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**UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT**

# PREPARING FOR FUTURE MULTILATERAL TRADE NEGOTIATIONS: ISSUES AND RESEARCH NEEDS FROM A DEVELOPMENT PERSPECTIVE

Report based on issues discussed at the ad hoc expert group meeting of the Secretary-General of UNCTAD
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Unedited version

## PREFACE

The third WTO Ministerial Conference is scheduled to be held in Seattle, the United States, in November/December 1999. At this conference, a decision on the launching of the next set of multilateral negotiations, including their scope and content, is expected to be taken. The process of preparing the agenda for the conference began at the September 1998 special session of the General Council of WTO and will continue until the Seattle Ministerial meeting at the end of this year.

It is in this context, that UNCTAD organized an ad hoc expert group meeting of the Secretary-General on "Preparing for future multilateral trade negotiations: Issues and research needs from a development perspective", which was held in Geneva from 21 to 22 September 1998. The meeting was a follow-up to a workshop held in March 1997 in Geneva, on methodological and analytical issues related to assessing the impact and dynamic effects of the Uruguay Round Agreements (URAs) on development.[1] The meeting reviewed ongoing and planned research work on issues likely to be on the agenda of future multilateral trade negotiations, with the objective of identifying those areas where further research could provide a more solid analytical and empirical basis for evaluating proposals for the forthcoming negotiations, including their impact on the economies of developing countries. In this context, it contributes to identifying a positive trade negotiating agenda from a development perspective.

The meeting was attended by experts from leading academic and research institutions in the field of international trade and development, as well as from a number of international and regional organizations (see Annex .. for the list of participants).

This report is based on the documentation presented to the meeting and the subsequent discussions that took place during the meeting. In order to provide the reader with a comprehensive analysis of the issues, the contributions made by the experts in the meeting were subsequently elaborated and complemented by additional supporting material. Each chapter in this report is devoted to one of the topics discussed at the meeting. It is divided into three main sections: first, the topic is briefly introduced, including an analytical summary of its main features and its current status within the WTO framework; second, following the discussions in the meeting, the topic is analyzed from a development perspective, outlining key issues of interest to developing countries as suggested by the participants in the meeting and reflecting the different views expressed by them; finally, possible future topics for research and analysis are outlined which could provide a basis for evaluating proposals for the future negotiations. There is no implication that all or any of the participants agreed with the views expressed in this report.

The workshop exemplifies one of a series of activities the UNCTAD Secretariat is currently carrying out as part of its ongoing work in assisting developing countries to set their own positive trade agenda for future multilateral trade negotiations. These activities include the preparation of several papers and studies on the positive agenda, the organization of intergovernmental meetings

[1] For a report on the meeting, which took place from 3 to 4 March 1997, see UNCTAD, *The Uruguay Round and Its Follow-up: Building a Positive Agenda for Development*, United Nations publication, Sales No. E.97.II.D.14.

on agriculture, air transport, competition policy and commodities, as well as a number of interregional meetings on the development of a positive agenda, to be held in Asia, Africa and Latin America, and direct technical assistance to developing countries including those that are presently in the process of accession to the WTO.

## OPENING STATEMENT BY MR. RUBENS RICUPERO

I would like to extend a warm welcome to all of you and to express our gratitude for your acceptance of our invitation to participate in this informal meeting. Many of you participated in a similar workshop which we organized last year and I am pleased that we are able to meet again to, so to speak, continue our discussion from that time.

As you know, that workshop, of which this meeting is a follow-up, had focussed on analytical and methodological issues relating to assessing the impact and dynamic effects of the Uruguay Round and its follow-up on development. That meeting had also reviewed a large number of country-specific case studies, undertaken in the immediate aftermath of Marrakesh by various organizations and research groups. I understand that copies of the report on that meeting, which is entitled "The Uruguay Round and its follow-up: Building a Positive Agenda for Development," are available in the room.

At last year's meeting, which took place barely three months after the first WTO Ministerial Conference held in Singapore, we began a process of discussion and reflection on issues to be considered in setting a positive trade agenda for developing countries in future multilateral negotiations. I should like to expand on this concept of a positive trade agenda, but first let me remind you of UNCTAD's current mandate in the trade area. UNCTAD's mandate as defined at our last Ministerial Conference held in Midrand, South Africa, in 1996 is to help developing countries, and particularly LDCs, to better integrate into the world economy and the world trading system. This encompasses a variety of tasks.

