NGOs) to work out a common agenda. The post Cancun meet in the light of lessons learnt from the Cancun experience was aimed to further the common South Asian interest in negotiations at the World Trade Organisation (WTO) level.

In the context of the collapsed WTO Ministerial, the possible strategies for negotiations for South Asia may be divided into two parts:

- An immediate strategy, related to the completion of the Cancun process; and
- A medium term strategy, related to negotiations for the completion of Doha Development Round (DDR).

South Asian strategy will also need to consider a number of tactical issues. An example can be cited taking into account the difference in the levels of development of South Asian countries. Least developed countries (LDCs) in the region can enjoy exemptions and derogation in terms of undertaking commitments. At the same time, developing countries are required to undertake varying degrees of discipline in terms of market opening commitments. While these market opening commitments, in some cases, erode preferential margins for LDCs, in others, it benefits developing countries in the form of improved market access.

Besides, another issue relates to the voice that South Asian countries are able to make at the multilateral level. It needs to be understood that developing countries in the region are now getting more support from other developing countries in their issues of interests. In the past, issues where a developing country did not have direct interest were not given due prominence in negotiating strategies despite the importance of those issues to other countries in alliance. The same attitude prevailed among LDCs as well. However, this stance is changing and countries are beginning to give due attention to even those issues that do not have a direct bearing on them. However, in-depth exercise must be carried out to estimate the associated costs and benefits of negotiation outcomes. South Asia will need to develop proposals and build alliances that may be used as bargaining chips during negotiations.

The other tactic would be to get ready for negotiations in areas that are still open and see what trade-offs can be made in future negotiations. Additionally, perspectives on issues where South Asia does not stand to gain directly, i.e., cotton issues, need to be firmed up.

4.2 Current Approach to Negotiations

In developing a short run strategy for negotiations, it is important to take stock as regard the post Cancun developments in Geneva. On one

hand, there are many issues to be discussed to advance the Doha Development Agenda (DDA) further, while on the other, Cancun has also shown that it is not feasible to negotiate on all outstanding issues at the same time. Chair of the General Council (GC) Pérez del Castillo had come up with an offer to limit talks in Geneva to four key areas: agriculture; industrial tariffs; cotton; and what are known as Singapore Issues. Taking cue from this, South Asia should initiate the strategy-building exercise by focusing on these four issues.

The strategy in this paper has been developed on the basis of following assumptions:

- Negotiations at Geneva will not deal with WTO reform issues;
- The starting point of negotiations in Geneva will be the second revision of the draft Cancun Ministerial Declaration; and
- Negotiations should reach certain level of agreement on progressing the DDR.

4.3 The Strategy and Position of South Asia

Agriculture is an issue where countries in South Asia have varying interest. The level of interest of India and Pakistan is not similar to the level of interest of Sri Lanka, Bangladesh and Nepal. The dimension of interest is also different; some countries are more interested in exporting agricultural commodities, others are interested more in protecting domestic agriculture, while some countries are interested in both. As a result, strategies will need to be designed, proposals to be prepared, and alliances to be built considering the diversity as well as the common interests in agriculture. A careful study to comprehend the benefits and implications of possible trade-offs will also be needed.

The following matrix has been prepared on the basis of the second revision of Cancun Ministerial Text. The text proposes alternative text, positions and strategies for important articles.

Articles	Text in the draft rev. 2	Alternative Text / Comments / Positions
Article 4	***Agriculture:*** We reaffirm our commitment….date of conclusion of the negotiating agenda as a whole.	The post Cancun Geneva meetings must settle on a priority basis the modalities for negotiations. In this regard, the meeting on 24 October 2003 could not decide the basis for re-starting negotiations. However, the US proposed to initiate negotiations on the basis of revision 2 of Chairman's draft.
Article 1.3	Article 6.5 of AoA will be modified so that members may have recourse to the following measures: (i) direct payments if: - such payments are based on fixed areas and yields; or - such payments are made on 85 percent or less of the base level of production; or - livestock payments are made on a fixed number of head. (ii) support under 1.3(i) shall not exceed 5 percent of the total value of agriculture production in the 2000-2002 period by (…). Subsequently, such support shall be subject to an annual linear reduction of (…) percent for a further period of (…) years.	According to Article 1.3(i) and 1.3(ii), the 'blue box' (direct subsidy) payments would be retained, but at a lower level. It proposes a limit on blue box payments of 5 percent of the value of agriculture production in the 2000 to 2002 period. Subsequently the reduction will be based on a linear approach without specifying the time frame to achieve this. South Asia should demand elimination of blue box subsidies with a specific time frame to be decided through negotiations.
Article 1.5	Green Box criteria shall be reviewed with a view to ensuring that Green Box measures have no, or at most minimal, trade-distorting effects or effects on production.	Revision 2 of Cancun draft had some improvements regarding Green Box measures. While Article 1.5 of Annex A of revision 1 kept the Green Box under negotiations, revision 2 aimed at 'no, or at most minimal, trade distorting effects or effects on production due to Green Box subsidies'. South Asia supports the G20+1 position on capping and tightening the green box.
Article 1.7	Developing countries shall be exempt from the requirement to reduce *de minimis* domestic support.	This is a positive development in negotiations, which South Asia should support.
Article 2.1	The formula applicable for tariff reduction by developed countries shall be a blended formula under which each element will contribute to substantial improvement in market access for all products. The formula shall be	The blended formula [Article 2.1] will enable developed countries to place their high-tariff items in a category for lower tariff cuts and thus avert removing tariff peaks. Due to the blended formula, developing countries now have to reduce some of the tariffs by an average formula,

Articles	Text in the draft rev. 2	Alternative Text / Comments / Positions
	as follows: (i) (…) percent of tariff lines shall be subject to a (…) percent average tariff cut and a minimum of (…) percent; for these import-sensitive tariff lines market access increase will result from a combination of tariff cuts and tariff restricted quotas (TRQs). (ii) (…) percent of tariff lines shall be subject to a Swiss formula with a coefficient (…). (iii) (…) percent of tariff lines shall be duty-free. [The resulting simple average tariff reduction for all agricultural products shall be no less than (…) percent.	while some other tariffs of tariffs would be subjected to a Swiss formula, under which higher the tariff the steeper would be the cut. Thus, for a majority of tariff lines, developing countries would have to reduce their tariffs in a very pronounced manner. In the absence of capacity to provide higher subsidies, there will be serious erosion of LDCs' ability to use tariffs to safeguard their farmers against imports. This is likely to have major fallout on rural livelihoods and poverty reduction objectives. In this context, South Asia may consider supporting the position of the majority of developing countries [including G-20 and Swiss Group of Six] that calls for developing countries' tariffs to be based on either a three-band UR approach, or a blend of the UR and Swiss formulas without a zero duty category.
Article 2.3	The issue of tariff escalation will be addressed by applying a factor of (…) to the tariff reduction of the processed product in case its tariff is higher than the tariff for the product in its primary form.	The issue of tariff escalation was elaborated in the revised text [Article 2.3] without specifying the factor of tariff reduction. South Asia should demand that the factor for tariff reduction in case of incidence of tariff escalation should be 0.1, which is the lowest of the three proposed tariff reduction factors, namely 0.1, 0.2 and 0.3. A faster elimination of tariff escalation will accord competitive edge to export of finished goods from LDCs.
Article 2.7	The formula applicable for tariff reductions by developing countries shall be as follows: (i) (…) percent of tariff lines shall be subject to a (…) percent average tariff cut and a minimum of (…) percent; for these tariff lines market access increase will result from a combination of tariff cuts and TRQs. Within this category, developing countries shall have additional flexibility under conditions to be determined to designate Special Products (SP), which would only be subject to a linear cut of a minimum of (…) percent and no	The Ministerial draft text and its Annex have not fully taken into account a variety of developing country and LDC specific concepts, such as SP and Special Safeguard Measures (SSM), which are of high importance to these countries. The proposed Framework on Agriculture should fully incorporate the proposals contained in Harbinson's Revised First Draft of Modalities. SSM should include self selection of SP without limiting the coverage. South Asia should demand that developing countries shall have the right to determine their own SP, and shall be exempt from tariff reduction for those products that were bound at lower levels during the UR.

Articles	Text in the draft rev. 2	Alternative Text / Comments / Positions
Article 2.9	SSM shall be established for use by developing countries subject to conditions and for products to be determined.	The demand for SSM has not been addressed adequately in Article 2.9 and 2.11, where the proposed mechanism is "subject to conditions and for products to be determined". South Asia should demand incorporation of detailed conditions so that it would be possible to make the agreed mechanism operational after conclusion of the negotiations.
Article 2.11	Participants undertake to take account of the importance of preferential access for developing countries. Further considerations in this regard will be based on paragraph 16 of the revised 'First Draft of Modalities' for Further Commitments (TN/AG/W/l/Rev. 1 refers).	
Article 3.1	With regard to export subsidies: - Members commit to eliminate export subsidies for products of particular interest to developing countries. A list of these products shall be established for the purpose of tabling comprehensive draft schedules. Elimination of export subsidies for these products shall be implemented over a (…) year period. - For remaining products, members shall commit to reduce, with a view to phasing out, budgetary and quantity allowances for export subsidies.	The draft incorporated a text [Article 3.1] on elimination of export subsidies on some products 'of particular interest for developing countries'. South Asia should demand that export subsidies be eliminated on products of interest to LDCs immediately and the rest be phased out within a realistic timeframe.

Articles	Text in the draft rev. 2	Alternative Text / Comments / Positions
3.2	With regard to export credits: - Members shall commit to eliminate, over the same period as in the first indent of paragraph 3.1 the trade-distorting element of export credits through disciplines that reduce the repayment terms to commercial practice [(…) months], for the same products in the first indent of paragraph 3.1 in a manner that is equivalent in effect. For the remaining products, a reduction effort, with a view to phasing out, that is parallel to the reduction in the second indent of paragraph 3.1 in its equivalent effect for export credits shall be undertaken.	According to the draft text [Article 3.2], subsidised export credit and food aid would be treated in parallel with export subsidies, which is not acceptable to developing countries and LDCs. Article 3.10 guarantees that as part of S&DT, developing countries would maintain flexibility to exempt certain transport and marketing subsidies from export subsidy reduction (Article 9.4 of AoA) until all export subsidies have been fully phased out by all members. While it is difficult for developing countries to increase subsidies at production level, they can afford to provide some support to exporters of agricultural products in the form of subsidised export credit. For some countries these supports are essential as they are related to poverty alleviation. South Asia may consider supporting the stance of developing countries in this regard and demand exclusion of export credit from the category of export subsidies.
Article 3.10	Participants shall ensure that the disciplines on export credits to be agreed shall make appropriate provision for differential treatment in favour of least developed and net food-importing developing countries as provided for in paragraph 4 of the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Counties.	The existing text does not reflect the concerns of net food importing developing countries (NFIDCs) [Article 3.10]. South Asia should demand that members shall immediately implement the Marrakesh decision on measures concerning possible negative effect of the reform programme on LDCs and NFIDCs, including through the establishment of a *revolving fund* to ease short-term financing problems linked to import of basic foodstuffs.
Article 4	Least developed countries shall be exempt from reduction commitments. Developed countries should provide duty-free and quota-free market access for products originating from least developed counties.	The revision 2 of the Cancun draft incorporated an improved text for LDCs. The revision 1 incorporated S&DT provision for LDCs in Article 4: "Least developed countries shall be exempt from reduction commitments. The objective of duty-free and quota-free market access for products originating form the least developed countries shall be expeditiously pursued". The second draft was further improved and the revised text said: "Least

Articles	Text in the draft rev. 2	Alternative Text / Comments / Positions
		developed countries shall be exempt from reduction commitments. Developed countries should provide duty-free and quota-free market access for products originating from least developed countries". This improvement also does not reflect the expectation of LDCs. South Asia should demand the articulation "shall" should be put in the text, with an addition to the text: "to be effective immediately after completion of negotiations".
Article 6	The 'peace clause' will be extended by (…) months.	The draft proposed the extension of the 'peace clause' [Article 6 of Annex A]. LDCs propose that the peace clause be abolished. As the draft was not adopted, the issue of extension of 'peace clause' remains open. Article 13 of AoA sets out the so called 'peace clause', under which WTO members agree not to challenge certain agricultural subsidies. Members of the G-22 considered the expiration of the 'peace clause' a non-issue, de-coupled from the ongoing agriculture negotiations. Others, such as the EC (which has benefited from the 'peace clause') consider its renewal a *precondition* for continuing negotiations. It appears that most developing countries are ready, in principle, to consider an extension of the 'peace clause'. However, they want to know what they would get in exchange. Some G-22 delegations are of the opinion that the alliance would be more willing to address the issue of the 'peace clause' only if a wider agricultural package that met key G-22 demands was agreed. South Asia may like to consider this approach.
Addition	The outcome of negotiations should add a new article on compensation to LDCs.	It is clear that negotiations will not be able to reduce trade distorting domestic support within a short period of time. Thus, South Asia may call for incorporation in the agreement of an article on compensation to those LDCs, which are negatively affected as a result of the subsidies, till the time these are phased out.

4.4 Conclusion

South Asia has tremendous interest in agricultural trade negotiations as most countries in the region are agrarian economies with a high contribution of the agricultural sector to the gross domestic product (GDP). However, countries in the region differ significantly in terms of the level of development. South Asia should negotiate keeping this fact in mind. Besides, during the process of negotiations, South Asian governments must be able to link agricultural trade negotiations to their poverty alleviation programmes in order to ensure that the impact of negotiations on livelihoods and food security is positive. This is of paramount importance as over 40 percent of the world's poor live in this region.

Endnotes

1 G20+ countries include Argentina, Bolivia, Brazil, Chile, China, Colombia, Costa Rica, Cuba, Ecuador, Egypt, Guatemala, India, Indonesia, Mexico, Nigeria, Pakistan, Paraguay, Peru, Philippines, South Africa, Thailand and Venezuela.

Annex 4.1

Major Developments Immediately After Cancun

Date	Developments
14 October 2003	*Coverage*: Exactly a month after the Cancun Ministerial collapsed without any negotiated declaration, the WTO convened its first post-Cancun heads of delegation meeting in Geneva. The GC Chairman and the Director General presented their proposals on how to conduct discussions and revive negotiations, to meet the deadline set by Ministers in Cancun of a 15 December 2003. They proposed to focus first on: (a) agriculture, and then subsequently take up (b) cotton issue, (c) non-agricultural market access, and (d) Singapore Issues. India, China, Costa Rica and others emphasised the importance of resuming negotiations and called for demonstration of 'good will' on the part of developed countries. Developed countries were conspicuously silent.
24 October 2003	*Agriculture*: Chair Pérez del Castillo and Director General Supachai Panitchpakdi held an informal "Ambassador plus one" 'green-room' consultation with a smaller group of 30 key members to discuss issues related to revival of the multilateral farm trade negotiations. No decision was made on the basis on which to start the negotiations
28 October 2003	*NAMA*: Around 30 WTO members gathered for the first 'green room'-style informal meeting. It was agreed that the point of departure would be the draft (revision-2, Annex B) circulated in Cancun (on 13 September 2003) for future negotiations.
28 October 2003	*Environment*: WTO members convened for the first post-Cancun session (as per earlier schedule) of the Committee on Trade and Environment (CTE). The meeting lasted only for two hours, as most delegates felt that discussion in CTE regular sessions is linked to CTE special sessions. The meeting was postponed until further notice. Besides, it was felt that there was no use in discussions unless other negotiating groups also started to work.
29 October 2003	*EU Position*: Mr Pascal Lamy made it clear that he was withdrawing his promise to drop demands for talks on 'global investment' and 'competition rules'. "I made this compromise when I thought it would move negotiations forward". He said that he would be consulting with member states as to whether Europe should push for an agreement on investment and competition among a small group of WTO states or return to its original position that they had to be part of the overall deal. The EU also initiated a review of its approach to WTO negotiations that would focus on (a) WTO rules, (b) decision making process, (c) agriculture, and (d) Singapore issues.

Source: www.investmentwatch.org, www.twnside.org, various issues of Financial Times.

Chapter - V

Post Cancun Services Trade Agenda for South Asia

Dr Upali Wickramasinghe

5.1 Introduction

The Uruguay Round (UR) of trade negotiations is generally considered as a watershed in terms of liberalisation of trade in services. Services were hitherto considered 'non-tradable', and often relegated to the denominator in international trade models that were taught under the banner of 'pure theory of international trade'. Interestingly, the development '*mantra*' that was being chanted up to that time changed overnight. A new '*mantra*' came: 'Get your services sectors opened and achieve economic development much faster than you could ever have achieved using agriculture or manufactures.' Several ministerials held since the UR have seen the winding road towards global trade liberalisation. With each of the passing Ministerial, the gap between the interests of developed and developing countries seems to have widened. This paper has three overriding objectives. First, it discusses the UR services commitments. Second, the paper highlights the issues that have emerged in the recent past in the area of trade liberalisation in services. Third, it attempts to draw lessons for future trade negotiations in services.

5.2 GATS Commitments, Market Access and Domestic Capacity

One of the major criticisms of liberalisation of trade in services under the UR by policymakers and trade practitioners from developing countries is that developed countries made commitments to liberalise the sectors that they had considerable amount of leverage (e.g., value added products in telecommunication and financial services) while they

kept closed the services sectors that developing countries had comparative advantage. Despite the General Agreement on Trade in Services (GATS) commitments, access to markets in developed countries for services from developing countries is very limited due to a number of limitations relating to tax measures, nationality requirements, residency requirements, registration and limits on ownership.

The GATS commitments made by countries under the four 'modes of supply' also reflected countries' preferences, and to some extent, the extent of competitive advantages of services industries. For example, the 'consumption abroad' mode received the highest share of full commitments, 'cross border' the second highest preference, 'commercial presence' the third preference, and finally the least amount of commitments under the 'presence of natural persons,' which happened to be the area where developing countries have the highest potential for exports.

In addition to the commitments made under the GATS, the UR also agreed for a built-in-agenda, which aimed at continuing further negotiations in a number of areas: financial services, telecommunications, air transport, the GATS rules, domestic regulation and specific commitments. This was an attempt in part by developed countries to continue the market opening exercise in several key areas. Note that despite the Seattle failure, many of these negotiations continued during 1999 and 2000 under different committees. If not for the built-in-agenda, these negotiations would not have taken place at all.

To be fair, developing countries should unequivocally admit that the difficulties to export services to developed countries are not limited to market access limitations. Developing countries' inability to penetrate foreign markets for services stems from their domestic market inefficiencies as well. To begin with, many of these countries have poor human resources capabilities and weak human resources development (HRD) programmes, with the existing programmes not catering to the needs of the global economy. Secondly, developing countries lack 'complementary infrastructure', which is an essential element of the competitiveness of service exports. This fact is quite evident in a number of areas. For example, many developing countries have poorly developed basic telecommunications services or access to computers and access to reliable electricity, and the available facilities are not

geared towards the needs of the changing global environment. In years to come, inadequate access to the Internet and insufficient attention to e-commerce are expected to become major hindrances for export competitiveness. Thirdly, public and private institutions in developing countries have poor capacity to respond to dynamic changes in the world market. The existing institutions are either weak or there is no proper leadership and resources. Fourthly, the technology gap between developed and developing countries is widening at an accelerated rate, which effectively shuns the ability of developing countries to catch-up with advanced countries, and the 'catching-up' model that led to the East Asian miracle seems no longer relevant for present day developing countries. Market access in the industrialised world alone is not sufficient, and developing countries would need to act decisively to correct the above mentioned internal market problems.

5.3 New Issues and Progress on Services Trade Negotiations

A number of issues have surfaced during the last three to four years, which will have some degree of bearing on future services trade negotiations.

5.3.1 Autonomous Liberalisation

The measures undertaken unilaterally by WTO members to liberalise their services sectors are referred to as autonomous liberalisation measures (ALMs). Two sources of ALM can be easily identified. Some countries unilaterally liberalised their services sectors after they realised the importance of services trade to their economies. Such unilateral liberalisation may be termed as pure ALM. The second source of ALM is due to the conditionalities imposed by the World Bank and the International Monetary Fund (IMF). Such conditionalities were imposed under the structural adjustment programme (SAP) for the release of funds, which are used for developmental activities or to mitigate balance of payment (BoP) problems. The argument of developing countries in this regard is simple: appropriate credit should be given for unilateral liberalisation undertaken by them in future negotiations.

Negotiations on services liberalisation held during the past several years concentrated on defining ALM, and developing criteria for assessing the value of ALM. The Committee on Trade in Services (CTS) approved the modalities on 6 March 2003. As approved, ALM is subject to certain conditions if it is to be considered in future trade negotiations. First, ALM needs to be scheduled under Part III Specific Commitments of GATS, and/or they should lead to the termination of 'most favoured nation' (MFN) exemptions as scheduled earlier. Secondly, ALM should be compatible with the principle of MFN. Thirdly, ALM should have been undertaken by the liberalising member unilaterally since the previous negotiations in accordance with Article XIX (Specific Commitments) in Part IV (Progressive Liberalisation). Fourthly, negotiations resulted in establishing some criteria for assessing the value of ALM, which may include: (i) the extent of sectoral coverage; (ii) the nature of liberalisation (e.g., elimination of measures restricting market access, elimination of measures that are inconsistent with national treatment and/or MFN); (iii) the date of entry into force and duration of the measure; (iv) share of the sector in total trade of the trading partner; (iv) share of the trading partner in total trade in the sector autonomously liberalised by the liberalising member; (v) importance and impact of ALM on the liberalising member's economy; (vi) market potential in the liberalising member for the trading partner; and (vii) opportunities for expansion of foreign participation in the sector after the introduction of the measure. It is important to note that granting of credit for ALM can only be advanced through bilateral negotiations.

5.3.2 Sectoral Negotiations

No offers have been made by developing countries under sectoral negotiations in the recent past, partly as a reaction to the deadlines missed in the current round of negotiations such as TRIPS and Public Health, implementation issues and concerns, special and differential treatment (S&DT) and agriculture. However, they want the treatment of mode four (movement of natural persons) in a multilateral manner and widening of the definition of professional services so as to include occupations.

It is important to keep in mind the negotiating positions of the United States (US) and the European Union (EU) in preparing the future

agenda for trade negotiations in services for South Asia. The US proposed new market access commitments in all 12 services sectors: telecommunications; financial services; express delivery services; energy; environmental services; distribution services; education and training; lodging and other tourism services; professional services; computer and related services; advertising; and audiovisual services. The rich and advanced developing countries such as Brazil, the Philippines and India would be asked to make most concessions. They have indicated that poorer developing countries would only be asked to 'start a dialogue on the role of services' and the 'value of openness'.

In terms of 'horizontal' commitments under the GATS, the US is interested in the following: (i) removing investment barriers (economic needs-tests, investment approval procedures) in mode three (commercial presence); (ii) increasing access for temporary entry and stay of professional employees under mode four; and (iii) more transparent national licensing procedures and notification of all new and changed regulation prior to their final adoption and entry into force. The US made offers covering sectors such as financial services, legal services, telecommunications, express delivery, energy services, healthcare, higher education, and environmental services. These proposals consolidate much of existing liberalisation in the US law, and go further in certain particular areas. While making offers, the US wanted to ensure their GATS offers did not affect their regulatory interests, assistance programmes to US citizens or minorities or the autonomy of US educational institutions.

The EU wanted improved market access in 12 services sectors, including professional services, telecom, postal and courier services, construction, engineering, banking, environmental services, tourism and energy. In addition, in a leaked document, the EU's interest in negotiating water for human use and wastewater management came to limelight. The European Commission (EC) rejected the general criticism of including water for future negotiations and maintained 'this sub-sector only concerns the distribution of water through mains and excludes any cross-border transportation'.

The EU offered to reduce certain restrictions and expand market opportunities for foreign suppliers, conditional on substantive offers of similar depth from other members. At the horizontal level, the EU's offer modified part of the EU general regime on investment by

removing prior authorisation requirements in some member states such as Portugal. Regarding real estate, some of the restrictions for acquiring and/or renting property have been removed, while they specifically attempted to maintain subsidies in the services sector. The various services sectors of sensitive nature are excluded from the offer, including education, health, social services, and audiovisuals, in order to address civil society concerns and the interest of some regional authorities in Europe. Regarding public utilities, the EU's offer does not change the current limitations. It is ironic that the EU has offered concessions to highly skilled labour and other categories while totally ignoring the less skilled labour category.

Sectoral negotiations have not seen much progress ever since the UR. This lack of progress can be attributed to a number of factors. The main and the most important reason for lack in progress is developing countries simply did not see any logic of further liberalisation in services without some concessions in other areas where they felt very strongly. Developing countries wanted, for example, access to essential medicines, S&DT and real liberalisation in agriculture. Without such parallel liberalisation, probably developing countries could not justify the kind of structural adjustments that would have been required had they opted for further liberalisation of services.

