

● TRADE ●

insight

SOUTH ASIAN COMMON POSITION

in WTO Negotiations



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Doha Round suspension and South Asia

THE Doha Round of multilateral trade negotiations has been suspended indefinitely, jeopardising the aspirations of developing Members to benefit from the successful completion of the 'Doha Development Round'. Some believe that this suspension embodies the failure of World Trade Organization (WTO) Members to complete the Doha Round and will ultimately lead to the collapse of the multilateral trading system. We, however, believe that the Doha Round of trade negotiations will be completed, albeit later than anticipated.

Multilateral trade liberalisation is beneficial for both developing and developed Members. No matter at what stage of development a country is, a rules-based, transparent and democratic multilateral trading system is much simpler and manageable compared to the 'spaghetti bowl' of bilateral and regional trade agreements. As WTO Director General Pascal Lamy stressed, the suspension gives Members "time out to review the situation, time to examine available options and time to review positions". The South Asian countries need to do this as much as, if not more than, any other WTO Members.

The WTO functions in a 'club mode', i.e., negotiations are shaped by positions of influential Members, which form groupings to strengthen their positions. Examples are the Five Interested Parties, the G-20, the African, Caribbean and Pacific countries and the African Group. This is an indication of the fact that the WTO's 'consensus' based decision making process is a façade behind which groups of countries influence negotiations to fulfill their interests.

South Asian countries can also strengthen their negotiating positions if they develop common positions at the WTO. There had been some attempts in the past from these countries to foster common positions; South Asia did have common positions for the Seattle and Doha Ministerials but this process could not be continued for the Cancún and Hong Kong Ministerials.

South Asia is a diverse region, comprising four least developed countries (LDCs) and three developing countries. Being at different stages of development and having their own priorities, South Asian countries do not have common views on all trade issues; there are areas of convergence as well as divergence. For example, the divergence in positions manifested during negotiations to grant duty-free and quota-free market access to the LDCs at the Hong Kong Ministerial in 2005. However, given that they also have common views on many issues, they can develop common positions.

The dual track approach followed by the Members of Association of South East Asian Nations (ASEAN) could be appropriate for South Asian countries – the 'first track' on issues in which there is convergence and the 'second track' on issues in which divergence exists. South Asian countries can develop common positions to negotiate jointly on issues of common interest whereas on other issues, they can form issue-based alliances with like-minded individual Members or groups of Members.

Given the current scenario, it is in the interest of South Asian countries to utilise the time out to review the situation, examine available options and formulate positions. It will enable them to negotiate more effectively in future multilateral trade negotiations for their collective good. ■

Contents

Trade Insight • Vol.2, No.2, 2006

Duty-Free and Quota-Free Market Access

Promises or Lies?

Does the Hong Kong Decision on DFQF market access really go far enough to enable LDC products to enter into the developed country markets?

VIEWPOINT 11

South Asian Common Position in

WTO Negotiations



Can South Asian WTO Members, at different levels of development and with different priorities, formulate common positions in WTO negotiations?

COVER FEATURE 14

DOHA ROUND 26

Suspension of Doha Round Implications for Development



What does the suspension of the Doha Round of trade negotiations imply for the future of the multilateral trading system, in general, and the development agenda of the Round, in particular?

The views expressed in the articles published in *Trade Insight* are those of the authors and do not necessarily reflect the official position of SAWTEE or its member institutions.

READERS' FORUM	4
TRADE WINDS	5
VIEWPOINT	8
Environmental Agreements and Free Trade Rules: A Case of Conflict	
REGIONAL FOCUS	18
Working Towards a Common Position for South Asia in the WTO	
TRADE DISPUTE	20
US – Gambling Dispute	
TRIPS	23
South Asian Common Position on TRIPS Review: Situation, Options and Positions	
AGRICULTURE	29
Agriculture Collapses the Doha Round	
WTO ACCESSION	31
Bhutan: Knocking on WTO's Door	
NAMA	32
Let the Round Collapse!	
UNDERSTANDING WTO	34
Regional Trade Agreements	
BOOK REVIEW	36
Are Asian LDCs Losing in Post-Quota World?	
NETWORK ACTIVITIES	37
PUBLICATIONS	39

SAWTEE NETWORK

BANGLADESH

1. Associates for Development Initiatives (ADI), Dhaka
2. Bangladesh Environmental Lawyers Association (BELA), Dhaka

INDIA

1. Citizen Consumer & Civil Action Group (CAG), Chennai
2. Consumer Unity & Trust Society (CUTS), Jaipur
3. Development Research & Action Group (DRAG), New Delhi
4. Federation of Consumer Organisation of Tamilnadu & Pondichery (FEDCOT), Thanjavur

NEPAL

1. Society for Legal & Environmental Analysis & Development Research (LEADERS), Kathmandu
2. Forum for Protection of Public Interest (Pro Public), Kathmandu

PAKISTAN

1. Journalists for Democracy & Human Rights (JDHR), Islamabad
2. Sustainable Development Policy Institute (SDPI), Islamabad

SRI LANKA

1. Law & Society Trust (LST), Colombo

Interesting and useful

I found *Trade Insight* very interesting and useful. The articles focus on emerging trade issues, primarily from the perspective of the least developed countries (LDCs). SAWTEE has been instrumental in disseminating information on what is at stake for the LDCs in this globalised world. Keep up the excellent work and all the best to the editorial board.

Keshav P. Acharya, Executive Director, Research Department, Nepal Rastra Bank, Kathmandu, Nepal

Topical and elegant

I appreciate *Trade Insight*, your quarterly magazine. The topics are topical and the presentation is elegant. I shall highly appreciate if you could send me this publication on a regular basis including the previous issues.

Indra Nath Mukherji, Professor of South Asian Studies, School of International Studies, Jawaharlal Nehru University, New Delhi, India

Enriching

I thoroughly enjoyed reading *Trade Insight*, Vol. 2, No.1, 2006. It was very enriching with information on trade and development issues concerning least developed countries (LDCs), especially the article on 'aid for trade' and its link to the Millennium Development Goals. Since 'aid for trade' is now an important issue in the Doha Round of multilateral trade negotiations, views from the LDCs will certainly help operationalise 'aid for trade' in a more desired way.

Pranav Kumar, Policy Analyst, CUTS International, Jaipur, India

Commendable

Your magazine *Trade Insight* is, indeed, a commendable effort. It has been able to raise debates on issues of topical interests through incisive and analytical writings. This should contribute to the betterment of trade and economic relations



amongst countries in South Asia. It should also provide a better perspective on issues, which have the potential to have negative spin offs such as implications of non-tariff barriers on market access; impact of trade negotiations on agriculture-based economies, especially on net-food importing economies; and implications of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) on farmers' livelihood, public health etc. I believe the magazine will continue to provide inputs into the policies and the thought processes of policymakers and researchers.

Sayed Alamgin Farrouk Chowdhury, Former Secretary, Ministry of Commerce, Government of Bangladesh, Dhaka, Bangladesh

Truly international standard!

"Truly international standard". This is how I want to brand and define *Trade Insight*. It may be worthwhile if an electronic copy of this publication is also launched. It will help expand its reach globally. My best wishes to the publisher and its team.

Hemant Batra, Secretary General, SAARC LAW

Narrowing the knowledge gap in South Asia

Issues dealt in the World Trade Organization (WTO) are not easy to grasp, particularly by stakeholders with insufficient academic backgrounds. In view of the importance of up-to-date knowledge and information regarding the WTO and the negotiations under the Doha Round, there isn't sufficient literature published in South Asia. In this context, *Trade Insight* has filled the knowledge gap since it provides crucial information on recent debates at the WTO. It's Vol. 2, No. 1 issue had articles like 'Flying Geese or Butting Heads? South Asia at a Crossroads', 'Problems and Prospects for Regional Cooperation in South Asia', 'Liberalisation and Food Security in Bangladesh', 'Market Access for the LDCs: Slippery Slopes', etc., which substantially covered many important issues related to trade liberalisation and development. I hope SAWTEE will continuously work on such issues to narrow the knowledge gap in South Asia on trade liberalisation issues.

Khondaker Golam Moazzem, Research Fellow, Centre for Policy Dialogue, Dhaka, Bangladesh

REQUEST FOR CONTRIBUTIONS AND COMMENTS

Trade Insight is a quarterly publication of SAWTEE. The organisation invites scholarly contributions on trade and development issues, preferably from South Asian country perspectives. Articles are invited on issues relating to international trade, multilateral trading system, regional cooperation, regional trade agreements, and Millennium Development Goals. We also request our valued readers to send comments on the magazine and letters for 'Readers' Forum'. All contributions and letters should be addressed to: The Editor, *Trade Insight*, SAWTEE, PO Box: 19366, Kathmandu, Nepal. Contributions and letters by email should be sent to sawtee@sawtee.org, mentioning *Trade Insight* in the 'Subject'. All contributions and letters should have the writer's full name and address.

Doha Round of trade talks SUSPENDED

THE General Council (GC) of the World Trade Organization (WTO), at its meeting on 27-28 July 2006, supported a recommendation by Director General (DG) Pascal Lamy to suspend the Doha Round of multilateral trade negotiations.

The DG, as chairman of the Trade Negotiations Committee, reported on his consultations to facilitate and catalyse an agreement among Members. In his report, he said that there were no significant changes in the negotiators' positions and the gaps remained too wide. Faced with this situation, the DG recommended that the only course of action available was to suspend the negotiations across the Round as a whole to enable the serious reflection by participants, which was clearly necessary.



In their statements, Members agreed with this assessment and endorsed the DG's recommendation. There were expressions of profound

regret, disappointment and frustration for the lack of progress in the negotiations. They agreed that a time of reflection was needed but they also expressed the hope that this 'time-out' would be temporary and short since there was a need to put the negotiations back on track as soon as possible. Members also agreed to preserve the achievements of the negotiations so far and build upon them. There was a general agreement on the need not to modify the mandate or split it allowing for selective progress.

The decision to suspend the negotiations came after talks among six major Members broke down on 23 July. Ministers from Australia, Brazil, the European Union, India, Japan and the United States – the G-6 – had met in Geneva to try to follow up on instructions from the St. Petersburg Summit on 17 July. The main blockage was in the two agriculture legs of the triangle of issues, market access and domestic support. Reports state that the six Members did not even discuss non-agricultural market access (WTO, 24.07.06 and 29.07.06). ■

Aid for Trade Task Force report submitted

THE World Trade Organization (WTO) Task Force on Aid for Trade tabled its final recommendations at a meeting of the General Council (GC) on 27-28 July, satisfying the July deadline set by the Hong Kong Ministerial. WTO Members decided to consider the panel's report at the next meeting of the GC, scheduled for October. The Aid for Trade Task Force was established in February 2006 with a mandate to provide Members with recommendations for how 'aid for trade' might contribute most effectively to the development dimension of the Doha Development Agenda.

The panel's nine-page final report states that 'aid for trade' is about "assisting developing countries to increase exports of goods and services, to integrate into the multilateral trading system, and to benefit from liber-



alised trade and increased market access." It aims, for example, "to enhance growth prospects, reduce poverty, and distribute the global benefits more equitably across and within developing countries." The recommendations stress the need for additional, predictable, and effective financing. In particular, the final version balances the interests of poten-

tial recipient countries and donor countries by underscoring the importance of measuring the additionality and adequacy of funding available to meet 'aid for trade' needs, as well as taking stock of existing aid mechanisms.

The Task Force is composed of 13 Members, viz., Barbados, Brazil, Canada, China, Colombia, the European Union, Japan, India, Thailand, the United States

and the coordinators of the African, Caribbean and Pacific Group of States, the African Group and the Least Developed Countries' Group.

The recommendations evolved over the course of Task Force meetings, as well as informal consultations with other WTO Members, international organisations, and other stakeholders (BWTND, 02.08.06). ■

BIMSTEC

fails to set date for free trade pact

THE Ninth Ministerial Meet of the Bay of Bengal Multi-Sectoral Technical and Economic Cooperation (BIMSTEC), held in New Delhi on 8-9 August, failed to announce the date for implementing the already agreed upon free trade agreement (FTA). Earlier, the bloc had decided to implement it from 1 June 2006.

The joint declaration of the high-level government officials' meeting on 8 August and the Ministerial Meet on 9 August stated that the pact pertained to finalisation of trading goods prior to the second BIMSTEC Summit for implementing the FTA. The meeting had also decided to hold the second Summit in India on 8 February 2007 to mark a decade of the establishment of BIMSTEC.

Issues such as regulation on origin of goods, negative lists and market protection have hindered the implementation of the accord. Yet, another challenge before BIMSTEC Members is to reduce customs duty to 0 percent on select products by 2017.

Bangladesh, Bhutan, India, Myanmar, Nepal, Sri Lanka and Thailand are Members of BIMSTEC (*THT*, 10.08.06). ■

LDCs asked to build capacities

IN recent years, many least developed countries (LDCs) have achieved higher rates of economic growth than in the past and even higher growth of exports and of foreign direct investment inflows. But this is not translating effectively into poverty reduction and improved human well-being. Moreover, the sustainability of growth is fragile as it is highly dependent on trends in commodity prices, aid inflows, trade preferences and weather conditions.

UNCTAD's *Least Developed Countries Report 2006* argues that the development of domestic productive capacities and concomitant expansion of productive employment opportunities is a key to sustained economic growth and poverty reduction in the LDCs.

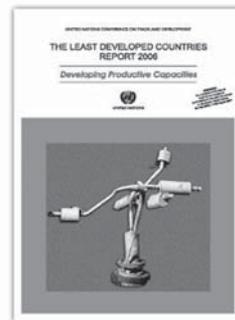
Defining productive capacities as "the productive resources, entrepreneurial capabilities and production linkages which together determine the capacity of a country to produce goods and services and enable it to grow and develop", the Report shows that the core processes through which productive capacities develop – capital accumulation, technological progress and structural change – have been very weak in most LDCs. As a result, labour productivity is low and there is widespread underemployment. This is the basic cause of persistent mass poverty in the LDCs.

For the LDCs as a group, the de-

cade 2000-2010 is going to be the first decade in which the growth of the economically active population outside agriculture is predicted to be greater than the growth of the economically active population within agriculture. This transition will affect more than half the LDCs during the decade and most others in the decade 2010-2020.

Substantial poverty reduction will, thus, require not simply increased agricultural productivity, but also the development of competitive businesses in manufacturing and services, as well as increased dynamic inter-sectoral linkages.

The Report calls for a paradigm shift from a consumption and exchange-oriented approach to poverty reduction towards a production and employment-oriented approach. It analyses three basic constraints on the development of productive capacities in the LDCs – poor physical infrastructure; weaknesses of the domestic private sector and supporting financial systems and knowledge systems; and insufficient demand and thus under-utilisation of domestic resources and capabilities as well as weak incentives to invest and innovate. The Report also identifies key policy priorities to overcome these constraints, including the mobilisation of underutilised domestic potentials and a re-balancing of the sectoral allocation of aid (*UNCTAD*, 21.07.06). ■



ASEAN suspends FTA talks with India

THE Association of South East Asian Nations (ASEAN) has suspended talks with India over a proposed free trade area (FTA) because of its reluctance to open domestic market to goods from ASEAN.

Malaysia's Trade and Industry Minister Rafidah Aziz said on 25 July that the talks had

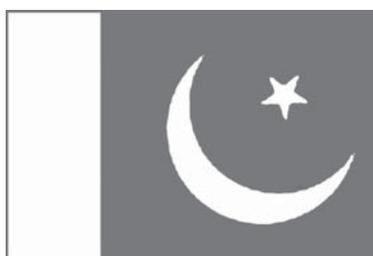
become difficult after India demanded that some 850 goods – which it imports from South East Asia – be excluded from the pact. In 2005, the list stood at nearly 1,400. The goods on the so-called exclusion list account for some 30 percent of South East Asia's exports to India.

Reportedly, India is keen to expand trade ties with the 10

ASEAN nations but wants to shelter its own sensitive sectors, such as agriculture, textile and other industries, which provide livelihoods to millions of Indians. In June, India's State Minister for Commerce and Industry Jairam Ramesh said that India expected a deal with ASEAN "in a few months" (*FE*, 26.07.06). ■

Indo-Pak trade dispute referred to council of ministers

FOREIGN Ministers of South Asian Association for Regional Cooperation (SAARC) decided to refer to the grouping's Council of Commerce Ministers India's complaint that Pakistan was not implementing South Asian Free Trade Area (SAFTA) in letter and spirit. According to India, Pakistan is violating the basic spirit of wholesome implementation of SAFTA Article 23. However,



Pakistan says that it prefers to trade with India on a 'positive list approach' as in the past, just to check massive inflow of Indian goods in its market.

The decision by the Foreign Ministerial Meeting of SAARC was received positively by the Indian side. India said Pakistan attaching conditionalities to trade with it under SAFTA was against the essence of the

agreement and 'contradict the commitment' made by the leaders at the Thirteenth SAARC Summit in Dhaka in November 2005.

SAFTA is a regional trading arrangement among Bangladesh, Bhutan, India, the Maldives, Nepal, Pakistan and Sri Lanka. It came into force from 1 January 2006 (*PTI*, 02.08.06 and *TKP*, 05.08.06). ■

India and China reopen SILK ROAD PASS

INDIA and China reopened a Himalayan pass to border trade on 6 July, 44 years after a frontier war shut down the ancient route. At an altitude of 4,310 metres (14,200 feet), Nathu La is the third border trading point to be opened by India and China but is considered the most significant as it controlled almost 80 percent of their entire trade before it was closed after their border war in 1962.

The pass is part of the historic Silk Road – a network of trails that connected ancient China with India, Western Asia and Europe. The reopening came days after Beijing linked the Tibetan capital of Lhasa with a railway, which is seen as another move to help modernise the long-isolated region. Nathu La border trade is expected not only to benefit border inhabitants in both countries and promote local openness and development, but also further motivate and open up a new channel for the blooming China-India trade relations. Although the two countries have agreed to resolve their border



rows politically, talks have made slow progress and much of their 3,500 km (2,200 mile) frontier remains disputed. Trade volumes, on the other hand, have soared, to US\$ 18.7 billion in 2005, a growth of 37.5 percent over 2004. In 2006, trade is expected to reach US\$ 22-23 billion. Border exchanges account for a paltry US\$ 100 million of total trade with the rest being accounted for by sea and air.