Although trade negotiations as such takes place in WTO, UNCTAD's mandate enables it to play a useful role as a pre-negotiation and post-negotiation forum. A country's integration within the international trading system needs to be seen in relation to its ability to (a) identify and take advantage of trading opportunities, (b) fulfil its multilateral trade obligations, (c) formulate and pursue development strategies within framework of those obligations, (d) defend its acquired trade rights, and (e) set trade objectives and effectively pursue them in trade negotiations. UNCTAD's assistance in the post-negotiating phase encompasses the first four of these elements, while the pre-negotiating phase covers the last element. Our members have repeatedly directed our assistance to focus particularly on, *inter alia*, capacity-building to assist developing countries to prepare for negotiations in the context of the built-in agenda of the Uruguay Round MTAs and improve the understanding of the implications of new and emerging issues. And the ministerial communique of this summer's ECOSOC both acknowledged our assistance through policy research and analysis, as well as technical cooperation, and invited us to continue to provide such support, "including assisting developing countries in formulating a positive agenda for future trade negotiations."

Finally, as you all know, WTO Ministers, meeting in their first Conference in Singapore in December 1996, welcomed the contributions that UNCTAD can make to the understanding of new and emerging issues, such as investment and competition policies, with a view to ensuring that the development dimension is taken fully into account.

If I have dwelt for a moment on our mandate, it is only to remind you of the important role which those same governments which will soon be entering negotiations at WTO have asked UNCTAD to play in helping to prepare them for that arduous task. And that indeed is why I have convened this meeting to continue a process begun years ago with our help to developing countries in the Tokyo Round, and to begin to build-up a network of researchers from both northern and, especially southern, countries to help with this extremely important job.

As you are aware, later this week, the General Council of the WTO will hold a special session which will formally began the preparatory process for the Third WTO Ministerial Conference. As you know, this Conference, which will be held in the United States before the end of 1999, is expected to decide on the launching of the next set of multilateral negotiations, including their scope and content.

Although the agenda is not yet fixed, the main topics of a future negotiating agenda are likely to be derived from issues related to the implementation of the URAs, the built-in agenda for future negotiations contained in the URAs (e.g. new negotiations on agriculture and services, reviews of the agreements on TRIPS and TRIMs), as well as the new issues currently being studied in WTO.

The new issues on the WTO work programme include: trade and environment (initiated during the Uruguay Round); trade and investment, trade and competition policy, transparency in government procurement and trade facilitation, initiated at the first WTO Ministerial Conference, held in Singapore in 1996; and electronic commerce, initiated at the second WTO Ministerial Conference, held in Geneva in 1998. Other issues, as you know, are also being proposed by some WTO members.

What are developing countries going to negotiate? Only the built-in agenda? Only the traditional market access issues? Are there new issues they could bring up?. How can we contribute to the task of identifying the issues that would be of particular relevance to developing countries? I see this workshop as making an important contribution to identifying a trade negotiating agenda from a development perspective.

The importance of adequate preparations by developing countries for global trade negotiations cannot be over emphasized. We are now in a process of continuous negotiations where governments must be prepared to enter into complex negotiations on issues of vital national interest, with relatively little time for preparation. The period leading up to the third WTO Ministerial Conference will be critical in efforts to influence the future trade agenda. This cannot be done simply by stating and restating traditional positions. Economic analysis and political consensus building will be essential in this process. These activities should benefit from public debate in developing countries and mechanisms to this end should be strengthened.

As experience has shown, in a forum such as the WTO, whose culture is devoted to trade liberalization, you have a strong moral case when you are saying no, not because you want to block negotiations, but because you want to have liberalization in a more balanced way. It is therefore my conviction that we need to help identify a positive multilateral trade agenda for

developing countries for the future negotiations. This requires providing them with analysis, research, data and information from which they can design their own negotiating proposals as well as evaluate the proposals of others.

Since our workshop of last year, the work of the intergovernmental bodies of UNCTAD as well as the technical assistance activities and collaborative research efforts of the secretariat with other institutions have contributed to an understanding of the issues on the multilateral trade agenda and the interest of developing countries in future negotiations. Our intergovernmental bodies have examined trade issues of interest to developing countries in specific sectors such as health, tourism/air transport and environmental services, as well as the scope for expanding the GSP to enhance the benefit of the system for LDCs, the future of preferences, modes of delivery in services and the development dimensions to issues regarding investment and competition policy.