Another fundamental reason for lack of progress is that developing countries have become somewhat mature in their negotiations. They have learned to prepare their requests with much care, and attempted to get actual concessions rather than relying on empty promises wrapped in sweet statements as in the past. In fact, it can be observed that negotiators from developing countries have shown much maturity compared to the situation at the time of the UR negotiations. Developing country negotiators have shown heightened awareness, improvement in sophistication and engagement in issues of interest. Another reason for the limited progress in sectoral negotiations in services as that there was a real and strong need for developing countries to stay out of horizontal limitations, such as residence requirements, property limitations and authorisation for foreigners, minimal participation and visa granting processes.

5.3.4 Emergency Safeguard Measures

Emergency Safeguard Measures (ESMs) have been under consideration for some time. The need for implementing ESM became much stronger with the East Asian financial crisis. It was the Association for South East Asian Nations (ASEAN), who requested this to be included in future negotiations. However, Australia proposed a two-model approach. The first model requires consensus amongst WTO members prior to the application of a safeguard measure, while the second model requires notification of the safeguard measure as well as consultation with members affected by the emergency. The legitimate question is the time it would require for developing consensus amongst members on ESM and consultation with the affected country. These requirements almost nullify the purpose of having any emergency safeguard provisions, because a country may need to take drastic measures within a short period to maintain economic stability. If the time it takes to negotiate ESM is long, there may not be any purpose of having such safeguard measures in the first place. The negotiations on this issue have stalled.

5.3.5 Increased Participation of Poor Countries

Uganda, on behalf of all least developed countries (LDCs), tabled an informal proposal (JOB(02)/30) under GATS Article XIX.3 for the modalities for special treatment for LDCs under Article IV.3 (Increasing Participation of Developing Countries). A list of elements for these modalities included: LDCs should not be requested to make specific commitments in more than four services sectors; developed countries should grant full market access and national treatment to services and service suppliers from LDCs in sectors and modes in which LDCs have specific export interest; and eliminate LDCs' entry barriers in sectors and modes of supply of export interest to developing countries.

5.3.6 Assessment of Liberalisation

There is a strong need to provide developing countries with necessary information to formulate their negotiating positions. The elements of such an assessment should include: recent statistical developments in

global services trade; empirical evidence on services reforms; structural changes and economic development; overview of sectoral studies; and assessment of whether the GATS objectives have been realised. Developing country governments need to be much more proactive in this area, as it is not possible to expect developed countries to undertake any of these studies. Even if they were to undertake such studies, developing countries will still have a dilemma as to whether the results should be accepted or not. The best option would be for developing countries themselves to undertake these studies using resources and experts available within developing countries.

5.3.7 Domestic Regulation

Under a proposal put forward by Japan in 2003, WTO members sought to develop domestic regulation provisions contained in Article VI.4 of the GATS. The objective of such a modification is to facilitate trade in services by 'ensuring that measures relating to licensing and qualifications requirements and procedures, and technical standards do not constitute unnecessary barriers to trade in services'. Such a modification could have implications on the regulatory functions of governments because regulations are the tools that governments use in controlling and assuring the manner in which any service is provided within a national boundary. Developing countries are particularly concerned over the 'necessity tests', transparency requirements and international standardisation efforts. For example, when it comes to international standards, whose standard should be implemented?

Standards as well as regulatory structures vary depending on the stage of development, the natural environment and many other idiosyncrasies. It should be borne in mind that developed countries took a long time to formulate many of the regulatory frameworks appropriate for themselves, and these frameworks also evolved with the level of economic sophistication and development. Weak regulatory structures that prevail in developing countries reflect their stage of development. The fact that developing countries are willing to enter into services trade liberalisation should not, therefore, be taken as a *prima facie* reason for requiring them to enforce domestic regulation. Whether or not a country implements regulatory structures should be the country's own choice. It is, however, important to create awareness on the need to regulate the services industries and generate intellectual

input to feed into the current GATS negotiations at the WTO. Furthermore, there is a need to build bridges between trade negotiators, domestic regulators, national parliaments and civil society in order to develop a cohesive industrial structure related to the provision of services. Regulatory structure of a country is intrinsically linked to the stage of development, and therefore, developing countries have the right to insist on implementing regulations as and when such regulations are needed.

5.3.8 Monitoring Mechanism

We should recognise that there are implementation problems of liberalisation commitments made under the GATS. As far as the interests of developing countries in services trade negotiations are concerned, several areas need close monitoring. They include: participation of developing countries; S&DT provisions for developing countries; and evaluations under the objectives of Article IV, namely strengthening services capacity and competitiveness, improving access to distribution channels and information networks, and greater market access in areas of special interest. Developing countries have made several proposals with regard to monitoring. The key proposals include: making 'progress review' a standing agenda; establishing benchmarks (e.g., reviewing the offers received in response to requests tabled); and making the 'request-offer' process more transparent.

5.3.9 Small Economies

Mauritius had tabled a proposal (TN/S/W/8) addressing particular problems of small economies in their quest for increasing their participation in world services trade. The GATS recognised the need to allow for increased participation of developing countries under Article IV, Part II. However, 'small economies' maintain that their economies are particularly vulnerable to changes in international market because their economies are smaller compared to even many developing countries. Many of these smaller economies also rely on a narrow band of services for their survival, such as tourism. The prospects of further focusing on sectors like tourism are 'constrained by the consideration to preserve the ecological balance and prevent environmental degradation'.

Although it is difficult to define what a small economy is, the general consensus is that it has to do with the size of the economy measured by gross domestic product (GDP). Therefore, smaller countries propose that the GATS takes into account their vulnerabilities and size in future services trade negotiations. Their specific proposals are: (i) GATS Article IV (increasing participation of developing countries) should be effectively operationalised; (ii) small economies should only be expected to make commitments that are commensurate with their capacities, levels of development, and size of economies; (iii) they should be provided with market access in sectors and modes of supply of specific interest to them; and (iv) a monitoring mechanism needs to be set up for reporting to CTS on the implementation of Article IV for the benefit of small service suppliers from small economies.

5.3.10 Services Subsidies

The issues that have been considered under subsidies to service industries are as follows:

(i) definition of subsidy in services, including relevance of the definition in the Agreement on Subsidies and Countervailing Measures (ASCM), and the need for, and possible ways of, establishing a categorisation of services subsidies;

(ii) examination of any evidence of subsidies, which may have distortive effects on trade in services (including production, distribution, consumption and export subsidies);

(iii) concepts relevant to what should be regarded as trade-distortive subsidies, including specificity, public policy objectives, nature of subsidies, and permissible or non-actionable subsidies;

(iv) to what extent do the WTO rules, in particular the GATS and its national treatment and MFN disciplines, already discipline services subsidies or provide the means to do so. This would include consideration of technical issues related to the GATS, including mode specificity and the concept of 'like service';

(v) the role of subsidies in public policy objectives, economic development objectives, and the needs of developing country members for flexibility, including S&DT; and

(vi) the need for additional GATS disciplines to avoid trade-distortive effects, including consideration of the appropriateness of countervailing procedures.

No consensus has been reached on any of these issues yet.

5.4 An Agenda for South Asia

Although services industries contribution is approximately 40 percent of GDP in South Asia, which varies from 38 percent in Nepal to 52 percent in Sri Lanka, the stakes of not taking proper decisions can adversely affect the future potential of growth for not just services industries, but even national economies. This is because the contribution of services industries to national economies rises with economic development. South Asia is facing a dilemma in this area, faced with whether to restrict services liberalisation and constrain overall economic development in the immediate future, or allow greater liberalisation and constrain future potential for employment generation and general economic development as economies reach maturity. The best policy would be to avoid both. There is no doubt that liberalisation of trade in services has brought a major boost in a number of areas including efficiency improvement in manufacturing industries across South Asia. This is particularly evident in services sectors such as telecommunications, hotels, management consultancies, banking and software. While there is evidence to suggest many of these sectors have benefited from liberalisation, evidence regarding foreign domination of services industries is mixed.

Many of the issues raised above are quite relevant for all countries in South Asia, and there is a need to individually and collectively take action to mitigate the adverse implications and improve benefits emanating from future liberalisation and rule making under the WTO in the area of services. South Asia should focus on:

(i) undertaking in-depth research into the services sector;

(ii) monitoring world markets, with an emphasis on barriers facing South Asia's private sector;

(iii) clarifying concepts; and

(iv) understanding negotiating positions of each country and coordinating at the multilateral level for effectiveness.

These can be achieved only if South Asia attempts to form issue-based alliances rather than relying on geographical alliances alone and clearly defines a negotiation strategy with 'fall-back' positions in the event such a negotiation strategy fails at the multilateral level.

Endnote

[1] A considerable amount of literature appeared on this subject following the UR. Interested readers could refer to (Srinivasan 1998) and (ESCAP 2000).

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Chapter - VI

The Mercantilist Game Plan to Wreck the Development Agenda

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Abstract: Notwithstanding their implications on development, the so-called Singapore issues are likely to impose a heavy burden on developing countries without bringing commensurate benefits. Not surprisingly, the European Union's (EU) insistence on the Singapore issues led to the failure of the Cancun Ministerial. The focus then shifted to Geneva. Opposition of developing countries in this regard meant that the stalemate would continue. In this context, concerns have been expressed that poor countries will suffer more in the ensuing international trade order that is likely to see a spurt in bilateral and regional trade liberalisation and increasing marginalisation of the World Trade Organisation (WTO). These concerns have resulted in panic in some developing countries.

An analysis of the situation indicates that this fear is exaggerated. Particularly, for developed countries, it will not be easy to improve market access in large developing countries, the way they may want to. However, developing countries need to maintain their unity shown at Cancun which will be challenged by different means in the coming months. Developed countries, on the other hand, must come to terms with the fact that they cannot take developing countries for granted. All members of the WTO should come together and resume discussion in the interest of enhancing global welfare.

6.1 Introduction

Developing countries in general have been against the inclusion of new issues at the WTO. The Singapore issues, namely investment, competition, trade facilitation and transparency in government procurement (TGP), are no exception. However, the WTO Ministerial held at Doha, Qatar in November 2001 made substantial progress in

pushing these issues further. The Doha Declaration recognised the utility of having multilateral agreements on these areas and proposed a work programme to clarify the elements of a possible multilateral framework on each of these issues. It also expressed the willingness of the members to launch negotiations after the Cancun Ministerial, subject to an explicit consensus on the 'modalities of negotiations'.

However, almost all developing countries remained sceptical about the benefits and rationale of such agreements. These issues played a significant role in leading the Cancun Ministerial to a fiasco, as many opposed the adamant insistence of the EU and some other developed countries to start negotiations on these issues. There are others who of course feel that the real intention of the EU was to block any progress on agriculture and hence they linked it to these issues, especially investment that was unacceptable to most developing countries.[1]

While multilateral agreements on these issues, especially investment and competition, are being pushed by developed countries such as the EU bloc, Korea and Japan, it is vehemently being opposed by India, Malaysia, Egypt and others. Interestingly, the US has remained quite indifferent. Recently, however, India showed some flexibility in some of the issues. Most developing countries feel that any further obligations at the multilateral level means more expenditure on structural adjustment and enforcement mechanism to meet such obligations. They believe that the costs of making such adjustment may turn out to be larger than the expected benefits. Developed countries, as usual, have promised technical and financial assistance for making those adjustments. However, developing countries believe that the promised assistance will not come through, while the obligations will be at the same time binding on them.

The failure of the Cancun Ministerial makes it imperative for WTO members, particularly the developing countries, to take a fresh look at the state of affairs at the WTO. This paper, following a brief analysis of the four Singapore issues from the perspective of developing countries, discusses the possibility and implications of the so-called progress at the WTO with or without the Singapore issues.

6.2 Trade and Investment

Developed countries had advanced the idea of framing multilateral rules to further liberalise the foreign investment regime right from the Uruguay Round (UR). Developing countries were opposed to any such idea, primarily because they were unwilling to embark on multilateral negotiations on investment under the General Agreement on Tariffs and Trade (GATT), which was essentially devoted to trade relations. Eventually, developing countries agreed to negotiate on four clusters of investment-related matters. The four agreements under the auspices of the GATT that relate to investment are:

- Trade Related Investment Measures (TRIMs)
- General Agreement on Trade in Services (GATS)
- Trade Related Aspects of Intellectual Property Right (TRIPS)
- Agreement on Subsidies and Countervailing Measures (ASCM)

TRIMs explicitly and exclusively deals with 'negative investment measures' issues such as local content requirement, export balancing, etc. The TRIPS Agreement has a bearing on foreign direct investment (FDI) matters in that the definition of these rights and the adherence to international standards and procedures constitute a part of the framework within which foreign investment takes place. The GATS relates to FDI matters as it recognises the establishment of a local company, either as a subsidiary or a joint venture, by a foreign service provider as a mode of trade in services. With respect to ASCM, certain investment incentives lie within the definition of a subsidy and as such are prohibited.

The demand for a comprehensive investment agreement within the WTO framework came back once again during the Singapore Ministerial in 1996. Many developing countries were not convinced as there was no evidence that an international investment agreement would increase investment flows to developing countries. Empirical studies have shown that FDI inflows are largely driven by 'gravity factors', such as market size, income levels, extent of urbanisation, geographical and cultural proximity with major source countries and

quality of infrastructure. The policy factors that a multilateral agreement would try to control play a relatively minor role[2].

On the whole, the multilateral framework on investment under the WTO includes many of the provisions that the exporters of capital from developed countries have been demanding so far. Hence, developing countries anticipated that the post-UR era would significantly increase the flow of FDI, particularly to developing countries. However, investment flows to developing countries have actually gone down as a proportion of total FDI since the establishment of the WTO *(See Table 6.1)*. The share of FDI flow to developing countries, however, increased once again in 2001, not because they performed better, but because developed countries had been more affected by the global slowdown in the aftermath of the terror strikes in the United States (US) on 11 September 2001.

Table 6.1: International FDI Flows

In US$ billion

Host Region	1996	1997	1998	1999	2000	2001
Developed countries	220 (58.2)	275 (58.2)	481 (70.7)	636 (73.5)	1005 (82.3)	503 (68.4)
Developing countries	145 (38.4)	179 (37.8)	179 (26.4)	208 (24.0)	240 (15.9)	205 (27.9)
Economies in transition	13 (03.4)	19 (04.0)	20 (02.9)	21 (02.5)	25 (01.8)	27 (03.7)
Total	378 (100)	473 (100)	680 (100)	865 (100)	1271 (100)	735 (100)

Note: figures in parenthesis represent percentage share of FDI

Source: UNCTAD. 2002.

Unconvinced developing countries are not very comfortable with the existing investment related provisions at the multilateral level. The proposed agreement on investment, they fear, will further limit the scope for domestic control of multinational corporations (MNCs) without any balancing measures, particularly in the case of least developed countries (LDCs) whose economic might is much weaker than that of many MNCs. The agreement would tie the hands of governments trying to channel investment flows according to their national development strategies. There is also a concern that the WTO rules might effectively give foreign investors preferential treatment

relative to national investors if the rules are modelled on the North American Free Trade Area (NAFTA) investment provisions.

There are reasons for the high levels of scepticism amongst developing countries over the proposed multilateral investment framework. The United Nations (UN) had taken initiatives to establish standards of behaviour for MNCs, particularly the Code of Conduct proposed by developing countries (the Group of 77). However, this effort was aborted in 1992 under pressure from developed countries, especially the US. Developed countries, so inclined to impose trade sanctions on grounds of labour and environmental standards, walk the other way when developing countries demand responsible behaviour from their MNCs. Obviously, the proponents of an investment agreement have shown no inclination to include investors' behaviour or home country obligations or corporate social responsibility (CSR) in the proposed agreement. This amply demonstrates that the basic objective of an investment agreement is not to promote development, but to ensure unrestricted freedom for their MNCs to operate in developing countries without providing any safeguards against misuse of their freedom.

6.3 Competition Policy

Competition policy is now widely recognised as a useful instrument to promote development in a market-oriented economy. Moreover, the international dimensions of regulatory challenges are becoming more prominent day by day. As trade and investment regimes are being liberalised in most developing countries, challenges are mounting in the form of stiff competition at the domestic level due to the inflow of foreign products and companies. While governments regulate domestic markets through various measures, including a competition regime, there is hardly any mechanism for regulating international markets. Stronger nations are able to tackle this problem to some extent through extra-territorial application of their domestic competition law. But weaker nations are not capable of applying such measures. Therefore, there are some *prima facie* arguments to suggest that multilateral discipline can help the weaker nations more.

Little wonder, the demand for multilateral rules on restrictive business practices came first from developing countries. However, it may be

surprising to note that developing countries, which once promoted the idea of converting the UNCTAD Set (The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices) to binding instruments are not enthusiastic about the idea of a multilateral competition framework within the WTO. Their scepticism, however, is not without reasons.

Developing countries have perceived the approach of both Japan and the EU on the issue of competition policy at the WTO as a 'market access' push only. In response to such criticism, the EU has shifted its focus from market access to hardcore cartels. However, this shift is nothing but a change in rhetoric. There has been no change on the ground and their proposed elements for a competition agreement continue to remain the same. Their strong emphasis on non-discrimination as one of the core principles clearly shows that there has been no shift in their market access agenda.

Although the proposed WTO agreement intends to cover hardcore cartels only, the principle of non-discrimination would apply on all other provisions should a country have them. Indeed, the countries that already have a competition law go much beyond that. This can be a serious disincentive for developing countries, which intend to enact a comprehensive competition law even if they need it for their own benefit.

International cartels are quite harmful to developing countries. But this has just been used as a ploy to thrust a competition agreement on them. There is no clarity as to how such an agreement will help developing countries to protect themselves from hardcore cartels. The solution offered in this regard is 'voluntary cooperation', which is also envisaged to work on a bilateral basis. However, one may wonder, how could the WTO act as a forum for promoting cooperation? This is especially because the WTO has been functioning as a Dispute Settlement Body (DSB) that adopts an adversarial approach.[3]

It has also been argued that competition *per se* will not necessarily ensure efficient outcomes, nor is it necessarily the case that competition-reducing agreements between firms are welfare reducing (Hoekman & Mavroidis 2002). It is also very often argued that a maximal degree of competition is not optimal. Rather, there should be

a judicial mix of cooperation and competition by firms. (Amsden & Singh 1994).

It is also a matter of concern that a ban on hardcore cartels would mean that import cartels will have to be disbanded while there will be no effective mechanism to deal with export as well as international cartels, as that would require cooperation of and strong action by developed countries. Paradoxically, proponents have been trying to sell their proposal as development-friendly by highlighting the harms caused to developing countries by international cartels. Import cartels, on the other hand, may be welfare enhancing, if they are formed primarily to get better bargain from foreign exporters.

An effective and successful cooperation arrangement can only be possible when there is enough mutual trust and goodwill among the parties involved. However, at the WTO, a group of countries are adamant on forcing an agreement on another group. Moreover, there is not much experience of co-operation on competition, especially among developing countries. Although a few developing countries like Brazil, Chile and South Africa have entered into such agreements of late, there is no evidence that they have gained much from these agreements. Even within the developed world, international cooperation has worked mainly on merger control, rather than tackling cartels.

It is widely recognised that the issues related to competition policy and law are quite complex, so much so that even some developed countries do not have adequate capacity in this regard (Mavroidis & Neven 2001). Obviously, developing countries with limited or no expertise have reasons to be scared to negotiate on this issue in a forum like the WTO where the stakes are very high.

6.4 Trade Facilitation

It is widely believed that there are merits in trade facilitation measures. The losses that businesses suffer through delays at borders, complicated and unnecessary documentation requirements, etc., are estimated to exceed, in many cases, the costs of tariffs. It is estimated that trade facilitation measures could save more than US$ 150 billion a year (Nanda 2003a). It may also be the case that developing country

traders are more constrained than their developed country counterparts because of these unnecessary hindrances. Since developing country traders are relatively small in size dealing with limited consignments, they find such costs disproportionately high, especially because they are very often fixed and do not vary with the size of the consignment.

However, it is also felt that resorting to trade facilitation measures would place a substantial financial burden on developing countries, much beyond the perceived benefits. Even if the benefits outweigh costs, it is widely believed that the development payoff might be greater if those resources were spent elsewhere. For example, to create a customs clearance infrastructure that will be as efficient as that of Singapore, even in small developing countries, the amount of money required may well be in excess of US$ 100 million.[4] In many small countries, this figure is much higher than the money the government spends on education. Moreover, considering that the share of developing countries in world trade is just about 30 percent[4], an overwhelming proportion of the estimated benefits of US$ 150 billion would accrue to developed countries, while at the same time developing countries would have to bear the costs disproportionately.

The costs of doing business in developing countries are much higher primarily because of inefficient institutions. However, most developing countries operate on a tight budget and a binding commitment on trade facilitation could lead to a disproportionate diversion of limited resources from other vital institutions to customs administration. This could create a situation where domestic businesses would incur the costs of compliance, which would arguably be much higher than what their foreign counterparts would bear in similar situations. Thus, trade facilitation may effectively mean that foreign players would get more than national treatment with adverse consequences for domestic business. Moreover, if trade facilitation measures result from a binding WTO commitment, rather than from domestic demand, issues of interest to domestic importers and foreign exporters might take precedence over those of interest to domestic exporters. Once again, foreign players will get more than national treatment (Nanda 2003b). Developed countries expect customs clearance systems in developing countries to be as efficient as their own. However, considering the huge productivity gaps, this is hardly feasible.

Some experts have raised another important question. If a party found that its consignment took three days to get customs clearance in a country instead of two, would it drag the country concerned to the WTO? There is no ready answer. But if such were to happen, the WTO dispute settlement mechanism would come under severe strain. It has been proposed that there will be a cut-off clause in relation to dispute settlement on trade facilitation matters, meaning that cases relating to small consignments will not be brought to the dispute settlement panel (Shin 2001). But nobody knows what the cut-off point would be. If the cut-off point is set at a high level, the agreement will benefit only developed country traders and developing countries may not be eligible to bring their complaints to the WTO owing to their smaller consignments.

Some international organisations are already involved in trade facilitation initiatives. In the context of discussions on trade facilitation at the WTO, the work being done by the World Customs Organisation (WCO) seems to be the most relevant. WCO's Kyoto Convention provides a regulatory framework for trade facilitation. Proponents of the adoption of the Kyoto Convention at the WTO argue that a multilateral agreement already exists. However, it is also astounding to see that some of the proponents of a trade facilitation agreement at the WTO, who have shown utter disregard for the WCO Kyoto Convention, are now arguing for the adoption of the Kyoto Convention Standards at the WTO (Nanda 2003a).

6.5 Government Procurement

TGP is indeed a development requirement and hence nobody is opposed to it as such. However, some developing countries believe that the issue is better left with the national governments. It is widely believed that a multilateral agreement on TGP may be the first step to push a market access agenda. Otherwise, why would some people be so keen on an issue that does not seem to benefit them? That this will help only developing countries by promoting good governance has raised suspicion about the actual motive. The suspicion has not yet dispelled although the Doha Declaration emphasised that negotiations would be limited to the transparency aspects and, therefore, will not restrict the scope for countries to give preferences to domestic goods and suppliers.

The distrust is not without reasons. If one looks at the existing plurilateral agreement on government procurement (GPA) that came into force on 1 January 1996, one can see that it is not only about transparency. It goes much beyond that. In fact, governments are required to apply the principle of national treatment to the goods, services and suppliers of other parties to GPA and abide by the most favoured nation (MFN) rule, which prohibits discrimination among goods, services and suppliers of other parties. In terms of services, of course, GPA takes a GATS-type positive list approach and only those services listed in the annexes are covered by the agreement (Evenett 2002).

Thus, if the proponents are to be believed, then the proposed multilateral agreement has to be fundamentally different from the existing plurilateral agreement as non-discrimination lies at the core of it. It is not clear what will happen to the existing GPA if a multilateral agreement is signed. Obviously, developing countries suspect that the ultimate aim of the multilateral agreement is to establish a framework similar to the existing plurilateral GPA.

Moreover, as many developing countries have argued, if TGP does not have anything to do with market access as claimed by its proponents, then it has no trade implications either. If it has no trade implications, then why should such an agreement be negotiated at the WTO? The WTO is there to promote trade and not to promote good governance in developing countries. There are other inter-governmental organisations devoted to this cause. The question remains unanswered.

6.6 Cancun and Its Implications

During the Cancun Ministerial, a situation was created for developing countries where they had to choose between some progress on the development agenda along with binding commitment on Singapore issues or nothing at all. The choice was indeed between the devil and the deep sea. They chose the devil rather than the deep sea. Agreeing to Singapore issues would have meant making commitments on issues whose implications are not yet known.

Concerns have been expressed in the aftermath of the failed Ministerial that poor countries will suffer more in the ensuing international trade order that is likely to see spurt in bilateral and regional trade liberalisation and increasing marginalisation of the WTO. Such an impression is being created by developed countries that have declared their intentions of going for bilateral and regional preferential trade agreements (PTAs). This might lead to panic among some developing countries, provoking them to wonder if they did the right thing at Cancun.