Senior officials from China's Tibet Autonomous Region and the tiny Northeastern Indian State of Sikkim cut a ribbon marking the border at the Nathu La pass. The opening is a major event for the two countries to expand and deepen trade and strengthen economic cooperation (*Reuters*, 06.07.06). ■

US reviews GSP

THE United States (US) has determined that certain imports from select developing countries should no longer be eligible for duty-free treatment under the Generalised System of Preferences (GSP), stating that imports from those countries could now compete effectively without preferences. As a result, US importers of those goods from the affected countries now must pay duties at normal tariff rates. Most affected by the decision are exports of dried guavas, mangoes and mangosteen fruits from the Philippines and Turkey's exports of travertine stone, which is used for tiles. The decision followed a 2005 review of the GSP, which was established in 1974 to give developing countries duty-free market access to the US (*United States Department of State*, 30.06.06). ■

NEWS SOURCES

BWTND: Bridges Weekly Trade News Digest
FE: Financial Express
PTI: Press Trust of India
THT: The Himalayan Times
TKP: The Kathmandu Post
UNCTAD: United Nations Conference on Trade and Development
WTO: World Trade Organization

Environmental Agreements and Free Trade Rules

A Case of Conflict



Since the interests of free trade rules and environmental protection rules are not contradictory, there should be a balance in policy making.

Priyanka Kher

The Doha Declaration adopted at the Fourth Ministerial of the World Trade Organization (WTO) in 2001 emphasises the need for a mutually supportive interface between 'Free Trade Rules' and 'Measures for Environment Protection'. However, this is a complicated task with conflicts existing between these two. The most challenging conflict is probably between the World Trade Organization (WTO) principles – the most favoured nation (MFN) and national treatment; and the specific trade rules as measures for environment protection under the Multilateral Environment Agreements (MEAs). In this regard, the point of contention for policy makers is determining the primacy of one of these or identify the other possible situations out of a state of deadlock.

The trade rules under the WTO and the trade rules within MEAs constitute separate, distinct and co-equal international legal regimes. The WTO rules emphasise reduction of trade barriers and non-discrimination between Members for a movement towards free and liberalised trade whereas trade rules within the MEAs call for environment protec-



tion, even at the cost of restricting trade.

An example of this conflict can be seen in the Convention on Trade in Endangered Species (CITES). It has the greatest number of enforcement-related trade measures, which may be directed against non-complying parties and non-parties. Though the Convention contains language that could ensure mutual supportiveness with WTO requirements, it requires parties to strictly regulate international trade in endangered species by imposing strict import and export controls, trade documentation requirements, and even including trade bans. Article XIV (1) of CITES expressly allows parties to adopt trade measures more stringent than those provided for in CITES with respect to species that are or are not included in the CITES Appendices. Other examples are the United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol. Only parties to the Kyoto Protocol can participate in the Kyoto mechanisms like emissions trading, joint implementation and the Clean Development Mechanism (CDM). As a result, markets in emission permits or the CDM certified emission reductions (CERs) would be barred to non-parties.

Plausible remedies: Remedies in law

GATT Article XX

The standard remedy is available in Article XX (b) and (g) of the WTO's General Agreement on Tariffs and Trade (GATT). The provisions under this article provide for exemptions from application of WTO rules. Under this Article, WTO Members may adopt trade-restrictive measures for reasons, including protection of human, animal or plant life or

health and for conservation of exhaustible natural resources.

Notably, Article XX of the GATT does not use the term ‘environment’ categorically anywhere in the exception. In 1998, the WTO Appellate Body (AB) decided that the interpretation of Article XX must be made in light of the contemporary concerns of the community of nations about the protection and conservation of the environment.¹ Environmental regulations imposed under this Article must not be “arbitrary or unjustifiably discriminatory between countries where the same conditions apply” or “a disguised restriction on international trade.” These qualifiers attempt to prevent a nation from imposing environmental regulations that are simply disguised protectionism.

These clauses/qualifiers are open-ended in nature and involve a very subjective enquiry. It is difficult to determine when a trade measure may be ‘necessary’ and when an environmental harm is so great as to warrant the imposition of a trade restriction. Restricting trade can have huge implications in terms of socio-economic costs. Also, the efficacy of a regulation and the actual benefit to the environment as a result of the regulation are complicated factors to be judged prior to imposition.

International law

Another option is to take recourse to international law. Under Article 3.2 of the WTO’s Dispute Settlement Understanding (DSU), the WTO agreements are treaties to be interpreted in accordance with customary rules of interpretation of public international law. Since MEAs are also international treaties, they are very much within the sphere of public international law.

The AB held in the reformulated gasoline case that the WTO agreements must not be viewed in isolation from other rules of international law, including treaties.² The logical deduction is that MEAs must be considered in the interpretation of the WTO agreements, including the exceptions. Article 3.2 also suggests that WTO agreements cannot be interpreted in a way that adds to or diminishes WTO rights.

Panels and the AB are under a general obligation, pursuant to Article 3.2 of the DSU, to presume there is no conflict with other WTO provisions when interpreting Article XX of the GATT. The legal framework suggests that there would be a concerted attempt to find

coherence between MEAs and WTO obligations.

International norm: *Lex Specialis*

Some authors have suggested a resolution by placing reliance on international norms. It can be argued that MEAs might form a *lex specialis*, recognising their specific nature. The status of *lex specialis* is supported by some commentators who perceive MEAs to be more specific treaties, since they contain specific measures applied to specific categories of products.³

Vienna Convention

Yet another approach is to take recourse to the law of the treaties as set out in the Vienna Convention. Applicable rules in possible situations under the Vienna Convention is given in the box below⁴.

Dispute Settlement	
Status	Applicable
Both states are parties to the MEA but not to the WTO	MEA
Both states are parties to the WTO but not to the MEA	WTO
One state is a party to both, while other state is a party only to the MEA but not to the WTO	Most likely, MEA
One state is a party to both, while other state is a party only to the WTO but not to the MEA	Most likely, WTO
Both states are parties to both the WTO and the MEA	Unclear

Reinforcing the hierarchy

Some of the aforementioned suggestions have their own set of complications. For instance, ‘exceptions’ contained in GATT Article XX are subjective applications by the Dispute Settlement Body. Not only it is difficult to define terms like ‘necessary’ or ‘least trade restrictive’, there is also an underlying hierarchy prevalent in their application, which goes against the ‘separate but equal’ line of reasoning adopted to allow countries to fully comply with WTO and MEA obligations. It implies that MEAs are subordinate to WTO rules because any measure adopted to implement these MEA trade rules will still have to comply with WTO rules defining what constitutes a valid ‘exception’ to WTO obligations under GATT Article XX. This also further implies that WTO Dispute Settlement Panels will have jurisdiction to determine whether the implementation of MEA trade rules are consistent with WTO rules and obligations. Therefore, an alternative to settle a conflicting situation has been suggested. One option is to

MEAs are subordinate to WTO rules because any measure adopted to implement the MEA trade rules will still have to comply with WTO rules

MEAs meeting certain criteria should be exempted from challenges under the WTO

obtain a waiver (granted in exceptional circumstances under GATT XXV) from WTO obligations for MEAs (as was granted in February 2003 for the Kimberley Process on conflict diamonds though the application for a waiver was itself controversial amongst the states participating in the Process⁵). Notably, a waiver reinforces a hierarchy of the WTO agreements over MEAs.

Policy-based and structural remedies

It is suggested that MEAs meeting certain criteria should be exempted from challenges under the WTO. These criteria would include: a minimum number of countries as signatories, an open process of negotiation (allowing all countries to become signatories), some universality of environmental benefits and harms being addressed by the agreement, and a strong case supporting the necessity of a trade restriction. This could be done through an amendment to the Final Act or through a legally binding WTO settlement body decision (requiring a simple majority). However, most developing countries see it as a way for developed countries to use environmental regulations as disguised protectionism.⁶ Another option could be to draw a list of specific MEAs, which are exempt from a WTO challenge. This model has been successfully taken up by Canada, Mexico and the United States, which agreed to keep certain environmental agreements beyond North American Free Trade Area (NAFTA). Such a list can then be endorsed by a WTO decision. The practical difficulty to carry out this alternative lies in reaching a consensus on the list of MEAs. Most importantly, legitimising trade restriction in these ways would, in effect, be asking for a fundamental reform of the WTO system.

Conclusion

Since the WTO Dispute Settlement Mechanism is considered to be effective, it is normally preferred over the MEA mechanism. It would be beneficial to involve the MEA in the WTO dispute settlement of environment related issues (under Article 13 of the DSU).

An interpretative decision on the relationship of MEAs and WTO rules or even a new agreement on MEAs in the WTO, defining its meaning, trade measures, categories of measures, linkage of burdens, etc., would clarify the position. Till the time such structural and policy changes take place, certain preventive measures may be considered. These relate to ensuring that trade restrictions in MEAs have a reasonable, close, substantial and objective

relationship with the policy objective as the end to be achieved, which must be least trade restrictive. The decision to adopt and maintain the regulatory measure must be supported by scientifically objective evidence. Finally, it must be understood that the interests of free trade and environment are not contradictory. A balance in policy making will benefit both agendas equally and further the cause of sustainable development. ■

Ms Kher is affiliated with Anand and Anand, a law firm, New Delhi.

NOTES

- 1 Trachtman, J.P. 1998. 'United States - Import Prohibition of Certain Shrimp and Shrimp Products, AB-1998-4, WT/DS58/AB/R (98-0000)' in *European Journal of International Law*. www.ejil.org/journal/Vol10/No1/sr4.html
- 2 WTO. 1996. *Appellate Body Report, United States - Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R*, adopted on 20 May, DSR 1996: I, p. 18.
- 3 Stilwell, M. and R. Tarasofsky. 2001. *Towards Coherent Environmental and Economic Governance*. Discussion Paper. A World Wildlife Fund-Centre for International Environmental Law. Gland: Switzerland.
- 4 Vicente P.B. 2004. *The World Trade Organization and Multilateral Environmental Agreements*. Discussion Paper. www.tradeobservatory.org/library.cfm?refID=25582. Also see Article 30 of the Vienna Convention.
- 5 Most Kimberley Process signatories did not support the move, implying as it does that the Process is subordinate to WTO rule-making. It was also argued that a waiver was unnecessary because of the text of GATT Article XXI (c), which exempts from GATT requirements a WTO member taking any action in pursuance of its obligations under the UN Charter for the maintenance of international peace and security. Conflict diamonds, also known as 'blood diamonds', are rough diamonds used by rebel movements or their allies to finance armed conflict aimed at undermining legitimate governments. The Kimberley Process is an international certification scheme that regulates the trade in rough diamonds. Its aim is to prevent the trade in conflict diamonds, while helping to protect the legitimate trade in rough diamonds. Implementation of the Kimberley Process is an important contributor to maintaining the peace, by helping to deny resources to rebel movements and by strengthening legitimate governments.
- 6 Many developing countries are concerned that small groups of developed countries would use WTO-sanctioned MEAs to restrict imports from developing countries with different (lower) environmental regulations and standards.

DUTY-FREE AND QUOTA-FREE MARKET ACCESS

Promises or Lies?

Talking about the ways to integrate Africans into the American society, Malcolm X, an African-American activist, once said: "sitting at the table does not make you a dinner unless you eat some of what is on that plate". Had trade negotiators been cognizant of Malcolm X's ideas of integration, the World Trade Organization (WTO) Ministerial in Hong Kong in 2005 would have made a decision on duty-free and quota-free (DFQF) market access in a different way.

Economists have been debating the utility of trade preferences, including DFQF market access. They argue that such arrangements have discriminatory properties and their trade and global welfare effects are 'second best'. Despite its sub-optimal nature, if preference is accorded to a small country or a group of countries that collectively are too insignificant to affect world prices, such recipients experience expansion in output, growth in exports and 'terms of trade' benefits.¹ Improved market access may also stimulate diversification toward a broader range of exports and foster export-driven economic growth.

Therefore, the demand of the least developed countries (LDCs) for special treatment, including non-reciprocal preferential market access, should not be considered in isolation but be understood as a part of their efforts to search a space for 'development' within the multilateral trading system. Its history goes back to 1960s when trade rules of the General Agreement on Tariffs and Trade (GATT) incorporated provisions of special rights of the LDCs to export markets. The LDCs reasserted the demand of special treatment during the Uruguay Round as well but the outcome was short of effective measures. Whalley (1999), reviewing the provisions, succinctly concludes: "the veritable smorgasbord of special and differential measures were sprinkled throughout the Uruguay Round decisions"².

The 'best endeavour' nature of the provisions neither helped the LDCs expand their exports nor deepened their integration into the global economy. Therefore, the LDCs have been questioning the utility of these provisions and asking for concrete and enforceable pro-

visions that could contribute to their development process. DFQF market access granted under non-reciprocal preferential regimes could be one of the most concrete forms of the special and differential treatment (S&DT) for the LDCs.

It was during the First WTO Ministerial held in 1996 in Singapore where the LDCs first put forward the proposal on DFQF market access. In response, the Ministerial agreed to a plan of action in favour of the LDCs, including duty-free access on an autonomous basis. During the preparation for the Third WTO Ministerial at Seattle in 1999, the European Union (EU) proposed to enter into a commitment to ensure duty-free market access for essentially all LDC exports and requested most advanced developing countries to contribute as well³.

The Doha Declaration of 2001 committed to the objective of DFQF market access for LDC products. A number of initiatives were also undertaken by developed countries to provide more favourable market access conditions for the LDCs such as Everything But Arms (EBA) initiative by the EU and the African Growth and Opportunity Act (AGOA) by the United States (US). In addition, the Canadian Government enlarged the Generalised System of Preference (GSP) scheme by providing duty-free access to all products originating from the LDCs, with some minor exclusion of agricultural products. Japan revised its GSP scheme by providing duty-free treatment to additional LDC products.

All these initiatives were unilateral and actions were taken at the multilateral level on DFQF market access in December 2005 in the Hong Kong Ministerial after a decade of the submission of the proposal. The Ministerial Declaration states: "building upon the commitment in the Doha Ministerial Declaration, developed-country Members, and developing-country Members declaring themselves in a position to do so, agree to implement duty-free and quota-free market access for products originating from LDCs as provided for in Annex F to this document"⁴. The relevant section of Annex F pro-

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Posh Raj Pandey

Markets in Quad countries constitute 57.2 percent of total LDC exports and about 20 percent of LDC exports face customs duties along with tariff peaks in a substantial number of products

vides, “we agree that developed-country Members shall, and developing-country Members declaring themselves in a position to do so should:

- Provide duty-free and quota-free market access on a lasting basis, for all products originating from all LDCs by 2008 or no later than the start of the implementation period in a manner that ensures stability, security and predictability.
- Members facing difficulties at this time to provide market access as set out above shall provide duty-free and quota-free market access for at least 97 percent of products originating from LDCs, defined at the tariff line level, by 2008 or no later than the start of the implementation period. In addition, these Members shall take steps to progressively achieve compliance with the obligations set out above, taking into account the impact on other developing countries at similar levels of development, and, as appropriate, by incrementally building on the initial list of covered products.
- Developing-country Members shall be permitted to phase in their commitments and shall enjoy appropriate flexibility in coverage⁵.

The Hong Kong Decision on DFQF market access has both commercial and diplomatic values. Markets in Quad countries (Canada, the EU, Japan and the US) constitute 57.2 percent of total LDC exports and about 20 percent of LDC exports face customs duties along with tariff peaks in a substantial number of products⁶. It is natural to expect significant trade expansion of the LDCs after its implementation.

On the diplomatic front, DFQF market access honours the United Nations Millenni-

um Declaration adopted in 2000. An official indicator of Goal 8 of the United Nations Millennium Development Goals (MDGs) is achieving DFQF market access for the LDCs into developed country markets and, *prima facie*, it is a movement in the right direction to address the development needs of the LDCs. However, the Hong Kong Decision is filled with loopholes, and one is forced to suspect the intention of the preference providing countries. What kind of leverage the developed Members would have to exclude the products under the veil of 3 percent? How can such an exclusion change the landscape of real market access situations for the LDCs? Why does the Decision talk about export interest of other developing countries rather than that of the LDCs in LDC-specific decisions? What are the modalities of progressivity in achieving DFQF market access? These are few unanswered but crucial questions that determine the utility and value of the Hong Kong Decision.

Trade relations and market access

The LDCs currently account for just 0.6 percent of world trade, reflecting their failure to overcome structural problems. The top three products account for more than 50 percent of the total exports of almost all the LDCs and for some, it is 100 percent.⁷ Considering product concentration at individual markets, the picture is more startling. For example, 0.5 percent of the tariff lines at Harmonised System (HS) 6-digit level constitutes more than four-fifth of the exports of Bangladesh and Nepal to Australia, Germany and the United Kingdom (UK). In Japan and the US, the magnitude is about three-fourth for Bangladesh and more than four-fifth for Nepal (Table 1). Similarly, the export market is highly concentrated, the EU and the US jointly account for 52 percent of their total exports.

Developed countries and selected developing countries grant reduced or zero tariff rates over the most favoured nation (MFN) rates on select products originating from the LDCs under GSP.⁸ United Nations Conference on Trade and Development (UNCTAD) reports that there are currently 13 national GSP schemes notified to the UNCTAD Secretariat mostly maintained by developed countries. But these schemes have their own definition of country eligibility, product coverage, rules of origin (ROO) and safeguard mechanisms.

The outcome of these schemes is that the published duty applicable to LDC exports is zero in majority of the products and in most of the developed countries. However, the pic-

Table 1: Market-wise product concentration in 2003

Export markets	Share of 0.5 percent tariff lines (in percent)	
	Bangladesh	Nepal
Australia	95.14	94.23
Canada	77.47	92.52
Germany	87.79	100
Japan	79.8	84.12
United Kingdom	83.75	84.17
United States	72.17	81.28

Source: Author’s calculation based on WITS (World Integrated Trade Solution).

Table 2: Duty-free tariff for LDC exports in developed countries in 2003 (in percent)

Markets	Tariff lines	Imports
Australia	100	100
Canada	98.9	100
European Union	99.4	99.1
Japan	85.5	50
New Zealand	99.2	100
Norway	96.4	99.5
United States	81.8	62

Source: WTO (2006).

ture of the products entering duty-free in developed countries is different. Although published duty are 85.5 percent and 81.8 percent of the tariff lines in Japan and the US, the LDCs pay MFN duty for 49 percent and 38 percent of their exports (Table 2).