We in the secretariat have been collaborating with a number of organizations to carry out joint studies and to organize workshops for the exchange of ideas and the examination of the results of research activities, not only with regional organizations, including the UN regional commissions, but also with WTO, ITC, the World Bank and the Commonwealth Secretariat. Two joint studies by UNCTAD and WTO, one published last October and the other presented to ECOSOC in July of this year, are noteworthy because they have greatly improved understanding of the remaining, post-Uruguay Round, trade barriers facing developing country exports, including those sectors subject to tariff peaks and a high degree of tariff escalation. As we go forward, the secretariat will continue its research work and efforts to collaborate with other institutions and individual researchers in this regard. Indeed, I regard this meeting as the first step in a long journey which I hope we will be taking together - the establishment of a network of researchers around the globe who will keep in touch and continue (including via the website which we have set up) to exchange ideas, information, and research papers which could be useful in developing the analytical basis for assistance to developing countries in preparing for the negotiations.

As the programme indicates, the workshop is organized into six sessions, covering a number of issues. Of course it will not be possible to do full justice to all of these complex issues in two days. However, as I have just mentioned, this workshop should be seen as the beginning of a process that will require continuing elaboration of issues and proposals from the development perspective in the months ahead.

The first session will review the findings of a number of recently completed, and still on-going, country-specific studies on the implementation of the Uruguay Round results, the built-in agenda and some of the new issues on the multilateral agenda. These case studies which cover some of the more advanced, as well as least developed, developing countries are meant only to be illustrative and to provide a concrete, empirical, background for the subsequent discussions of specific issues that might be on the multilateral negotiating agenda. The studies cover four Latin American countries (Argentina, Brazil, Chile and Uruguay) which were included in a joint pilot study carried out by UNCTAD and ECLAC and a number of African countries which were included in a recent study by the African Economic Research Consortium (AERC) and which have been included in an on-going study being conducted by UNCTAD with the assistance of Professor Messerlin. I would recommend that we bear these, and other developing country-specific

situations, in mind - as a sort of reality check - as we brainstorm and come up with suggestions and proposals in particular areas during the course of this workshop.

Aside from the subject of electronic commerce, the second and third sessions focus largely on issues of concern to developing countries that have arisen in relation to the implementation of the Uruguay Round Agreements with respect to market access, and on the built-in agenda in the areas of agriculture and services. I shall not, at this point, go into the substantive issues relating to each of these subjects as these are summarized in the notes on the agenda and the suggestions for discussion. However, suffice it to say that the revision process foreseen in the built-in agenda provides opportunities to modify aspects of the MTAs to enhance their development friendliness.

Session four covers a number of issues which fall broadly in the domain of domestic regulations and policies, and which have a particular bearing on the development of the supply capabilities of developing countries. Some of these issues, in particular TRIPS and TRIMS, are already subject to multilateral discipline as agreed to in the Uruguay Round. As is known, the TRIMS Agreement will be subject to review before 1 January 2000 to consider whether it should be complemented with provisions on investment policy and on competition policy. The activities of the working group established by the Singapore Ministerial conference on the Relationship between Trade and Investment and on the Interaction between Trade and Competition Policy are relevant to their process. As you know, a decision is to be taken by the end of this year on how the work of both of these groups should proceed. I hope that our discussion in that session will help to elucidate the development dimensions to these issues.

The fifth session deals with a systemic issue of the multilateral trading system of major concern to developing countries. The question here is the ability of the system to accommodate the economic interest of countries, or economies, at different levels of development under its rules in a manner that will ensure, or permit, growth and development for all, particularly the least developed economies. I do not want at this point to trace the history and evolution of the concept of special and differential treatment for developing countries in the multilateral trading system. We will have occasion to go into those matters in that session. I wish we will take a forward-looking approach in our consideration of this issue. As progress is made towards global free trade, if marginalization and increasing impoverishment are to be avoided, efforts in developing countries, and in particular the least developed countries, to build internationally competitive supply capabilities, take on a greater degree of urgency. Care will therefore need to be exercised in the framing of multilateral rules so as to avoid proscribing the use by developing countries of policy measures that could be effective in fostering a durable development of their supply capabilities.