From the viewpoint of developing countries, the main reason for the failure at Cancun seems to be their inability to go ahead with the Singapore issues. However, the argument that the real intention of the EU was to block any progress on agriculture and hence they linked it to these issues, especially investment that was unacceptable to most developing countries, has significant weight. The fate of the Singapore issues is not yet clear.

6.6.1 What Might Have Been Lost

It is imperative to carefully look at what has been lost and what may be the possible fallout of the collapsed Ministerial that has put a brake on the Doha Development Round (DDR). Developed countries have reasoned that since it was a development round, developing countries have lost an opportunity. Let us now have a closer look at the so-called Doha Development Agenda (DDA) to understand the context.

The DDA includes three types of issues. The issues of the first type aimed to address the existing anomalies, or to mitigate the 'side effects' caused by the existing WTO agreements. These included TRIPS and public health, implementation issues, the work programmes on issues like special and differential treatment (S&DT), small economies, LDCs, trade, debt and finance, trade and transfer of technology, etc. The second type of issues on the agenda included liberalisation or reforms in agriculture, services, non-agricultural products, WTO rules (such as those on anti-dumping and subsidies), TRIPS (geographical indications) and dispute settlement, etc. The outcome of these could go either way, but developing countries could benefit if they negotiated properly. The third type included the Singapore issues and environment, which would broaden the agenda of the WTO putting an

unequal burden on developing countries (Nanda 2003b). Indeed, an objective balance sheet of the process and outcomes at Doha makes it clear that calling it the DDA stretches to both reality and imagination (Malhotra 2002).

The issues of the first type were raised by developing countries. The issues of the second type were more or less raised jointly, while the issues in the third category were thrust upon developing countries by the developed ones. It is quite obvious that the promises developing countries got from rich countries were too little compared to the commitment (although conditional) that they had to make in return. Moreover, the post Doha experience shows that developed countries have least regard for the issues that are important for developing countries. While they had no worries about the deadlines of the first two types of issues, developed countries, especially the EU, were hell-bent on launching negotiations on new issues. Except on the issue of TRIPS and public health, progress made in all other areas has been quite insignificant. Hence, the immediate concern that the unsuccessful Ministerial at Cancun may slowdown the Doha work programme, in real terms, means that the compromise reached on TRIPS and public health may take some more time to be implemented.

However, it may be noted that the compromise did not really mean any substantial sacrifice for the US. The issue is of supplying medicines to some poor countries that do not have domestic manufacturing capabilities and hence are not able to resort to compulsory licensing in a public health crisis. However, the purchasing power of these countries is so low that big pharmaceutical companies cannot really reap much profit in the absence of the compromise. It is probably this understanding that led the US to come down from its earlier position.

The WTO system's overriding purpose is 'to help trade flow as freely as possible – so long as there are no undesirable side effects'. However, even when there was no serious attempt to address the existing anomalies or side effects, developed countries were pushing for seeking commitments in new areas. Of course, they never forget to emphasise that these were only to promote development. In reality, however, these were meant for furthering market access, which will put substantial burden on developing countries without guaranteeing any improvement in their terms of trade. In fact, Pascal Lamy, the EU Commissioner for Trade, in an article published in the Wall Street

Journal on 17 July 2003 made a clean breast that all new issues were essentially to 'give effect to market opening'.[5] Given these circumstances, a successful Ministerial would have meant that developing countries would have made huge commitments and compromises in exchange of minor concessions.

6.6.2 Future Concerns

Concerns that the lack of adequate progress at the WTO would lead to the creation of more regional trade agreements (RTAs) as well as signing of more bilateral free trade agreements (FTAs) were expressed even after the failure of the Seattle Ministerial. Such concerns would come to light whenever there is a glitch at the WTO. Jagdish Bhagwati, for example, expressed worry that the situation may turn into a 'spaghetti bowl' – a messy maze of preferences as RTAs or PTAs formed among/between countries with each having bilaterals with other and different countries, the latter in turn bonding with yet others, each in turn having different rules of origin[6] (ROO) for different sectors, and so on (Bhagwati 2002). If this really happens, that might be bad for all countries, individually and collectively.

However, the worst fear may not come true. The spread of bilateral and regional agreements may not be as pervasive as one thinks. Moreover, the signing of these agreements has been quite independent of the processes and progress at the WTO. A successful Ministerial at Cancun would not have meant such efforts would have stopped anyway. The US, for example, has signed FTAs with Jordan, Singapore and Australia. It is also engaged in negotiations with 33 other countries of the Americas and the Caribbean to create the Free Trade Area of the Americas (FTAA), intended to be the most far-reaching trade agreement in history. The US certainly would not have dropped all such initiatives despite a successful Ministerial at Cancun.

The US and the EU may have become more aggressive in signing bilateral and regional agreements. However, movement along those lines has also not been that easy. Indeed, the US has shown keen inclination towards bilateral agreements as it finds it easier to shape the agreement in its favour in a bilateral setting as the parties to such agreements are much weaker, whereas at the WTO it has to face the collective bargaining power of weaker countries.

The question now is as to what extent will the US, the EU or other developed countries be able to get into bilateral deals with other countries which really matter? It is quite difficult to imagine that the emerging market economies or important developing countries like India, Brazil, China, Malaysia, South Africa, etc., will sign bilateral FTAs with developed countries, especially the US, which insists on a particular type of agreement.

The FTA that the US signed with Jordan is entirely shaped by the former and hence includes measures for investment liberalisation as well as provisions on environment and labour standards. It also imposes more restrictive intellectual property rules on Jordan than those under the WTO. Most developing countries would find it politically difficult to accept such an agreement with the US. This is because the positive aspects of globalisation have now started showing their impact as the globalisation of knowledge and information has ensured that the awareness of these issues is much greater in developing countries now than it existed even two years back.

One of the major deficiencies of bilateral agreements is that unlike the WTO they do not have a dispute settlement mechanism. Developing countries will, therefore, find it difficult to enforce such agreements from their side. Developed country traders will make their way in getting measures like anti-dumping duties or non-tariff barriers (NTBs) imposed on products coming from countries with an FTA. This will further reduce the attractiveness of bilateral agreements with developed countries.

The US government cannot impress its traders with a 'fantastic' agreement with Jordan as many of them will wonder whether Jordan is in Asia or Africa. Similarly, the additional gain that the US can expect from its agreement with Singapore is marginal, as the latter is already one of the most open economies in the world. Singapore has hardly anything to offer to any country in a bilateral agreement. The situation may not be different for other developed countries that may wish to go for such bilateral agreements.

Regional agreements are, of course, a different ballgame. They are not just FTAs. They generally go much beyond that. This may be good for the participating countries. However, they may not necessarily be bad for others that are not a party to such agreement. For example, an

Indian trader may find it easier to export to a number of African countries when they are part of a common market than when they are not integrated and maintain different rules. Admittedly, the net effect of an RTA depends on the relative importance of trade-diverting and trade-creating effects.[7] Earlier studies have shown that due to strong trade-diversion effects, RTAs have tended to worsen the welfare of member countries, and even worsen worldwide efficiency (Bhagwati, Krishna & Panagariya 2000).

However, a recent study involving seven South–South RTAs has shown that with the exception of the Andean Community and MERCOSUR, which seemed to have reduced trade with non-members, South–South RTAs were not only trade-creating, but also trade-expanding, increasing overall trade, even with third countries, sometimes quite significantly.

Nevertheless, if a huge trade grouping like the FTAA really comes up, it may be a cause of concern for many countries, not only developing but developed as well. However, it would not be so easy to launch the FTAA. The proposed FTAA contains provisions on competition policy, government procurement, market access and dispute settlement. This, together with the inclusion of services and investment, could remove the ability of all national governments to create or maintain local or national laws, standards and regulations to protect the health, safety and well-being of their citizens and the environment they share (Barlow 2001). Once again, globalisation of knowledge and information will make it difficult for this initiative to take off the way the US wants. Many Latin American and Caribbean countries will find it difficult to convince their domestic constituencies about the 'virtues' of the FTAA package after vehemently opposing the Singapore issues at Cancun. The statement by the Barbados Trade Minister A. Millier, "We know which world we are living in but we cannot jeopardise the millions of poor farmers and we cannot jeopardise their interests," is possibly a pointer to that direction[8].

One may wonder, however, if the EU progressed this much, then why should it be so difficult for other regional groupings, including the FTAA? To get an answer to this, one has to look at the history of the EU. The member countries of the EU share a common history and culture, geographical location and similar levels of development. The situation is quite different for countries that are negotiating the FTAA.

Moreover, even though some countries were more powerful than the others in the EU, there was never any hegemony of one country over the other, whereas the US is explicitly trying to establish its own hegemony over the western hemisphere through the FTAA. Furthermore, not only that huge amount of resource transfer took place from the advanced countries to the laggards within the EU, there was also an elaborate S&DT arrangement, and richer countries made sacrifices. However, sacrifice is possibly a dirty word for the US, which is approaching the FTAA purely from a mercantilist angle. It also took about five decades for the EU to reach to this stage, but the US wants similar progress on the FTAA at one stroke.

It is, however, unfortunate to note that the EU is now ignoring its own history while approaching the issue of accession of the Central and East European countries to the EU or dealing with the issue of 'development of developing countries' at the WTO. For example, the so-called Singapore issues have been inspired by the experience of their own regional integration at the EU. However, they have ignored the speed of adjustment. Just a few years back, some members of the EU did not have a national competition regime, even though all of them were developed. And yet, the EU wants to impose a competition law even on LDCs through a WTO agreement. Given its approach, the EU may find it difficult to further deepen its relationship with the African, Caribbean and Pacific (ACP) countries with which it already has an agreement.[9]

6.7 Beyond Cancun

As discussed in the previous sections, developing countries had hardly anything to gain from a "successful" Ministerial at Cancun. An unbalanced and unfair declaration pushed developing countries to the wall without any space for manoeuvrability. Developing countries had already given huge concessions in terms of TRIPS, TRIMs and GATS to get agriculture, and textile and clothing into the GATT/WTO framework during the UR. Hence, linking investment with reduction in agricultural subsidies as a *quid pro quo*, as demanded by the EU, was quite outrageous and amounts to selling one commodity twice. The process at Cancun has also raised the question of the appropriateness of the process of preparing the draft declaration in particular, and the

decision making process at the WTO in general. After all, everybody wanted a successful Ministerial.

Nevertheless, all is not lost. The so-called DDA is still alive. Members of the WTO can still talk. Developing countries should be proactive in taking the discussions further, especially on issues where they stand to gain. Particularly, they should try to finalise the agreement on the issue of TRIPS and public health, which apparently was almost final. However, it is also the case that there will be pressure to negotiate on controversial Singapore issues, which seek substantial commitment on regulatory regime. The WTO should not be encouraged to put more and more regulatory restrictions on its members. Moreover, overloading the WTO could destabilise it, which is certainly not good for both developing and developed countries.

Countries like Brazil, China, India and Malaysia that played a significant role at Cancun have become the targets of developed countries that are trying to break the solidarity of developing countries. The intention of developed countries was apparent with what the US Trade Representative Robert Zoellick said following the collapse of the Ministerial – "Some larger developing countries spent too much time with tactics of inflexibility and inflammatory rhetoric before getting down to negotiate. Unfortunately, many smaller developing countries that followed this lead couldn't make the turn that some of the other bigger developing countries were ready to negotiate. As a result, all walked away empty handed." Developed countries are also pushing for more RTAs/PTAs, not necessarily for their own sake, but to break the developing country alliances.

The failure at Cancun holds lessons for both developed and developing countries in more than one way. For developing countries, the lesson is that collectively they can make a huge difference. At Doha, developed countries were finally able to push their own agenda essentially because there was no unity among developing countries.

Maintaining this unity will be even more important in the future. Developed countries will try to rope in some of them with unilateral concessions, which they might even withdraw in future at an opportune time. Thus, for developing countries, Cancun was not an end, but just a new beginning. Developed countries should accept the fact that they cannot take developing countries for granted. They

thought that Cancun could be a repetition of Doha. But they ignored that developing countries had been encouraged by the so-called success of developing countries in shaping the WTO agenda at the Doha Ministerial.

Endnotes

1 For example, Guy de Jonquières, in his article, "Cancun's failure threatens end to Machiavellian games", observes: Sir Leon (now Lord) Brittan, EU trade commissioner at the time, badly wanted to launch a new world trade round in the mid 1990s. But to do so, he had to overcome expected objections from France and other EU member states that feared trade liberalisation would undermine Europe's Common Agricultural Policy. Leon's advisers hit on a Machiavellian solution. As one explained later: "The trick was to come up with a negotiating agenda that the French thought other WTO members would reject. Then we would get our agenda accepted [by the rest of the WTO members] and call France's bluff." The upshot was proposals for investment rules, competition, trade facilitation and transparency in government in procurement.

2 See Lamy, Pascal (2003)

3 A procedural approach, such as in the Anglo-American legal system, involving active and unhindered parties contesting with each other to put forth a case before an independent decision-maker.

4 According to an estimate by Finger and Schuler (2000) the minimum costs of customs reforms alone will be about US$40mn in most developing countries.

5 This includes share of countries like South Korea, Taiwan and Hong Kong who can now be considered as developed countries.

6 Rules of origin is a requirement in all RTAs/PTAs to prevent non-members from taking advantages via entry into members, e.g., a country getting easy access into the US market through a bilateral agreement with Mexico which is a member of NAFTA.

7 The concepts of trade-creation and trade-diversion were first espoused by Jacob Viner in 1950. A detailed discussion on these issues can be found in Bhagwati, Krishna and Panagariya (eds), (2000).

8 See Financial Express (2003).

9 EU has a partnership agreement with a group of least developed, landlocked and island states from Africa, Caribbean and Pacific (ACP) regions known as the Cotonou Agreement.

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Chapter - VII

Competition Agreement at the WTO: The Right Initiative at the Wrong Forum

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Abstract: Discussion on multilateral rules on competition policy is by no means a new issue as it has been on the world trade agenda since the aborted Havana Charter. Indeed, there are good reasons for adopting a multilateral competition regime, some among which relates to market access, international cartels, export cartels, merger and acquisitions, anti-competitive practices by multinational corporations (MNCs) in small/developing economies, etc. There is also a case for promoting international cooperation on competition, not only to tackle competition cases with international dimensions but also to build capacities in developing countries to establish strong competition regimes.

The case for a multilateral framework on competition, however, is not strong except for market access considerations. Neither developing countries are interested to promote further market access through competition rules, nor the proponents are candid enough in saying that indeed this is the motive. Other competition problems, notably international cartels, are difficult to handle without a strong international authority which in any case is not included in the proposed framework at the World Trade Organisation (WTO). The alternative soft approach suggested, namely voluntary cooperation, can be useful to some extent. However, given its character, the WTO is not the right forum for promoting such cooperation.

7.1 Introduction

The need for a multilateral approach to competition policy was recognised in the Havana Charter, which unsuccessfully tried to set up an International Trade Organisation (ITO) just after World War II. The General Agreement on Tariffs and Trade (GATT), which emerged instead, was based on the Havana Charter. Competition issues,

however, remained outside the GATT framework. These issues came up for discussion at the multilateral forums time and again. As one consequence, the 'Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices' was adopted in 1980 under the auspices of United Nations Conference on Trade and Development (UNCTAD).

The issues pertaining to competition and measures to deal with restrictive business practices were raised in the Uruguay Round negotiations. They finally entered the WTO arena through the 1996 Singapore Ministerial Declaration. At the Doha Ministerial, further progress was made on the issue of competition, as the need for a multilateral framework on trade and competition was recognised in the Doha Declaration. There was tremendous pressure from the European Union (EU) and some other countries to launch negotiations on this issue, among others, at the Fifth Ministerial held at Cancun, Mexico in September 2003. However, many countries were sceptical about the benefits of and rationale for such an agreement. The main objection of developing countries in this regard is that they do not have adequate experience and expertise. The Cancun Ministerial eventually failed, but the issue is not yet dead.

One cannot overlook the fact that with the opening up of domestic markets to foreign competition, countries have become increasingly sensitive to anti-competitive practices that originate outside their own territory. MNCs have entered developing country markets and/or increased their presence and activities within these countries.

The entering of MNCs can have many positive effects on developing countries' economies. At the same time, there is a serious concern among these nations that competition could suffer because of the entry of MNCs, as their ability to deal with cross-border competition problems is either inadequate or non-existent (Jenny 2000). A recent study on the infamous vitamin cartel has validated this. It has found that the extent of overcharges by the cartel was relatively higher in countries without any anti-cartel enforcement (Clarke & Evenett 2002).

How do competition authorities (CAs) in developing countries deal with these cross-border (international) challenges? This is clearly a difficult task. As Karel van Miert, a former EU Competition Commissioner, observed, national or even regional authorities are ill

equipped to grapple with the problems posed by commercial behaviour occurring beyond their borders (Jones & Sufrin 2001). When CAs from highly developed countries/blocks like the EU face difficulties in handling cases with a cross-border dimension, it is clear that the authorities in developing countries face even greater and more serious problems. Against this backdrop, the paper makes an attempt to critically look into the desirability of a multilateral framework and assesses whether the WTO is an appropriate forum to host such a framework. The paper takes a closer look at the issue of international cooperation on competition, which appears to be the only substantive remedy that has been proposed to deal with competition problems with international dimensions.

The paper looks at the relevant issues from a developing world perspective and is divided into six sections. The next section discusses the sources and types of cross-border competition cases that affect developing countries. The third section takes a closes look at the kinds of difficulties that developing countries face in tackling competition problems, including those with cross-border dimensions. It tries to chart out a road map for developing an effective competition regime in developing countries and discusses the role of international cooperation therein. The fourth section discusses the existing cooperation agreements/arrangements on competition at various levels. The fifth section examines the WTO as a forum for dealing with competition issues, particularly cooperation on competition. The sixth section concludes with some suggestions and recommendations.

7.2 Sources and Types of Cross-border Competition Cases

The nature of cross-border anti-competitive practices is quite similar to that of those perpetrated within national borders. The only difference lies in the cross-border (international) dimension of the anti-competitive behaviour. A number of areas where enterprise behaviour perceived to have given rise to competition concerns with international dimensions are discussed here. There is no single way by which one can estimate the damage that these cross-border anti-competitive practices are causing. However, one can have a fair understanding of the nature

and dimensions of the problems through the analysis of anecdotal evidence. These issues can broadly be classified into four groups:[2]

Market power in global or export markets

Barriers to import competition

Foreign investment

Intellectual property rights (IPRs)

7.2.1 Market Power in Global or Export Markets

Anti-competitive practices under this category are international cartels, export cartels and related arrangements, international mergers or mergers with international spillovers, abuse of dominance in overseas markets, cross-border predatory pricing and price discrimination.

7. 2.1.1 International Cartels

There has been a sharp increase in the global cartel activity lately. Simultaneously, enforcement agencies have swung into action and slapped multi-million-dollar fines on several companies. However, to date, only a handful of countries have taken action to penalise transgressing companies or to recover compensation. Particularly, no developing country, except Brazil, has made any attempt to take action on these cartels.[3]

A World Bank study has shown that in 1997 developing countries imported US$ 81.1 billion of goods from industries in which price-fixing conspiracies had been discovered during the 1990s. These imports represent, on an average, 6.7 percent of imports and 1.2 percent of GDP in developing countries (Levenstein & Suslow 2001). The vitamins cartel alone cost developing countries nearly US$ 3 billion in the 1990s (Clarke & Evenett 2002). There might have been several other price-fixing conspiracies that remained undiscovered. All of these cartels constituted of producers mostly from industrialised Organisation for Economic Cooperation and Development (OECD) countries.

7.2.1.2 Export Cartels

Export cartels have generally been ignored or even encouraged as their activities do not usually affect the host countries. For instance, the Export Trading Company Act of 1982 establishes a procedure for the United States (US) exporters to obtain limited immunity from US anti-trust laws for export acts and collaborations, as long as they do not distort competition within the boundary of the US. Dealing with such practices through the application of the 'effects doctrine'[4] is quite common in the developed world, but developing countries have not really used such options.

In India, the CA tried to deal with such cases using the 'effects doctrine', especially in the controversial soda ash case. The Monopolies and Restrictive Trade Practices Commission (MRTPC) granted an injunction on imports from American Natural Soda Ash Corporation (ANSAC) as a cartel, which was upheld by the Supreme Court in its interim order. ANSAC, however, preferred to lobby with the US government while filing an appeal in the Supreme Court of India. The US Trade Representative (USTR) took up the issue with the Indian government. The Government of India, under pressure, reduced the import tariff on soda ash from 35 percent to 20 percent.[5] In its final verdict, the Supreme Court impugned the order and held that the Commission could not deal with the case as it was beyond its jurisdiction.

7.2.1.3 Merger & Acquisition (M&A) with International Dimensions

Large companies merge in the developed world and consequently their subsidiaries and associates in developing countries too end up in new combinations. This can create positions of dominance for merging firms leading to subsequent abuse. Moreover, developing countries may also be affected by M&A activities that take place outside their territory without any local presence. Because these companies operate in multiple markets, they can also adversely affect developing country markets.

Developing countries have mostly dealt with only the first type of cases, i.e., subsidiaries merging as a result of a merger between parent

companies internationally. But stopping the subsidiaries from merging would not serve any purpose, as both will continue to be controlled by the same parent company. Thus, the issue could possibly be dealt with appropriately only through the application of the 'effects doctrine' and regulating the merger in the home country.

But the question is whether a developing country could enforce such action on the parent companies in the home country. Similar actions are, however, quite common in the developed world. For example, the EU blocked the merger between GE and Honeywell, both US based corporations. Similarly, in the Philip Morris-Rothmans case, a merger between US and British/South African companies was stalled by Germany.

7.2.1.4 Anti-competitive Practices by Foreign-based Dominant Companies

Other than collusion or combinations, the size and scope of MNCs make it possible for them to engage in a variety of anti-competitive practices. Microsoft is a case in point. The company has been hauled up for indulging in anti-competitive practices time and again in the US and the EU. But, by and large, it has not faced such action in other jurisdictions. It is difficult to believe that a globally dominant company like Microsoft did not perpetrate anti-competitive practices elsewhere, especially when the regulatory framework in most other jurisdictions is much weaker.

7.2.1.5 Cross-border Predatory Pricing

Cross-border predatory pricing can also lead to market distortions. Due to some striking similarities, cross-border predatory pricing is very often equated with dumping and thus action is taken under anti-dumping legislation. However, the principle underlying anti-dumping is different from that underlying competition law in that it seeks to protect competitors and not competition. Dumping is, in fact, welfare enhancing unless it is predatory.

In this context, the parallel anti-dumping and competition-law cases relating to the sale of Japanese television sets in the US are interesting. Beginning in the 1960s, US producers sought relief from low-priced

imports of Japanese television sets and other consumer electronics products initially under anti-dumping and subsequently under competition law. As a result, the US decided to impose anti-dumping duties on Japanese television sets in 1971. The competition law case was finally decided by the US Supreme Court in 1986, where, in a split decision, the majority expressed the view that the market for electronics products in the US was fundamentally incapable of being successfully monopolised through a predatory-pricing conspiracy.

However, the situation in most developing countries would be quite different due to the small size of markets and low levels of market contestability. Hence, there would be more convergence between anti-dumping and anti-predation actions. But, ironically, until recently, the main users of anti-dumping laws were developed countries, though increasingly developing countries too are taking recourse to these laws (WTO 2001a).

7.2.2 Barriers to Import Competition

Import cartels, vertical market restraints creating import barriers, private standard setting activities, abuse of monopsonistic dominance (dominance of a buyer), etc., may fall under this category.

Import cartels formed by domestic importers or buyers and similar arrangements such as boycott of, or collective refusal to deal with, foreign competitors may be a threat to maintaining fair competition in a market. In principle, a national competition law may generally be able to tackle market-access barriers to foreign supplies and suppliers. However, import cartels whose function is solely to exercise monopsony power in order to get a better price from foreign suppliers may be viewed more favourably from a national efficiency and welfare perspective than cartels that also exercise market power within the domestic market. But it may be difficult to make such a distinction or to separate the two types of activities.

Another related concern in this regard is inadequate domestic enforcement of competition law against import cartels in markets for a country's exports. The best-known example in this regard is the dispute between Japan and the US where it was alleged that Fuji effectively prevented Kodak's exports to the Japanese market by controlling the

distribution channel. In the early 1990s, such concerns prompted a revision of the US guidelines regarding international enforcement to permit application of the US anti-trust laws to foreign-based activities, including import cartels that restrict US producers' access to foreign markets. To date, however, therevised US guidelines have never been employed.

7.2.3 Foreign Investment

Foreign direct investment (FDI) has now become an important way for companies to manufacture goods for foreign markets. FDI may increase competition in local markets, particularly in the investments of greenfield type. However, there is a possibility that over time such takeovers may make the markets increasingly concentrated to the extent of having one or a small number of dominant players. Moreover, even though a single instance of cross-border acquisition may seem to have no effect on competition from a narrow national-market perspective, it may lead to a lessening of effective competition in the market if the acquirer has been a major exporter to the country. MNCs may aim such acquisitions at regional or global consolidation.