The Quad preference schemes exclude more than a quarter of LDC exports, mostly textiles and clothing (T&C), and out of potential coverage, only a fraction actually received trade preferences at the time of customs clearance in the preference giving countries. Thus, the utility of the Quad initiatives recorded a low of 42 percent in 2001.⁹ The prime suspects for low utilisation of preference are the exclusion of products of export interest to the LDCs such as T&C, restrictive ROO, lack of security of market access, cumbersome administrative procedures and supply capability of the LDCs.

The other important factor with regard to export destination is the changing landscape of export markets for the LDCs for primary products. Fifteen LDCs from different regions export more than 50 percent of their products to developing countries.¹⁰ Therefore, preferential market access in developing countries also bears significant importance. China, Republic of Korea, Morocco and Turkey grant duty-free market access to the LDCs on a non-reciprocal basis. However, as the depth and coverage of these schemes are often limited, these preferences do not have a significant value for the LDCs.

Two caveats emerge from the discussion. Firstly, LDC exports are highly concentrated in few tariff lines in their destination markets. Thus, the flexibility provided to developed countries to exclude 3 percent of tariff lines under DFQF initiatives may exclude virtually all exportable products of the LDCs. Secondly, mere granting of duty-free market access to the LDCs does not ensure that they are effectively utilising the prefer-

ences. Such preferences should be supplemented by measures that address their structural problems.

Making DFQF Effective and Meaningful

In the light of the trade structure of the LDCs and the past experience, one has sufficient reasons to doubt the efficacy of the Hong Kong Decision on DFQF market access. If we go along with the existing ambiguities, it would constitute no more than the current market access facilities that the LDCs are already granted and at the worst, it may run the risk of rolling back the existing preferences. Thus, the Hong Kong Decision needs to be further corroborated with the following interpretations and explanations:

ready granted and at the worst, it may run the risk of rolling back the existing preferences. Thus, the Hong Kong Decision needs to be further corroborated with the following interpretations and explanations:

- The flexibility provided to developed Members to exclude certain products from DFQF market access should be interpreted as 3 percent of existing non-zero tariff lines and should also be capped by the volume of imports (for example, not exceeding 10 percent of imports at tariff lines)
- Any developing Member, constituting more than one-fifth of the exports of any LDC Member, should provide DFQF market access for at least half of the tariff lines, comprising half of the export value.
- The LDCs should be allowed to designate specific percentage of tariff lines, for example, 0.5 percent in the case of developed countries and 0.1 percent in the case of developing countries, not to be included in the exclusion lists. Immunity should be provided to these products from the 'impact test' on other developing countries.
- The ROO for preferential market access should incorporate the stage of development of the LDCs and be harmonised for all preference granting countries. A product originating in any of the LDCs or any of the regional partners should be considered a product originating in the exporting LDC.
- On other areas of negotiations under the Doha Round, particularly 'aid for trade' and trade facilitation, special consideration should be given to improve supply-side capacity and reduce administrative costs in the exports to preference granting countries. ■

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NOTES

¹ Grossman, G.M. and A.O. Sykes. 2005. 'A Preference for Development: The Law and Economics of GSP' in *World Trade Review*. Vol.4, No.4.

² Whalley, J. 1999. 'Special and Differential Treatment in the Millennium Round'. *The World Economy*. Vol.22, No.8.

³ UNCTAD. 2003. *Trade Preferences for LDCs: An Early Assessment of Benefits and Possible Improvements*. Geneva: United Nations Conference on Trade and Development.

⁴ WTO. 2005. *Doha Work Programme Draft Ministerial Declaration WT/MIN(05)/W/3/Rev.2* 18 December 2005.

⁵ As above note 4.

⁶ WTO. 2006. *Market Access Issues Related to Products of Export Interest Originating from Least Developed Countries*. TN/MA/S/19. 22 February 2006.

⁷ As above note 6.

⁸ A generalised, non-reciprocal, non-discriminatory system of preferences in favour of the developing countries, including special measures in favour of the least advanced among the developing countries.

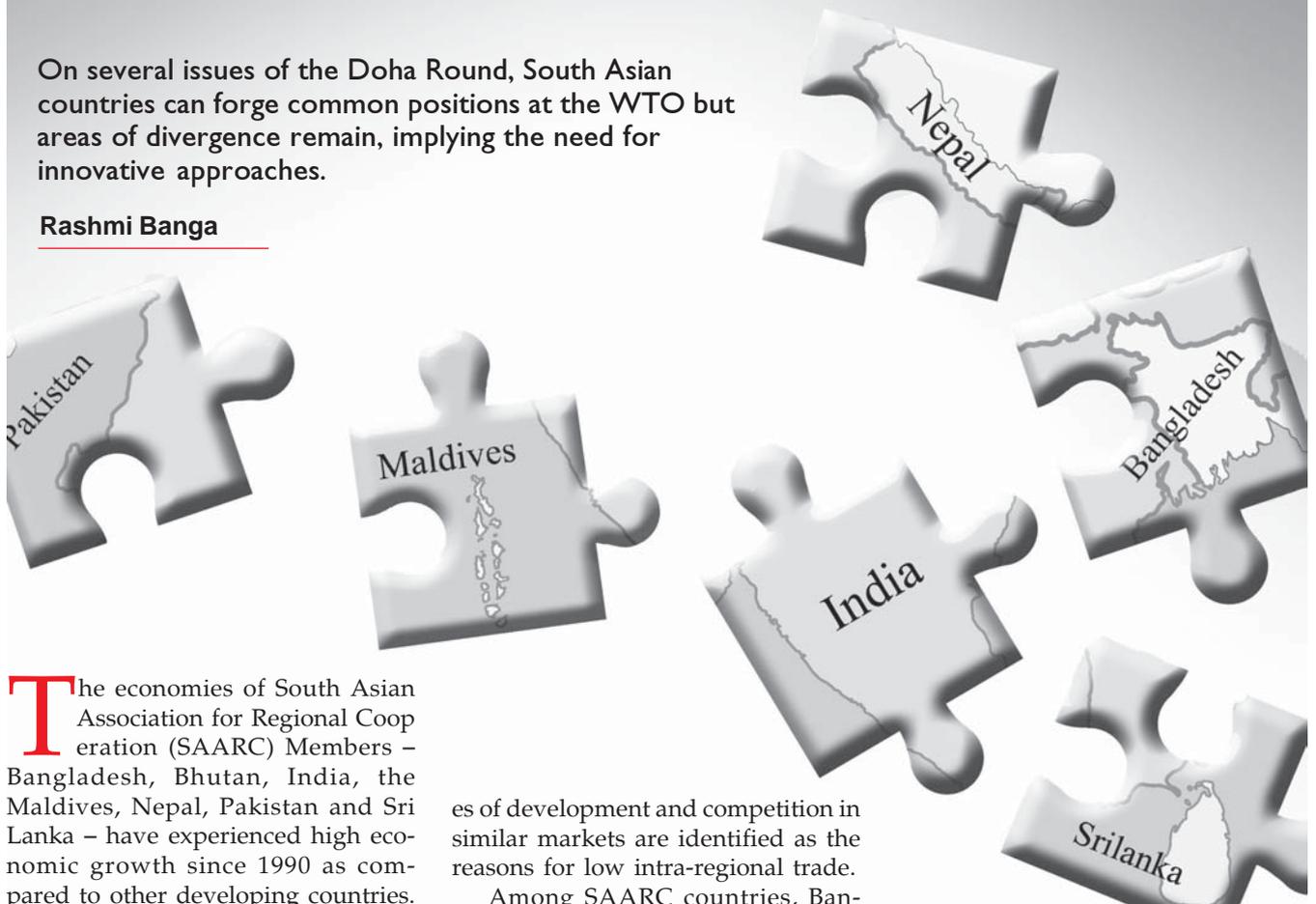
⁹ As above note 3.

¹⁰ As above note 6.

South Asian Common Position in WTO Negotiations

On several issues of the Doha Round, South Asian countries can forge common positions at the WTO but areas of divergence remain, implying the need for innovative approaches.

Rashmi Banga



The economies of South Asian Association for Regional Cooperation (SAARC) Members – Bangladesh, Bhutan, India, the Maldives, Nepal, Pakistan and Sri Lanka – have experienced high economic growth since 1990 as compared to other developing countries. According to *World Development Indicators 2005*, the region's gross domestic product (GDP) grew at the rate of 5.3 percent per annum since 1995. However, they are collectively ranked the lowest in terms of 'trade openness' (measured as the ratio of trade to GDP), which averaged around 29 percent during 1995–2004 (Figure 1). SAARC Members also have the highest 'trade restrictiveness index' (which takes into account tariff as well as non-tariff barriers) despite having undertaken substantial unilateral tariff reductions. Intra-regional trade accounts for only 5 percent of their total merchandise trade. Low economic integration, different stag-

es of development and competition in similar markets are identified as the reasons for low intra-regional trade.

Among SAARC countries, Bangladesh, Bhutan, the Maldives and Nepal are the least developed countries (LDCs) whereas India, Pakistan and Sri Lanka are developing countries. Barring Bhutan, all other countries are World Trade Organization (WTO) Members. Despite being at different levels of development, they have made some collective efforts to preserve their interests in multilateral trade negotiations, e.g., they put together 'common positions' at Seattle (1999) and Doha (2001). However, they have not done so thereafter as they are failing to reach consensus on many issues of the Doha Round. Various factors have been thwarting the formation of South Asian common

positions in multilateral trade negotiations. Firstly, there may exist a conflict of interest between the developing countries and the LDCs. While the latter avail of preferential market access in industrialised countries, the former calls for disciplining tariff peaks and tariff escalations, which may, in turn, erode the preferential market access of the LDCs. Secondly, countries may not agree to certain sector-specific provisions and negotiations, e.g., tariff reductions in textiles and rules of origin (ROO) are a bone of contention between more competitive countries like India and Pakistan and less competitive countries like

Figure 1: Trade openness (average, 1995-2004)

Bangladesh and Nepal. Thirdly, differences may surface between net-food importing countries (NFICs) and net-food exporting countries (NFECs). NFICs may not be in favour of pressurising developed Members to reduce their agricultural subsidies as this may raise world food prices; whereas NFECs are concerned with the issue of market access in developed country markets vis-à-vis reduction of farm subsidies. Fourthly, as a *quid pro quo*, some South Asian countries may be ready to undertake reciprocal obligations while LDCs may be exempted. Last but not the least, similar export commodities aimed at the same destination, such as the Organisation for Economic Cooperation and Development (OECD) Members, intensify competition among South Asian economies themselves. These factors raise doubts on reaching common positions in multilateral trade negotiations of the WTO, especially the Doha Round.

Notwithstanding these challenges, there are sufficient grounds that could enable SAARC Members to identify issues where they could have a common position. Firstly, South Asian economies are undergoing similar structural changes. The share of agriculture has declined in almost all countries although the primary sector still employs the majority of the workforce. In the cases of India, Pakistan and Bangladesh, the share of agricultural value added to GDP has declined from more than 50 percent in the 1950s to 22 percent, 23 percent and 22 percent in 2003. In Sri Lanka's case, it has come down to 19 percent in 2003. The share of services has increased to around

half of GDP in almost all the countries (except for Bhutan and Nepal). However, trade in services still remains low. It was less than 10 percent of total trade in Bangladesh, India, Nepal and Pakistan and around 17 percent in Sri Lanka in 2003. Secondly, there has been a convergence in macroeconomic policies followed by these countries since the early 1990s. Thirdly, South Asian countries face common development challenges with regard to poverty, inequality, unemployment and vulnerability concerns. The region is home to 22 percent of the world's population but consists of 50 percent of the world's population living below the poverty line.

Given their shared concerns, it is vital to identify areas in which South Asia can negotiate as a unitary bloc. For this purpose, different issues under the Doha Round of trade negotiations — agriculture, non agricultural market access (NAMA), services and other issues — are dealt hereunder.

Agriculture

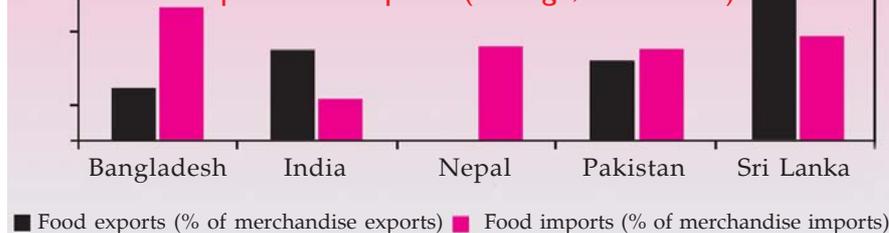
Agriculture is linked to food security and livelihood concerns in South Asia. On an average, the region is a net-food exporter, which implies that it has the potential of being self-suffi-

cient in food (Figure 2).

Two main issues arise in the case of agriculture in multilateral trade negotiations: domestic support and market access. Industrialised countries account for 88 percent of total global domestic support payments. The European Union (EU), Japan and the United States (US) are the primary users of domestic support. The composition of domestic support reveals that in the EU, total support under Aggregate Measure of Support (AMS) is 55 percent, 23 percent under the Blue Box and 22 percent under the Green Box. In the US, the Green Box accounts for 83 percent of domestic support whereas AMS accounts for 12 percent. In Japan, the share of AMS is 48 percent and that of the Green Box, 51 percent. Trends show that the Amber Box commitment levels are much higher than actual levels of subsidy but the support levels in other forms are increasing.

Meat, dairy products, cereals and sugar account for 82 percent of all reported non-exempt domestic support. Compared to 1986-88, there has been only a marginal reduction in support levels to these commodities. The support as a percentage of gross farm receipts is more than 35 percent in the case of rice, sugar, milk, coarse grain and wheat. Producer Support Estimate (PSE) in wheat was US\$ 9,498 million in the EU and US\$ 2,611 million in the US in 2002, while it was US\$ 303 million and US\$ 891 million in rice. The US accounts for approximately half of the world's total production subsidies for cotton.

Developed countries provide huge amounts of domestic support to crops like rice, wheat, sugar and cotton, which has led to a continuous increase in their share in world exports. These are the crops of interest

Figure 2: Food as a percentage of merchandise exports and imports (average, 2000-2004)

to India and Pakistan. A high level of domestic subsidy leads to over production. Hence, export subsidy is used to dispose of this surplus in world markets at prices much lower than those in domestic markets.

Although the WTO Hong Kong Ministerial in 2005 mandated that export subsidies have to be removed by 2013, this may not have a significant impact till domestic subsidies remain high. South Asia's subsistence farmers are adversely affected by 'dumping', which result due to these doles provided by developed WTO Members.

Significant and effective cuts on total AMS, along with product-specific caps, are necessary to improve the competitiveness of South Asian countries in agricultural exports. South Asian economies should call for strengthening of disciplines on the Blue Box and the Green Box to prevent box-shifting under a common agenda. There is evidence indicating that subsidies provided under the Green Box in the form of direct payments are also trade distorting. It is necessary to retain only those programmes under the Green Box that have 'no or minimal trade distorting effects'. Programmes of developing countries with respect to agrarian, institutional and land reforms need to be included under the Green Box expenditures.

South Asian economies are under tremendous pressure to reduce their agricultural tariffs. Lower tariff reduction and higher threshold of bands (less than two-thirds for developing countries) proposed by the G-20 are in favour of South Asia. This can be undertaken under the joint agenda so as to maintain policy space. Furthermore, a common position with respect to Special Products and Safeguard Measures is urgently required to protect subsistence farmers.

Tariff rate quotas (TRQs) enable exporters to access markets at lower tariffs. South Asian economies need to seek changes in the existing rules relating to TRQs in order to seek great-

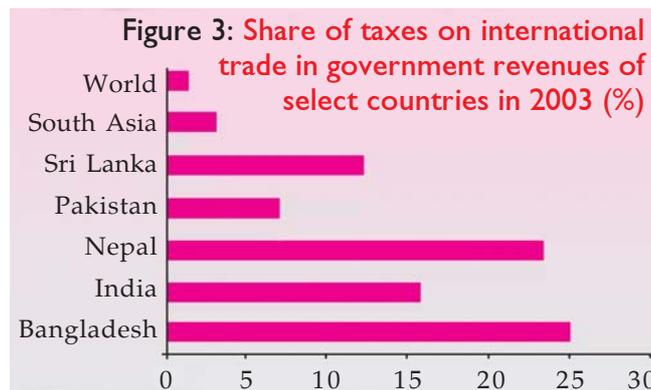
er access to agricultural markets in developed countries. Lack of access to TRQ allocations is a major hindrance to South Asian countries. Most developed countries provide more or all of their TRQ amounts on a previously negotiated country-specific basis and often largely to other developed countries. South Asian countries can argue that quotas, which are not globally available, should not be counted towards TRQ amounts. Substantial expansion of TRQs, transparency in administration and allocation of TRQs for specific products can be jointly stressed.

Industrial market access

South Asian countries have undertaken substantial unilateral reductions in industrial tariffs. However, their tariff levels are still high compared to developed countries. The significance of industrial tariffs to many South Asian countries arises

products, metals and footwear. In the EU, tariff escalation exists in textiles, industrial chemicals, leather, wood and rubber products. To enhance market access in developed Members, it is important to jointly stress on reduction of tariff peaks and tariff escalation. It is also vital to obtain flexibility to address developmental sensitivities. Together, South Asian countries might be successful in disciplining/reducing/eliminating existing non-tariff barriers (NTBs) under a fast track approach.

Furthermore, under Paragraph 8 of the Framework for Establishing Modalities in Market Access for Non-Agricultural Products outlined by the 'July package', developing Members are given two options as flexibilities. They can either apply less than formula cuts up to 10 percent of their tariff lines or not apply formula cuts for up to 5 percent of tariff lines. Developed Members are now seeking to restrict these flexibilities through a higher coefficient (4-5 additional points) for developing Members in the tariff reduction formula. There is a need to jointly stress caps on import value and more transparency and predictability with regard to the tariff lines to be covered by flexibilities. A common negotiating strategy is essential to retain policy space with respect to industrial tariffs. It is also important to identify the NTBs in the developed Members.



from the fact that these tariffs account for a large proportion of central government revenues (Figure 3).

Under the Doha Round, South Asian countries would be required to undertake significant tariff reductions in their bound rates. The simple average of South Asian bound tariff lines ranges from 19 percent to 35 percent. Bangladesh has bound just 3 percent of its tariff lines while Nepal has done so for 99.3 percent.