In the final session of the meeting, I hope we will be able to bring together the main elements of what we could call a positive multilateral trade agenda for developing countries. This of course will be just some suggestions, some ideas, which will undoubtedly need to undergo further elaboration in the months ahead. In this context, it would also be helpful to identify areas where further research and analysis would provide a more solid empirical basis for establishing such an agenda.

To conclude, let me thank you once again for coming to this meeting. I look forward to a very fruitful discussion with you over the next two days.

**COUNTRY-SPECIFIC STUDIES ON THE IMPLEMENTATION OF THE URAS, THE BUILT-IN AGENDA AND NEW ISSUES**

## Introduction

In the first session of the Ad Hoc Expert Group meeting, a number of country-specific studies were presented which analysed (i) the overall impact of the Uruguay Round Agreements (URAs) in terms of implementation, foreign trade performance, institutional questions, structural changes and development outlook; (ii) trade policy alternatives and priorities; and (iii) priorities and outlook for future negotiations.

Country-specific studies provide valuable insights to the discussion on future multilateral trade negotiations by addressing the particular situations of individual countries. Thereby they:

- capture the diversity of effects of the URAs by comparing experiences of individual countries, thus eliminating pre-conceived views on developing countries;
- allow for a qualitative evaluation of the effects, which is important given that the consequences of the implementation of the Multilateral Trade Agreements (MTAs) are extremely difficult to quantify (as opposed to tariff negotiations);
- identify problems arising from past agreements as well as those arising from issues expected to be included in the multilateral trade agenda in the future;
- allow the identification of the main deterrents to developing country exports (e.g. supply constrains as opposed to market access problems);
- provide empirical elements which can lead to the formulation of a positive agenda; and
- identify trade constraints related to institutional and human resources.

The main findings of the studies conducted in Latin America, Africa and the Middle East are presented in the following sections.

## Latin America

In Latin American, four country studies were undertaken under a joint UNCTAD-ECLAC project on the following countries: Argentina, Brazil, Chile and Uruguay.[2] They were based on the methodology that emerged as a result from the discussions held during the previous Ad Hoc Expert Group meeting referred to in the introduction of this report.[3] Their main objectives were: (i) to analyse the relative impacts of the URAs and of the structural changes which these countries are undergoing; (ii) to describe major concerns of domestic actors, such as governments,

[2] Additionally, ECLAC coordinated a project on *Comparative study of development strategies, with special reference to trade and industrial policies under the new international trading system* (cf. Annex I), which strove to draw a comparison between trade and development strategies of selected countries of Asia and Latin America. In the latter region, the project conducted case studies on Argentina, Brazil and Chile.

[3] "Analysing the impact and dynamic effects of the Uruguay Round and its follow-up on developing countries", Workshop convened by the Secretary-General of UNCTAD, 3-4 March 1997.

entrepreneurs and organised labour; and (iii) to identify the main elements of a positive agenda for future trade negotiations.

**Impacts of the Uruguay Round**

The short-term impact of the Uruguay Round Agreements (URAs) on the countries studied is significantly mitigated by the fact that they were undergoing processes of structural adjustment before the launching of the Round and/or during the negotiation period (1986-1994). Such processes had as their main components:

- external financial constraints and the conditionalities and restrictions on macroeconomic policy imposed by creditor countries and international financial institutions;
- retrenchment in public expenditures, including the elimination of several sectoral subsidies and special regimes (e.g. fiscal and credit instruments to promote local industries and export diversification);
- privatisation of industrial, infrastructure and service companies;
- reorientation in foreign economic relations, with the abandoning of import-substitution strategies and sectoral targeting in favour of unilateral trade liberalisation and relaxation of foreign investment regimes;
- pursuance of regional trade initiatives in parallel with multilateral negotiations.

In this context of drastic structural change, the main challenges that private companies and public agents in these countries had to face over the last two decades have been the retrenchment of the state (particularly in sectors previously considered of "strategic" interest) and, for companies, becoming competitive in an open economy, where a surge of imports followed the rapid lowering of import barriers. The growing penetration of foreign products has led to company closures, industrial restructuring and constant pressure on the mark-up of domestic industry. This process took place before the end of the Uruguay Round and the negotiations *per se* did not affect the policy choices of Latin American countries. Rather, the negotiations and eventual adoption of the URAs constituted one element of the international environment to which these countries were adjusting themselves.