7.2.4 Intellectual Property Rights

IPRs may generate or contribute towards a position of market power. The IPR holders typically engage in licensing arrangements with firms in different countries. The territorial nature of property rights in such agreements means that rights holders may frequently use national laws to prevent parallel imports. In many cases, it has also been observed that cartels were built around patent cross licensing schemes and, thereby, foreclosed competition.

Some developing countries have relied upon special-transfer-of-technology law or regulations as a means to preventing abuses in connection with the licensing of IPRs. However, the adoption of more open and market-oriented economic policies meant that countries have abandoned or diluted these laws and regulations. Weakness of both competition and IPR regimes in most developing countries means that there are not many instances of competition cases related to IPR that have come up before CAs.

7.3 Role of International Cooperation on Competition in Developing Countries[6]

Problems encountered by CAs in handling domestic competition cases also apply to cross-border competition cases. But the latter pose some additional problems too. There are large differences among the countries on how the cases were handled by the CAs. Whereas some authorities handled cases very seriously, others have not acted at all or acted only with limited interest. Although problems are caused by the special nature of such cases, sometimes the authorities' own lack of action or interest also becomes an important factor.

Whether to deal with anti-competitive practices that occur at national level or that have international dimensions, having a strong and well-functioning competition regime is the bare minimum. This requires that CAs in developing countries must have adequate fund and a group of competition law enforcement officials, who are technically competent. Unfortunately, both funds and competence are in extremely short supply in most of these countries.

Developing countries usually start implementing competition laws under very unfavourable circumstances. In mature jurisdictions, competition officials operate in a stable and adequate policy environment. Their developing country counterparts, on the other hand, do not have such an environment in place beforehand. They have to strive to create such an environment.

Moreover, it should be noted that there are economies of scale and economies of learning in the implementation of competition law. In the initial stages, one would need huge resources. But these initial investments fetch significant replicable gains, once the competition-policy mechanism is firmly entrenched in the market system.

One alternative frequently suggested to overcome the shortcomings of finance and skill is to adopt a regional approach to competition enforcement. Pooling of resources can indeed be beneficial in this regard. However, it must be recognised that the implementation of competition policy requires time, investment in institutions and a change in the market culture. Developing countries that have recently enacted a competition law can learn from jurisdictions that have a

longer experience of implementing such laws, mostly those of developed countries.

The above considerations show the importance of defining priorities and setting a plan for institution building for developing an effective competition regime in developing countries. It is useful, for analytical purposes, to identify a sequence of evolutionary stages that could serve as a reference for comparisons among different countries. Table 7.1 contains a useful timetable to serve as a reference.

Table 7.1: Stages of Institutional Development of Competition Regimes

I. Start	Competition advocacy + Control of horizontal restraints + Checking abuse of dominance + Technical assistance
II. Enhancement	I + Merger control + Control of vertical restraints
III. Advancement	II + Regulation + International cooperation agreements
IV. Maturity	III + Second generation cooperation agreements + Proactive competition advocacy

The sequencing proposed is based on ideas suggested by different individuals and organisations [Khemani & Dutz 1995; Oliveira 2003; and CUTS 2003a]. Given its limited resources, the agency should start with the actions that would most likely benefit the market. Gradually, it should introduce measures requiring more sophisticated analysis. Thus, there is a need to focus on the quality of competition law enforcement, rather than on the mere enactment of the legislation. For this, effective international cooperation in the area of competition policy must go beyond the standard forms to effectively meet the challenge of institutional building.

There are two major areas for which international cooperation is needed. Both are of great interest for developed and developing countries:

- Promoting institution building and disseminating a competition culture
- Dealing with competition problems with international dimensions

Cooperation has a variety of forms and meanings. Literature identifies four basic forms or levels:

- Information sharing (public domain) and technical assistance (weak)
- A positive comity7 basis (semi-strong)
- Positive comity and sharing of confidential information (strong)
- Negative comity8 and mutual recognition and enforcement of laws (virtual integration)

These are ranked in terms of the level of implied participation by countries. The elements listed in the first two bullets can come under the 'first-generation cooperation agreements, while those listed thereafter can be covered in the 'second-generation cooperation agreements'. The focus of international cooperation would depend upon the stage of institutional development of each national jurisdiction, as summarised in Table 7.2.

Table 7.2: Stages of Institutional Development and the Cooperation Agenda

Stage	Cooperation Agenda	Content
I and II	Technical assistance	Training and drafting of legislation and procedures in line with due process
III	Simple cooperation agreements	Cooperation in selected cases with exchange of public information
IV	Advanced cooperation agreements	Systematic cooperation with exchange of confidential information

At Stages I and II of Table 7.2, technical assistance seems to be more appropriate. Most typically, a developing country will be the recipient and a developed country the provider. Technical assistance from countries in intermediary positions should be stimulated since the institutional environments might be similar to those at the beginning and more useful.

At Stage III, when the agency has already built in some internal experience, simple cooperation agreements including exchange of public information can be helpful. However, one should be realistic regarding the limited resource endowment in developing countries, which would not permit joint action in all cases. More advanced agreements, including exchange of confidential information, would require institutional maturity and greater homogeneity and integration among the participants.

7.4 The Existing Agreements and Initiatives

7.4.1 Bilateral and Tripartite Agreements

The US, the EU and Canada have signed a number of bilateral agreements with other countries to cooperate in the area of competition law. While the US has agreements with Australia, Brazil, Canada, Germany, Israel, Japan and Mexico, the EU has such an agreement with Canada. Similarly, Canada has signed bilateral agreements with Chile and Mexico. It has also entered into a tripartite cooperation agreement with Australia and New Zealand.

Similarly, there is a tripartite agreement between Denmark, Norway and Iceland. France has an agreement with Germany. China has bilateral agreements with Russia and Kazakhstan. Taiwan has such agreements with Australia and New Zealand. Papua New Guinea has an agreement with Australia. In addition, competition-related provisions can be found in many bilateral trade agreements as well.

7.4.2 Regional Approach

A comprehensive regional approach to competition policy was first adopted by the EU and subsequently by Carribean Community for Economic Cooperation (CARICOM). The primary objective of adopting a regional competition policy within the EU was to use it as a vehicle for further integration of the common market. On the other hand, the main objective of CARICOM regional competition policy was to apply competition rules in respect of cross-border anti-competitive business conduct, to promote competition in the community and coordinate the implementation of the Community Competition Policy (CCP). Such an approach is at various stages of discussion/adoption in many other regional groupings like Common Market of the South (Mercosur), Common Market for Eastern and Southern Africa (COMESA), Southern African Development Community (SADC), East African Community (EAC), Economic and Monetary Community of Central Africa (CEMAC), etc. All of them may need to accelerate their efforts in this regard.

7.4.3 Global Initiatives

Over the last few years, several global initiatives have been taken up to deal with competition problems, especially those having international dimensions. Some are by government or government agencies while others are at non-governmental level. None of them of course aim to seal competition-related international disputes, but to promote cooperation. If cooperation and coordination could be promoted in an appropriate manner, then international competition disputes could be avoided and even resolved.

The issue of control of restrictive business practices (RBPs) figured on the agenda of UNCTAD **I**, and again at UNCTAD IV, where a decision was made for starting a work programme at the international level, which led to negotiations under the auspices of UNCTAD. In December 1980, the UN General Assembly adopted by resolution the Set of Multilaterally Equitable Agreed Principles and Rules for the Control of Restrictive Business Practices, which is more popularly called 'the Set'. The importance of the Set and UNCTAD in this area of work should not be underestimated. The 1990 review conference indicated a high degree of consensus on the contributions of the Set

and on UNCTAD's role. UNCTAD has become very active in providing technical assistance to developing countries.

The OECD has a standing committee on competition policy and law, which has all member countries as members, other than five observers. The OECD has been regularly cooperating with different non-OECD countries to provide capacity building support. With the advent of the OECD's Global Forum on Competition (GFC), it claims, its cooperation with non-OECD countries will extend beyond capacity building to include high-level policy dialogues to build mutual understanding, identify 'best practices', and provide informal advice and feedback on the entire range of competition policy issues. The forum can also be used to promote cooperation among countries.

CAs of different countries have come together to promote the International Competition Network (ICN). ICN is intended to encourage the dissemination of competition experience and best practices, promote the advocacy role of competition agencies and facilitate international cooperation on competition issues. ICN has already adopted a common set of guiding principles for merger notification and review. Similar initiatives are likely to be taken in other area of competition enforcement.

7.5 WTO as a Forum for Competition Agreement

Strong competition regime at the national level may not be enough to tackle the cross-border anti-competitive practices. Indeed it would be a good idea to have provisions for extra-territorial jurisdiction on the basis of the 'effects doctrine' to legally empower CAs to deal with such cases. However, most developing countries do not have enough muscle to actually enforce such provisions. Therefore, there are some *prima facie* arguments to suggest that multilateral discipline can help the weaker nations too.

In this context, the setting up of a global competition agency could possibly be the best solution, though this may turn out to be a Utopian idea given the existing global geo-political situation. Thus, the international community has had to be content with second best

solutions like cooperation. The proposal for an agreement on competition at the WTO has to be considered from this perspective.

As mentioned at the outset, competition policy is not a new issue in the GATT/WTO framework. The issues pertaining to competition were raised in the UR negotiations too. Although no agreement on trade and competition policy was signed, the issue is very much present in many of the provisions of the existing WTO agreements. The agreements that refer to competition issues are:

- General Agreement on Trade in Services (GATS)
- Trade Related Aspects of Intellectual Property Rights (TRIPS)
- Trade Related Investment Measures (TRIMs)
- Agreement on Implementation of Article VI of GATT 1994 (Anti-dumping Agreement)

Although the WTO agreements touch on a number of competition issues both directly and indirectly, nothing substantial has emerged on these issues through negotiations. Consideration for a possible framework on competition policy and investment has been provided as a built-in agenda under the TRIMs Agreement.

The current WTO proposal under the Doha Development Agenda (DDA) is a statement of core principles on transparency, non-discrimination, procedural fairness and recognition of the ills of hardcore cartels. It also includes development of flexible cooperation modalities and technical cooperation.

7.5.1 Core Principles

Transparency has been one of the core principles of the GATT system since its inception. In the context of competition, transparency is likely to mean that the administration of competition regulation must be based on published laws, regulations and guidelines. This requirement might also encompass an obligation to make known all general enforcement priorities as well as exemptions and exceptions from competition laws.

It is, however, important to note that a competition agency may decide to pursue an individual enforcement action confidentially without disclosing details. The main reason is that competition law procedures differ across countries. Thus transparency in the competition context is not entirely clear and the issue of what constitutes a transparent competition regime may become controversial.

Non-discrimination is again a fundamental tenet of the WTO. The WTO jurisprudence on non-discrimination has clarified that equality of competitive opportunity underpins this concept, a perspective that is also relevant in the context of competition policy. However, developing countries feel that this is essentially to push the market access agenda. They also feel that they need to retain their right to discriminate on the basis of nationality, which may be required to support their own industrial development. The existing national treatment obligations for WTO members relate to all laws and regulations that affect traded goods and scheduled services. The proposed agreement would modify it to extend the national treatment obligation for competition law to non-traded goods and non-scheduled services. There might also be an issue of national treatment being defined by ownership of firms rather than origin of goods. It is this issue that developing countries perceive would be more problematic.

Many of the existing WTO agreements already contain the procedural-fairness obligation. Due process does not require any given institutional structure. But in the competition context, one may presume that the decisions by CAs or courts must be well reasoned and published, and competition law must be applied in a non-discriminatory manner. However, this is another area for potential conflict. In many areas, competition cases are considered on a case-by-case basis and 'rule of reason' is applied where economic analysis plays an important role. But it is not uncommon for different analysts to come to different conclusions on the same case. Controversy, therefore, is inevitable.

The decade of the 1990s saw a considerable change in the priority given to competition law. In 1970, there were only about 20 countries with a competition law. About 40 jurisdictions adopted some type of competition law since 1990, taking the total number of jurisdictions with such laws to above 80. Although counts vary, all point to the fact that many countries have adopted competition laws for the first time. Also of interest is that about 75 percent of the 40 odd jurisdictions

were developing countries. A binding commitment at the WTO will distort this natural process. It may be noted that developing countries find it extremely difficult to implement competition law due to the lack of domestic constituencies for competition. They would probably find it even more difficult to implement if it were forced on them by the WTO.

Although a WTO agreement is proposed to cover hardcore cartels only, the principle of non-discrimination would apply on all other provisions, should a country have them. Indeed, countries that already have a competition law go much beyond that. Such an agreement can be a serious disincentive for developing countries that intend to enact a comprehensive competition law.

Most developing countries argued that the primary objective of both the EU and Japan behind bringing the issue of competition policy is to promote further market access. The EU, however, tried placating them by shifting its focus to hardcore cartels. However, many developing countries still believe that there has not been any change in the real intent. In fact, just a few days before the Cancun Ministerial, in an article in the Wall Street Journal, Pascal Lamy, the EU Commissioner for Trade, made a clean breast that all the new issues, including competition policy, are essentially to 'give effect to market opening'. The fact that the proposed elements for a competition agreement continue to remain the same implies that there has not been any change of substance. Their continued strong emphasis on non-discrimination as one of the core principles clearly shows that market access continues to be the primary objective.

It may be noted that one of the primary objectives of the WTO is to promote market access for its members. However, this has to be done in a fair and balanced manner. It must be ensured that developing countries gain equally, if not more, from any push to improve market access. The market access implications of private barriers are indeed the compelling reasons for bringing competition policy into the WTO (Fox 1999). What requires to be seen is whether a competition agreement can improve the terms of trade for developing countries, while not implying significant implementation costs at the same time (Hoekman & Mavroidis 2003).

It may also be noted that the core principles of the WTO were adopted to deal with border measures. There is a structural problem in taking the same set of principles into possible agreements on competition or investment, as these are not just border measures but will have serious implications for domestic policy as well. For example, the concept of special and differential treatment (S&DT) was brought into the WTO framework to deal with differing requirements of border measures corresponding to different levels of development. However, the same is not sufficient to take care of the varying needs of domestic practices such as competition law.

7.5.2 Cartels and Cooperation

From the perspective of developing countries, prevalence of international cartels is probably the most compelling ground for going for a multilateral agreement on competition. But the proponents of a competition agreement at the WTO, though heavily focussed on this issue in their argument, have not been able to come out with credible solutions. Their suggestion in this regard is 'voluntary cooperation' only, which is also envisaged to work on a bilateral basis. Undoubtedly, it is difficult to think of any better arrangement to tackle the problem at this stage. Indeed, as already examined, international cooperation can play a significant role in fostering an effective competition regime for tackling cross-border competition problems, particularly in developing countries. However, it is quite difficult to imagine how the WTO could act as an ideal forum for promoting 'constructive cooperation', given that it has been functioning as a dispute settlement body that adopts an 'adversarial approach'[9]. It may be worth mentioning here that under the aborted Havana Charter, the proposed ITO was not to adopt an adversarial approach to dispute settlement. Moreover, if cooperation is to work on a bilateral basis, then what is the point of bringing it into a multilateral forum like the WTO?

The proposal for a 'blanket ban' on cartels has also been questioned by many. Why should the WTO be interested in banning domestic cartels that do not have any significant cross-border impact? Competition *per se* will not necessarily ensure efficient outcomes, nor is it necessarily the case that agreements between firms in an industry that reduce competition between them are welfare reducing (Hoekman & Mavroidis 2003). In fact, it has been argued that a maximal degree of

competition is not optimal and that increasing economic growth requires a mix of cooperation and competition by firms. Analysis conducted by Amsden and Singh (1994) is noteworthy in this context. They observed – "In general, whether competition was promoted or restricted [in Japan] depended on the industry and its life cycle: in young industries, during the developmental phase, the government discouraged competition; when industries became technologically mature, competition was allowed to flourish. Later, when industries are in competitive decline, the government again discourages competition and attempts to bring about an orderly rationalisation of the industry."

It is also quite clear that due to the proposed ban on hardcore cartels, the import cartels will have to be disbanded. However, one is not sure whether developing countries will be able to protect themselves from the harms caused by export cartels and international cartels, as that will require cooperation of and strong action by developed countries, something not guaranteed in the proposed agreement. Ironically, the proponents have been focussing on international cartels while selling their proposals to developing countries. Import cartels that try to get better bargains from foreign exporters may be welfare enhancing, especially in developing countries where there is no production base in many sectors.

An effective and successful cooperation arrangement can be possible only when the parties involved mutually agree to it. However, at the WTO, the mutual trust is conspicuous by its absence and one group of countries is bent on forcing an agreement on another group. Moreover, the past experience in cooperation on competition has predominantly been a developed world phenomenon, although a few developing countries have entered into such agreements recently. Even within the developed world, international cooperation has worked mainly on merger control rather than cartels. It is argued that much of the evidence in cartel cases is very often collected through 'leniency programmes'[10] and hence cannot be shared with others.

Armed with a cooperation agreement with the US, Brazil decided to investigate the vitamins cartel. However, it could not proceed much as the cooperation received was far too less. In fact, it could hardly procure anything from the US authorities that was not publicly available. Thus, it is yet to prosecute the offenders, even as an estimate

puts the amount of overcharges in Brazil at US$ 183.37 million (Clarke & Evenett 2002).

7.5.3 Dispute Settlement

This is one area where there is much confusion and uncertainty about the proposed agreement. Proponents have tried to make others believe that the agreement would not come under the ambit of WTO dispute settlement mechanism. It has been proposed that there would be periodic peer reviews, which, to some extent, would bring discipline. However, doubts have been expressed whether the peer review system will be effective. There is apprehension that peer review will exert significant pressure on the smaller or developing countries, while letting the mighty developed countries rule the roost.

It is not quite clear if peer reviews will be limited to legal provisions only or include their enforcement as well. The ambiguity arises on account of the EU proposal that national competition laws would de jure need to be in conformity with the commitments that the WTO members make in the agreement and not *de facto*. Despite assurances from the EU, there is a feeling that once the agreement comes into being, it may be difficult to ignore enforcement issues in the peer reviews or any dispute settlement mechanism envisaged in the agreement. It has also been questioned if such de *jure-de facto* distinction would make any sense.

There is a view that since the core principles would be treated as binding rather than guiding in the context of the proposed agreement, it would automatically come under the dispute settlement mechanism. In fact, a recent submission by the EU has indicated that binding core principles imply that 'compliance with these principles is subject to dispute settlement'.

In sum, many developing countries believe that keeping this area in the proposed agreement vague is actually a ploy by the EU to lure them into the trap. If there were no dispute settlement mechanism, then the agreement would become simply irrelevant. Besides, such ambiguities can create major problems in the future. It might also overburden the existing dispute settlement mechanism at the WTO.

7.5.4 Existing Anomalies

The WTO has already brought a number of competition issues into its existing framework and, more often than not, these have restricted competition rather than promoting it, and consequently, put consumers at a disadvantage, particularly in developing countries. The most damaging aspect of the WTO agreement is the inclusion of IPRs in its framework, which is essentially about restricting trade and competition and guaranteeing big profits to MNCs of developed countries at the cost of consumers worldwide. TRIPS goes against the principle of trade liberalisation as it facilitates longer existence of limited monopolies. The current provision of a protection period of 20 years is too long and has no economic logic. This is definitely going to promote exploitative monopolies. The introduction of product patents may imply significant social costs due to higher prices charged for patented products, especially pharmaceuticals and agro -chemicals.

Indeed, TRIPS does not belong to the WTO. Prof. Jagdish Bhagwati has rightly observed "…TRIPS does not involve mutual gains; rather, it positions the WTO primarily as a collector of intellectual property-related rents on behalf of multinational corporations" (Mehta 2003). As a matter of fact, the case for a competition agreement is much stronger than that for TRIPS. This, however, does not imply that a competition agreement at the WTO is already overdue. Two wrongs do not make a right anyway!

The capacity of national governments to deal with the RBPs of MNCs was further eroded by the TRIMs Agreement. TRIMs could be used as a weapon to deal with some of the RBPs perpetrated by MNCs. For example, one can use a manufacturing requirement measure to prevent the practice of 'refusal to deal'. However, the TRIMs Agreement has outlawed some of the measures and therefore governments are left without many tools to tackle RBPs of MNCs (Puri & Brusick 1989).

Another area that needs a close look and a rethink from the competition angle is anti-dumping. Anti-dumping has been linked to cross-border predatory pricing, as mentioned earlier, and often actions for across-the-border predatory pricing are taken under anti-dumping laws. However, this provision of the WTO has been grossly misused by developed countries. In most cases, they are used not to protect and

promote competition, but simply as a protectionist measure. Initiations of anti-dumping investigations have steadily increased since 1995. About one-half of all investigations initiated by developed countries between 1995 and 1999 were targeted at developing countries, while 25 percent were targeted at other developed countries and 25 percent at transition economies (WTO 2001a). One would, however, imagine that firms from developed countries with their bigger size would be more able to monopolise the markets of developing countries through predatory dumping, rather than small firms from developing countries doing it in developed country markets.

7.5.5 Lack of Capacity

The issues related to competition policy and law are quite complex. In fact, it is recognised that even some developed countries do not have adequate capacity in this regard (Mavroidis & Neven 2001). Developing countries with no experience or very limited experience are not in a position to negotiate on competition policy at a forum like the WTO where stakes are very high. Neither are many of them in a position to implement competition law in an appropriate manner, whatever its form. For many, implementation of competition law will be similar to administering a high-risk drug by a quack!

Moreover, without adequate resources and capabilities, CAs would not be able to launch a comprehensive attack on prevailing anti-competitive practices, and hence they need to be selective in choosing cases. However, if they make international commitment in such a situation, they will end up choosing cases that will help foreign players rather than those helping the domestic economy.

It may also be noted that even though countries like India have a long experience of competition law, this may not be relevant in today's context or in that of a multilateral agreement. The basic objective of the competition law adopted in India in 1969 was to control monopolies where size, and not even the structure, was the most important factor. However, the new law, passed in December 2002, focuses entirely on conduct, thus, in fact, jumping a step. Obviously, India does not have any experience in implementing a modern competition law.

The Doha Ministerial Declaration states, "We recognise the needs of developing and least developed countries for enhanced support for technical assistance and capacity building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development." It also adds, "To this end, we shall work in cooperation with other relevant inter-governmental organisations, including UNCTAD, and through appropriate regional and bilateral channels, to provide strengthened and adequately resourced assistance to respond to these needs." (WTO 2001b)

The question is – Have these needs been adequately addressed? The answer is an emphatic 'no'. In the name of capacity building, only a few regional workshops have been organised by the WTO and UNCTAD. In these workshops, especially those organised by the WTO, resource persons have mostly been from developed countries and known for their pro-competition agreement leanings. Obviously, the exercises were meant to convince the participants of the benefits of a multilateral competition agreement rather than build their capacity in policy analysis and development so that they may better evaluate the implications of a multilateral competition agreement. Some bilateral donors have provided assistance in this regard, but that is too small compared to the huge needs. Clearly, the promise of capacity building and technical assistance made in the Doha Declaration has not been fulfilled. This broken promise alone can be a good excuse for not starting any negotiations on the issue in the near future.

7.6 Conclusion

Nobody can deny the need for a multilateral competition framework. On account of the fast pace of globalisation, cooperation among national CAs would be a key to the successful frustration of anti-competitive practices, especially those of cross-border nature. However, from the perspective of developing countries, the time is not yet ripe for a multilateral agreement, least of all at a forum like the WTO.

People also question whether the proposed agreement will have the desired effectiveness even if it is finally signed. First, because there is

no proposal to have binding global rules, and the proposed commitment for cooperation is only voluntary. Secondly, even if the agreement is signed, it will be an outcome of power politics and may lack the mutual trust among nations that is the primary requirement for meaningful cooperation to tackle cross-border competition issues.

Other forums or initiatives to promote international cooperation on competition should be strengthened or launched instead of pushing for a competition agreement at the WTO. As we have seen before, there is no dearth of existing forums at the multilateral level. However, there is a need to make them more effective. Given that there are a number of forums at the global level, proper coordination among them is essential. Failure to do so may create confusion and may even add to the problems surrounding competition issues with international dimensions. It may be noted that multiple forums are not necessarily bad, as, collectively, they might bring a balance in the system.

Regional competition regimes will only focus on those cases in which anti-competitive practices have a regional dimension. Hence, member countries should also consider adopting a national competition law as early as possible. Developed countries and inter-governmental organisations should provide generous assistance to these countries in drafting domestic competition legislation and related implementation legislation in developing countries, and strengthen the capacity of CAs where these already exist.

It must be kept in mind that the existing agreements at the WTO, though unequal and unfair to developing and least developed countries in many respects, can also protect their interests in many ways. However, developing countries are not able to take full advantage of such provisions due to their weak capabilities. They lack the expertise and resources to challenge trade policies and measures of industrialised countries that harm their export interests, even if those policies are in violation of the commitments made at the WTO. They are also not able to defend themselves effectively against complaints against them due to their lack of access to expert lawyers who could argue their case. Thus, signing a multilateral agreement on competition will not serve any purpose for developing countries, even if developed countries generously take care of their interests, unless their capacity is built first.