South Asian economies face tariff peaks and tariff escalations in developed Members. The US has 7 percent of its tariff lines at 8 digit level with tariff peaks while Japan has 12.1 percent and the EU around 12 percent. In Japan, tariff escalation is prevalent in textiles, petroleum refinery, rubber

Services

South Asia's commercial service exports grew from US\$ 7.9 billion to US\$ 32.9 billion between 1993 and 2003, of which India alone accounts for US\$ 27 billion. Low growth from other countries is attributed to substantial under-estimation of actual flows. For instance, 40 percent of remittances to Bangladesh are through illegal *hundi* sources and in Pakistan, only US\$ 1 billion out of US\$ 10 billion is sent through official channels. Sri Lanka's remittance receipts are larger than its tea exports and in the case of Nepal, remittances contributed to 12 percent of GDP in 2004.

South Asia is the second largest recipient of remittances in the world, receiving US\$ 32 billion in 2005 alone. Across all the countries, remittances constitute between 2 percent to 12 percent of GDP. The region, therefore, has a comparative advantage in Mode 4 of GATS, i.e., movement of natural persons. However, barriers in developed Members include wage-parity requirement, discouraging import of cheap labour; strict visa procedures; economic needs tests; non-recognition of professional qualifications; imposition of discriminatory standards or burdensome licensing requirements; payment of social security without corresponding benefits like medical and pension insurance schemes; and requirements of registration with professional organisations.

Article VII of the General Agreement on Trade in Services (GATS) allows Members to enter into mutual recognition agreements (MRAs), enabling them to recognise the education/experience requirements and licenses/certifications granted in one or several other countries. Till date, a limited number of MRAs exists. Changing demographic conditions in developed countries assure a growing demand for workers. By 2050, labour supply in industrialised nations is projected to decline substantially due to early retirement, aging population, falling birth rates, increasing affluence and time spent in higher education of young population. For instance, France, Germany, Italy, and the United Kingdom (UK) – in order to ‘save social security’ to keep the ratio of their economically active population to the dependent population stable – would have to increase immigration 37 fold, by almost 9 million a year. A common position on temporary migration will benefit the region as a whole.

Cross-border trade in services under Mode 1 is also important for Bangladesh, India, Pakistan and Sri Lanka, which are also emerging as prime business process outsourcing (BPO) destinations. Although cross-border supply in areas like BPO and information technology enabled services is largely unregulated, legal

and regulatory frameworks are posing a challenge to such exports. In 2003, four bills restricting offshore sourcing — the practice of acquiring services from a non-US vendor — were introduced in the US. In 2004, 40 federal bills and 200 state bills were introduced, significantly affecting offshore servicing of goods or services by the US.

In the Uruguay Round (1987-95), limited success was achieved with respect to trade in services. Fifty percent of General Agreement on Tariffs and Trade (GATT) Members undertook full commitment in Mode 2, 30 percent in Mode 1 and 20 percent in Mode 3. However, only 96 WTO Members made commitments by 2000 under the ‘request and offers’ approach and only six proposals were tabled (by Canada, Colombia, the EU, India, Japan and the US) relating to Mode 4. Sectoral coverage has also been poor. It is important to bind the extent of liberalisation that exists in developed countries with respect to Mode 1. Thus, the two most important strategies with respect to GATS are: lowering of restrictions on movement of natural persons under Mode 4 and locking the current existing regime with respect to Mode 1. Time bound, employment specific and temporary GATS visas in Mode 4 can be jointly stressed under the common position. Under the plurilateral approach, South Asia as a group can identify sectors and put requests for liberalisation to the concerned group of countries but since this would involve a reciprocal opening, it requires detailed studies.

Other issues

There are other equally relevant issues on which South Asia could forge a common agenda. These relate to Trade Facilitation (TF), Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) and ‘aid for trade’, among others.

Regarding negotiations on TF, the prime issue for developing countries is whether resources will be available for implementing TF. Along with other developing Members, South Asia may collectively propose a common position for the provision of techni-

cal assistance by either the WTO Secretariat or aid agencies to support TF measures, including trade-related infrastructure.

Article 27.3 (b) of TRIPS (related to patents) has emerged as highly controversial and its review is already underway. South Asian countries should negotiate for the amendment of TRIPS to include provisions for patent applicants to disclose the country of origin of genetic resources and traditional knowledge used in the inventions and evidence of fair and equitable benefit sharing.

The Aid for Trade Task Force submitted its recommendations to the General Council by the stipulated deadline of 31 July 2006. The recommendations have not addressed the quantity and modalities of the fund. Therefore, South Asian countries should propose that such aid flows should be stable, predictable and demand-driven. It must encompass technical assistance, institutional reform, supply side capacity building and infrastructure while covering adjustment costs arising out of multilateral liberalisation.

Conclusion

There exist sufficient grounds for South Asian countries to forge common positions on various issues at the WTO. Together, they can influence the negotiations for their collective benefit. Convergence of macroeconomic policies and common developmental interests strengthens the possibility of South Asia reaching a consensus on various issues being negotiated at the multilateral level. However, differences in some important issues will remain. To pursue common goals as well as protect national interests, the possibility of a ‘two track’ approach as followed by the Association of South East Asian Nations, i.e., the ‘first track’ on common agenda and the ‘second track’ on issues where countries ‘agree to disagree’, may be explored. Greater trade integration could also go a long way in forging economic interests in South Asia. ■

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Working Towards a Common Position for South Asia in the WTO

At a time when WTO Members are forming groups to negotiate with a common agenda to influence trade negotiations, it is important to see whether South Asia actually needs a common position for WTO negotiations.

Saman Kelegama

When the Uruguay Round (UR) became a *fait accompli* and the knowledge about the World Trade Organization (WTO) was meagre, a common position for the South Asian countries in the WTO looked ideal. This is precisely what the Group of Eminent Persons (GEP) report (1998) on South Asian Association for Regional Cooperation (SAARC) stated, i.e., to formulate a South Asian common position in international trade negotiations.

SAARC Trade and Commerce Ministers met and adopted a common position for the WTO Ministerials at Seattle (1999) and Doha (2001) and these positions clearly stated South Asia's concerns: that the WTO agenda should not be overloaded; that new issues should not be brought in before implementation issues are fulfilled; that a new round should not be initiated until the unfinished agenda is fully met; that the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) should be made compatible with the Convention on Biological Diversity (CBD); and so on. However, South Asia soon realised that with new issues gradually emerging in the WTO, such a common position is becoming increasingly difficult.

This realisation was aggravated with the differences among South Asian countries becoming more prominent, viz., the four least developed countries (LDCs) – Bangladesh, Bhutan, the Maldives and Nepal – having different concerns from the three developing countries – India, Pakistan

and Sri Lanka; and Sri Lanka itself having differences with the two large developing countries. For instance, before the expiry of the Agreement on Textiles and Clothing (ATC), Sri Lanka, Bangladesh, Nepal, and the Maldives preferred an extension of the quota regime beyond 2004, but not India and Pakistan. The net-food importing countries in South Asia were having different concerns than the net-food exporting countries. When some South Asian countries attempted to work out a free trade agreement (FTA) with the United States (US) around 2002-2003, they even considered toying a 'WTO-plus' path on some issues such as TRIPS. Clearly, there are different interests and all South Asian countries want to individually gain from the WTO. These factors worked against formulating a common position in the later years and this was seen at the WTO Cancún Ministerial in 2003.

Once the 'July package' of 2004 dictated the WTO negotiations, South Asian countries found it even more difficult to harmonise their position on an issue-based package. The fact that there is no common ground on special and differential treatment (S&DT) became crystal clear when Pakistan and Sri Lanka opposed duty-free and quota-free (DFQF) market access to the LDCs at the Hong Kong Ministerial in 2005. The fact that India wanted something more than a plurilateral watered-down arrangement on liberalisation of services clearly showed that common ground in services liberalisation is

difficult to work out. Even in the most optimistic scenario, South Asian cooperation seems to be limited now than it was during the Uruguay Round and the first five years after the establishment of the WTO. The common denominator of the past no longer works.

All these issues obviously raise the question as to whether South Asia really needs a common position in the WTO? South Asia is still a small player in global trade. For instance, India's share in world exports was 0.83 percent in 2005 compared to 18.12 percent for the European Union (EU), 8.95 percent for the US and 6.18 percent for Japan. Similarly, its share in global imports was 1.03 percent in 2005 compared to 18.33 percent for the EU, 16.07 percent for the US and 4.8 percent for Japan. When the global scenario with regard to the largest South Asian nation is so clear, there is no need to mention about the rest of the South Asian countries. Given this situation, South Asia has a long way to go in integrating with global trade and for this purpose, a non-discriminatory rules-based global trading system is necessary and the cost of failure of the WTO is too high for South Asia.

Given that the Doha Round has been suspended, the EU and the US will most likely form regional trade arrangements (RTAs) with friendly countries. World trade will get further fragmented and RTAs will operate more on the basis of power relationships and less on the basis of rules, hence squeezing the majority of South

Asian countries. Trade disputes will increase; non-tariff barriers (NTBs) will rise; larger trading nations will attempt to bully the smaller ones; and the weaker trading nations will stand to lose the most, including those in South Asia.

It may be recalled that with the formation of the WTO in 1995, large and powerful trading nations were forced to alter their laws and procedures, most often to the advantage of weaker trading nations. There have been several WTO Panel and Appellate Body rulings against the big trading powers such as the US on dumping, subsidy, safeguards, etc. Brazil won some cases against the US over cotton and against the EU over sugar. The US amended its 1979 Anti-Dumping Code and the Commerce Department changed its methodologies employed in calculating anti-dumping margins. All these achievements can be a thing of the past if the WTO is weakened. South Asia can play a more effective role to prevent this but a different approach is needed for this purpose. It is evident from the current trade negotiations that most WTO Members do not act alone but function in a 'club mode'. For instance, the G-20; African, Caribbean and Pacific (ACP) nations; and the Cairns Group, etc., work together to articulate and defend their positions during multilateral trade negotiations. It is this issue-based coalition building that is gathering momentum in the WTO.

South Asia could make use of this approach to its advantage. Clearly, two or more South Asian countries could effectively cooperate more actively in the context of broader issue-based Friends Group. This could formally complement the WTO talks of individual South Asian countries in formal negotiations. Where there are common specific interests – technical assistance, trade facilitation, anti-dumping, etc., – South Asia can formulate common positions. After all, in general terms, South Asia is look-

ing forward to: redressing the past imbalance and perceived inequity in global trade; enhancing market access; creating more policy space; supporting capacity building and technical assistance; and maintaining procedural fairness from the Doha Development Agenda.

Finding a common ground is, thus, not a difficult task on general issues. A common stand can be very effective during crucial times at the



WTO. For instance, the EU Trade Commissioner, Mr Peter Mandelson came to the WTO Hong Kong Ministerial saying that he had no mandate to discuss EU agricultural subsidies but had to agree to the 2013 phase out deadline when he realised that the G-20 had got together with the G-90 to form the G-110 to speak with one voice on this issue.

Finding commonality amidst different interests is challenging. Association of South East Asian Nations (ASEAN) has been unable to find a common position as its three LDC Members, viz., Cambodia, Laos and Myanmar; and Singapore having its own 'WTO-plus' agenda. ASEAN, thus, follows a 'two-track' approach, viz., the 'first track' on common agenda and the 'second track' on issues where they 'agree to disagree', i.e., members go their separate ways working through issue-based coalitions. They follow the dual track approach with political will and cooperation among their WTO missions in Geneva because they strongly believe in

some degree of unity than no unity at all.

South Asia could think of a similar approach. Deeper economic integration in South Asia will certainly assist this approach. If Bangladesh is elevated from its LDC status to a developing country status and Bhutan obtains WTO membership, conditions would be more favourable for formulating a common position. India may have to play a pivotal role in this process as it is the most influential South Asian WTO Member.

Critiques may say that WTO has become weak after Cancún and at present, it is in limbo with the proliferation of RTAs. With 90 odd developing countries, the WTO resembles a United Nations (UN) system having to accommodate a plethora of interests and preferences, thus making effective decision making elusive.

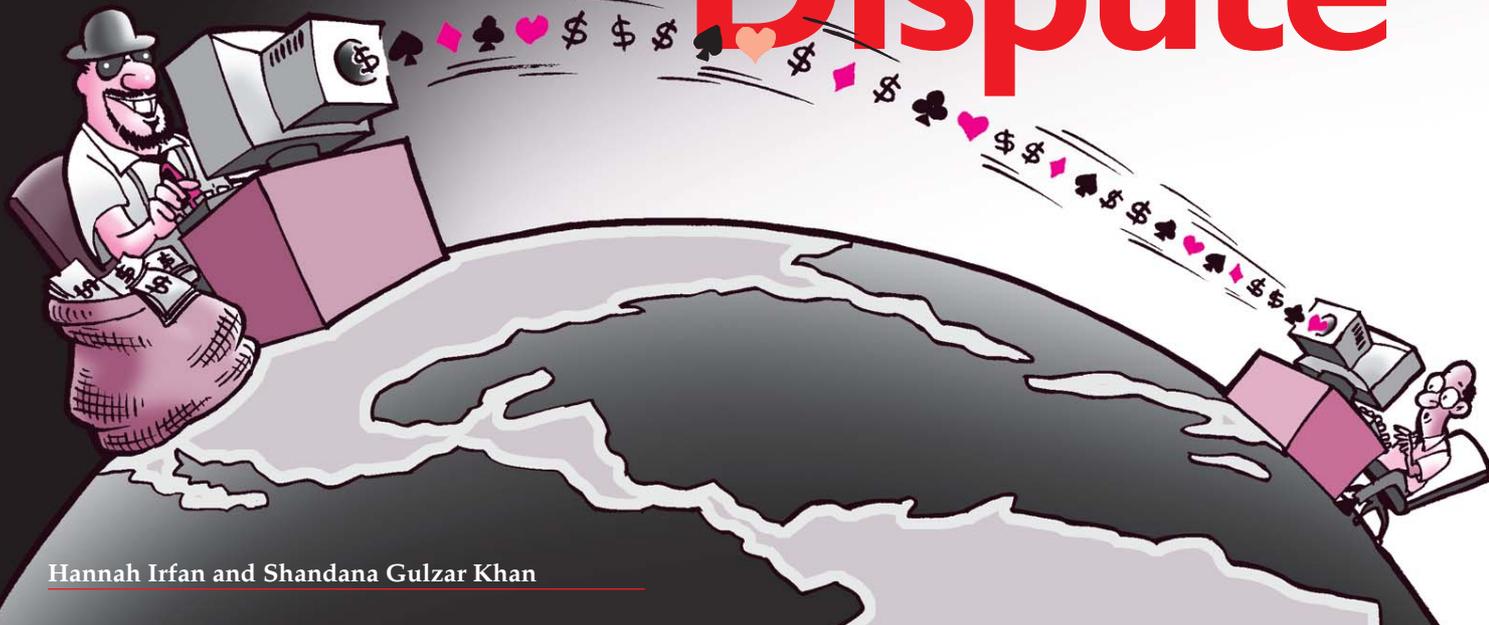
The collapse of the Doha Round of trade negotiations on 24 July 2006 may be highlighted as an example. In such a situation, why bother about a common position?

One should not be too pessimistic. Trade negotiations invariably take a long time; the Uruguay Round took eight years to complete. Regardless of the way the negotiations proceed, it is prudent to take cognizance of the statement by Prof. Helliner at the World Bank's 2004 Annual Conference: "it is more important for the WTO and other rule systems to be broadly fair and acceptable however long it may take to get them right, than rush to further liberalisation as interpreted by major economic powers... If the current round of WTO negotiations fail; it will not necessarily be, as some suggest, a disaster for development... If the Development Round fails, we shall have to try again".

It is this trying that will eventually bring gains to South Asian economies. In this process, a common position on selected issues is certainly going to assist South Asia. ■

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US - Gambling Dispute



Hannah Irfan and Shandana Gulzar Khan

The General Agreement on Trade in Services (GATS) was signed in 1995 but it is surprising that only two disputes regarding trade in services have been brought to the Dispute Settlement Body (DSB) hitherto. In both disputes, viz., the Mexico Telecommunications Dispute and United States (US) – Gambling Dispute, panel findings have set precedents on interpretations of various GATS articles, concepts and qualifying terms.

This article focuses on the outcome of the US – Gambling Dispute brought against the US by Antigua and Barbuda. Some trade experts opine that while the decision of the DSB is multifaceted, the dispute highlights the clash between modern technology and decades-old trade agreements. It also points to the speedy pace of e-commerce. This is important for developing countries, which are increasingly supplying different kinds of services over the Internet.

This dispute has become a guide for developing countries on issues like necessity tests, general exceptions, scheduling guidelines and specificity of commitments. It also has policy implications, guidelines and questions that are bound to crop up in the

next few years in the GATS arena. Regardless of which side in this dispute claims victory, all WTO Members that have either prepared a GATS offer or are in the process of doing so must be clear on exactly what they are offering and how they plan to regulate their offers. That might seem tautological but this is exactly how the dispute arose.

How the dispute began?

In 1998, Mr Jay Cohen, a US national and President of World Sports Exchange was arrested upon his arrival in the US from Antigua and Barbuda. His alleged crime was that he provided gambling services to US citizens in violation of the Federal Wire Communications Act, 1961. The case was heard in many courts and the US Supreme Court refused to review the matter. After serving 21 months in imprisonment, Cohen approached the government of Antigua and Barbuda to take up his case at the WTO, which, he contended, had been about business, specifically e-commerce.

The WTO's Dispute Settlement Mechanism (DSM) is strictly a process between states. Yet, in an increasing number of cases, a single compa-

ny stands behind the scenes of the state-sponsored complaint (in this case, Mr Cohen and World Sports Exchange). Moreover, businesses engage in what one could call 'state shopping'. In the US – Gambling Dispute, a US national and investor, lost his battle within the US itself and then obtained the support of a foreign government, Antigua and Barbuda, to pursue the US on the same matter. The WTO case could, thus, be seen as pitting a US investor against his own government.

Panel proceedings

Antigua and Barbuda, on 21 March 2003, requested consultations with the US regarding measures applied by central, regional and local authorities in the US, which affect the cross-border supply of gambling and betting services. It asserted that certain US measures were inconsistent with the US obligations under GATS, in particular, Articles II, VI, VIII, XI, XVI and XVII thereof, and the US Schedule of Specific Commitments annexed to GATS. The crux of the contention put forward by Antigua and Barbuda was as follows: Certain US measures prevented suppliers based out-

side the US to export online gambling services to US consumers. These measures constituted a violation of US GATS market access commitments for cross-border gambling services under GATS Article XVI, which is a guarantor of market access to trade partners via the prohibition of quantitative restrictions. However, Article XVI becomes operational only if the WTO Member has made sector-specific commitments in its GATS schedule. Finally, it argued that the US allowed domestic suppliers to provide online gambling services, discriminating against foreign service suppliers in violation of GATS Article XVII (national treatment).

On its part, the US maintained: It had not committed in its schedule, market access commitments for cross-border gambling services. The reasoning behind it was that under the US law, any supply of online gambling services, even by domestic suppliers, is banned. It also asserted that specific commitments under GATS Article XVI do not render impossible the total prohibition of the electronic supply of certain services, given that this GATS provision is only concerned with avoiding specified quantitative limitations. Finally, the US claimed that it was invoking GATS exemptions under Article XIV that allows a Member to derogate from GATS market access commitments due to overriding public policy considerations.

Panel decision

On 10 November 2004, the report of the Panel was circulated to Members. The Panel found, among other issues, that: The US had submitted, without realising that it had done so, in its GATS Schedule, specific commitments for gambling and betting services under the sub-sector entitled 'Other Recreational Services (except sporting)'. Three US federal laws and the provisions of four US state laws prohibited means of delivery of service included in GATS Mode 1, i.e., cross-border supply, contrary to the specific market access commitments made by the US for gambling and betting services under Mode 1. The US failed to accord services and service suppliers of Antigua and Barbuda,

treatment no less favorable than that provided for under the terms, agreed and specified in the US Schedule, contrary to GATS Articles XVI:1 and XVI:2 on market access. The US was also not able to invoke GATS exceptions under Article XIV as it was unable to demonstrate that the three federal Acts are 'necessary' under Articles XIV (a) and (c) dealing with exemptions from market access commitments, including public morals clauses and are consistent with the requirements of the chapeau of GATS Article XIV.

Appeal to the Appellate Body

Both Antigua and Barbuda and the US appealed to the Appellate Body (AB) on issues of law and legal interpretation. On 7 April 2005, the AB circulated its report to the membership.

- The AB found that the Panel should not have ruled on claims advanced by Antigua and Barbuda with respect to eight state laws of the US as the former had not established a *prima facie* case of inconsistency with GATS.
- The AB upheld the Panel's finding that the US Schedule includes a commitment to grant full market access in gambling and betting services.
- The AB upheld the Panel's finding that the US acted inconsistently with Article XVI:1 and sub-paragraphs (a) and (c) of Article XVI:2 by maintaining certain limitations on market access not specified in its Schedule.
- Finally, the AB reversed the Panel's finding on Article XIV (a) and found that the US measures are justified under Article XIV (a) as measures "necessary to protect public morals or to maintain public order".
- It upheld the Panel's finding that the US, had indeed failed to show that these measures satisfy the conditions of the chapeau of Article XIV. Turning to the introductory paragraph of Article XIV, the AB also disagreed with the Panel's finding that the US enforced its gambling laws more strictly against foreigners than against US suppliers. It confirmed one other

form of discrimination based on an apparent (but not decisively confirmed) authorisation in the Inter-state Horse Racing Act permitting domestic, but not foreign, service suppliers to offer remote betting services in relation to certain horse races.

Implementation of the ruling

In May 2005, the US stated its intention to implement the DSB's recommendations, indicating that it would need a reasonable period of time to do so. As both parties failed to agree on a reasonable time of period for implementation, in June 2005, Antigua and Barbuda requested that the reasonable period of time be determined through binding arbitration pursuant to Article XXI.III (c) of the Dispute Settlement Understanding (DSU). The WTO Director General appointed Dr Claus-Dieter Ehlermann to act as Arbitrator.

On 19 August 2005, the Arbitrator circulated his Award to the Members, determining that the reasonable period of time for implementation was 11 months and 2 weeks – from 20 April 2005 to 3 April 2006. On 24 May 2006, the parties informed the DSB that, given the disagreement as to the existence or consistency of measures taken by the US to comply with the recommendations and rulings of the DSB, they had agreed on certain procedures under Articles XXI and XXII of the DSU dealing with surveillance of implementation of recommendations and rulings and compensation and suspension of concessions respectively.

Policy implications

The internet has led to a growing cross-border delivery of services. The WTO Work Programme on E-commerce is still in limbo but the US – Gambling Dispute has authoritatively done away with many ambiguities and shed light on many rules yet to be negotiated.

Firstly, the US – Gambling Dispute has confirmed that electronically supplied services are not exempt from GATS rules and commitments, i.e., GATS Mode 1 commitments are needed to secure cross-border Internet-

supplied services. Secondly, it has clarified the definition of a 'like' service regardless of the mode of delivery, e.g., a market access commitment in a specific GATS mode would cover the right to supply the same service via telephone, Internet, snail-mail etc., unless opt outs are mentioned in the schedule. Thirdly, it provides that the methodology by which specific GATS commitments are scheduled must be crystal clear. Fourthly, it has clarified the scope of GATS market access commitments under Article XVI. An outright ban on the means of cross-border supply is a limitation on the number of service suppliers in the form of numerical quotas within the meaning of Article XVI and, thus, a quantitative limitation with a zero-quota effect. Fifthly, it has clarified the difference between Article VI on domestic regulation and Article XVI on market access. Article VI stipulates that domestic regulations should not "unnecessarily and intentionally negatively" affect trade in services. Article XVI deals with ensuring full market access with respect to bound commitments. It follows that matters dealing with regulation of quality of services are not matters that can be tackled as long as they are non-discriminatory. Sixthly, when it comes to defining what constitutes 'public morals' and 'public order', cultural differences have been given weight and options given to policymakers which can override scheduled commitments.

Policy advice

Some of the most important guidelines that can be gleaned from this landmark judgment for developing countries are:

- Scheduled commitments should be accurate and clear; they should explicitly mention any conditions required for fulfilling development dimensions of national policy on GATS.
- Whichever system of classification of services a WTO Member employs, e.g., the GATS Services Sectoral Classification List in conjunction with the United Nations Central Product Classification (UN-CPC) and following the 2001 GATS

Scheduling Guidelines or other internationally-recognised classification systems, it must clearly be spelled out as confusion can in itself give rise to new disputes.

- Article XIV can provide policy space for Members wishing to retain policy measures that can be inconsistent with their commitments under GATS in order to sustain policy objectives, thereby allowing room for non-trade concerns. This can work both for and against developing country interests. In order to avoid misuse of this policy space, measures that are applied under Article XIV (a) and (c) will only be upheld if applied "in a manner that does not constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services".

Some issues related to the dispute

Will future decisions on non-trade concerns such as gender, child labour, environment, health and other social policies occupy center stage as well? For instance, how would future panels keep matters that should rightfully be in the realm of, say the International Labour Organization (ILO) out of GATS disputes, especially regarding Mode 4? Some new questions that are bound to be raised after the decision in the US – Gambling Dispute are related to:

- Interpretation of Members' scheduled commitments that deal with many issues, including the legal importance of the Scheduling Guidelines and the W120 Classification Lists, the importance of statements in the context of preparing a schedule, and the impacts on scheduling of limitations.
- Referring to the GATS objectives, the 'unfettered' right to regulate the impact on the development provisions in GATS.
- Interpreting GATS Article XVI, implications for existing and future GATS commitments and for negotiations on domestic regulations.
- Interpreting Article 14, including the new effects of the necessity test for general exceptions and the

ease and/or difficulty of claiming exceptions.

The future of GATS

The bottom-up approach to liberalisation under GATS spells out flexibility, phased commitments and domestic regulation. The WTO Hong Kong Ministerial in 2005 proposed the 'plurilateral approach' to expedite the pace of negotiations on GATS in the Doha Development Agenda (DDA) and might have the effect of forced liberalisation *a la* the GATT. The cumulative effect is a 'minimum number of sectors/sub-sectors in an agreed list of priority sectors/sub-sectors and across all modes of supply' on offer by all of the membership, accompanied by its requirement to reduce (development) exemptions.

Many developing Members, having neither the negotiation capacity nor enough experience, could be facing double jeopardy as this approach envisages speedy commitments without understanding what entails and then being called accountable for them at the DSB *a la* the US – Gambling Dispute. It could be used in conjunction with Articles IV and XIX (increasing participation of developing countries and Part IV of GATS on progressive liberalisation and negotiations of specific commitments respectively) to diminish the flexibility of GATS.

Conclusion

The decisions in the US – Gambling Dispute can be seen as a victory for the binding force of GATS commitments and the flexibilities and exceptions therein. It can also be viewed as an attempt to encroach upon national sovereignty on matters such as domestic regulations. Either way, combining the guidance offered by the US – Gambling Dispute, developing countries are well informed about how to make requests and offers before the conclusion of the DDA. ■

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South Asian Common Position on TRIPS Review

Situation, Options and Positions

South Asian countries should develop a common position on TRIPS Article 27.3 (b) to strengthen their voice during review negotiations and ensure that TRIPS does not negate the principles of access and benefit sharing and prior informed consent.

Kamalesh Adhikari

The apprehension that World Trade Organization (WTO) Members would fail to make any major breakthrough in trade negotiations, given the persistence divergence on issues of the Doha Round, proved to be true. The Doha Round of multilateral trade negotiations has been suspended with no certainty on when the negotiations will resume.

After trade ministers from Australia, Brazil, the European Union (EU), India, Japan and the United States (US) failed to bridge differences, WTO Director General (DG) Pascal Lamy had no choice but to recommend for the suspension of multilateral trade negotiations. While stating a bitter reality that the Doha Round of trade negotiations would not be completed by the agreed deadline, i.e., the end of 2006, he, however, indicated that the suspension of talks in all subjects across the Doha Round as a whole is also meant "...to enable the serious reflection by participants which is clearly necessary." He also said that

the suspension of trade negotiations gives WTO Members "time-out to review the situation, examine available options and review positions".

If these remarks from the DG are any indication that WTO Members have to build consensus on the negotiating issues of the Doha Round, it is more than a positive reflection of the importance of the multilateral trade body. Indeed, the multilateral trade body and its rules are essential to promote global trade and facilitate better integration of countries into the global economy. Particularly, for developing and least developed countries, there is no better option than to conduct trade through multilateralism and no better choice than to support and sustain it.

In this context, how should the biodiversity-rich South Asian countries¹ "review the situation, examine available options and review their positions" with regard to one of the most debated provisions of the WTO's Agreement on Trade Related Aspects

of Intellectual Property Rights (TRIPS)² – the provisions under Article 27.3 (b).

Situation review

The review of TRIPS Article 27.3 (b) is mandated by the TRIPS Agreement³ and started since 1999. However, during review negotiations, Members were indifferent to each other's positions, particularly with regard to patents on life forms. While developing Members lobbied for the incorporation of Convention on Biological Diversity (CBD)⁴ principles within TRIPS, developed Members, mainly the US and Japan, opposed it. This issue received wider consideration at the Fourth WTO Ministerial in Doha in 2001. The Doha Declaration instructed the TRIPS Council to examine, *inter alia*, the relationship between TRIPS and CBD; the protection of traditional knowledge (TK) and folklore; and other relevant new developments raised by Members pursuant to Article 71.1⁵ of TRIPS. The Doha





Declaration also stipulated that while undertaking this work, the TRIPS Council shall be guided by the objectives and principles set out in Articles 7⁶ and 8⁷ of TRIPS and shall take into account the development dimension.

Members, individually as well as in groups, have been submitting different proposals to the TRIPS Council, in which discussions have gone into considerable detail. Here, one can notice a clear divide between the technology-rich developed Members and biodiversity-rich developing Members (*See Box 1*). Among all the proposals, most recently discussed are the proposals on disclosing the source of biological materials and associated TK.

Broadly speaking, the review of Article 27.3 (b) is still under negotiations with persistent divergence among Members, particularly on the issue of the relationship between TRIPS and CBD. Many developed Members argue that there is no need to incorporate any changes in the current provisions of Article 27.3 (b). They view that the concerns of developing Members are not under the scope of TRIPS and need to be addressed outside the TRIPS system, e.g., through national laws, private contractual arrangements, the World Intellectual Property Organization (WIPO) Patent Cooperation Treaty and CBD. However, most developing Members, which do not reject patenting of life forms, have been asking for the amendment of Article 27.3 (b) with conditions on patentability such as disclosure of the source of genetic materials and associated TK, and evidence of fair and equitable benefit sharing and prior

informed consent (PIC). It is but clear that developed Members are not yet willing to show flexibilities to incorporate access and benefit sharing (ABS), PIC and disclosure requirement into TRIPS.

Options available

South Asian countries have got some flexibilities under TRIPS as well as CBD to develop national legislation on plant variety protection and ABS.

Under TRIPS, they can devise a *sui generis* (of its own kind of system) legislation on plant variety protection, which is a flexibility given to WTO Members by Article 27.3 (b). Under this law, they can make provisions for the rights of breeders in a way that does not adversely affect farmers' rights that are under threat due to global IPR rules. India has done the same in its *sui generis* law, Plant Variety Protection and Farmers' Rights Act, 2001. Therefore, other South Asian countries can also include provisions in their laws to safeguard farmers' rights to save, exchange, reuse and sell seed; get protection from the misappropriation of TK; obtain benefits derived from the commercial use of their biological resources and associated TK; and participate in the decision making and law making process on matters related to their biological resources and associated TK. However, this system only covers plant varieties whereas patent provision in the TRIPS Agreement applies in all technologies. Therefore, South Asian countries should also find ways to deal with ABS, PIC and disclosure requirement in other broad areas of patents, in addition to implementing a law for plant variety protection.

Box 1: TRIPS review debate

During TRIPS review negotiations, the ideas and proposals put forward by different countries and groups of countries include:

Disclosure as a TRIPS obligation:

A group represented by Brazil and India, including Bolivia, Colombia, Cuba, Dominican Republic, Ecuador, Peru, Thailand, and supported by the African group and some other developing countries, has proposed to amend TRIPS so that patent applicants are required to disclose the country of origin of genetic resources and TK used in the inventions, evidence that they received PIC, and evidence of fair and equitable benefit sharing.

Disclosure through WIPO:

Switzerland has proposed an amendment to the regulations of WIPO's Patent Cooperation Treaty (and, by reference, WIPO's Patent Law Treaty) so that domestic laws may ask inventors to disclose the source of genetic resources and TK. Failure to meet the requirement could hold up a patent being granted or, when done with fraudulent intent, could entail a granted patent being invalidated.

Disclosure, but outside patent law:

The EU's position includes a proposal to examine a requirement that all patent applicants disclose the source or origin of genetic material, with legal consequences of not meeting this requirement lying outside the scope of patent law.

Use of national legislation, including contracts:

The US has argued that the CBD's objectives on access to genetic resources and on benefit sharing, could best be achieved through national legislation and contractual arrangements based on the legislation, which could include commitments on disclosing of any commercial application of genetic resources or TK.

Adapted from www.wto.org

Box 2: Positions of the LDCs and developing countries

LDCs' position: The LDC group views that the review of Article 27.3(b) should incorporate the conditions on patentability to disclose the source of genetic material and relevant TK. If we look at the past negotiating positions and the submission of proposals by the LDCs, we find most LDCs want the evidence of fair, sustainable and equitable benefit sharing, and PIC as a condition for patentability in order to stop biopiracy of genetic resources and TK. Also, the Dhaka Declaration – adopted at the International Civil Society Forum for Advancing LDC Interests in the Sixth WTO Ministerial in the Context of the Doha Development Round, held from 3-5 October 2005 in Bangladesh – had demanded for the incorporation of ABS, PIC and disclosure requirement within TRIPS.

Developing countries' position: Prior to the Hong Kong Ministerial, Commerce Minister of India, Mr Kamal Nath wrote a letter to 31 trade ministers to support the proposal submitted by eight countries to the TRIPS Council. The proposal urges WTO Members to ensure that TRIPS provisions do not conflict with CBD. The proposal also calls upon WTO Members to ensure that TRIPS duly recognises and respects the spirit of ABS and PIC. In addition, the proposal asks WTO Members to ensure that disclosure requirement be enforced within TRIPS and be made mandatory for the patent applicant to comply with.

Notes

- 1) The LDC group includes four South Asian LDCs – Bangladesh, Bhutan, the Maldives and Nepal.
- 2) The eight countries are Bolivia, Brazil, Cuba, Ecuador, India, Pakistan, Peru, Thailand and Venezuela. Out of these, India and Pakistan are South Asian developing countries.

Similarly, under CBD, they can devise national legislation dealing with biological diversity, ABS and PIC, which is a flexibility provided by the Convention to its contracting states. In this case too, India has already devised a legislation, Biological Diversity Act, 2002. Hence, other South Asian countries⁸ too should not delay in implementing the national ABS law.

These countries should also examine the pros and cons of other available options. For instance, the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA)⁹, 2001 provides a flexibility to protect farmers' rights. The countries, which have ratified this International Treaty, can devise a national legislation to implement farmers' rights at the national level.

Position review

If we observe the common positions of the least developed countries (LDCs) and the developing countries with regard to Article 27.3 (b), we find that most South Asian countries have similar positions (Box 2). It means that there cannot be any disagreement among them to develop a South Asian common position for TRIPS review negotiations. It would, therefore, be in their interest if they capitalise on the South Asian Association for Regional Cooperation (SAARC) forum to put forward their position on TRIPS review. It will not only help them effectively implement the laws they have enacted or are considering to enact as part of their obligations under CBD and TRIPS but will also enable them to benefit from the vast amount of biological resources and associated TK they possess.

If these biodiversity-rich countries fail to negotiate for the amendment of Article 27.3 (b) of TRIPS in a manner they want or if TRIPS continues to negate ABS and PIC principles and disclosure requirement, they will certainly find it difficult to curb biopiracy and receive benefits from the commercial use of biological resources and associated TK. It is, indeed, the "time out to review the situation, examine options and review positions". ■

NOTES

- 1 Among the seven South Asian countries, barring Bhutan, all are WTO Members. Bhutan is also in the accession process.
- 2 This issue is not among the five negotiating issues, identified by Members under the 'July package', but is an important issue under the Doha Round and negotiations on it at the TRIPS Council were on progress until the suspension of trade talks in August 2006.
- 3 According to TRIPS, the review of Article 27.3 (b) would be done after four years of the implementation of TRIPS. TRIPS came into implementation from 1995.
- 4 CBD sets out the three objectives: the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of benefits arising out of the utilisation of genetic resources.
- 5 The Council for TRIPS shall review the implementation of this Agreement after the expiration of the transitional period referred to in paragraph 2 of Article 65. The Council shall, having regard to the experience gained in its implementation, review it two years after that date and at identical intervals thereafter. The Council may also undertake reviews in the light of any relevant new developments which might warrant modification or amendment of this Agreement.
- 6 The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.
- 7 1. Members may, in formulating or amending their laws and regulations, adopt 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, provided that such measures are consistent with the provisions of this Agreement. 2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.
- 8 All the seven South Asian countries have ratified CBD.
- 9 ITPGRFA sets up a multilateral system of ABS. The Treaty provisions are limited to 64 listed plant genetic resources – food and forages – that are fundamental to food security and are either in the public domain or are under the hold of natural and legal persons.