As of now, countries should promote cooperation on competition issues through bilateral means as well as regional and other multilateral forums. A limited agreement on competition, involving market access issues, may be negotiated but only at a later date when there is an 'explicit consensus'. Meanwhile, the WTO should continue to discuss the issue in its working group to clarify things. It should also review and modify the existing agreements like TRIPS, TRIMs and anti-dumping that have anti-competitive impacts.

Endnotes

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[2] This categorisation is borrowed from "Special Study on Trade and Competition Policy" as included in Chapter Four of WTO Annual Report for 1997.

[3] South Korea has also successfully busted some cartels. However, for the purpose of this paper it is not considered as a developing country even though it is recognised as one as per WTO classification. South Korea is now a member of the OECD and can reasonably be called a developed country.

[4] As declared by the US Supreme Court in the famous Alcoa case (United States v. Aluminium Co. of America, 148 F.2nd 416, 1945), "any state may impose liabilities, even upon persons not within its allegiance, for the conduct outside its borders that has consequences within its borders which the state reprehends". This principle has come to be known as "effects doctrine".

[5] Alkali Manufacturers Association of India, (2000).

[6] Discussions in this section and the succeeding one draw heavily from CUTS (2003b), a briefing paper on "The Role of International Cooperation in Building an Effective Competition Regimes in Developing Countries", written by the author.

[7] According to OECD (1999), positive comity means, "the principle that a country should:

> (i) give full and sympathetic consideration to another country's request that it open or expand a law enforcement proceeding in order to remedy conduct in its territory that is substantially and adversely affecting another country's interest, and
>
> (ii) take whatever remedial action it deems appropriate on a voluntary basis and in considering its legitimate interests"

[8] Negative comity means, "that each party will at all stage in its enforcement activities, take into account the important interests of the other party."

[9] A procedural approach, such as in the Anglo-American legal system, involving active and unhindered parties contesting with each other to put forth a case before an independent decision-maker.

[10] Under leniency programme if one of the conspirators come forward to provide significant information leading to prosecution then it is treated with leniency.

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Chapter - VIII

Doha Round and Environmental Issues

James J Nedumpara

8.1 Introduction

Environmental issues lie at the heart of the multilateral trading system. They have been controversial even since the days of General Agreement on Tariffs and Trade (GATT). Although the World Trade Organisation (WTO) has no specific agreement that deals exclusively with the environment, a number of WTO agreements include provisions related to environmental concerns. Even the Preamble to the Agreement Establishing the World Trade Organisation includes objectives of sustainable development and environmental protection. Outside the WTO, there are more than 200 international agreements referred to as multilateral environmental agreements (MEAs) that are currently in force. These agreements relate to various environmental issues. Some 20 odd MEAs contain specific trade provisions.

Issues relating to sustainable development, trade and environment have been discussed in the GATT and the WTO for many years. The Committee on Trade and Environment (CTE) was created following the adoption of the 1994 Ministerial Decision on Trade and Environment. CTE is open to all members of the WTO. Besides, a number of inter-governmental organisations have observer status in its meetings. The mandate of CTE is to identify the relationship between trade and environmental measures in order to promote sustainable development and make appropriate recommendations on whether any modifications in the provisions of the multilateral trading system are required.

8.2 Procedure for Negotiations

At the Doha Ministerial, members of the WTO undertook open negotiations on certain aspects relating to the linkages between issues

on trade and environment. Although several developing countries and the United States (US) were very reluctant to include the issue under the Ministerial Declaration, the European Union (EU), Japan, Switzerland and Norway pressed for its inclusion. Ultimately, a decision was taken at Doha to have a mandate for negotiations on a limited number of issues. Paragraph 51 of the Doha Ministerial Declaration states that the Committee on Trade and Development (CTD) and CTE shall: "*Within their respective mandates, each act as a forum to identify and debate developmental and environmental aspects of the negotiations, in order to help achieve the objective of having sustainable development appropriately reflected.*"

Negotiations were carried out principally in special sessions of CTE, pursuant to a decision taken by the Trade Negotiation Committee (TNC) at its first meeting on 1 February 2002. The committee was mandated to submit a report on the results of the negotiations to the TNC at Cancun in September 2003. These issues are a part of the Doha Round single undertaking, with a negotiating deadline of 1 January 2005.

8.3 Relationship between MEAs and Existing WTO Rules

The Doha Declaration spells out a relatively narrow set of issues for the ongoing negotiations. Paragraph 32 provides for actual negotiations on three topics: (i) the relationship between existing WTO rules and specific trade obligations set out in MEAs, with the caveat that negotiations will be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question and the negotiations will not prejudice the WTO rights of any member that is not party to the MEA in question; (ii) procedures for regular information exchanges between the WTO and the secretariats of MEAs; and (iii) reducing tariff and non-tariff barriers (NTBs) to environmental goods and services. Of the three negotiating topics, the linkage between MEA trade obligations and WTO rules is clearly the most controversial one, and the most likely to spark continued debate.

Paragraph 32 of the Declaration establishes an agenda of topics for possible future negotiations. It instructs CTE to pursue work on all items on its existing work programme but with a particular focus on

three issues: (i) the effect of environmental measures on market access, especially for developing countries; (ii) relevant provisions of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS); and (iii) trade issues surrounding environmental labelling requirements.

In addressing the three main areas, a part of CTE's mission is to identify the WTO rules that may require clarification. CTE was directed to report to the fifth Ministerial with recommendations for future action on these subjects, including recommendations on the desirability of negotiations on these topics. Accordingly, CTE submitted its report to the Cancun Ministerial (WTO 2003a).

Pursuant to the Doha Declaration, special sessions of CTE were held focussing principally on clarifying the relationship between multilateral trade and environment regimes, with related discussions of information exchanges between WTO committees and MEA secretariats. In addition, there have been CTE discussions about liberalisation of trade in environmental goods and services.

The discussions in CTE were particularly active. Several proposals and discussion papers were tabled in the special sessions. They include an Australian proposal for a three-phase approach to MEA negotiations (WTO 2002a). It was widely supported by, among others, the US, Chile, Hong Kong, New Zealand, Pakistan, Canada and India. Australia suggested that the first phase should aim to clarify: (a) specific trade obligations (STOs) in MEAs; and (b) the WTO rules that are relevant to these obligations. The second phase would involve seeking information from MEA secretariats regarding the specific trade provisions of those agreements and WTO members' real-world experiences in implementing them. The third phase would be to base negotiations on the information collected during the first and second phases.

More substantive and analytical discussion papers were submitted by Argentina, the EU and Switzerland. The papers focused primarily on the terminology in the Declaration's mandate. Argentina, for example, noted that the Declaration terminology of STOs of MEAs is narrower than MEA 'trade measures' that have been the subject of CTE discussions to date. The EU paper, closely echoed by Switzerland, suggests categories for classifying such obligations. These members

argue that to qualify as an STO, the provision must be both mandatory and specific. An example could involve the provisions in the Convention on International Trade in Endangered Species (CITES) under which trade in species threatened with extinction is permitted only in exceptional circumstances.

The papers submitted by Argentina and the EU indicate a divergence of opinion. Argentina suggests that members not party to a given MEA will be completely unaffected by the MEA or these negotiations. The EU maintains that MEAs and any new rules emerging from the WTO negotiations will be relevant to MEA non-parties because, *inter alia*, they will be relied upon in interpreting Article XX exceptions.

The submission made by Switzerland also included a procedural recommendation (WTO 2002b). It suggested that members focus on negotiating an 'interpretative decision' with regard to the link between the existing WTO rules and STOs of MEAs, as opposed to incorporating an MEA clause into Article XX or relying on case-by-case resolution of the MEA-WTO question in dispute settlement unit (DSU) proceedings. India and the US sounded notes of caution, stating that there is no need to hasten into any decision of this kind at this time.

The discussions have resulted in compiling an updated matrix of STO pursuant to 14 MEAs, which have been put together by the WTO Secretariat. There appears to be some convergence on an analysis of STO in at least six MEAs, out of which three have entered into force, i.e., the Rotterdam Convention on Prior Informed Consent Procedures for Certain Hazardous Chemicals and Pesticides, the Stockholm Convention on Persistent Organic Pollutants and the Biosafety Protocol to the Convention on Biological Diversity (CBD).

On information exchanges with MEA secretariats and observer status as required under Paragraph 31 (ii) of the Doha Declaration, the US and other members drew attention to the already substantial information exchange mechanisms in place between WTO Secretariat, United Nations Environment Programme (UNEP) and MEA secretariats. A US submission focused on possible concrete actions to improve coordination. Several delegations argued that the most direct and effective way of ensuring coherence between trade and environmental policies was to start at the national level. Although there

was suggestion that MEA secretariats be formally invited to attend CTE special sessions, no decision was reached on this issue.

Concerning paragraph 31(iii) on eliminating barriers for environmental goods and services, an understanding was reached among members in early 2002. As per the understanding, negotiations on environmental goods and services would be conducted in the Council for Trade in Services (CTS) special session and the Negotiating Group on Market Access for Non-agricultural Products respectively. However, CTE special sessions have continued to examine the scope and definitional aspects of environmental goods, on which a consensus is yet to emerge.

8.4 Eco-labelling

CTE was, *inter alia*, given a mandate to undertake work on labelling requirements for environmental purposes and make recommendations to the 1996 WTO Ministerial. A major part of CTE's work under this item involved examination and analysis of voluntary eco-labelling schemes, including those based on life cycle analysis (LCA) and their relationship to the WTO provisions, in particular the Agreement on Technical Barriers to Trade (TBT). Members including the EU, Switzerland and Canada, have argued that eco-labels that involve non-product related process and production methods (PPMs) are covered by the TBT Agreement and such eco-labelling schemes are not *per se* a violation of the WTO rules. This point of view was strongly opposed by developing countries. They argued that the negotiating history of the TBT Agreement indicates clearly that there was no intention of legitimising the use of measures based on non-product related PPMs under the TBT Agreement. These underlying differences, which surfaced even prior to the Singapore Ministerial in 1996, still remain.

After the Singapore Ministerial, the debate on eco-labelling in CTE as well as the TBT committee has not made any substantial progress. The grounds, either in support or against eco-labelling, also have not undergone major changes. However, increased production of genetically modified (GM) crops in some of the member countries, such as the US, Canada, Argentina, etc., has made this issue very topical and increasingly sensitive. The EU has been the main proponent of eco-labeling and has made a number of submissions in CTE and the

TBT committee on labelling (WTO 2000; WTO 2003b). The EU in its submission to CTE in March 2003 focused on voluntary eco-labelling schemes based on LCA (WTO 2002c). In this submission, the EU proposed further work, *inter alia*, with regard to the following:

- The use of voluntary eco-labelling schemes based on a life-cycle approach is legitimate within the rights and obligations of the WTO agreements.
- Providing technical assistance to developing countries.
- Those using such schemes should, to the extent possible, be encouraged to reflect the principles of the TBT Code of Good Practice (CGP).

If LCA based voluntary eco-labels were to be considered as legitimate within the rights and obligations of the TBT Agreement as proposed by the EU, they should be treated as 'standard' as defined in Annex 1 of the TBT Agreement. Although members such as Switzerland and Norway have supported this proposal, it faced stiff opposition from the US, which is the largest exporter of GM food and has major concerns about mandatory eco-labelling. Developing countries have always been opposed to inclusion of non-product related PPM criteria in the WTO, including in the definitions of 'technical regulation' and 'standard' as they would affect their export of both agricultural and industrial products. It was, therefore, argued on their behalf that LCA based eco-labelling schemes are neither covered, nor should they be brought within the purview of the TBT Agreement.

In June 2003, in the run-up to the Cancun Ministerial, the EU made a proposal for a decision at the Ministerial on voluntary eco-labelling schemes, particularly those based on LCA. The EU subsequently deleted reference to LCA in its proposal. The European Commission (EC) gave a revised proposal on 19 August 2003 that read: "*Recognising the work done by the TBT committee, and with the aim of fostering trade in environmentally friendly products, in particular those originating in developing countries, we instruct the Committees on Trade and Environment and on Technical Barriers to Trade to hold jointly, and before the end of 2004, three "dedicated sessions" on voluntary eco-labelling schemes. Recommendations for further action shall be made, as appropriate, to the next Ministerial...*"(WTO 2003d)

This revised EC proposal, though much shorter, was essentially the same as its earlier proposal. Voluntary eco-labelling schemes are mostly based on LCA. Thus, LCA based eco-labelling schemes, though not specifically referred to, were included in the revised proposal from the EU. This proposal was discussed in the meetings convened by the facilitator on behalf of the chairman of the General Council (GC). This proposal was strongly opposed by the US, the Cairns group and developing countries. The facilitator was of the view that there was strong opposition on this proposal and he did not foresee the possibility of convergence of view on this issue. Thus, the EU proposal on eco-labelling was not included in the draft text forwarded by the chairman to the Cancun Ministerial. Therefore, it should be presumed that the debate that started in the GATT on PPMs following the *Tuna-Dolphin* case still appears to be elusive and controversial.

8.5 Conclusion

The environmental issues included in the Doha Development Round are important, but not the most pressing from the negotiating point of view. Most of the issues under discussions have been at the root of controversy for a long time and may require lengthier discussions. To that extent, the discussions in CTE have succeeded in eliciting a broad spectrum of opinion. However, if negotiations were to be taken to its logical end, it requires a fair amount of sensitivity to the concerns of those countries that will be the most affected.

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Chapter - IX

Trade Facilitation: Assessing Nepal's Status in Current International Trade Practices[1]

Prof. Bishwambher Pyakhuryal

9.1 Introduction

In a competitive global market, movement of goods and services from one place to another must be ensured rapidly, efficiently and safely. From this perspective, if one defines free trade as a situation where the movement of goods across a national frontier is no more costly than the movement of the same good over the same distance within a single country, internationally traded goods should not be at competitive disadvantage to domestically traded goods. This needs procedural simplification.

Removing procedural obstacles to international trade by rationalising border controls at customs, standards, quarantine regulations, immigration-related procedures, etc., and designing a methodology to correctly address these procedural impediments could go a long way in simplifying and harmonising international trade. This, in fact, can be termed as trade facilitation. In trade facilitation, a major aim is also to ensure a continued flow of information on the complexities of trade procedures to exporters and importers to better prepare them to comply with trade rules.

9.2 Need to Develop Trade Facilitation Methodology

Import and export procedures tend to work as non-tariff barriers (NTBs) to trade. Compliance with procedural requirements costs between two percent and 10 percent of overall transaction costs, according to estimates made by United Nations Conference on Trade

and Development (UNCTAD) and others.[2] Costs to business from procedural complications could go as high as US$ 70 billion[3]. It necessitates action for simplifying, harmonising and automating procedures by improving pre-shipment, customs inspection and licensing rules. The call for such action is mainly to reduce costs for especially small and medium-sized traders and ensure higher revenue intakes to governments. Developing countries do not agree to negotiate binding rules. They are, however, taking measures to improve and enhance trade infrastructures to facilitate trade, according to their own priorities and resources. Developing countries do not appreciate the mandatory compliance of standards suggested by developed countries as part of a single undertaking. They fear such approach would eliminate the reality of resource constraints and crowd out the welfare and development priorities of developing countries.

To sustain trade-based development processes, trade facilitation measures are advocated, where efforts in reducing transaction cost are made and integration of developing countries in global trade is ensured. Trade facilitation demands a comprehensive effort to link governance and infrastructure with customs procedures. A piecemeal effort to reduce and rationalise trade procedures did not help much to achieve goals of facilitation in the past. Therefore, competent staff, good management system, sound legal and regulatory measures and high-level infrastructure should accompany a coherent strategy for customs reform.

9.3 Expectation from Trade Facilitation Initiatives

South Asia accounts for only one percent of world trade. There are various factors, such as NTBs that limit free movement of goods across borders. This situation may hinder the realisation of full potential of free trade. Experiences have revealed that inadequate investment in transportation system and lack of harmonisation of technical standards, customs documentation and procedures have significantly impeded trade facilitation initiative. Therefore, there is a need to examine the problems experienced by key commodity movements within South Asia in particular and across borders in general, so as to identify bottlenecks and constraints for trade facilitation. Identification of proper methodology can be expected to facilitate trade in South Asia.

Trade facilitation supports the possibility of increasing regional cooperation. The checklist of issues raised during the World Trade Organisation (WTO) trade facilitation symposium in 1998 reveals that non-harmonised and unnecessary document requirements in some countries increase paper work four-folds. Besides, waiting time in the border accounts up to 20 percent of total transport time and up to 25 percent of total transport costs. Therefore, export-led economic growth for poverty alleviation necessitates the reduction of all potential impediments hindering export competitiveness. Full potential of economic growth of South Asian nations, especially the landlocked countries, cannot be realised without the development of efficient and effective trade facilitation mechanisms. It has been proved that trade facilitation in liberalised global regime intends to promote supply chain linkages and reduce NTBs to trade. This can be done through the simplification, harmonisation, automation and speeding up of the international flow of goods and trade information.

International trade discussion has undergone significant changes as the security emphasis has shifted from 'threats to trade' to 'threats from trade'. There has been a growth in regional blocks to address the problems of respective economies for avoiding additional burden created through the inclusion of new issues in international trading system. From this perspective, the intellectual debates to develop appropriate methodologies and remedial implementation modalities for identifying trade facilitation problems are commendable.

9.4 Organisation of the Paper

Trade and Industry Division of the United Nations Economic and Social Commission for the Asia and the Pacific (UNESCAP) has conducted a study on "Proposed Step-by-Step Methodology to Identify Problems related to Trade Facilitation and Implementation of Remedial Action"[4] for the Asia and the Pacific region. The proposed methodology intends to guide governments in identifying the problems and bottlenecks within a country's trade facilitation system and to come up with remedial action by addressing major aspects of international trade transaction. In recognition to the trade facilitation impediments such as any policy, regulations, practices or procedural measures resulting from delays and bottlenecks in the movement of goods; complex and complicated trade regulations and procedures; and higher

transaction costs for the movement of goods and services in and out of the country, the objective of the present paper is to summarise the status of Nepal's trade facilitation initiatives on the basis of eight logical step-by-step methodology as proposed by the UNESCAP funded study. The reason step-by-step methodology is considered because the author was also involved as one of the experts to review the proposed methodology for UNESCAP.

9.5 Trade Facilitation Initiatives

It is widely recognised that improvements in six areas, namely customs, transport, banking and insurance, information for trade, business practices and telecommunications can help increase trade efficiency and hence facilitate trade as well. Adoption of trade efficiency measures in these areas can significantly lower costs of trade transactions at 7-10 percent of the total value of world's trade.

Studies are conducted to develop strategies for enhancing competitiveness by exploring the reasons for institutional and physical obstacles to trade, transport and telecommunications. Focused areas for consideration in the World Bank's initiative on Trade and Transport Facilitation Project for south eastern Europe include: the collection of indicators at major border crossing points to measure performance in accordance with established methodology; support for public-private dialogue on trade facilitation; and improving information mechanisms regarding procedures, regulations and laws affecting transport and trade by using new technologies.

Studies also reveal various economic advantages gained from e-commerce in trade management and trade facilitation covering national, industry and enterprise level experiences from several countries. It is important to identify investment costs and benefits at various levels and discuss efficiency, barriers and solutions to overcome trade facilitation problems by emphasising on e-commerce and design and application of electronic data interchange (EDI) standards. A survey conducted by Asia Pacific Economic Cooperation's (APEC) Business Advisory Council revealed that trade facilitation issue was among the most important trade impediments in the region. Particularly, customs procedures were ranked as the most important trade impediment among 10 major categories surveyed. International

trade transactions should be made cost and time efficient. Simplification of trade and transport procedures is desired to make such transactions as a one-stage uninterrupted operation.

The major problem faced by trade facilitation is the absence of measures that determine clear-cut responsibilities and effective coordinative structures. A suggestion was, therefore, made to design trade facilitation rules as part of the global system during the inter-agency meeting of UNCTAD on trade facilitation held on 5 April 2002. In the event of likely agreement on a global compulsory legal environment for worldwide trade facilitation, the continuation of existing prescriptive rule rather than a mandatory nature may not be acceptable for long time.

Over the years, UNCTAD has developed several trade facilitation documents including technical assistance (TA) projects. The work include: legal aspects of international transport; use of information technology (IT) in transport operations; development of a trade facilitation handbook; development of new versions of the Advanced Cargo Information System (ACIS) and Automated System of Customs Data (ASYCUDA) software; convening of groups of experts on e commerce and international transport services and on trade facilitation; and follow-up of TA proposal on trade facilitation in the post-Doha context[5].

UNCTAD's TA to landlocked developing countries and their transit neighbours started since the mid-1970s. Multi-modal Transit and Trade Facilitation Project (MTTFP) is noteworthy. MTTFP adopts commercial practices to international standards to remove unnecessary trade barriers. Three main actors – the government, service providers and traders – are involved in trade and transport sector. Proper consultation mechanism between these players can yield positive result.

UNCTAD's study during the mid-1980s in developing countries identified physical and non-physical obstacles to trade. It recommended the need to monitor cargo movements, which gave birth to ACIS, a computer-based system that can track transport equipment and cargo with UNCTAD-developed high-powered software.

ASYCUDA assists in the modernisation and automation of customs processed procedures. Major activities include customs clearance of

imported or exported goods, revenue collection, fraud struggling and the provision of statistical trade data for government analysis and planning. ASYCUDA takes into account international codes and standards established by International Organisation for Standardisation (ISO), World Customs Organisation (WCO) and the United Nations (UN).

UNESCAP has organised several workshops and has developed a training manual on trade facilitation. Likewise, the International Monetary Fund's (IMF) trade related TA programme for the period 2001-2003 covers three areas: customs administration; tax and customs administration; and tax and customs policy. United Nations Industrial Development Organisation's (UNIDO) work for rapid access to international markets was basically on industrial products standardisation with an aim to establishing agreed levels of quality for traded goods. The Global Facilitation Partnership for Transportation and Trade (GFPTT) was one of the World Bank's key initiatives for trade facilitation. A corresponding methodology "Trade and Transport Facilitation: A toolkit for Audit, Analysis and Remedial Action" was published in December 2001. The International Labour Organisation's (ILO) Port Worker Development Programme offers systems and procedures for container handling with the objective of improving the overall efficiency of trade flow. There are innumerable works published in trade facilitation. The major concerns of less developed economies are their documentation, dissemination and implementation. Urgent thought is needed to elaborate on steps following the implementation of trade facilitation initiatives. The review of trade facilitation work is, however, not exhaustive. It is a sample case that merely intends to highlight the commonalities in the procedures for removing trade impediments as proposed by selected international organisations.

9.6 A Review of Nepal's Trade Facilitation Initiatives

Trade and transit cost in Nepal is at the higher side. The Nepalese government sought to bring efficiency in the operation of external trade of the country by streamlining transit transport, trade facilitation and trade logistics. In this regard, Nepal is implementing the World Bank financed US$ 28.5 million Nepal Multi-modal Transit and Trade Facilitation Project (NMTTFP) (MoICS 2002). NMTTFP in its March

2003 progress report states seven objectives under the trade facilitation component. These objectives include:

- improve Nepal's transit transport operations;
- implement trade facilitation measures;
- modernise transport-related legislation;
- prepare an express procedure for transit of containerised cargo by rail;
- establish a technical team;
- promote benefits of multi-modal transport concept on the Nepal/Calcutta corridor; and
- offer standard carrier insurance policies to road haulage industry.

The success of the project will depend on the realisation of an efficient and uninterrupted railway movement, exchange of cargo information between gateway port and Inland Container Depots (ICDs), creation of legal regime for road and rail mode of transport, and the introduction of multi-modal transport system.

Therefore, NMTTFP intends to develop ICDs for facilitating the inter-modal transfer of goods combined with measures of introducing multi-modal transport system. The road based ICDs in Biratnagar and Bhairahawa and rail linked ICD at Birgunj have been completed. Operation of ICD at Birgunj started in July 2004.

UNCTAD assisted components of trade facilitation measures including customs reforms and modernisation with the introduction of ASYCUDA and the implementation of ACIS are noteworthy initiatives. These activities have yet to be consolidated and integrated within the relevant national institutions.

Nepal's trade policy is inextricably linked with India mainly due to two reasons. First, a high proportion of Nepal's foreign trade is with India. Secondly, a significant quantity of Nepalese goods exported to overseas market is done through the Kolkata port. Nepal's dependence on India is higher than the dependence of other landlocked countries of their transit neighbours. Unlike in the case of Nepal, other landlocked

economies are found to depend on more than one transit country to gain access to port facilities.

It is estimated that Nepal's transit cost for exports is about 15 percent of the export value. Nepal has to transport about 90 percent of its third country bound export via road through almost three states and several municipalities in India. The distance of the nearest seaport in India is about 700 kilometres from Nepal, which significantly decreases export competitiveness and weakens nation's export-led growth strategy. The problem is compounded by the meagre information available on customs, transportation, insurance, telecommunications and other business related sectors.[6] Therefore, lack of simplified cargo-customs procedures, including transit has significantly increased transaction costs. There is also a problem in effectively implementing legal and regulatory policies in the absence of a well-developed trade facilitation institutional structure.