Suspension of Doha Round

Implications for Development



Why was the Doha Round of multilateral trade negotiations suspended? When and how will the Round resume? What will happen to the development-friendly decisions made in the Doha Round? What are the implications for the developing and least developed countries?

Ratnakar Adhikari

The decision by the Director General (DG) of the World Trade Organization (WTO) to suspend the Doha Round of trade negotiations on 24 July 2006 came as a surprise to many observers closely following the 'Development Round'. Some justify by saying it is the right course of action under the given circumstances but others are unconvinced.

The 27 July Meeting of the General Council (GC), which was expected to endorse the decision for suspending the Round, "took note" of the DG's statement to suspend negotiations. The GC Meeting was the perfect platform for WTO Members to intervene and seek clarification and rightfully demand a word on when and how the talks would resume.

This article attempts to trace the reason for the suspension of the talks and discusses issues relating to the future of trade liberalisation and the multilateral trading system from development perspective.

Developing modalities for negotiations on agriculture and non-agricultural market access (NAMA) by 31 July 2006 as mandated by the Hong Kong Ministerial was in itself a tall order given the divergence of views in the run-up to the Hong Kong Ministerial. It may be recalled that Commerce Minister of India, Mr Kamal Nath had walked out of the negotiations on 1 July, prompting the Head of States of the Group of Eight (G-8) countries to have a discussion with their counterparts from five developing countries during the formers' meeting at St. Petersburg in mid-July. The WTO DG flew to the Summit venue to obtain a political commitment from the Head of States in favour of the Doha Development Agenda (DDA). He was able to secure the same but that too was short-lived.

This is the first time in the histo-

ry of the WTO that despite the directives given by the Head of States, trade ministers decided to stick to their earlier positions, which resulted in the suspension of the Round. The Doha Round had received a setback even in the past when the Cancún Ministerial collapsed due to irreconcilable differences among the Members on agricultural liberalisation on the one hand and the possible inclusion of the 'Singapore Issues' in the multilateral trading discipline on the other. However, the current failure is of a greater magnitude. No date has been set for the resumption of talks. In order to cover up each others' weaknesses, Members have intensified the blame game.

In this respect, there are several issues to be considered – the process, content and most importantly, the implications of the decision to suspend the Round. Some of these were also raised at the GC Meeting of 27 July by the Geneva based trade diplomats.

Firstly, since the WTO is a consensus-based system, the suspension of the Doha Round of trade negotiations should have been decided by consensus. Therefore, questions were raised on the process followed to 'suspend' the negotiations. Some Members were exasperated with the fact that there has neither been a bottom up approach to negotiations, nor was the principle of 'decision by consensus' respected. In the aftermath of the Hong Kong Ministerial, Australia, Brazil, the European Union (EU), India, Japan and the United States (US) – the G-6 – exclusively negotiated among themselves to find solutions to the most contentious issues, viz., agriculture and non-agricultural market access (NAMA). The fact that the African countries and least developed countries (LDCs) were not represented in this Group is inexcusable for a consensus-based organisation.

Secondly, countries have invested considerable time and resources in the Development Round. As the suspension has taken place without their consent, they are bound to feel discouraged. These views were eloquently expressed in the GC Meet-

ing by the representative of the African Group.

Thirdly, given the suspension of negotiations, it is not clear whether other issues in which decisions have already been made at the Hong Kong Ministerial will have the same binding power or they too will fall victim of the suspension. Issues such as trade facilitation, aid for trade, enhanced Integrated Framework, LDC specific special and differential treatments, which were unequivocally endorsed by the Hong Kong Ministerial fall into this category. Since these issues are part of the Doha Round, which is a 'single undertaking', some suspect there is no obligation on the part of WTO Members to abide by these rules. However, the EU Trade Commissioner Peter Man-

This is the first time in the history of the WTO that despite the directives given by the Head of States, trade ministers decided to stick to their earlier positions, which ultimately resulted in the suspension of the Doha Round of multilateral trade negotiations

delson said he is in favour of allowing the development friendly decisions made so far to be implemented despite the breakdown of the talks.

Fourthly, although this is not the first time multilateral trade negotiations have collapsed,¹ stakes are much higher and positions more entrenched at the present juncture. Therefore, the Round itself could fall apart if the differences are not reconciled. The Doha Round is not yet dead, it is "between intensive care unit and crematorium" in the words of the Indian Commerce Minister. However, the prospect for reconciliation is not as promising as was during the Uruguay Round (UR), where only two parties had to agree on certain issues and other parties were minor players in trade negotiations. In this Round, the agreement within

the G-6 itself is a monumental task; let alone convincing other equally influential countries – in terms of their stakes as well as negotiating prowess – which are outside the G-6. A number of developed and developing Members, including Canada, China, Indonesia, Mexico, Norway, Pakistan, South Africa and Switzerland, may not easily agree to the decisions made by the G-6. To further compound the problem, the LDCs and the African Group, which are becoming extremely vocal in the WTO platform, may also demand that their concerns be reflected in the final negotiated outcomes.

Fifthly, the climate in the US is inhospitable for the completion of the Doha Round.² This is mainly because the Trade Promotion Authority (TPA)³ provided to President George W. Bush is expiring in June 2007. This is one of the reasons for setting 31 December 2006 as the deadline for the conclusion of Doha negotiations. The failure of WTO Members to agree to modalities of negotiations means that meeting the 31 December 2006 deadline for concluding the Doha Round talks is impossible. This makes it impossible for the Bush Administration to get the trade deal emerging out of the Doha Round approved by the Congress. Although it is possible for President Bush to seek an extension of the TPA, if the Doha Round of trade negotiations were to be concluded in early 2007, he may not get it so easily. This means that the revived Round will have to wait until the next presidential election in 2008 even if it is finalised within 2007. Moreover, the US farm bill is to be reauthorised in 2007. With Doha in abeyance, lawmakers will do little to cut subsidies and the current administration will do little to force them. Another farm bill will make it even harder to restart the Doha Round talks.⁴

Sixthly, there is complacency among a number of countries since their economies have been growing satisfactorily and their trade potential has not been hindered not least because there exists a possibility of following other routes for trade liberalisation. Regional trade agree-

ments (RTAs) and bilateral trade agreements (BTAs) are not only proliferating but are also emerging as alternatives for several WTO Members, both developing and developed. They have made their intentions to follow regional and bilateral routes for trade liberalisation clear after the suspension of the Doha Round. However, it is necessary to understand that BTAs, particularly North-South variety, tend to be 'WTO plus' in nature and developing countries, in particular, are asked to comply with requirements that go well beyond the intellectual property rights, services, investment, environment, labour and competition related agreements within the WTO.⁵ Due to asymmetric negotiating power and/or lack of awareness of the potential implications, developing countries tend to readily agree to such conditions, which could restrict the rights of developing countries to ensure access for HIV/AIDS patients to anti-retroviral medicines, allow farmers' to save, exchange, plant back and sell seeds, regulate investment in national interests, and liberalise 'services' as per their own development priorities.⁶

Seventhly, if the talks do not move forward in the right direction, the WTO Dispute Settlement Body would be flooded by trade disputes, mainly from the developing countries challenging the agricultural subsidies provided by the developed countries. Despite the expiry of 'peace clause' in 2003, which prevented WTO Members to resort to the Dispute Settlement Mechanism for trade disputes relating to agricultural support, not many cases have been brought against the agricultural subsidies so far. This was with the hope that the Doha Round of trade negotiations would conclude by 1 January 2005 or at the latest by 2006 and the 'peace clause' would either be extended or subsumed within a possible new agreement. The only case of this nature brought to the WTO in 2004 by Brazil against the US to prevent the latter from subsidising cotton production, has gone in favour of the former. With a number of trade distorting and actionable subsidies

Given that the Doha Round was the first attempt to put 'development' in the agenda of the global trading system and a successful completion would contribute to lifting millions of people out of the poverty trap, the failure of the Round would arrest the development prospects of a number of developing countries

still in place, the EU and the US could be the major targets of such disputes. The possibility of all the verdicts going in favour of developing countries challenging illegal subsidies of the EU and the US is imminent. Should that happen, it will provide ammunition to the members of the US Congress, some of whom are becoming more hostile to trade agreements, to propose that their country pull out of the WTO, let alone negotiate a trade deal under the Doha Round.

Despite these challenges, there is no alternative but to bring the Doha Round back on track. There is considerable interest on the part of the G-6 as well as other countries not only to prevent the development-friendly Doha Round from sliding off but also to preserve the single undertaking nature of the Round. At the same time, they are also convinced that RTAs and BTAs are no substitute for the multilateral trading system. This is because of two reasons. Firstly, the US, which has now become a major advocate of RTAs, will find it equally difficult to sign RTAs without the Congress making amendments on the deal, because when the TPA expires, RTAs will come under the same level of scrutiny as any other trade agreement. Secondly, certain sectors like agriculture can only be liberalised through a multilateral platform, as seen from the lacklustre agricultural deals con-

tained in various FTAs signed mainly by the EU and Japan with other developing countries.

Given the fact that the Doha Round was the first attempt to put development in the agenda of the global trading system and a successful completion of the Round would contribute to lifting millions of people out of the poverty trap, the failure of the Round would arrest the development prospects of a number of developing countries. For the Asia-Pacific region, where trade has contributed to lifting millions of people out of poverty and where RTAs are fraught with challenges⁷, failure to revive the Round in earnest would be tantamount to suspending development. This sense of urgency should guide trade negotiations in days to come. ■

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NOTES

- 1 The eighth round of multilateral trade negotiations under the GATT, the Uruguay Round, which started in 1986 collapsed in 1990 due to differences between the US and the EU on the issue of agricultural trade liberalisation. Finally, the Blair House accord reached between these two trading powers in November 1992, helped revive the Round and led to the conclusion of talks in 1994, and the creation of the WTO.
- 2 The Economist. 2006. *In the twilight of Doha*, 29 July.
- 3 Previously referred to as 'fast track authority' provided to the US President to sign trade agreements without ratification by Congress, which has to pass the agreement by a yes or no vote.
- 4 The Economist. 2006. As above note 2.
- 5 Gibbs, M. and S. Wagle. 2005. *The Great Maze: Regional and Bilateral Free Trade Agreements in Asia*. Colombo: UNDP Asia-Pacific Regional Centre.
- 6 See also M. Montes and R. Adhikari. 2005. 'Dangerous Liaison' in *South China Morning Post*, Hong Kong, 12 December.
- 7 The Economist. 2006. As above note 2.

Agriculture collapses the Doha Round

The Doha Round of trade negotiations broke down due to divergence in agricultural negotiations but a deal compromising the interests of developing Members would have been too high to bear.

Carin Smaller

Agriculture has been at the centre stage of World Trade Organization (WTO) negotiations. When the Doha Round was launched in 2001, developing Members demanded radical reforms to existing WTO agreements to redress the massive imbalances arising in agricultural trade. A key element was the comprehensive reform of agricultural trade rules to address structural inequities in agricultural trade. Five years later, hopes for redressing the imbalances remain more distant than ever.

In July 2006, WTO Members failed to meet the deadline to reach modalities for reducing tariffs and subsidies on all goods; a key step needed to conclude the Doha Round of trade negotiations as mandated by the Hong Kong Ministerial in December 2005. Agricultural tariffs and subsidies in the European Union (EU) and the United States (US) became a bone of contention that led to the Doha Round breakdown. Nevertheless, WTO Members have pledged to revive talks but uncertainty looms. The possibility of successfully concluding the Doha Round of trade negotiations became remote even as talks intensified in the first half of 2006. This was confirmed by the Chairs of the negotiations on agriculture and non-agricultural market access (NAMA) in the draft texts prepared for Trade Ministers in Geneva at the end of June 2006.

What were the areas of divergence among WTO Members in relation to agriculture so that ultimately trade talks became the casualty?

Agriculture in the Doha Round

Prior to the June mini-ministerial in Geneva, Chair of the agricultural negotiations – Ambassador Crawford Falconer of New Zealand – conducted six weeks of intensive negotiations with WTO Members to try to reach an agreement on the details of a deal. He met with representatives from different Member countries, listened to their proposals and ultimately prepared a text that summarised the state of negotiations.

The document was a balanced and accurate picture of the different interests and positions of WTO Members. It showed insurmountable differences between countries and revealed that there is almost no agreement on any of the issues. There were hundreds of areas of disagreement identified by 760 brackets in the document. It is a stark reminder to Members of the complexity of the issues, the different approaches to deal with wide-ranging interests related to trade, and how far apart Members remain. Some of the most contentious issues include the percentage reduction of tariffs and subsidies; the flexibility granted to developed and developing Members; and issues such

as preference erosion, tropical products and commodity prices.

The US took a very aggressive position at the agricultural negotiations, pushing for all tariffs in all countries reduced as much as possible (with the exception of the least developed Members). It asked for some tariffs to be reduced by up to 90 percent. The US is loathe to accept flexibilities for any Members that would lessen the impact of the tariff cuts. The US was also reluctant to offer cuts in its domestic farm support that would force it to reduce its current spending levels. The EU wanted lesser reductions to agricultural tariffs but made huge demands for greater access to developing country markets. Some developed Members, grouped as the G-10, were even more protectionist than the EU in agriculture and are seeking to negotiate sufficient leeway to maintain what are mostly small amounts of heavily supported agricultural production as well as flexibilities to lessen the tariff cuts (they have asked for 15 percent of their agricultural tariff lines to be subject to lesser cuts under a category called sensitive products).

A few developing countries like Brazil, Argentina and Chile demanded reduction in agricultural tariffs and subsidies to increase market opportunities for their agricultural exporters but were concerned about deep cuts to industrial tariffs asked of them. The majority of developing Members wanted market access to developed Members. The G-20 asked developed Members to cut their tariffs, on average, by 54 percent but many developing Members wanted to maintain tariffs to protect their domestic agriculture and industry.

An overwhelming majority of developing Members were unhappy with the proposed radical tariff cuts being demanded of them by Australia, New Zealand and the US. They view tariffs as a useful tool for raising government revenues and for allowing governments some measure of direction in nurturing particular sectors of their economy. In agriculture, there are serious concerns, especially among the G-33 (an alliance of 46 developing countries) and the 56 developing country Members of the Africa,

Caribbean and Pacific (ACP) Group about food and livelihood security and rural development for the millions of small-scale farmers, whose livelihoods are undermined by growing levels of imports in their local markets. To this end, the G-33 successfully negotiated a mechanism in Special Products to address these concerns. The agriculture document, however, reveals broad differences in how to use this mechanism. The US wanted to restrict Special Products to five tariff lines whereas the G-33 position was to designate at least 20 percent of tariff lines as Special Products (amounting to roughly 400 tariff lines). Five tariff lines could in no way adequately address food and livelihood security concerns in developing countries. The US proposal ignores the extensive range of submissions and proposals made by the G-33 countries over the past few years on this issue.

The issue of preferences is another concern for many developing countries; both those that receive preferences and those that do not. Preference agreements exist between many of the poorest developing countries and some developed countries, enabling developing countries to export products without being subject to tariffs. As developed countries lower their tariffs, the margin of the preference is eroded. This is particularly a problem in relation to the EU and ACP countries. Therefore, many ACP countries would like to see lesser tariff reductions on products they export to the EU in order to maintain their margin of preference. On the one hand, many Latin American countries argue that their exporters are disadvantaged because of the preferential access given to ACP countries and would not like to see any exemptions for such products. The agriculture text provides six different options to deal with preferences. To date, none of these have been agreed and the issue remains highly divisive between developing countries. On the other hand, there is an initiative by many Latin American countries for further tariff cuts on tropical products. This initiative has also not been agreed to.

A major proposal by the African Group (an alliance of 41 African coun-

tries) on managing trade in agricultural commodities was on the table. The African Group proposal is a refreshing way forward for addressing rural poverty. It emphasises the need to ensure stable, equitable and remunerative prices for commodity producers and to deal with structural oversupplies in commodity markets.

Time for a new approach?

The Doha Round of trade negotiations was suspended following the irreparable differences between developed and developing Members. WTO Director General Pascal Lamy stressed that an eventual agreement needs to generate "new trade flows." This will clearly have to wait under the new circumstances.

This aggressive new push for market access, particularly into developing country markets, triggered a passionate response from developing countries, represented by the G-20, G-33, the ACP Group, the LDCs, the African Group, the Small and Vulnerable Economies (SVEs), the NAMA-11, the Cotton-4 and the Caribbean Community and Common Market (CARICOM). Almost all have criticised the developed Members for sidelining the development dimension of the Doha Round and for making onerous market access demands. Brazil's Foreign Minister, Celso Amorim, said the burden of leadership is on the developed countries to give more in the negotiations. India's Commerce Minister, Mr Kamal Nath, emphasised this was meant to be a Round for trade flows and trade wins for developing countries and not for developed countries. Indonesia's Trade Minister, Mari Pangestu, felt that the flexibilities given to developing countries should not be seen as eroding market access but as creating effective instruments to address food and livelihood security and rural development. South Africa's Deputy Trade Minister, Rob Davies, called for the development essence of the Doha Round to be reclaimed.

The collapse exposes a deep rift among WTO Members. The assumption that the greatest good will come from the highest levels of market access is not shared by all. The idea finds

strongest support from the US, the EU, most developed countries and a few developing countries. It is a belief strongly supported by Pascal Lamy and much of the WTO Secretariat. However, the majority of developing Members are against this agenda as evidenced by the radically different positions presented by Ambassador Falconer in the agriculture document. Many developing countries do not believe their development needs will be served solely by market access. Instead, they are demanding tools to help build up different sectors of their economy to domestic and export demand. They also want ways to protect vulnerable groups, particularly small-scale farmers.

Developing Members have expressed fears that the Doha Round could displace local agricultural production, force factories to close, and result in massive job losses and loss in government revenue. Larger developing Members have strong domestic constituencies, which are growing increasingly vocal: millions of subsistence farmers in India; industrial trade unions in Argentina, Brazil and South Africa; fisherfolk in the Philippines; millions of rice farmers in Indonesia; and textile workers all over South Asia and Africa. The growing power of developing countries in the global trade talks makes it even harder to ignore these voices.

The degree of conflict in the Doha Round is becoming increasingly difficult to resolve. The WTO has lost its way by creating rules that promote trade for trade's sake, rather than prioritising the lives of people and communities. WTO Members need trade rules that allow countries to decide whether and at what speed to liberalise local sectors, with due allowance for sectors that need increased protection. Therefore, it is high time that WTO Members inject some fresh thinking into what kind of multilateral trade rules would best serve development needs. ■

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B H U T A N

Knocking on WTO's door

Sonam Tobgay



Bhutan's decision to join the World Trade Organization (WTO) is a carefully considered step in recognition of the role that the WTO would play in trade diversification and modernisation of its economy. The country views the accession not as an end in itself but as a key element in the pursuit of national economic development strategy under its successive Five-Year Plans. Furthermore, to accommodate the growing aspirations of its people, Bhutan must enhance its interaction with the world. Invariably, Bhutan's accession forms a key part of its foreign economic policy.

WTO membership is expected to provide an opportunity to frame coherent policies so that important concerns arising out of trade integration are addressed. Membership is expected to enhance market access in goods and services and provide opportunities for growth and employment. However, Bhutan also has to overcome supply-side constraints, given its low productivity and high transportation costs mainly arising out of its landlocked status. Unless supply side bottlenecks are removed, the provision of any market access benefits

will be meaningless. Therefore, Bhutan must come to terms with its realities as a least developed country (LDC) and frame policies to address its development challenges.

Apart from predictable market access for its products, other potential benefits from accession would be the improvement in the investment climate. Bhutan has already opened the economy for foreign direct investment (FDI) and demand for foreign goods and services is growing rapidly. It is not mandatory for a business firm to comply with FDI requirements. However, in the sectors opened under WTO commitments, all foreign players would be required to enter through the FDI channel. Besides, the accession would complement the process of domestic reforms by providing policy stability and predictability in the trading regime, which would be beneficial for the growth of the private sector.

As an LDC, Bhutan can enjoy the special benefits offered to such nations, including transition periods to implement certain provisions of the agreement. Technical assistance can also be availed either from the WTO Secretariat or through bilateral channels to enable Bhutan to compete with other countries by improving national standards and other quality parameters.

However, the prime issue is whether Bhutan would be capable of pursuing its national interest given its economic position and performance in the global context. Bhutan's

economy is predominantly agrarian. The main traded items from the agricultural sector, viz., horticulture products, occupy a low share in the country's exports. Despite the potential for agro-processing industries, no headway has been made in further expansion of such industries. Manufacturing and services sectors are incipient. Bhutan imports most of its consumer, intermediate and capital goods.

Joining the WTO requires adequate preparation to shoulder responsibilities pertaining to obligations. WTO rules on non-discrimination and non-reciprocity prescribe competition at the global level and are based on the principle of national treatment and reciprocity for trade in goods and services. Free movement of capital, labour and technology changes existing socio-economic and cultural settings in any country.

If Bhutan desires to uphold its overarching development principle of Gross National Happiness, careful thinking will be required towards such initiatives. The country will have to create dynamic competitive advantages by enhancing efficiency, improving productivity and dismantling supply-side bottlenecks through appropriate policy measures. Otherwise, the gains of WTO membership could be elusive. ■

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Let the ROUND collapse!

NAMA negotiations are characterised by developed Members insisting developing Members to undertake deep reductions in industrial tariffs as well as growing differences among the latter on the industrial market access formula.

Prabhash Ranjan

Multilateral trade negotiations on non-agricultural market access (NAMA) in the World Trade Organization (WTO) have been characterised by a slew of concessions being made by developing Members without anything concrete coming their way. These concessions are moving from a milder to a stringent tariff reduction formula and binding all the tariff lines.

Before one understands the significance of these concessions, it is important to underscore that industrial and consumer products still account for more than 75 percent of global trade. The WTO's *World Trade Report 2004* notes that trade in goods is growing faster than world commercial services trade. It is in this context that the draft report of Ambassador Don Stephenson, Chair of the NAMA Committee, and other attendant develop-

ments on NAMA at Geneva with their long-term implications on survival and growth of the industries of developing Members such as India, merit stock taking.

It is vital to evaluate the importance of NAMA negotiations and their implications for developing Members. For countries such as the United States (US) – where consumer and industrial good exports alone have been estimated at US\$ 670 billion per year and support 12 million high paying jobs – NAMA negotiations are a priority. It is projected that a reduction of tariffs by one third can lead to more than US\$ 267 billion increase in global economic welfare. Therefore, the US is making a fervent pitch for ambitious market access in NAMA as a yardstick for the successful completion of the Doha Round. A strong push by the European Union (EU) and the US for

reciprocal offers of zero tariffs in sectoral arrangements amongst a critical mass of countries should be seen in this context.

The centerpiece of the onslaught for increased industrial market access has been a long-drawn wrangling over the differential scale of reduction of tariffs through a mathematical formula known as the 'pure' Swiss formula and its variants. While developed countries revealed their preference for the pure Swiss formula known to cut higher developing country tariffs steeply, Argentina, Brazil and India (ABI) sought to soften the impending punch through their own variant known as the ABI formula. This variant is superior to the pure Swiss formula as it takes into account the average tariff rate of a country while reducing a particular tariff. Hence, the new tariff structure that will come into existence is reflective of the old tariff regime and not completely independent of it as would happen if the pure Swiss formula is used for reducing tariffs.

The WTO Hong Kong Declaration of 2005 adopted a 'Swiss formula with coefficients'. In other words, at Hong Kong, despite the deadlock, hopes of the adoption of ABI formula (which is a variant of Swiss formula and completely fits in the description of 'Swiss formula with coefficients' for achieving tariff reductions) were kept alive and carried forward for further negotiations at Geneva. However, as the WTO pundits never fail to remind us, the name of the game is compromise and cross-sectoral trade offs in agriculture and NAMA or NAMA and services are necessary. Vociferous champions of the ABI formula now seem to be getting into a compromise mode, as is evident in the case of Brazil, which has signalled a shift in its stance over the ABI formula. This compromise has happened despite the Hong Kong Declaration stating that a 'Swiss formula with coefficients' would be adopted. The draft report of Ambassador Don Stephenson, whilst mentioning that the ABI is on the negotiating table, also states that there is a broader and stronger

Vociferous champions of the ABI formula now seem to be getting into a compromise mode, as is evident in the case of Brazil, which has signalled a shift in its stance over the ABI formula

support for the pure 'Swiss formula'. This dangerous assertion has not been attacked by NAMA-11, which comprises of Brazil and India clearly showing that the pure 'Swiss formula' has been accepted and the ABI formula buried forever.

Moreover, a recent statement made by Celso Amorin, Brazilian Foreign Minister that the steep tariff cuts (with a coefficient of 30 in the pure Swiss formula) would be acceptable also conveys the abandonment and burying of the ABI tariff reduction formula. The rider, of course, is a trade off in terms of a more liberalised trading regime in agriculture. Although India has maintained a studied silence on this new development, it is officially not known to what extent India has extended its support to this stance of Brazil. However, given that Brazil and India have been negotiating jointly on NAMA, it is not impractical to assume that the shift in stance has India's support.

If this is, indeed, the case, it is worth considering a few scenarios and likely implications of the Brazilian approach in selected sectors. Calculations show that if a 'coefficient of 30' is applied, the new bound rate of fish and fish products in India would come down from the present 100.7 percent to 23 percent, a reduction as high as 77 percent. It is easy to see that the new bound tariff rate would be even lower than the present applied rate (30 percent) on fish and fish products. Similarly, in the motor vehicles parts and equipments sector, bound tariff rates of 105 percent in certain tariff lines will come down to 23 percent. In stones, gems and precious metals, electronics and electrical goods and in textiles and clothing, the bound tariff rates of 35 percent would be more than halved to 16 percent in most of the cases.

This abandonment of the ABI formula by India is the latest in the series of compromises made in the NAMA negotiations. In the past, India compromised by giving up its demand for a linear formula to cut tariffs. Similarly, it compromised again by accepting to bind all the tariff lines. WTO pundits justify such

concessions by arguing that compromises have to be made in global trade talks. However, India is yet to get any tangible gain for these compromises. WTO watchers are also quick to remind us that such concessions in NAMA will enable India to clinch a favourable deal on services. This is a flawed argument as developed Members do not seem to be in the mood to give anything on services. The offers of key developed countries such as the US on movement of natural persons are as yet highly inadequate and with the tightening of the immigration laws it may be foolhardy to expect any dramatic changes. Moreover, all potential gains in services are mere promissory notes in anticipation of which India seemingly has already conceded a lot in NAMA.

What gains can developing Members then look forward to in the current circumstances? The EU and US proposals on NAMA do not even make pretence of the same and would hardly lead to any reduction in tariff peaks and tariff escalations, let alone address non-tariff barriers. Even with the end game in progress, the US continues to pitch for even steeper tariff cuts on applied rates. This reduction from the applied tariff rates is to be achieved through a 'coefficient of 15' in the pure Swiss formula for developing countries. It is worth noting that if the US approach is acceded to, a bound tariff rate of 100 percent would come down to a mere 13 percent, a reduction by 87 percent! Not only does this amount to a slap on the face of the Development Round but is also illegal since the present mandate is to cut tariffs from bound and not applied levels. Needless to mention, the principle of 'less than full reciprocity', which is an intrinsic element of the negotiations and whereby developing countries will cut their tariff

The principle of 'less than full reciprocity', which is an intrinsic element of the negotiations and whereby developing countries will cut their tariff rates much less than what developed countries will do, has not been conceded

rates much less than what developed countries will do, has not been conceded.

Much has been made of the protections that would be available in such a liberalised trade scenario in the form of 'flexibilities' whereby certain tariff lines may not be subjected to similar reductions. Following the 'July package' of 2004 and the Hong Kong Declaration, developing Members have the option of either shielding 5 percent of their

tariff lines from tariff reduction or subjecting 10 percent of tariff lines to less than formula cuts. Hence, a country like India would be able to protect at best roughly 500 tariff lines if the 10 percent option is exercised. Even then, these 500 tariff lines will have to undergo tariff reduction, with the only saving grace being that these cuts will be less than the formula cuts. It is worth remembering that given the overall steep reduction in tariff rates, even these protected tariff lines would have to undergo a relatively steeper reduction. The inadequacy of the protective net is best understood by noting that in fisheries and textile and clothing alone, sensitive sectors by any account, there are close to 1400 tariff lines in India!

Given scheme of things, the situation appears to be gloomy for developing Members. Trade liberalisation can certainly not happen at any cost. In case, the adequate safeguards are not forthcoming, the 'development dimension' of the Doha Round will not be met. Perhaps, developing Members should allow the talks to collapse for the time being, thus signaling to developed Members that unlike in the past, they cannot be taken for a ride anymore. ■

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Regional trade agreements

Regional Trade Agreements (RTAs) are agreements to enhance economic ties between nations, which do not necessarily fall in the same geographic region. Furthermore, they can be specified according to their level of integration and could be classified into two broad categories – shallow and deep integration – and five sub-categories.

Shallow Integration

Preferential Trading Agreements (PTAs) are agreements among a set of countries involving preferential treatment of bilateral trade between any two parties to the agreement relative to their trade with the rest of the world, e.g., Association for South East Asian Nations (ASEAN) – China.

Free Trade Agreements (FTAs) are agreements where member countries completely abolish trade barriers (both tariff and non-tariff barriers) for goods originating within the member countries. However, countries do not completely abolish trade barriers even within FTAs and most such agreements tend to exclude sensitive sectors, e.g., South Asian Free Trade Area (SAFTA).

Customs Union is a union in which member countries impose a common external tariff (CET)¹ on goods imported from non-member countries, e.g., Mercado Comun del Sur (MERCOSUR).

Deep Integration

Common Market exists when member countries attempt to harmonise institutional arrangements as well as commercial and financial laws and regulations among themselves. Doing so implies free movement of factors of production, i.e., removal of controls on free movement of labour and capital, e.g., Common Market for Eastern and Southern Africa (COMESA).

Economic Union occurs when countries adopt and implement common economic policies and regulations as well as a single currency, e.g., the European Union (EU).

Growth in RTAs

There has been a surge in the number of RTAs since the 1990s. Within Asia, the number of such trade deals is exploding.² The RTAs that have been notified to the World Trade Organization (WTO) have also multiplied mainly because almost every WTO Member, except Mongolia, is engaged in an agreement with other Members or non-Members. By July 2005, 330 RTAs had been notified to the WTO.³

RTAs and the WTO

WTO rules on RTAs can be traced back to the General Agreement on Tariffs and Trade (GATT), 1947. Article XXIV of the GATT was further refined by an understanding negotiated during the Uruguay Round (1986–1994), thus providing a legal foundation for RTAs. The Enabling Clause adopted in 1979 provides for the mutual reduction of tariffs on trade in goods among developing countries while rules covering trade in services in RTAs are set out in Article V of the General Agreement on Trade in Services (GATS).

Though the formation of RTAs departs from the core WTO principle of most favoured nation (MFN), Members are permitted to enter into such arrangements under specific conditions, which are spelled out in three sets of rules:

Article XXIV of GATT: The provisions of this Agreement allow contracting parties to form customs union or a free trade area or the adoption of an interim agreement necessary for the formation of customs union or a free trade area, provided that:

a) with respect to a customs union, or an interim agreement leading to a formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case may be;

b) with respect to a free trade area or an interim agreement leading to the formation of a free trade area, the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free trade area, or interim agreement as the case may be; and

c) any interim agreement referred to in subparagraphs a) and b) shall include a plan and schedule for the formation of such a customs union or of such a free trade area within a reasonable length of time.

Enabling Clause: This decision by signatories to the GATT in 1979 allows derogations to the MFN principle in favour of developing countries. In particular, its paragraph 2 (c) permits preferential arrangements among developing countries in trade in goods.

Paragraph 2 (c): Regional or global arrangements entered into among less

and the WTO

developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the contracting parties, for the mutual reduction or elimination of non-tariff measures, on products imported from one another. The treatments specified by this exception are as follows:

- a) Generalised System of Preferences (GSP), which is a system of tariff preferences provided by developed countries to developing countries;
- b) Differential and more favourable treatment regarding non-tariff barriers initially negotiated under the GATT those of which are now in the WTO framework;
- c) Combined arrangements among developing countries or between a few of them; and
- d) Special treatment on the least developed among the developing countries in the context of any general or special measures in favour of developing countries.

Article V of GATS: This Agreement allows Members to enter into an agreement liberalising trade in services between or among the parties to such an agreement, provided that such an agreement:

- a) has substantial sectoral coverage;⁴ and
- b) provides for the absence or elimination of substantially all discrimination, in the sense of Article XVII, between or among the parties, in the sectors covered under sub-paragraph (a), through: elimination of existing discriminatory measures, and/or prohibition of new or more discriminatory measures, either at the entry into force of that agreement or on the basis of a reasonable timeframe, except for mea-

asures permitted under Articles XI, XII, XIV and XIV *bis*.

Scope of RTAs

There is a widespread debate about whether RTAs are 'building blocks' or 'stumbling blocks' towards multilateral trade liberalisation. Advocates of regionalism maintain that RTAs enable countries to liberalise trade and investment barriers to a greater degree than multilateral trade negotiations. Others feel that RTAs can lead to discriminatory liberalisation.⁵

Although the formation of RTAs departs from the fundamental WTO principle of MFN, they complement the multilateral trading system. Services, intellectual property, environmental standards, investment and competition policies are all issues that were raised in regional negotiations and later developed into agreements or topics of discussion in the WTO.

There is no definitive, empirical assessment of RTAs on trade liberalisation and economic growth. This remains ambiguous because the economic impact of an RTA depends on its particular infrastructure and the choice of its major internal parameters like the depth of trade liberalisation and sectoral coverage.⁶

Despite problems with economic assessment and the notion that the proliferation of too many RTAs can undermine the multilateral trading system, the adoption of certain principles in RTAs could help promote a more effective multilateral system. This could be done in three ways⁷: engage in regional commitments which they would be willing to extend to the multilateral setting; move towards the across-the-border elimination of duties on industrial products at an MFN level; and promote the principle of transparency.

Recent Developments

In order to harmonise RTAs in the multilateral setting through more

transparency in their functioning, a draft on the Transparency Mechanism for Regional Trade Agreements was prepared by the Negotiating Group on Rules on 29 June 2006. Some of the measures that the Mechanism seeks to implement are as follows:

Early Announcement: Members participating in new negotiations aimed at the conclusion of an RTA shall inform the WTO.

Notification: The required notification of an RTA by Members that are party to it shall take place no later than directly following the parties' ratification of the RTA and the parties shall also specify under which provisions of the WTO agreements it is notified.

Transparent Procedures: The parties shall make available to the WTO data on tariff concessions, MFN duty rates, product specific preferential rules of origin and import statistics. ■

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NOTES

- ¹ A common tariff rate applied by the countries in a customs union.
- ² The 10 ASEAN countries have bilateral deals with each other; all have, in effect, individual bilateral deals with China. Others are being negotiated with India, South Korea and in several cases, Japan. By one estimate, East Asia alone will have around 70 free trade deals by 2006. See *The Economist*. 2006. *In the twilight of Doha*. 29 July.
- ³ Of these, 206 were notified after the WTO was created in 1995; 180 are currently in force and several others are believed to be operational although not yet notified.
- ⁴ This condition is understood in terms of numbers of sectors, volume of trade affected and modes of supply. In order to meet this condition, agreements should not provide for a prior exclusion of any mode of supply.
- ⁵ The kind of liberalisation that is attractive for countries seeking to reap gains from trade in product areas where they cannot compete internationally. See J. Crawford and R. Fiorentino. 2005. 'The Changing Landscape of Regional Trade Agreements', Discussion Paper 8. Geneva: World Trade Organization.
- ⁶ J. Crawford and R. Fiorentino. 2005. As above note 5.
- ⁷ J. Crawford and R. Fiorentino. 2005. As above note 5.