The cost has become substantially higher because there is no direct control over port charges, road tolls, and freight forwarding or brokerage fees applicable in the transit country. Nepal's alternative routes to the sea through Bangladesh or Tibet are not feasible for large freight movements. A proper analysis of overall economic costs is important to enhance Nepal's negotiating leverage. Nepal Trade and Competitiveness Study (NTCS) (World Bank 2003) reveals important findings on estimated cost between land routes and railroad. The cost of sending an equivalent of a 20-foot container of freight by road from the port of Kolkata, India to Birgunj, Nepal is about US$ 650. The cost by rail from Kolkata to Raxaul near Birgunj range between US$ 325 to US$ 430. Additional transport cost of US$ 325 is incurred from Birgunj to Kathmandu indicating the fact that the transfer from road to rail would comprise a saving of 22-33 percent and ultimately would contribute to an annual savings of approximately US$ 5 million. Travel time can also be reduced from 10 to three days by lowering down transit cost from 12-15 percent of the value of the freight to about 8-10 percent of the value.

It is argued that container terminals at Mumbai can provide direct sailing to European or other destinations by avoiding trans-shipment at Singapore. This can reduce transit costs by about US$ 400 per 20-foot-equivalent unit. Therefore, TA should be sought in conducting study on Mumbai-Birgunj corridor as an alternative port for increasing the level of competitiveness.

9.7 Status of Nepal's Trade Facilitation Initiatives in Terms of Step-by-Step Methodology

9.7.1 Institutional Structure for Trade Facilitation

Stage 1 recommends to designate and manage a lead agency comprising of government and private sector players to work on the common objectives of trade facilitation. In Nepal, a Trade Facilitation Cell (TFC) called 'Domestic Trade Infrastructure Development and Trade Related International Organisation Division' (DTIDTIOD) is established under the International Trade Division of the Ministry of Industry, Commerce and Supplies (MoICS). This division works as a secretariat of the National Trade and Transport Facilitation Committee (NTTFC). NTTFC also works as Trade Facilitation Advisory Committee, which is headed by the secretary, MoICS. Altogether 18 individuals are members to this committee. The members include representatives from MoICS, Ministry of Finance (MoF), Ministry of Labour and Transport Management, Department of Customs, Nepal Rastra Bank (NRB), Nepal Transit and Warehousing Company Limited, Federation of Nepalese Chambers of Commerce and Industry (FNCCI), Nepal Chamber of Commerce (NCC), Nepal Freight Forwarders Association, Nepal Banker's Association, Nepal Insurer's Association, Trade Promotion Centre, Handicrafts Association of Nepal, Central Carpet Industries Association, Goods Carriers Association and NMTTFP. Sub-committees on insurance, transport law and trade facilitation have been constituted. There have been discussions to establish a container freight station in the special economic zone (SEZ) to facilitate trading activities.

9.7.2 Collect Feedback from Industry Players

On the basis of private sector involvement, Stage 2 admits that the lead agency could identify key issues in trade facilitation with an insight into the on-the-ground perspective. Some visible problems exist in customs clearance. The proximity between customs house and dock area sometimes contributes to prolonging the processing time for transit of goods. Difficulties in non-compliance of cargo transit document at transit country customs are observed. Policies should be designed to overcome logistically cumbersome and time-consuming delays.

Normally, bill of landing, invoice, packing list, and a copy of the letter of credit is required, but customs administrations cause unnecessary bureaucratic delays.

In Nepal, UNCTAD consultants have completed various works as suggested by the proposed methodology on the basis of United Nations Layout Key (UNLK) to simplify import and export procedures and identify problematic trade facilitation issues. Focused group discussion with relevant stakeholders can help properly identify categorical problems. Measurable indicators should address unresolved issues of the landlocked countries which have bilateral trade treaties.

9.7.3 Revise Trade and Customs Laws and Regulations

Stage 3 recommends reviewing and revising customs-related laws and regulations to meet the requirements of current international trade. In order to do so, Nepal has so far completed the first draft of four different Acts that provide clear-cut modalities for harmonising and regulating trading activities. The major objective is to modernise and improve Nepal's liability regimes in terms of carriage of land and multi-modal transport. Drafts of Multi-modal Transport Act (MTA) including rail and road legislation have been completed. The fifth draft of Marine Insurance Legislation (MIL) has been completed and forwarded to the National Insurance Board (NIB).

Nepal's trade regime in the context of economic liberalisation and globalisation has drastically changed necessitating the review of trade related laws for complying with international obligations. MoICS is working on them. Customs Act is being reviewed and valuation procedures modernised. To minimise the burden of physical verification, selectivity and risk management modules are being completed. An online direct trader input module is in progress. Nepal needs to amend at least 40 to 45 legislation while reviewing bilateral, regional and multilateral agreements on trade, transport and transit. Several new legislation need to be enacted as well.

UNCTAD is providing support in designing national measures related to trade and transport facilitation regulatory framework and human resource development (HRD). The consultancy services are being provided in the areas of: i) Multi-modal transport and trade facilitation;

ii) phase II customs reforms and modernisation under ASYCUDA; and iii) ACIS for cargo tracking. These activities are expected to help in streamlining trade related documents and procedures, increasing efficiency in customs clearance process, improving revenue control, installing a mechanism for production of high quality customs and trade statistics, providing predictable service in cargo handling and efficient management through information system of cargo tracking. This may help integrate Nepalese trade into world trade.

9.7.4 Simplify, Standardise and Harmonise Trade and Customs Procedures

Trade documents and customs procedures are integral part of trade facilitation. These procedures should be simplified and rationalised to facilitate international trade. A technical committee under DTIDTIOD should be entrusted to facilitate trade under a 'one window system'. The existing Customs Act and other accompanying rules need to be revisited in terms of Kyoto Convention. Immediate work needs to be done on the post-clearance verification and audit, automation of customs procedures, and targeting of goods for inspection using selectivity criteria.

Nepal faces big problem in the simplification, harmonisation and rationalisation of trade documentation and customs procedures. Currently during import, five or six copies of altogether 17 documents have to be completed carrying more than 100 signatures. Export faces a more or less similar problem. It is being alleged that private sector organisations such as FNCCI and NCC influence customs authorities to make 'certificate of origin' (COO) mandatory even on those products where it is unnecessary under international trade practice. Such unhealthy practices need to be restricted and alternative measures for generating resources to these organisations explored.

ASYCUDA, ACIS and Border Pass Monitoring System (BPMS) are being used to check, scrutinise and clear goods. So as to simplify application of import and export licenses, Nepal imposes licensing requirements for only negative list items.

9.7.5 Implement Effective Trade and Customs Procedures

Customs authorities confront two pronged problems. They need to facilitate trade as well as ensure compliance of trade and customs regulations. Facilitation and compliance are possible when existing measures are forcefully implemented. Nepal's ACIS and ASYCUDA initiatives are well structured but need greater effort and efficient mechanism for their implementation. Such enforcement may also help generate information on new changes and trade statistics.

Pre-inspection and post audit programmes for risk management, pre-submission of documents to pre-select cargo consignment for inspection and system for pre-payment duties need to be developed. Besides, physical inspection of cargo is not done in an efficient manner. The setting up of juxtaposed customs offices may be justified to facilitate faster and cost effective border trade.

9.7.6 Disseminate Information Effectively

Trade and customs regulations need to be changed in relation to the changing international trade environment. Trading partners under a bilateral free trade agreement (FTA) require specific rules of origin (ROO) for levying preferential tariff on imports. Nepal has a long way to go in conducting information and training needs assessment for traders and government agencies to properly understand trade facilitation requirements.

9.7.7 Apply Information and Communication Technology

An efficient information and communication technology (ICT) is needed for automating trade and customs procedures. Some preliminary work has been done in this regard. However, there is no legislation for doing businesses electronically. Least developed countries (LDCs) in general lack cyber laws. The private sector is not sufficiently developed to cash the benefits of e-commerce for trade either. The government should take the role of a leader to facilitate entrepreneurship and education to help different stakeholders take the benefit of latest technologies by avoiding intermediary steps.

9.7.8 Review and Assess Results

A successful review and assessment of implementation results may result into significant benefit to the private sector in saving time and cost. The government may also be able to generate revenue yields. The reason for regular review is to find out whether the recommended solutions need to be changed or enhanced or upgraded for better results. Since the lead agency, namely DTIDTIOD, is in its infancy, and the task is beyond the capacity of the government's existing state machinery, proposals for TA should be developed.

The above-mentioned steps are merely an inventory to consider selected methods for trade facilitation. The addition and deletion of recommended stages can be done on the basis of country-specific needs and global trade requirements.

9.8 Potential Areas for TA

On the basis of the aforementioned review of constraints and opportunities, there is a huge scope for TA. The progress report of NMTTFP has brought out cross-cutting issues in the trade facilitation regime. On the basis of Nepal's experiences in the current trade facilitation efforts and the changed regime in the context of its accession to the WTO, selected areas for TA can be identified as follows:

- TA in harmonising documents and procedures.
- TA in the development of domestic market through transport infrastructure and network.
- TA for customs to improve its ability to enforce laws and rules especially by reorganising structure and modernising procedures.
- TA in reviewing bilateral, regional and multilateral agreements on trade, transport and transit.
- TA for post-clearance verification and audit, automation of customs procedures, and targeting of goods for inspection using selectivity criteria.

- TA in removing physical barriers such as inadequate port facilities and rail or road infrastructure, poor transport equipment, insufficient telecommunications and so forth.
- TA for cooperation between border customs by complying with international trade practices in cross-border terrorism.
- TA for creating transparent and easily accessible database of import and export requirements and application of modern customs techniques of pre-arrival processing, post-release controls, audit methods, and green channel facilities for authorised traders based on the WCO Kyoto Convention.

9.9 Conclusion

The average annual growth of trade is in an increasing trend in LDCs. However, their share in total world trade is negligible. There is a need to explore measures to increase trade. For smooth movement of goods and services, impediments to trade have to be identified with appropriate remedial action, preferably with a measurable indicator that may help governments to properly develop trade facilitation systems. Trade facilitation measures in this regard should adequately elaborate trade hassles and specific position of landlocked countries like Nepal. For example, the documentation and procedural requirements of Bangladesh and India are different. This necessitates harmonisation of trade documents between the transit nations for reducing transit cost. From this perspective, it may be a worthwhile suggestion to set up juxtaposed customs offices.

For lesser developed countries in the South Asian region, South Asian Association for Regional Cooperation (SAARC) can play a big role. To integrate member countries of SAARC into global market would require development of domestic market as well. The development of transport infrastructure and network, therefore, remains one of the top priority areas for international support. The policy should also consider the application of ICT to trade facilitation by making IT application as a part of a larger national IT strategy.

In general, one of the missions of trade facilitation should be to gain non-discriminatory access to foreign markets. This should be looked

from not just at the national level, but also from the platform of the South Asian level as well.

There is a need to chart a strategy for enhancing private sector cooperation and developing consensus on specific measures for promoting trade in the region. Political, economic and administrative issues have negatively influenced intra-regional economic cooperation. A multi-pronged approach at different levels by emphasising on trade facilitation, infrastructure, transit infrastructure, transport infrastructure and trade barriers is required. In this regard, government-to-government cooperation is much warranted.

Endnotes

1 This is a revised paper on the basis of the observations made by the author during 30-31 July 2003 at the Expert Group Meeting on Trade Facilitation and E-commerce, UNESCAP, Bangkok.

2 EU's proposal to the WTO concerning Trade Facilitation, Regional Seminar on New Issues, December 2000, Chile.

3 Seminar on "Investment, Competition, Environment and Trade Facilitation", February, 7-9, 2002, Cape Town.

4 This study has been prepared by Mr. Leon Khor, International Trade Institute of Singapore, and reviewed by UNESCAP, 22 July 2003.

5 For details see the proceedings from UNCTAD's Inter-Agency Meeting on Trade Facilitation, 5 April 2002, Geneva).

6 People's Review Weekly, 20-27 August, 1998, Kathmandu.

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Chapter - X

Patent Rules and Access to Medicines

Leena Chakravarti

10.1 Introduction

"The essence of a satisfactory system is that the rich and the poor are treated alike; that poverty is not a disability and wealth not an advantage" – these were the words of Aneurian Bevan, the founder of the British National Health Service. These words have now come to be accepted by most, in the sense that access to medicines is a means to an end and not an end in itself. The end is health for all. Restricted access to medicines is only one of the many hurdles that have to be dealt with to ensure health for all. In this context, this paper highlights various health related issues that are of importance to developing countries in general and South Asia in particular.

10.2 Global Health Divide

The relationship between global disease burden and health spending reflects the existing inequity on which the 'one size fits all' based Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement is being conceptualised. Each year the world spends seven percent of its gross domestic product (GDP) on health. Unfortunately, resource utilisation is inversely related to need. Global estimates show that developing countries, on an average, account for 80 percent of the global disease burden, and yet this compares to only 10 percent of the global health spending. A case in point is the sub-Saharan African region. This is a region, which accounts for the highest child mortality and lowest life expectancy, but accounts for only one percent of total health spending.

Developed countries accounting for a small proportion of the disease burden not only spend much more on their health, but their governments also account for a much larger proportion of this spending. A comparison between England and India reiterates this inequity all the more. Average health spending in England amounts to US$ 1,193 per person per year and households pay only three percent of this. In India, the health spending stands at US$ 23 per person per year, with households paying almost 84 percent of this spending. Overall figures in South Asia are equally bleak, with households accounting for more than 80 percent of the region's expenditure on medical expenses, while for the sub-Saharan African region, the figures stagger at around 60 percent. Health service in developed countries is essentially dominated by public spending or pre-paid private insurance (as in the case of the US).

On the other hand, in developing countries, out of pocket expenses dominate the spending sources – a clear reflection of inadequate public investment on health. In effect, limited public spending in poor countries means that the cost of financing medicines is not only privatised but the cost of medicines also absorbs a large share of the already constrained household health budgets. In countries like Tanzania, Vietnam and Colombia, pharmaceuticals account for more than one-fifth of the total public health spending. However, this large slice of small budgets translates into derisory levels of spending on medicines per capita ranging from 13-14 cents in countries like India and Mali to 40-50 cents in Tanzania to US$ 3 in Colombia.

10.3 What Restricts Access to Medicines

The Doha Declaration on TRIPS and Public Health held out much promise. Unfortunately, developed countries, particularly the US, have sought to frustrate any positive outcomes. The 30 August 2003 deal is unfortunately not a panacea, and definitely not a final solution to the barriers to access to medicines caused by the WTO patent rules.

Poverty[1] is paramount among other hurdles that restrict access to medicines. Increasing prices are only worsening the situation further. Findings from a research conducted by Oxfam indicate for instance that in Zambia US$ 8-10 dollars is what is required to treat a single episode of pneumonia. Sixty percent of the population in this country

have an average income of US$ 18 per month. It might only be a coincidence that US$ 18 in fact corresponds to the cost of a minimum food basket. But implications have nothing to do with a coincidence – families living on the margins of existence would have to cut spending on food by one half to treat a single case of pneumonia. Similar stories and figures can be cited across most or all developing countries.

The Zambian example is just an indicator. It indicates that poor people often end up facing increasingly vulnerable conditions as diseases strike them, especially the life threatening ones. Oxfam's own programme experience has shown that very poor people frequently attempt to buy medicines when the disease is life threatening. They will take children out of school; go into debt; and sell land or/and livestock to buy medicines. But as stated earlier, it is not only poverty, other reasons complicate and add to the ferocity of the situation as well.

On of these reasons relates to the implementation of national drug policies. The World Health Organisation (WHO) indicates that more than 90 member countries either already have national drug policies or are in the process of having one. Almost 140 countries possess national essential drug lists that are continuously used for purchasing drugs and public education on medicines. More than 100 countries have also framed national treatment policies and these are figures that the WHO uses to claim success of its Essential Drugs Programme (EDP). The reality is not so rosy however. The figures are correct, but they do not reveal the real picture. Essential drug lists and national drug policies apply only to the public health sector in all developing countries and not to the private sector. On the contrary, it is the private sector that controls on an average 50-90 percent of the national pharmaceutical markets in all these developing countries. In all probability, the immediate reflection will be that the answer for all ills lies in the public sector where all these lists and policies are applicable.

Let us take a stock of the reality with reference to the public sector. Public sector health expenditure in most developing regions is abysmally low. Six countries in South Asia and South East Asia, for instance, register a maximum allocation of one percent of the GDP for health expenditure. In 13 other countries of the same region, the figures are two percent of the GDP. Only two of the least developed countries (LDCs) in the region show an average expenditure of 5.1 percent of their GDP on public health. It would not be very difficult,

thus, to assess as to why more than two billion people in the world have minimal or no access to medicines.

Inadequate public health infrastructure is a gnawing problem in most developing countries. India can very well be used to exemplify similar problems elsewhere within the block of LDCs and developing countries. India has been providing various incentives for the development of private healthcare services in the country, whereas the public health sector has suffered extensively due to lack of funding. The structural adjustment and economic reforms programme that began in 1992 caused a further shrink in resource allocation for public health services. Evidence of the collapse of the public health sector in India, for instance, can be seen in the national survey of public health infrastructure, which reveals that in 1999-2000, critical facilities were grossly inadequate (Duggal 2003). The 2002 National Health Policy recognised this situation and recommended public health investment to at least be doubled within the next five years to provide a reasonable level of public health care. The trend is shifting from social contracts to private contracts for sectors like health, water, education, etc. A number of backgrounders to the 2004 World Development Report also negate the model of government provision for basic services in favour of private contracts, thereby, giving a push to such a shift. For developing countries and LDCs that have to contend with acute poverty, inadequate infrastructure adds fuel to the fire.

Strong protection on pharmaceuticals and their negative impact on public health have featured as the most important agenda for researchers across the globe and empirical data to convincingly prove the same are abundant. The TRIPS Agreement requires all WTO member countries to have a 20-year patent protection period for pharmaceutical products. Most developing countries across the world are WTO members. The most highlighted negative impact of strong protection of the pharmaceutical sector is the increase in restrictions to access to medicines, especially due to increase in prices of patented medicines.

Developing countries have traditionally avoided stringent patent regimes on medicines in the interest of public health. A sophisticated generic drug industry has emerged with a specialisation in development of low cost equivalents of expensive patented medicines for low-income population. India, Thailand and Egypt for instance have

succeeded not only in decreasing their dependency on imported medicines but also in developing capacity to export them. The Indian Drug Manufacturer's Association (IDMA) has anticipated a national health disaster following the implementation of the TRIPS Agreement. This is based on the context that in India, in spite of relatively low prices of drugs (one of the lowest in the world), only 30 percent of the population can afford modern medicines. A price comparison of certain drugs within the Asian region is instructive. The case of Pakistan, for instance, which has had strong product patent protection as compared to India, provides an instructive comparison. *Ciprofloxacin* used for treating blood diarrhoea in children is up to eight times more expensive in Pakistan than in India. A comparison is also available between India and Malaysia. The latter demonstrates drug prices that are 20 to 760 times higher than that in India. A study by K Balasubramaniam has shown that welfare loss for India due to increased prices of drugs will be in the range of US$ 162 million to US$ 1.26 billion annually while annual profit transfer would range between US$ 101 million and US$ 389 million (Balasubramaniam 2003).

This brings us to the precarious situation today – with increasing drug resistance and decreasing global investment on tropical disease research and development (R&D), infectious diseases that were at one point of time easily curable with simple antibiotics are becoming increasingly drug resistant. Old killers like malaria, tuberculosis (TB), blood diarrhoea and respiratory infections, a group of diseases that cost millions of lives each year in developing countries, are proving increasingly difficult to treat. The danger that faces developing countries is that the use of next generation drugs to protect public health will be restricted, either by new patent protection or by the extension of old patent rights. Other factors like lack of political will of governments, poor health infrastructure, inappropriate drug selection, asymmetry in information regarding health needs and inappropriate government procurement policies have made things worse.

10.4 WTO and Drugs – Rules Loaded Against the Poor

The TRIPS Agreement intends to establish minimum standards for the protection of intellectual property rights (IPRs). For instance, the right to exclusivity to market a patented product for at least 20 years is integral to the Agreement. But the implementation of the Agreement is

a different story altogether. Some of the developed Northern governments are increasingly using bilateral and regional trade agreements to negotiate even more stringent protection for patents under the so-called TRIPS plus features. Some of the TRIPS plus features as proposed in the Free Trade Area of the Americas (FTAA) draft chapter on IPRs include deletion of exceptions to patentability and limitations of measures that countries can undertake to address public health issues (Anon 2003).

Apart from establishing minimum standards for IPR protection, the TRIPS Agreement also recognises the potential conflict between public health interests and interests of private profit of patent holders. Through Article 31, it has been provisioned that governments can issue compulsory licenses to authorise production without the consent of patent holders, subject to adequate compensation to the patent holder for the same. The measure of parallel importing is also open to governments, whereby governments can allow the import of a patented product, which is marketed elsewhere at prices lower than those in the domestic market. Many developed countries have made these provisions an integral part of their law and practice. Since the initiation of the implementation of the TRIPS Agreement, many compulsory licenses have been issued by the northern countries, but the same cannot be said about developing nations in the South. One of the clauses in Article 31, namely 31(f), clearly limits the use of compulsory license by developing countries. Article 31(f) indicates that compulsory licenses must be used 'predominantly for the supply to the domestic market of the member authorising such use'.

However, one fact needs to be registered. Whether compulsory licensing or parallel imports, these are provisions to help increase access to medicines, but cannot be considered as long term solutions to ensure health for all or access to medicines for all. This needs as stated earlier, investments on building and upgrading capacities in terms of R&D, and enhancement in technological status of the pharmaceutical sector in developing countries and LDCs.

10.5 Implications for Restricted Access

Over 14 million people die every year from preventable infectious diseases. Non-communicable diseases like cancer, diabetes and

cardiovascular problems also take a large toll accounting for at least 40 percent of all deaths in developing countries. Much of this illness could be prevented if people had access to affordable medicines. Currently one–third of the world's population does not have regular access to affordable medicines and only a fraction of people suffering from HIV-AIDS in developing countries have access to the required treatment. Moreover, there is a genuine lack of R&D and medicines for major killer diseases like TB, malaria, shigella, etc.

The TRIPS Agreement has certain features that restrict this access more than others, and Article 31(f) is one of the most widely debated amongst them. Paragraph 6 of Doha Declaration on TRIPS and Public Health and mandated ministers to find a solution to one of many unfair and highly damaging double standards in the Agreement, which prevents countries with limited manufacturing and economic capacity, including most developing countries and LDCs, from making effective use of compulsory licenses to gain access to affordable generic medicines. The same rule restricts access to generics for developing countries that do not grant pharmaceutical patents. The few remaining developing country drug producers such as India and Egypt will have to comply with WTO rules by 2005 and will no longer be allowed to meet this demand. Almost all developing countries will, therefore, have to pay the high price of patented products - which their population can ill-afford - or leave patients without treatment. This will be true even for those LDCs, which avail themselves of the extended deadlines agreed at Doha and exempt drug patenting until at least 2016.

The implications of Article 31(f) can be unpacked to some extent for better understanding. There are two direct implications. The first consequence is on countries that do not possess any or only negligible manufacturing capacities, which will face scarcity of accessing affordable drugs that are produced by only a handful of developing countries and that too *predominantly* for local markets. The number of developing countries possessing manufacturing capacities of generic drugs will not be more than ten. Even with a less onerous condition for compulsory licensing, countries with limited production capacity or small domestic markets will find it impossible to obtain the required drug at an affordable price, unless there is a larger country that is producing them and is ready to export to this country.

The other direct impact will be on countries with some generic manufacturing capacities. These countries will find themselves with little capacity to establish economies of scale to ensure sustenance of cost effective supply. This particular implication has to be seen with the other clauses specially the one which directs governments to make use of compulsory licenses only when the member country faces a public health emergency. However, it is up to the member governments to decide what according to them constitutes public health emergency. This particular clause is being looked on as a major impediment on the way of making TRIPS work in the favour of poor countries.

However, there are some suggestions that have been made from various quarters to negate the harmful impact of these provisions. A simple administration module to issue compulsory licenses is being suggested as an alternative to existing cumbersome procedures. Legislation on powers to authorise the use of patents for public use or non-commercial use should not be any less stronger or clear in developing countries than what they are in developed countries. Doing away with clause 31(f) has also been strongly suggested by many to help export generic drugs.