Are Asian LDCs losing in post-quota world?

Shyamal Krishna Shrestha

Global competition in the textiles and clothing (T&C) sector has intensified since the expiry of the Agreement on Textiles and Clothing (ATC) on 1 January 2005. While some Asian economies have either improved or maintained their competitiveness, others have been marginalised.

Sewing Thoughts: How to Realise Human Development Gains in the Post-Quota World – authored by Ratnakar Adhikari and Yumiko Yamamoto of the UNDP Regional Centre in Colombo – tracks the performance of Bangladesh, Cambodia, China, Fiji, India, Indonesia, Laos, the Maldives, Mongolia, Nepal, Pakistan, Philippines, Sri Lanka, Thailand and Vietnam a year after the quota system ended. The report assesses the human development ramifications arising due to competition, leading to unemployment in some least developed countries (LDCs).

The 15 Asian economies accounted for 41.8 percent share of US T&C imports in 2004 (in value terms), which increased marginally to 42.1 percent in 2005. As for the EU, the Asian exporters (barring Fiji, the Maldives and Mongolia) were able to increase their market share from 47.2 percent in 2004 to 53.2 percent in 2005. These average figures hide individual country performance and their implications for human development. T&C is the mainstay of manufacturing employment in many LDCs such as Bangladesh, the Maldives and Nepal, wherein women account for a sizeable proportion of the workforce. Failure to compete has resulted in the closure of many firms in Fiji, Laos, the Maldives, Mongolia and Nepal. In others, the need to maintain competitiveness implies employing higher-skilled workers and clustering, both of which are biased against low-skilled personnel and small firms. Women are especial-



Title: Sewing Thoughts: How to Realise Human Development Gains in the Post-Quota World
Publisher: UNDP Regional Centre in Colombo
Authors: Ratnakar Adhikari and Yumiko Yamamoto
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ly vulnerable to lay-offs. Thus, levels of poverty may have arisen as a result of foregone earnings.

The adverse performers blame preferential trade agreements involving the US and some Caribbean and Sub-Saharan nations as the prime cause of their dislocation. Domestic factors are hardly held accountable. Preferential deals are, by nature, discriminatory but the preference-receiving countries have been unable to convert 'market access' into 'market entry'. Import shares declined to 1.6 percent in 2005 as compared to 2.1 percent in 2004 for countries benefiting from the African Growth and Opportunity Act (AGOA). This underlies the importance of addressing supply-side factors.

The report concludes by making recommendations such as investment in human capital, upgrading technology, speedy delivery, establishing and

operating export processing zones (EPZs), improving trade facilitation, optimising benefits of 'aid for trade' and enhancing access to finance.

As long as LDCs depend on cheap and unskilled labour as a perennial source of comparative advantage, they can neither experience sustained industrialisation nor benefit from trade. As Duke University sociologist Gary Gereffi notes: "low cost labor – the main asset of Third World exporters in buyer-driven commodity chains – is a notoriously unstable source of comparative advantage". This clearly underscores the need to invest in training and human resource development.

Upgrading is necessary both to increase workers' skills as well as to bridge the 'technology gap'. Speedy delivery constitutes the 'inseparable triad', besides price and quality, to ensure that products reach markets duly. EPZs facilitate industrial clustering so as to take advantage of external economies, joint actions and social capital. Trade facilitation has become imperative to overcome trade transaction costs and it is the primary responsibility of developed countries to provide funds for this purpose. 'Aid for trade' is vital to facilitate the insertion of LDCs into the multilateral trading system. The T&C sectors are facing crises in various LDCs, including access to finance. Foreign investment could flow out as easily as it enters an economy if sectoral competitiveness does not improve.

Diversification alone may not ensure the recovery of the T&C sector. Tariff peaks, tariff escalation and non-tariff barriers are hindrances. However, the recommendations provide an opportunity to address long standing weaknesses as part of an overall industrialisation strategy in countries that have failed to adjust to economic globalisation. Experience shows that apathy is costly. ■

South Asian common position at the WTO

SAWTEE and its network institutions organised two regional meetings during 2-5 July 2006 in Lalitpur, Nepal. The first meeting was on "WTO Doha Round Negotiations and South Asia" and the second was on "Access and Benefit Sharing, Prior Informed Consent and Disclosure Requirement: Issues for South Asia." More than 70 participants from Bangladesh, India, Nepal, Pakistan and Sri Lanka participated in these meetings.

First regional meeting

Participants recognised that South Asian countries must develop regional consensus and consolidate their regional agenda on issues such as agriculture, industrial market access, services and 'development dimension', if they want to strengthen their negotiating positions during World Trade Organization (WTO) negotiations. Participants discussed the Doha Round issues from the perspective of the interest of the individual South Asian countries as well as the region as a whole. They viewed that South Asia needs to adopt a 'two track' strategy to develop a regional position on the Doha Round issues. The first strategy would be to develop a common position on is-



issues in which there is convergence. The second strategy would be to form issue-based alliances with like-minded WTO Members or groups of Members. It would be crucial to safeguard national interests on issues in which there is divergence among South Asian countries.

Second regional meeting

Participants emphasised the need to develop a regional position on the review of the WTO's Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), especially the controversial Article 27.3(b) of TRIPS that deals with 'patent' and 'plant variety' protections. Participants agreed that biodiversity-rich South Asian countries must have common positions on issues such as

intellectual property rights (IPRs) and commercial use of biological resources and traditional knowledge (TK). They also viewed that South Asian countries need to have a common position on the relationship between TRIPS and Convention on Biological Diversity (CBD), 1992. It was stressed that if biodiversity-rich Members of the WTO fail to incorporate effective provisions on access and benefit sharing (ABS), prior informed consent (PIC) and 'disclosure requirement' within TRIPS, it would not only be difficult to curb biopiracy or misappropriation of TK, but the states and the communities will also fail to receive benefits from the commercial use of their biological resources or associated TK. ■

Regional economic cooperation

CUTS Centre for International Trade, Economics & Environment (CUTS-CITEE), Jaipur and Friedrich Ebert Stiftung (FES), India organised the final meeting of the project "Regional Economic Cooperation in South Asia" in Kathmandu during 14-16 August 2006. Representatives of business chambers, academia, government and inter-governmental organisations, civil society and media from Bangladesh, India, Pakistan, Nepal and Sri Lanka attended the meeting. While analysing the future prospects of economic cooperation, participants assessed the present status of South Asian Free Trade Area (SAFTA). This meeting is the result of the series of national consultations held in various South Asian countries under this project, wherein efforts were made to gather country perspectives on the obstacles faced by the region in enhancing economic cooperation. ■

Congratulations!

SAWTEE congratulates its former President, Dr Posh Raj Pandey, on his recent appointment as Member of National Planning Commission, Government of Nepal. Dr Pandey – a leading trade economist of the country – played a crucial role during Nepal's accession process to the World Trade Organization (WTO). Nepal became the WTO's 147th Member in April 2004. ■



SPS and TBT: Implementation Issues for Nepal

WHILE acceding to the World Trade Organization (WTO), Nepal had made a commitment to comply with its Agreement on the Application of Sanitary and Phytosanitary (SPS) Measures and Agreement on Technical Barriers to Trade (TBT). SAWTEE conducted two research studies on each of these two agreements to identify the implementation challenges for Nepal. Besides, identifying the implementation challenges, these research studies have also reviewed the salient features of the existing laws related to SPS and TBT agreements and proposed the necessary amendments to make them compatible with SPS and



TBT provisions.

Against this backdrop, SAWTEE and ActionAid Nepal (AAN) organised the Nineteenth Forum on Globalisation and WTO with the theme “SPS and TBT Agreements: Implementation issues for Nepal”. Organised on 8 August 2006 in Kathmandu under the Reform and Capacity Building Agenda in the Post WTO Accession

Era (RECAP) Project, the objective of the forum was to gather feedback on the findings of the draft research reports.

After the incorporation of the comments and suggestions received from the participants, SAWTEE and AAN would finalise these

research studies and disseminate the outputs among a wide range of stakeholders, including government authorities.

More than 50 participants from concerned government ministries, departments and related agencies, private sector, civil society, research organisations and media attended the forum. ■

Importance of Competition Law

DURING Nepal’s accession to the World Trade Organization (WTO), the country had made a voluntary commitment to enact a competition law. At present, a Fair Competition Bill has been prepared by the government. Civil society experts and lawyers opine that if the government enacts the Bill in its present form, it would not serve its purpose.

Realising that the Fair Competition Bill requires changes in many of its provisions, SAWTEE and Forum for Protection of Consumer Interest, Kathmandu organised the interaction programme titled “The Importance of Competition Law in Nepal” on 5 August 2006 in Lalitpur. The programme was organised with two main objectives: discuss the weaknesses of the Fair Competition Bill with the Members of Parliament (MPs) and media persons; and sensitise the MPs on the importance of implementing Competition Law and establishing ‘competition culture’.

More than 35 MPs and 15 media persons attended the programme. Mr Subhas Chandra Nemwang, Hon’ble Speaker of the House of

Representatives, was the chief guest.

In order to facilitate the discussion, four presentations were made. The first presentation was on “Competition Law: Why and For Whom?”; the second on “The Contours of Competition Law”; the third on “Competition Law from Consumers’ Perspective”; and the fourth on “Competition Law from Private Sector Perspective”. During discussions, the MPs expressed their commitment to review the Bill before its enactment. The MPs also made a commitment to review the process through which the proposed law had been prepared. They also agreed to a recommendation of a MP that the government should assign a committee to review the draft and make required amendments.

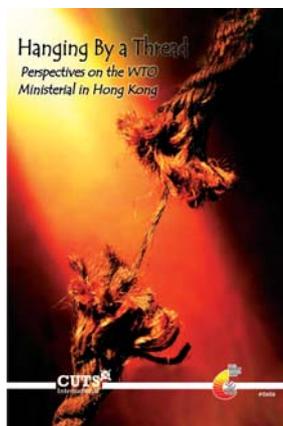
After the programme, SAWTEE and Forum for Protection of Consumer Interest formally provided their comments and suggestions on the Bill to the Chief Whips of the major political parties and Speaker Mr Nemwang. The Parliament has now sent the Bill to the concerned committee, pointing out the need to make amendments. ■

IPRs and FARMERS’ RIGHTS issues

FORUM for Protection of Public Interest (Pro Public), Kathmandu; SAWTEE; Genetic Resources Policy Initiative-Nepal (GRPI-Nepal), Kathmandu; and Local Initiatives for Biodiversity Research and Development (LIBIRD), Pokhara organised the two day workshop titled “Access and Benefit Sharing (ABS) and Prior Informed Consent (PIC)” in Pokhara on 14-15 August 2006. The workshop was organised to sensitise the local communities of Nepal on issues of intellectual property rights (IPRs) and their implications on farmers’ rights and their livelihood. At the workshop, participants were made aware of the nature and scope of three major international instruments that deal with IPR, ABS and PIC issues – International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), 2001; Convention on Biological Diversity (CBD), 1992; and Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) of the World Trade Organization. More than 50 participants from eight districts representing government bodies, farming and local communities, researcher groups and media attended the workshop. ■

Perspectives on the Hong Kong Ministerial

CUTS Centre for International Trade, Economics & Environment (CUTS-CITEE) has published the book titled *Hanging by a Thread: Perspectives on the WTO Ministerial in Hong Kong* that compiles the various points and views expressed by renowned experts and commentators on the World Trade Organization (WTO). These viewpoints are of the trade experts and policymakers of different countries and were expressed prior to, during and after the last WTO Ministerial. The book will be useful for trade negotiators and trade policy officials as well as other concerned stakeholders, including civil society and media. For more information, see: <http://www.cuts-citee.org/HK-book.htm> ■



Title: Hanging by a Thread: Perspectives on the WTO Ministerial in Hong Kong
Publisher: CUTS-CITEE

Bilateral FTAs: Trade with caution

BILATERAL trade agreements (BTAs), signed between a developed and a developing country, tend to create highly imbalanced outcomes because of the asymmetric negotiating power and resources. However, examples from a few developing countries show that if developing countries do adequate homework and use appropriate strategic negotiating tactics, it will not be easy for the negotiators of the developed countries to push their unreasonable demands. Taking a cue from such countries, South Asian countries, which are in the process of signing BTAs with other countries, need to trade with caution. Analysing these different issues, this policy brief deals with how South Asian countries can protect farmers' livelihoods, which are under threat due to intellectual property right (IPR) rules. This policy brief also recommends South Asian governments to support multilateralism since there is relatively little room for developed countries to squeeze developing countries to agree to their unreasonable demands, such as in relation to higher IPR standards that threaten farmers' livelihood. ■



Title: Bilateral Free Trade Agreements and Farmers' Livelihood: Issues for South Asia
Publisher: SAWTEE
Author: Ratnakar Adhikari

Trade Facilitation Issues for South Asia

SAWTEE recently published the briefing paper titled "Trade Facilitation in South Asia: Doha Round and Beyond". The paper explains the importance of facilitating trade through simplification, standardisation, harmonisation and elimination of procedures, data requirements and administration involved in the cross-border movement of goods and services. At the World Trade Organization (WTO), an agreement had been reached under the 'July package' to launch negotiations on trade facilitation (TF) with the aim of improving relevant aspects of Articles V, VIII and X of the General Agreement on Tariffs and Trade (GATT), 1994.

These clauses do support TF but are a burden for developing countries since these countries do not have adequate resources and infrastructure. For example, WTO Members would have to incur high costs to ensure freedom of transit under Article V, make provisions to decrease fees and formalities under Article VII, and publish all trade related laws and regulations under Article X.

This briefing paper discusses the contents and the elements of the multilateral framework on TF to examine the challenges under the Doha Round of multilateral

trade negotiations, particularly for South Asian countries. Highlighting the status, concerns and approaches of South Asia, the paper looks at particular issues for South Asian countries with respect to the implementation of TF measures.

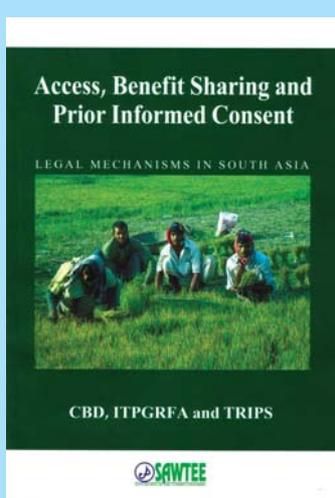
WTO Members have submitted several proposals on TF but there are divergences in views between developed and developing Members. Even though developing Members do not disagree with the merits of TF, they are concerned about the additional obligations and burdens that are likely to arise from a multilateral commitment. The issues for South Asian countries with respect to the proposals are many and varied. Like most developing countries, the key factor inhibiting most South Asian countries from implementing TF are the costs associated with those measures.

The paper states that South Asian countries have undertaken notable measures, both unilaterally and through regional agreements to facilitate trade.

However, they are still far from reaping benefits from the prospects of TF since they lack physical and services sector infrastructure and regulatory environment. ■



Title: Trade Facilitation in South Asia: Doha Round and Beyond
Publisher: SAWTEE
Authors: Dushni Weerakoon and Jayanthi Thennakoon



Title: Access, Benefit Sharing and Prior Informed Consent: Legal Mechanisms in South Asia
Publisher: SAWTEE
Editor: Kamallesh Adhikari



Title: Realising Aid for Trade in the Doha Round
Publisher: SAWTEE
Author: Dr Posh Raj Pandey

Benefit Sharing Mechanisms in South Asia

THE intellectual property right (IPR) rules under the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) are considered one of the most controversial provisions in the World Trade Organization (WTO). Particularly, TRIPS Article 27.3 (b), which deals with patent and plant variety protections, has been widely debated. Divergence in views is wide between technology-rich developed Members and biodiversity-rich developing Members, mainly on issues of 'benefit sharing for the commercial use of biological resources', 'prior informed consent for obtaining access to biological resources and associated traditional knowledge', and 'disclosure requirement while applying for IPR'. At the TRIPS Council, different proposals have been submitted with regard to review of Article 27.3 (b), including on the relationship between TRIPS and Convention on Biological Diversity (CBD), 1992.

Dealing with these issues and the existing legal mechanisms on access and benefit sharing (ABS), prior informed consent (PIC) and disclosure requirement in South Asia, this book contains three chapters. The first chapter is on "Biodiversity in South Asia and International Legal Instruments on ABS and PIC" and the second chapter is on "Legal Mechanisms on ABS and PIC in five South Asian Countries". The third chapter concludes by stating that South Asian countries should implement an effective ABS regime at the national level and at the same time, should also develop a common position on why TRIPS should incorporate conditions for ABS, PIC and disclosure requirement at the multilateral level. ■

Realising Aid for Trade in the Doha Round

THE Sixth Ministerial of the World Trade Organization (WTO), held in Hong Kong in December 2005, recognised the contribution that 'aid for trade' could make to enable developing countries, especially the least developed countries (LDCs), to benefit from WTO agreements and, more broadly, to expand their trade. A Task Force has also been constituted to provide recommendations on the operationalisation aspects of 'aid for trade'. Among others, the key challenge for the Task Force is to sort out the size and scope of the fund, institutional mechanism and the management of the fund and its linkage with the Doha Round, on which the Hong Kong Ministerial Declaration is silent.

Keeping in consideration these challenges of the Task Force, this briefing paper explores some pertinent issues required for a successful 'aid for trade' package. The paper stresses that the aid flows should be stable, predictable and demand-driven. The aid must encompass technical assistance, institutional reform, supply-side capacity building and infrastructure while covering adjustment costs arising out of multilateral liberalisation. The paper also states that preferably, new units at the existing multilateral organisations should operate the aid assistance. In a broader context, 'aid for trade' should form a part of the 'single undertaking' of the trade negotiations under the Doha Round and should be considered an essential component of the Doha Development Agenda. The paper, however, mentions that developing countries are ultimately responsible for trade-related capacity building and successful global integration, with 'aid for trade' playing the role of a catalyst, albeit a significant one. ■

Launched in December 1994 at Nagarkot, Nepal by a consortium of South Asian NGOs, South Asia Watch on Trade, Economics & Environment (SAWTEE) is a regional network that operates through its secretariat in Kathmandu and member institutions from five South Asian countries, namely Bangladesh, India, Nepal, Pakistan and Sri Lanka. Registered in Kathmandu in 1999, the overall objective of SAWTEE is to build the capacity of concerned stakeholders in South Asia in the context of liberalisation and globalisation.