Unwarranted political influence of pharmaceutical corporations is increasingly leading to subordination of trade policies to corporate goals. To extrapolate this argument a little further, it is helping the subordination of developing country needs to developed country greed. A clear reflection of the same was witnessed between 2000 and 2002 when many developing countries were threatened with trade sanctions. The list of countries includes India, Brazil, Dominican Republic and Argentina. The threats of sanctions came in the wake of failing to strengthen patent rules. India, for instance, faced the threat of trade sanctions for failing to include highly restrictive compulsory licensing conditions in national legislation and for allowing generic companies to export medicines to other developing nations. The Dominican Republic faced threats of withdrawal of trade preferences for textiles from the US since the latter believed that in spite of the small market size, the country was setting a wrong example that others would follow by not complying with the demands of the pharmaceutical lobby.

Negotiations in the post Doha period have been tough, which even caused the collapse of the Cancun Ministerial. But developing countries

have been negotiating in a good faith even after the Cancun failure. They have indicated their acceptance of the Chairman of the TRIPS Council Ambassador Motta's (of Mexico) 16 December text on the Paragraph 6 issue, essentially because they feel they cannot hit their heads forever against the intransigence of rich countries. However, there has been tremendous pressure from a block of developed countries, notably the US, and the pharmaceutical lobbies to water down the proposed rule change and render it impracticable.

The US, under the influence of the Pharmaceutical Research and Manufacturers of America (PhRMA), has striven to make any rule change be a temporary fixture at best and to restrict it to only certain diseases or only the poorest countries. In fact, the Doha Declaration clearly said that TRIPS can and should not prevent governments from taking measures to protect public health and to promote access to medicines for all. Imposing such restrictions would be deeply unfair. The 2002 deadline set by WTO ministers to solve this issue was not met because the US sought to restrict the diseases covered by the solution. Since then the debate has witnessed some changes with most countries, including the US, agreeing to make the list of diseases more inclusive, at least in theory. Unfortunately, some incidents underscore the fact that this agreement might really have been just that – in theory. The case of Canada, as elucidated in Box 10.1, is just an indicator.

Box 10.1 Scope of Disease Coverage – The Case of Canada

The Doha Declaration was followed up with consistent efforts from the US to restrict the scope of diseases. This was done with reference to Paragraph 1 of the Declaration, which refers to the gravity of public health problems afflicting many developing and LDCs, specially those resulting from HIV-AIDS, tuberculosis, malaria and other epidemics. Paragraph 6 negotiations in December 2002 saw an impasse solely with respect to disease coverage.

The unilateral moratorium by the US insisted that the scope of disease coverage be limited to HIV-AIDS, tuberculosis, malaria and other epidemics of similar scale in future. This list was later lengthened to include Ebola, African trypanosomiasis, cholera and diarrhoea. The irony, however, is that hardly any patented medicine is available for these diseases because investments on R&D of tropical diseases do not feature

in the priority list of most drug companies worldwide. These are the diseases that mainly impact poor people in developing countries.

However, with the 30 August deal, the US reluctantly backed out from limiting this scope. But this was, as usual, again an agreement that was not to be respected in practice. A fresh example of the so-called change of heart of the US in broadening the scope of disease coverage, which was now being targeted as a no-restriction list, was in the limelight recently.

The example is that of Canada. Canada embarked on a legislative reform in October 2003 to permit its generic drug industry to supply the needed medicines to developing countries. This reform would have had an impact on the North American Free Trade Agreement (NAFTA), which reinforced the small list or the restrictive list of diseases. On being asked by Canada to waiver whatever rights the US had under this agreement that reinforced the restrictive list, the US went about with theatrical flair to do so. The reality differed. A footnote had been added to the order – "It is understood that shipments in keeping with the WTO deal would be for treating AIDS, TB, malaria and other public health emergencies of similar nature" – a far cry from the agreed non-restrictive list of diseases.

10.6 Post TRIPS World – Ways Ahead

The TRIPS Agreement is here to stay and organisations across various sectors are busy deliberating on ways to deal with the manifestations of the Agreement. The civil society in developing countries has been quite vociferous in advocating some of the workable solutions. Many non-governmental organisations (NGOs) including Oxfam and some legal experts are of the opinion that the 16 December Motta text constitutes a political solution but cannot be expected to provide a workable solution to the problem of access to generic medicines after 2005. The objection mainly stems from the burdensome and complex legal mechanism it entails and the fact that it saddles developing countries with restrictions and conditions not faced by rich countries in the use of TRIPS safeguards.

One can only gauge the problem of importing countries in having to seek the consent of the government in the exporting country. That amounts to an unjustified form of political dependency, which developed countries would probably never have accepted for

themselves. According to the formula laid out in this text, importing countries will be required to fulfil several conditions and go through costly bureaucratic processes, all of which make the process extremely vulnerable to legal action by patent holders.

On a lighter note, the complexity of the text can be ascertained from the fact that an article of 20 words was replaced by a text that goes to the length of eight pages. In addition, the Motta text contains ambiguities, which the US could take advantage of to secure further limitations. Reportedly, the US has already said it would not regard Philippines as a country eligible to import generics under the Motta system. And this in only an early period of initiating the implementation of the so-called workable Motta text. Such incidents only reassure that a long battle still remains to be fought. Even within the available political solution, developing countries will have to resist intense pressures to restrict the flexibilities provided to them in the Doha Declaration rather than pushing themselves to further disadvantageous positions, especially during bilateral and regional trade negotiations. Hypocrisy of developed countries is clearly evident. Box 10.2 provides a case in point.

Box 10.2

Deviation from the Spirit of Doha[2]

Bullying on TRIPS plus features continues. Complaints increased from 18 developing countries in the pre Doha period to 20 in the post Doha period. Bilateral and regional trade agreements outside the WTO are being used extensively for the same. As of 2002 end, 28 developing countries had bilateral IPR agreements. The bilateral policies on patents and medicines are still heavily influenced by narrow commercial interests of pharma companies.

Special 301 is being increasingly used to bully developing countries. Key generic producers are being targeted – the list includes India, Brazil, Argentina, Thailand and Colombia, among others. Some of the bullied, however, have little or no production capacity. Continued bilateral pressure on developing countries is the key to delaying or restricting the production of generic versions of new medicines. This not only reduces access to medicines but is also instrumental in choking off the supply of cheaper drugs to poor drug importing countries.

Hypocrisy continues – while maintaining a tough stance on generic production overseas, the US is going soft on the same area back home. Interestingly, US President George Bush unveiled a plan in late 2002 to bring low cost generics rapidly into the domestic market by closing legal loopholes that allow companies to block them.

At all costs, WTO members should not weaken the Motta text by agreeing to the demands of developed countries to limit the amendment to only certain diseases or countries. Such restrictions would effectively limit the implementation of the Doha Declaration, which developing countries fought hard to keep. Given the flaws in the current proposal, a fresh start to Paragraph 6 is essential, even though this is a major political challenge.

Developing countries should avail themselves of the extended deadlines for introducing drug patenting until 2016, and should make full use of the existing flexibilities in TRIPS to gain access to affordable medicines. Most developing countries are in the process of amending their national patent related legislation to make them TRIPS compatible. This is where developing countries need to be most careful and well informed. Developing countries will have to strive to work towards greater global coordination for need driven R&D in public health, and not demand driven as at present. Rather than providing arbitrary dates to conform to TRIPS, developing countries should be working towards intensifying pressure on being allowed to frame achievement-based milestones to gradually transform and finally comply with the TRIPS framework.

Endnotes

1 For the sake of this paper, poverty is being reflected as the lack of purchasing power or lack of money to buy medicines.

2 Excerpts from a research conducted by Oxfam one year after Doha Round of the WTO.

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Chapter - XI

TRIPS and Public Health: What Needs to be Done in a Human Rights Perspective?

Shafqat Munir

Abstract

The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) of the World Trade Organisation (WTO) has generated both opportunities and apprehensions for the rich and the poor respectively. The opportunities under the TRIPS Agreement have largely benefited multinational corporations (MNCs) of the North. The apprehensions are high in the South amid developments that are directed towards regulating trade and intellectual property rights (IPRs), thus threatening farming communities and the agricultural sector as a whole. Furthermore, TRIPS has been pushing developing countries to adopt patent regimes in the pharmaceutical sector, thus hindering access to essential drugs for poor populations in these countries.

At one hand, TRIPS allows patents to MNCs that control quality and prices of drugs in the world market, while on the other, it gives opportunity to governments to exploit the flexibilities provided in certain Articles of the Agreement to ensure access of their people to essential medicines. The access to healthcare is a fundamental human right and has been protected under various human rights covenants and conventions besides the United Nations Declaration of Human Rights (UDHR).

This paper discusses the TRIPS Agreement and its impacts on public health and argues that governments can intervene in health and pharmaceutical sectors to guarantee people's access to pharmaceutical products by utilising the flexibilities provided in the TRIPS Agreement. The paper also emphasises that states must interpret the TRIPS Agreement in line with international human rights laws with the assumption that these laws have preference over treaties including trade related international regimes.

11.1 Impact of Globalisation on Public Health

The fundamental concept of globalisation seems deviating from its assumed role of ensuring free flow of trade, finance and information while liberalising markets to achieve the goal of economic development. This is because of the fact that developed countries continue to limit breathing space for developing and least developed countries owing to their heavily subsidised agricultural sector and over protected trade. This uneven globalisation has caused an expansion in the gap between the winners and the losers, i.e. the rich and the poor.

"Globalisation has its winners and its losers. With the expansion of trade and foreign investment, developing countries have seen the gaps among themselves widen...Poor countries often lose out because the rules of the game are biased against them, particularly those relating to international trade. The Uruguay Round hardly changed the picture" (UNDP 1997, 82).

Globalisation has gradually been curtailing the role of the state in developing countries as the imperative to liberalise has led to reduced state involvement in social sectors and markets. It has serious implications for states, as market liberalisation has made it difficult for governments to subsidise health services for the poor. The privatisation processes have weakened many states and have thus increased their vulnerability to the impact of limited access to medicines as they do not have sufficient strength to oppose powerful international groups. Structural adjustment programmes (SAPs) of the Bretton Woods institutions have increased this vulnerability further. These trends demand stronger states to protect people's rights, specially their right to access to health services and drugs.

11.1.1 Drug Patents under the TRIPS Agreement

The TRIPS Agreement links intellectual property and trade issues and provides a multilateral mechanism for settling disputes between states on intellectual property. This Agreement is the most comprehensive ever reached on intellectual property. It establishes minimum universal standards for almost all rights in this field (such as copyrights, patents, and trademarks) including patent protection for pharmaceutical

products, which may have a significant impact on access to drugs in developing countries (Velasquez & Boulet 1999).

For all practical purposes, intellectual property laws are to protect and reward inventors. The inventors who file patent applications in a particular state ask that state to recognise its exclusive right to inventions within the state's territorial boundaries, and therefore to exclude others from the use of inventions without the inventors' authorisation and the payment of compensation (such as royalties). Because knowledge, unlike consumer goods, can be shared by any number of persons without being diminished, inventors are dependent on such legal protection against direct copying or use of the products or processes they have invented. Most industrialised countries have actively promoted the adoption of new international rules to obtain worldwide protection for the innovations they generate.

The TRIPS Agreement provides minimum standards for the protection of intellectual property, and each member of the WTO is required to incorporate these into its own laws before specified transitional periods have elapsed. Provisions in the TRIPS Agreement regarding patents, trademarks, health registration data and other items set the basic framework that virtually all countries are expected to follow, or they can be brought before the WTO dispute settlement body (DSB). Some provisions of the TRIPS Agreement are controversial in the area of health care and pharmaceuticals, especially for developing countries.

Under the TRIPS Agreement, all WTO members have to make patent protection available for at least 20 years to any invention of a pharmaceutical product or process which fulfils the criteria of novelty, inventiveness and usefulness. This provision only applies to inventions for which a patent application was filed after 1 January 1995, and consequently is entirely prospective, excluding products in the pipeline.

The protection of products in the pipeline would include patent protection for any patent application made abroad prior to the date of the introduction of product patent protection in the patent law. However, because some countries did not previously have any patent protection system for pharmaceuticals, the TRIPS Agreement allows them a 10-year transitional period to amend their patent legislation in compliance with the new rules. Countries that choose to delay the introduction of TRIPS-compatible patent laws and currently do not

offer product patent protection, therefore, have to provide a mechanism to store patent applications for products invented after 1 January 1995. Such applications will remain unprocessed in a "mailbox" until countries introduce new patent laws giving product patent protection. They are required to do this by 2005 at the latest.

Prior to the TRIPS Agreement, many developing countries did not make patent protection available for pharmaceuticals, to permit manufacture of copies and generic equivalents of drugs at reduced prices. In the past, it was considered the right of each nation to determine such laws.

According to a study commissioned by United Nations Industrial Development Organisation (UNIDO) on pharmaceuticals, the contrasts between industrialised and developing countries are sharpest in the case of patents. Almost all industrialised countries grant patents on both products and processes typically for a period of 20 years. In developing countries, only 45 percent studied granted product patents and these were usually valid for a shorter period of time than in industrialised countries. Patents on production processes were more common in developing countries, although, again, the period of validity was comparatively brief. Such non-patent regulation for pharmaceuticals helped some developing countries to build an indigenous pharmaceutical industry based on imitative cheaper drugs. Some developed countries in the past had the same kind of approach and thus managed to create powerful pharmaceutical industries.

Another UNIDO study revealed that the TRIPS Agreement may have a severe impact, especially in the high technology sectors such as pharmaceuticals, working at the disadvantage of developing countries in two main respects: domestic manufacturers wishing to produce and commercialise products covered by patents will be forced into licensing agreements involving royalty payments to patent-holders; while research and development (R&D) activities may be hindered since TRIPS is likely to inhibit reverse engineering, the process by which research-based industry products are copied and adapted for developing country usage.

11.1.2 Compulsory Licensing

Article 31 of the TRIPS Agreement allows "other use without authorisation of the right-holder". This refers to use by governments or third parties authorised by governments and is known as compulsory licensing. The Agreement establishes a number of conditions for granting licenses by public authorities, notably the need for case-by-case evaluation and decision, which means that the patent law cannot indicate in advance the specific cases in which compulsory licenses will be granted. However, the law may provide a basis for granting such licenses, for instance on the grounds of public health, abuse of patent rights or the refusal of a voluntary license from the patent-holder. Such reasoning should be based on Articles 7 and 8 of TRIPS, which provide for "the promotion of technological innovation and transfer and dissemination of technology", as well as "measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development".

11.2 Building upon Doha Declaration on Patents and Public Health

The fourth Ministerial at Doha specifically addressed the issue of access to medicines in the context of TRIPS. This was in response to growing controversy concerning the impact of TRIPS on the health sector of most developing countries, and in particular the HIV/AIDS tragedy in sub-Saharan Africa. The TRIPS Agreement requires, among others, that all WTO members introduce product and process patents in all fields of technology. Exceptions in the fields related to the fulfilment of basic needs such as health are not granted.

The Doha Declaration seems to be a direct consequence of the multiple controversies concerning patents in the health sector, in particular in the context of HIV/AIDS pandemic. Its importance is linked to the recognition that the existence of patent rights in the health sector does not stop states from taking measures to protect public health. More specifically, it affirms that TRIPS should be "interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote

access to medicines for all". This strengthens the position of countries that want to take advantage of the existing flexibility within TRIPS. Though the Declaration does not open new avenues within TRIPS, it confirms the legitimacy of measures seeking to use, to the largest extent possible, the in-built flexibility found in TRIPS.

The Declaration focuses mainly on questions related to the implementation of patents and the use of flexibilities, such as compulsory licensing. Compulsory licensing is being used as a tool to ensure unhindered access to essential drugs. In the case of health, the rationale is to make sure that the existence of a patent does not create a situation where a protected medicine is not available to the public because of non-health related factors. The Drugs Act, 1976 of Pakistan and the Patents Act, 1970 of India provide an elaborate regime that included both compulsory licenses and licenses of right. The TRIPS Agreement has not done away with the notion of compulsory licenses but provides a comparatively restrictive framework. The recognition in the Doha Declaration that WTO members can use the flexibility provided in the Agreement and can, for instance, determine the grounds on which compulsory licenses are granted, must thus be understood in the context of a generally increasingly restrictive international patent regime.

The Declaration had been hailed as a major step forward in the quest for making the TRIPS Agreement more responsive to the needs of developing countries and, more specifically, to all individuals unable to afford the cost of patented drugs. In fact, it addresses a number of important issues related to the implementation of medical patents. However, it fails to take up the much more fundamental question of the scope of patentability and the duration of patents in the health sector. The Doha Declaration has largely been seen as a big step forward in the struggle to ensure essential drugs at affordable prices. Building on the victories in the South African and Brazilian cases, the huge profile given to the issue has changed the political climate relating to TRIPS. It will now be much harder for the US and the drug companies to bully poor countries over their patent policies. Poorer countries would have liked to see a stronger Doha Declaration, but there is a clear political statement that TRIPS must be implemented in a way that promotes access to medicines.

Cecilia Oh of the Third World Network (TWN) while commenting on the Doha Declaration had said, "The Declaration (as it stands) is a good first step. Developed countries, in agreeing to the Declaration, have committed themselves to this process. We want to see a commitment on their part, and their pharmaceutical lobbies, to stop pressures on developing countries. Developing countries can get down to the work of implementing and enacting domestic measures, with the guarantee that there will not be pressures or legal threats."

Some experts still feel that the Doha Declaration on TRIPS is the strongest and most important international statement, yet there is a need to refashion national patent laws to protect public health interests. It is a road map for using the flexibilities under TRIPS to protect public health. It also sets a standard to measure any new bilateral or regional trade agreement.

There has been a strong affirmation at Doha that TRIPS "can and should be interpreted and implemented in a manner…to protect public health." In practical terms, it means that countries are not at the mercy of multinational corporations (MNCs) when they practice price gouging. The threat of punitive action against a country that attempts to address its health needs has been dramatically reduced. With this Declaration, it is doubtful that a wealthy country would dare file a dispute against a developing country for using one of the safeguards such as compulsory licensing. Now patent holders either offer prices that make their drugs accessible or risk losing their monopoly rights. The victory at Doha is really for the people who need or will need access to life saving or extending medicines.

The Doha Declaration's text clearly states that there is a serious conflict between the obligations under TRIPS. Besides, as already noted, it also states that countries need to protect public health, including ensuring access to medicines. It adds that countries have the right to take measures to overcome patent barriers to public health and the statement outlines clearly how countries can do this. It is a missed opportunity that the Doha Ministerial did not offer a solution for countries without production capacity that want to make use of compulsory licensing.

11.3 The TRIPS Agreement in a Human Rights Perspective

Due to the growing HIV/AIDS crisis in recent years, the issue of access to affordable medicines in many of the world's poor and developing countries is finally receiving the attention it deserves. There are no two opinions that making medicines accessible to those who need them requires action on many fronts. There is a dire need to look into private patents in pharmaceutical products under the TRIPS Agreement as these patents keep drugs prices much higher than the affordability of those who need them the most.

The current and anticipated impact of TRIPS on countries' ability to take legislative measures to make medicines more accessible to their populations is a matter of ongoing discussion, not only among civil society organisations (CSOs) and treatment activists, but within governments and at the inter-governmental level as well.

The issue is now firmly on the agenda of various United Nations (UN) bodies and the WTO. Within the UN system, bodies ranging from the Commission on Human Rights to the United Nations Development Programme (UNDP) have begun to examine the issue from the perspectives of human rights and human development. Within the WTO, both the General Council (GC) and the subsidiary Council for TRIPS are taking up this issue as a matter of human development, generally with little or no reference to the directly relevant body of international law dealing with human rights.

11.3.1 Public Health as Human Right in International Law

The right to healthcare has been recognised as a fundamental right by the international community since the adoption of the Constitution of the World Health Organisation (WHO) in 1946. Although the UN Charter (adopted in 1945) makes no specific reference to a right to health, it obliges all UN member countries to take action to achieve universal respect for, and observance of, human rights, which is one of the four foundational purposes of the UN. Articles 1, 55 and 56 of the UN Charter create a legally binding treaty obligation on states to ensure and respect human rights.

Health as a basic human right is also covered in other instruments in international law. The UDHR recognises every person's right to a standard of living adequate for his/her health (Article 25), right to a share in scientific advancement and its benefits (Article 27), and right to a social and international order in which the UDHR's rights can be fully realised (Article 28). The UDHR has achieved the status of a customary international law. Its norms are legally binding upon all UN member countries.

Several of the key treaties, declarations and statements by states that have established the UDHR as part of customary international law include, the Helsinki Final Act (1975), the Declaration on the Rights of Disabled Persons (1975), the Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind (1975), the Declaration of *Alma-Ata* on Primary Health Care (1978), the Vienna Declaration and Programme of Action (1993) from the UN's World Conference on Human Rights, and the UN General Assembly's recent Millennium Dedaration (2000).

As confirmed by the International Court of Justice (ICJ) in the 1970 *Barcelona Traction* case, human rights obligations are *erga omnes*, meaning that they are incumbent upon every state in relation to the international community as a whole. Furthermore, the centrality and importance of human rights in the body of international law are highlighted by the fact that at least some of the norms set out in the UDHR amount to *jus cogens*, meaning that they are peremptory norms not subject to any derogation and unquestionably superseding all other rules of international law.

Even those human rights norms which have not yet achieved the status of *jus cogens* may, nonetheless, still enjoy primacy over norms of international law, including states' obligations under trade treaties. Treaties are also a principal source of a legally binding right to health in international law. The key provisions of regional instruments creating a legally binding right to health in the inter-American, European and African human rights systems can be canvassed. Finally, there is a need to look at the significance of the provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR) that create a legally binding right to health (Article 12) on states, which are parties. Besides, ICESCR also imposes legal obligations on all members to cooperate internationally to realise this right (Article 2). Of particular

importance is the expert observation of the UN's Committee on Economic, Social and Cultural Rights. In particular, its General Comment 3 mulls on the nature of members' obligations under the ICESCR to fulfil the rights it sets out, and its General Comment 14 that focuses on the right to health and provides useful guidance in filling in the content of the human right.

11.3.2 Trade and Primacy of Human Rights in International Law

This part of the paper builds a legal argument that countries' obligations under the international law of human rights take precedence over other obligations under international law (including trade agreements). As noted above, Articles 1, 55 and 56 of the UN Charter create legally binding treaty obligations on all UN member countries to realise human rights. Article 103 expressly states that in the event of a conflict between states' obligations under the UN Charter and their obligations under any other international agreement, their obligations under the UN Charter shall prevail.

Even the ICJ has confirmed this hierarchy in international law in its 1992 ruling in the *Aerial Incident over Lockerbie Case*. General practice also indicates that the UN Charter enjoys primacy in international law. From the entry into force of the *Vienna Convention on the Law of Treaties*, to many resolutions of the UN General Assembly, the world community has affirmed the "paramount importance" of the UN Charter and the obligation on all states to fulfil its obligations under the Charter. In its 1970 advisory opinion in the *Namibia Case*, the ICJ ruled that countries denying fundamental human rights are in flagrant violation of the UN Charter. The combination of the supremacy of the UN Charter in international law, plus the elaboration of the human rights referenced in the Charter in an instrument such as the UDHR that has achieved the status of customary international law, provides a solid basis for the proposition that basic human rights norms enjoy primacy over states' obligations under trade treaties. Beyond treaties, customary international law and the decisions of the ICJ, states' practice also provides evidence of their recognition of the primacy of human rights in international law. Examples include the Charter of Economic Rights and Duties of States (1975), adopted by an overwhelming majority of the UN General Assembly, as well as the

UN's Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms (1998), and the resolution adopted at the UN General Assembly's Special Session on Social Development (2000).

Commentary from learned jurists with expertise in the field also concludes that human rights, including the right to health, must take priority over other obligations under international law.

The UN Committee on Economic, Social and Cultural Rights (UNCESCR) has reminded states that they must give due attention to the right to health in international agreements, and that measures restricting other states' supply of adequate medicines "should never be used as an instrument of political or economic pressure." In addition, the UN sub-Commission on the Promotion and Protection of Human Rights has repeatedly reminded all governments of "the primacy of human rights obligations under international law over economic policies and agreements," and has specifically called on governments to ensure that the implementation of the TRIPS Agreement does not negatively affect human rights.

11.3.3 Correctly Interpreting the TRIPS Agreement under International Law

Amid multiple health hazards in a large part of the world due to pandemics such as HIV/AIDS, environmental degradation and rising costs of medicines due to patents on drugs by MNCs, there is a need to correctly interpret and implement the TRIPS Agreement. The Agreement directly impacts millions of individual people and their families across the globe and the world community's collective efforts to respond to these crises. International and national laws require states to take all appropriate measures, including legislative measures, to realise each person's right to enjoy the highest standard of healthcare. Many countries and commentators have claimed that the necessary flexibility is already there in the TRIPS Agreement, though it is still a question whether or not it is sufficient.

A correct interpretation of the TRIPS Agreement is one that is consistent with the states' superseding obligations under international

law to respect, protect and fulfil human rights, including the right to health.

There are a number of elements in the TRIPS Agreement that lend support to an approach of interpreting the Agreement in a manner allowing states to satisfy their legal obligations to realise human rights. In particular, the Preamble and Articles 1, 8, 27, 30, 31 and 40 all indicate that the treaty's provisions must be interpreted so as to allow maximum flexibility to countries in balancing their obligations to accord exclusive patent rights in medical inventions against their obligations to protect and improve public health.

For example, Article 8 allows WTO members to adopt measures necessary to protect public health and promote public interest in sectors vital to their development, as well as prevent the abuse of patent rights and practices that unreasonably restrain trade and international transfer of technology. The WTO jurisprudence acknowledges that Article 8 must be considered in interpreting other terms of the TRIPS Agreement.

Similarly, Article 27 allows countries to exclude inventions from patentability if preventing their commercial exploitation is necessary to protect *ordre public* or morality, including the protection of health. The protection and promotion of internationally recognised human rights, including the right to health, must be considered a fundamental interest to society that would fall within the rubric of *ordre public* or morality as a basis for limiting the scope of claims to private patent rights.

States have a legal obligation to act in good faith to fulfil their treaty obligations, and this obviously applies to their obligations under human rights conventions and the UN Charter as well. Given this obligation of good faith, the interpretation of treaties such as TRIPS must proceed on the assumption that states already bound by international legal obligations to protect and promote human rights would not enter into other treaties (such as the WTO agreements) with the intent of violating those existing obligations which are of the highest order, derived as they are from the UN Charter and the UDHR.

Indeed, as the UNCESCR has observed in its General Comment 14 on the right to health, 'there is a strong presumption that retrogressive

measures taken in relation to the right to health are not permissible' by virtue of states' legally binding obligations under the ICESCR.

Although failing to use the language of human rights law, the WTO jurisprudence has recognised that obligations under trade agreements may need to give way to more important public interests in protecting health (e.g., *Thai - Cigarettes*, 1990; *EC -Asbestos*, 2001). By way of a non-limiting example, the need for affordable medicines in the context of widespread illness such as the HIV/AIDS pandemic is a clear cut example of a case in which states' obligations to act to protect and promote the human right to health is unquestionably of a higher legal as well as ethical order than the protection of private patent rights.

The UNCESCR had reminded WTO members before the third Ministerial (Seattle, 1999): "Human rights norms must shape the process of international economic policy formulation so that the benefits for human development of the evolving international trading regime will be shared equitably by all, in particular the most vulnerable sectors. ... Trade liberalisation must be understood as a means, not an end. The end which trade liberalisation should serve is the objective of human well-being to which the international human rights instruments give legal expression." The arguments above set out a clear situation under which countries could focus attention on the interests of their people while complying with provisions of TRIPS, particularly in health and agricultural sectors.

11.4 Conclusion

Under the TRIPS Agreement, developing and least developed countries have been granted a grace period of 5, 10 or 11 years, depending on their level of development, to amend their IPR laws in accordance with TRIPS standards. Some of them have already modified their patent laws; others still have to do so. However, in implementing the TRIPS provisions at the national level, there are some options for ensuring that the poorest populations have access to essential drugs. Two types of provision in the TRIPS Agreement may be used to protect public health goals. They are exceptions to exclusive rights and compulsory licensing.

Article 30 of the Agreement allows members to include in their patent laws some limited exceptions to the exclusive rights of patent holders. This means that countries can decide on some specific cases or situations where the use of a patent without the consent of the patent holder would not constitute an infringement. Some examples can even be found in several existing laws at the national and global levels.

It is important to provide for exceptions relating to research and experimentation on inventions for scientific and commercial purposes so as to facilitate innovation based on the improvement of protected inventions.[1] Another type of exception relates to the price advantage of generic products. Some countries allow tests to establish the bio-equivalency of generic products before patents expire, thus helping generic manufacturers to put their products on the market as soon as expiry occurs.

Parallel imports, permissible under the principle of exhaustion of rights, may also be listed in patent law as an exception to exclusive rights. For example, if a patented product is sold in country A for US$ 100 and in country B for US$ 80, the principle of exhaustion of rights allows any interested party in country A to import the product from country B without the consent of the patent owner (Correa 1997). This arises because once a product has been legally put on the market, the rights of the patentee are exhausted, since he/she has already exercised his/her rights in the matter. Imports of such patented products by a party without the authorisation of the title holder are generally known as parallel imports. This issue is of particular importance for developing countries wishing to ensure access to products on a competitive basis and, therefore, at lower prices.

The TRIPS Agreement appears to request members to treat pharmaceuticals like any other technological products in so far as the granting of patent protection is concerned. But drugs are not ordinary consumer products: they save lives, and if patients want to be cured they have to buy them. Moreover, it is often the one who prescribes, rather than the consumer who decides, which pharmaceuticals should be purchased. Patents may well have stimulated the discovery of new cost effective drugs, although it does not follow that these have been affordable to all people. However, R&D in the pharmaceutical industry are subject to market imperatives, and consequently new drugs that

come on to the market do not always meet the most pressing therapeutic needs of the majority of the population.

The patent system in the private sector should not be seen as the only source of finance for pharmaceutical research. The WHO should also encourage other sources, such as the public sector, to finance R&D in pharmaceuticals and provide incentives for innovation in vital fields, for instance that of tropical diseases.

As stated elsewhere, "the differences between the health/drugs and other markets (informational imbalance, limited competition, externalities and non-profit objectives) justify government/state intervention in the health and pharmaceutical market". It is essential that all involved in the health sector be aware of the issues at stake.

The new international economic and social context is likely to have an important effect on the equitable access of populations to health and drugs, especially in developing countries. The new rules on intellectual property could increase these countries' dependence. Each country's strategy regarding globalisation in the field of production and distribution of drugs should be incorporated into a national pharmaceutical policy within national health policy.

The member states should know that their binding legal obligations to realise human rights have primacy in international law. Therefore, the TRIPS Agreement must be interpreted in a fashion consistent with states' superseding obligations under international law to respect, protect and fulfil human rights; and where this is not possible, states' obligations under the Agreement must be recognised as not binding to the extent that there is a conflict with their human rights obligations under international law.

Members should formally recognise, in the context of the WTO and its legal instruments, the primacy of their legal obligations to respect, protect and fulfil human rights in international law, whether conventional or customary. This should be done through a variety of mechanisms.

All provisions in the TRIPS Agreement must be interpreted in the light of Articles 7 and 8, as well as the relevant obligations of WTO

members under international human rights law, both customary and conventional.

When interpreting the TRIPS Agreement (or any other WTO agreement), the DSB must prefer any reasonable interpretation of the agreement that is consistent with states' obligations under international human rights (including their obligations to realise the right to health) over any alternative interpretation that is inconsistent with those obligations.

TRIPS should be amended to include express reference to states' obligations under international human rights law, and to include a clause that recognises the non-binding status of their obligations under the Agreement when these require states to act (or refrain from acting) in breach of their obligations under international human rights law.

Endnote

1 *Options for implementing the TRIPS Agreement in developing countries*. 1997. Report of an expert group on the TRIPS Agreement and developing countries. Third World Network (TWN), Penang.

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Appendix

Workshop Report

South Asia Watch on Trade, Economics and Environment (SAWTEE), Kathmandu, Nepal and Consumer Unity & Trust Society (CUTS), Jaipur, India, in association with Friedrich Ebert Stiftung (FES), Kathmandu, Nepal and Novib, The Hague, Netherlands organised a three-day regional conference cum training "Post Cancun Agenda for South Asia" from 30 November to 2 December in Kathmandu. The main objectives of the event were:

- Equipping the South Asian stakeholders, including civil society representatives, government officials and trade negotiators, as well as general public, with necessary knowledge relating to emerging World Trade Organisation (WTO) issues.
- Identifying areas of common concerns of the South Asian nations and converging other individual concerns towards forming a common position for the purpose of trade negotiations at the WTO as a South Asian block.
- Training different stakeholders on newer and emerging issues within the WTO framework, the understanding on which is much below the understanding of older issues that are discussed at the global level.

The event was divided into two components:

- The first day of the event was organised as a conference, and it focused on the common WTO issues confronting the South Asian countries in the post-Cancun period, namely, agriculture, Singapore issues and Trade Related Aspects of Intellectual Property Rights (TRIPS).
- The second and third days were devoted to provide training to participants on newer issues that are emerging or are being discussed at the multilateral level. The issues covered included: trade and environment, biotechnology, services, implementation issues, special and differential treatment

(S&DT), and the so-called Singapore issues (which include competition, investment, trade facilitation and transparency in government procurement).

A total of 53 participants representing non-governmental organisations (NGOs), media and governments from India, Pakistan, Sri Lanka, Bangladesh and Nepal took part in the three-day event.

Inaugural Session

Delivering his welcome speech, Mr Dev Raj Dahal, Head, FES, Kathmandu said that the Cancun failure exhibits the complexity of North-South negotiations. He also added that achieving a more peaceful and more equitable world order requires a global community based on negotiated consensus. That is important to create a level playing field and to avoid distortions in trade. He stated that non-implementation of WTO agreements by the rich nations, pressure on weaker countries to open their lucrative services markets while protecting their own farm sectors, and rich countries' relentless pursuit for obtaining new concessions on investment have increased weaker nations' vulnerability to global economic uncertainties.

In his guest speech, Mr Dinesh Chandra Pyakurel, Secretary, Ministry of Industry, Commerce and Supplies (MoICS), Kathmandu said that the event was timely because it was necessary for the countries in South Asia to take stock of what transpired during the Cancun Ministerial and plan their future strategy. He also added that the way developed countries view agriculture has to undergo a metamorphosis to ensure fair trade in this sector.

In his inaugural speech, Dr Shankar Sharma, Vice Chairman, National Planning Commission (NPC), Kathmandu said that developing countries as well as least developed countries (LDCs) should maintain their unified stance in order to reap maximum benefits offered by the global trading regime.

Delivering his remarks, chairman of the session, Dr Posh Raj Pandey, President, Executive Committee, SAWTEE said that there has been numerous failures at the multilateral level, but those failures did not inflict any serious damage to the global trading regime. He added that

the Cancun failure has in fact given all the opportunity to introspect where and what went wrong. Dr Pandey added that it is in the best interest of South Asia to have a rules-based multilateral trading system than to have untamed trading regime under which developed countries get free hand to develop their own unilateral legislation and practices.

Ms Diana Melis, Research Associate, CUTS, Jaipur thanked the special guests, resource persons, participants and donors/partners for their support and cooperation in organising the event.

Technical Session 1: TRIPS and Public Health

The following papers were presented in this session:

1. "TRIPS and Public Health: What Needs to be Done in a Human Rights Perspective" – Shafqat Munir, President, Journalists for Democracy and Human Rights, Islamabad, Pakistan
2. "TRIPS and Public Health: Patent Rules and Access to Medicines" – Leen a Chakravarti, Oxfam GB in India

Dr Jafrullah Chowdhary, President, Consumer Association of Bangladesh, Dhaka and Dr. Surenrda Bhandari, Director, Foundation of Parliamentary Studies, Kathmandu were the discussants during the session.

The major issues raised/discussed during the session were:

- The right to healthcare has been recognised as a "fundamental right" by the international community since the adoption of the Constitution of the World Health Organisation in 1946 and states obligations under the international law of human rights take precedence over other obligations under international law including trade agreements.
- National patent laws must take maximum advantage of Article 30 of TRIPS that allows member states to include in their patent laws some limited exceptions to the exclusive rights of the patent holders.

- Public funds should be mobilised to finance research and development in pharmaceuticals and to provide for innovation in vital fields such as tropical diseases (need driven and not only demand driven research).
- The WTO rules affecting drugs are loaded against the poor. Price increase of drugs resulting from extension of exclusive marketing rights will have grave consequences for public health in developing countries.
- Developing countries must build pressure to begin the mandated review of the TRIPS Agreement.
- Prices of drugs are high in developing countries not only due to patents but also due to wrong policies of their governments.
- Drugs should not be treated as an ordinary commodity as consumers do not use their discretion in purchasing drugs and depend on third party (doctor) recommendation.

Technical Session 2: Singapore Issues

The following papers were presented in this session:

- "Singapore Issues : South Asian Perspective" – James J. Nedumpara, Consultant, UNCTAD–India, New Delhi
- "Singapore Issues: The Mercantilist Game Plan to Wreck the Development Agenda" – Nitya Nanda, Policy Analyst, CUTS, Jaipur

Ms Avanthi Gunatilake, Research Assistant, Law and Society Trust (LST), Colombo and Mr Sajid Kazmi, Research Associate, Sustainable Development Policy Institute (SDPI), Islamabad were the discussants during the session.

The major issues raised/discussed during the session were:

- Developing countries are generally opposed to new issues because the real intention of developed country members of the WTO to raise Singapore issues is to block progress in agricultural liberalisation.

- Developing countries are unilaterally providing investment friendly environment and a multilateral agreement on investment will limit the policy scope of developing countries.
- Developed countries must provide support for progressive reinforcement of competition institutions in developing countries through capacity building.
- The issue of transparency in government procurement is a *trojan horse* for market access agenda.
- Implementation of trade facilitation measures will place substantial financial burden on developing countries.
- South Asian countries must negotiate to put the Singapore issues in the backburner, if not drop from the WTO agenda, until other issues such as agriculture, S&DT and TRIPS and Public Health are addressed.
- Diversity in South Asia makes it difficult to reach a common position on all these issues. Thus the strategy for South Asia should be to have issue based agreements on some issues and stagger decisions on other issues on which immediate agreement cannot be reached.

Technical Session 3: Agriculture

The following papers were presented in this session:

- "Balancing the Livelihood Options with Three Pillars of AoA" – Prof. J George, Research Fellow, Research and Information System for the Non-aligned and Other Developing Countries, New Delhi
- "WTO Regime on Food and Agriculture and Issues for the Region" – Dr Wajid H. Pirzada, Director Research, WTO Division, Pakistan Agriculture Research Council, Islamabad

Dr Ananya Raihan, Research Fellow, Centre for Policy Dialogue, Dhaka and Dr Posh Raj Pandey, President, Executive Committee, SAWTEE, Kathmandu were the discussants during the session.

The major issues raised/discussed during the session were:

- South Asian countries have "small holder" subsistence farming that needs to be highlighted in negotiations on agriculture.
- Agriculture is homespun "safety net" of developing countries and this is at stake due to various agreements of the WTO that have direct impact on agriculture.
- South Asian countries must be clear on what they want - Agriculture policy aimed at food security or export earnings.
- Developed countries raised the Singapore issues in Cancun, as they did not want the Cancun negotiations to fail due to their non-compliance on agriculture issues.
- In addition to the three pillars, a fourth pillar of S&DT for selected products needs to be added in the Agreement on Agriculture (AoA).
- Tariff escalation and export subsidy in developed countries are harming the export potential of developing countries.
- South Asian countries must seek time bound commitment to remove all subsidies in the agricultural sector by developed countries.
- South Asian position in agriculture must be based on thorough research and not only rhetoric.
- Development of agriculture and agriculture processing in South Asian countries has been hindered due to lack of market access in developed countries.

Technical Session 4: Investment and Transparency in Government Procurement

Mr B.V.R. Subrahmanyam, Director, Ministry of Commerce, Government of India presented papers on Investment and Transparency in Government Procurement (TGP).

The major issues raised/discussed during the session were:

- Developed countries are pushing investment issues because they are the suppliers of investment and FDI.
- The WTO is already overburdened and it does not make sense to bring investment into it.
- A multilateral framework on investment does not guarantee higher FDI in developing countries.
- Investment policies are linked closely to national development policies and should not be linked only with trade.
- TGP could be a disguised attempt to seek mandate for an agreement prescribing procurement practices of members.
- TGP is the first step towards the eventual inclusion of market access provisions for government procurement – which is detrimental to the interests of developing countries.
- Developing countries' right and ability to make and modify public procurement rules/regulations should in no way be affected by any transparency agreement as government procurement is also used as a tool to implement social and industrial policy.

Technical Session 5: S&DT and Implementation Issues

The following papers were presented in this session.

- "Implementation Issues – Bad-faith Negotiation Tactics of the Major Trading Powers" – Dr Abid Suleri, Research Fellow, SDPI, Islamabad.
- "Special and Differential Treatment – A Post Cancun Update" – Mr Faisal Haq Shaheen, Visiting Research Associate, SDPI, Islamabad.

The major issues raised/discussed during the session were:

- Developing countries have not benefited from the WTO regime because developed countries have not complied with the Uruguay Round (UR) agreements.

- South Asian countries should say no to new issues until implementation issues are fully resolved.
- South Asian countries must demand further S&DT for the "WTO plus steps" that have been already taken under the World Bank, Asian Development Bank (ADB) and International Monetary Fund (IMF) conditions.
- Civil society organisations must get engaged with the states and build their capacity on WTO issues.
- International Financial Institutions (IFIs) are medieval organisations. Their decision making system must be revamped.
- The main problem of S&DT provisions under the WTO is that the important ones are not mandatory.
- Of the four types of S&DT clauses, longer transition periods and reduced level of commitments are binding but increased market access and technical assistance are merely best endeavour clauses, which can never be enforced.

Technical Session 6: Trade in Services

In this session, Dr Upali Wickramasinghe, Research Fellow, University of Sri Jayewardenepura, Colombo presented the paper – "Post Cancun Agenda for Trade in Services".

The major issues raised/discussed during the session were:

- Small economies should only be expected to make commitments that are commensurate with their capacities, levels of development and size of economies.
- National treatment should be given to services and service providers from LDCs in sectors and modes in which LDCs have specific export interests.
- Commitments made by developed countries are in the areas of their comparative advantages e.g., value added products in telecom, financial services, etc.

- Despite commitments made by developed countries, access to their markets is very limited due to a number of market access limitations such as tax measures, nationality requirement, licensing and standards.
- South Asian countries must ask developed countries to leave some horizontal limitations such as residency requirements, property limitations and visa granting process.
- South Asian countries must ask for deeper liberalisation in mode four (movement of natural persons) from developed countries.
- South Asian countries must ask developed countries to widen the definition of professional services so as to include 'occupations' according to the International Standard Classification of Occupations (ISCO) of the International Labour Organisation (ILO).

Technical Session 7: Trade Facilitation

Prof. Dr Bishwambher Pyakhuryal, President, Nepal Economic Association, Kathmandu presented the paper – "Trade Facilitation Initiative: An Overview of Measures Assessing Nepal's Status Under the Current International Trade Practices."

The major issues raised/discussed during the session were:

- Trade facilitation is basically removing the procedural obstacles by rationalising border controls in customs, standards, quarantine regulations etc. to international trade.
- The cost of implementing trade facilitation measures is very high and developing countries do not have adequate financial resources. South Asian countries must link trade facilitation measures with technical assistance.
- Trade facilitation will definitely increase efficiency and is desirable even in developing countries but many feel that the benefits may not be commensurate with the cost.
- Trade facilitation measures should be implemented by developing countries and LDCs in an autonomous manner,

but this issue should not be included within the WTO proscenium.

Technical Session 8: Biotechnology

Dr Hari Prasad Bimb, Chief, Biotechnology Division, Nepal Agriculture Research Council, Kathmandu presented the paper – "Biotechnology in Agriculture: Opportunities and Challenges".

The major issues raised/discussed during the session were:

- The major concerns of developing countries regarding the current global trends on biotechnological research and developments are:
  - (i) Whether biotechnology revolution would help resource poor farmers to increas e productivity.
  - (ii) What will be the potential adverse impact of genetic engineering research directed at finding substitute for national products e.g., corn syrup, natural or synthetic sweetener as substitute of cane and beet sugar on the farming sector?
  - (iii) What will be effect of genetically modified organisms (GMOs) on people's health in developing countries that are being used as testing grounds by multinational corporations (MNCs) to avoid stringent regulations prevailing in industrialised countries?
- South Asian countries are at different levels of development regarding biotechnology.
- There needs to be an evaluation of the broader impact of biotechnology on society.
- Biotechnology in agriculture is fully recognised as a powerful tool for sustainable agriculture, especially keeping in view the needs of small and marginal farmers.
- Research on staple food crop species in developing countries needs to be supported internationally.

- The cost of biotechnology is high and may not be suitable for small farmers in South Asia.

Technical Session 9: Non-agricultural Market Access

In this session, Dr Ananya Raihan, Research Fellow, CPD, Dhaka presented a paper on Non-agricultural Market Access.

The major issues raised/discussed during the session were:

- The barriers to market are of different types:

(i) Tariff barriers: tariff escalation, tariff peaks, tariff dispersion in manufacturing products, complex and non-transparent tariffs and tariff rate quota (TRQ).

(ii) Non-tariff barriers: Export/import quota, quantitative restriction (QR), Voluntary Export Restraint (VER), Rules of Origin (ROO), discriminatory government procurement practice, anti dumping and countervailing duties, predatory pricing and price discrimination, sanitary and phytosanitary measures (SPS), technical barriers to trade (TBT), subsidies, labour standards, etc.

(iii) General Agreement on Trade in Services (GATS): Restriction on movement of natural persons (Mode 4 of GATS), immigration policies and qualifications, quantity restriction on visa for professionals, entry barriers in the forms of entry needs test and local market test.

(iv) Environmental measures: Eco Labelling, Compliance sticker, etc.

(v) New issues: Safety, customs valuation, trade facilitation related barriers, etc.

- Perspective, interests and strategies in South Asia may not always converge in all areas and all issues. However, it is of critical importance to all South Asian countries that common interest are articulated, conflict of interests identified, and renewed effort is made in terms of plying a more proactive role at the WTO.

Technical Session 10: Trade and Environment

In this session, Mr James Nedumpara, Consultant, UNCTAD–India, New Delhi presented the paper – "Doha Round and Environmental Issues".

The major issues raised/discussed during the session were:

- Committee on Trade and Environment (CTE) was established in 1995 in accordance with the UR of Ministerial Decision with the following mandate:

(i) To identify the relationship between trade measures and environmental measures in order to promote sustainable development.

(ii) To make appropriate recommendations on whether or not any modifications of the provisions of the WTO are required. The CTE covers all areas of the WTO, including goods, services and intellectual property.

- In the Doha Ministerial Declaration, the CTE was asked to give particular attention to the following:

(i) The effect of environmental measures on market access, especially in relation to developing countries, in particular the LDCs.

(ii) Situations in which the elimination or reduction of trade restrictions and distortions would benefit trade, environment and development.

(iii) The relevant provisions of the TRIPS Agreement.

(iv) Labelling requirements for environmental purposes.

(v) Report to the fifth Ministerial and make recommendations, where appropriate, with respect to future action, including the desirability of negotiations.

(vi) Sharing expertise and experience with member countries wishing to perform environmental reviews at the national level.

- Environmental protection is used as an argument both in favour and against agricultural trade liberalisation.
- Many developing countries argue that TRIPS should support CBD provisions in the areas of biological resources and traditional knowledge systems.
- According to precautionary principle, absence of full scientific certainty should not be used as a reason to postpone measures to prevent environmental damage.

Technical Session 11: Competition

In this session, Mr Nitya Nanda, Policy Analyst, CUTS, Jaipur presented the paper – "Competition Agreement at the WTO: The Right Initiative at the Wrong Forum".

The major issues raised/discussed during the session were:

- Market power in global or export markets may be gained through international cartels, export cartels and related arrangements, international mergers or mergers with international spill-overs, abuses of dominance in overseas markets and cross-border predatory pricing and price discrimination.
- Barriers to import competition can be created through import cartels, vertical market restraints creating import barrier, private standard setting activities and abuse of monopolistic dominance.
- Cartels may be formed if intellectual property right holders engage in licensing arrangements with firms in different countries.
- South Asian countries should support only the provision of voluntary cooperation and not agree on any binding global rules on competition.
- The WTO should not be used as a forum to set global standards on national competition laws.

Additional Session: Nepal's Accession to the WTO

On the request of some of the participants, Mr Ratnakar Adhikari, Executive Director, SAWTEE made a presentation on Nepal's Accession to the WTO.

The major issues raised/discussed during the session were:

- WTO plus conditions is a major hurdle for most acceding countries.
- Nepal's accession package has been described as "the best accession package so far" by UNCTAD.
- Nepal's motivation for accession are:
  - (i) To integrate into global economy
  - (ii) To secure market for exports
  - (iii) To lock-in policy reforms
  - (iv) To strengthen domestic institutions
  - (v) To attract foreign direct investment
  - (vi) To enhance competitive ability
  - (vii) To secure transit rights
- Positive aspects of Nepal's accession package are:
  - (i) Foreign exchange restriction on consumption abroad
  - (ii) No membership to plurilateral agreements and UPOV
  - (iii) Inclusion of a paragraph on technical assistance
- Negative aspects of Nepal's accession package are:
  - (i) No credit for autonomous liberalisation
  - (ii) Other duties and charges (ODC) to be phased out in 2-10 years
  - (iii) Commitment on wider services (70 sub-sectors)

(iv) 37 legislation to be introduced/amended

- SAWTE E's role in the future:

  (i) Oppose any move of the government to sign UPOV

  (ii) Support government in policy reforms in agriculture and competition law

  (iii) Prepare a handbook on accession

  (iv) Continue networking, advocacy and capacity building in the area of international trade and WTO.