In most industrial sectors of the four Southern Cone countries which have been studied, the direct impact of the Round in terms of domestic tariff reduction was minimal, since tariffs were bound at ceiling levels above applied rates[4]. The most important impact had already taken place with the autonomous import liberalisation initiatives and/or when tariffs had been changed due to the implementation of Mercosur in the early 1990s[5]. Still, some of the Agreements of the WTO required Southern Cone countries to introduce legislative and institutional changes, such as the Agreement on Subsidies (leading to changes from prohibited to non-actionable subsidies); the Anti-Dumping Agreement (adoption of new legislation) and TRIPs (adoption of new legislation

[4] It is important to note, however, that for the first time these (and other Latin American) countries have bound the large majority of their tariff lines.

[5] After a transition period which lasted from 1991 to 1994, the Mercosur came into force as an imperfect customs union on 1 January 1995. Its full members are Argentina, Brazil, Paraguay and Uruguay, while in 1996 Bolivia and Chile became associate members.

and changes to existing laws).

In economic terms, some of the Agreements had an important impact on specific sectors, both positive and negative. One case is the traditionally export-oriented agricultural sector (including agricultural-based industries), which has benefitted from the first steps of the worldwide agricultural reform process and from the increased market access resulting from the implementation of the Agreement on Agriculture. However, there are other sectors for which the implementation of and compliance with the URAs has brought significant costs. This is particularly the case of sectors dependent on intellectual property rights, especially the pharmaceutical and software industries; and the automotive industry, for which export subsidies and trade-related investment measures (TRIMs) are in place in Argentina, Brazil and Chile, such as waivers of duties on imported components up to an equivalent value of exported final goods and trade balancing requirements, will have to be phased out by the year 2000.

In terms of horizontal issues, a major concern of the exporters of the countries analysed has been the high frequency of anti-dumping and other "trade remedies" actions taken against their exports, after the conclusion of the UR. At the same time, however, in order to protect national industry from import competition, in recent years Latin American countries have significantly increase their use of the same instruments, particularly anti-dumping. This highlights the divergent interests among different industrial sectors.

Therefore, with the exception of the sectors mentioned above, the costs of compliance with the URAs in Southern Cone countries has not been very high until now[6]. However, in the medium term the costs may be higher. Given that the main problem of these countries in reaching extra-regional foreign markets is one of competitive supply capacity, the new disciplines on investment and industrial policy (particularly those embodied in TRIMs and subsidies) are seen as depriving countries from instruments which may be part of a wider policy to overcome these supply constraints.

The conclusion of the studies on selected South American countries is that the room for manoeuvre for trade policy formulation and particularly for protection has been reduced as a result of the strengthened disciplines implied by the URAs. There is an increased awareness of the importance of abiding by the multilateral disciplines. Thus, governments have been able to resist demands for protection on the grounds that the measures which were being required were incompatible with WTO commitments. This has allowed them to keep some coherence with their market opening policies. Additionally, in the past many developing countries could count on benign neglect towards their absence of complete compliance with GATT commitments. However, the growth of their economy, trade and, hence, relevance has meant that international scrutiny over their policies has increased accordingly. This is enhanced by strengthened WTO mechanisms such as notification obligations and trade policy reviews.

Nevertheless, there is the perception that in the new multilateral framework loopholes can still be found and that a "crafty" interpretation may still be made of such loopholes, which Latin

[6] It should be recalled that the impact of the URAs has not yet been completely experienced, since the transition periods foreseen in some agreements - which are likely to have major global effects (particularly Agriculture, TRIPs, TRIMs and Textiles and Clothing) - have not yet elapsed, nor has the time for implementation of tariff bindings.

American countries are learning how to do. Given that public policies aimed at diversifying the composition of exports remain, a number of policy instruments are sill available which are non-discriminatory in their conception and implementation. They allow governments to deal with structural deficiencies and to accelerate growth, promote investment, increase systemic competitiveness and assure a better income distribution. These policies include, *inter alia*: (i) broad-based competitiveness measures; (ii) R&D promotion; (iii) human resource development; (iv) enhancement of SMEs; (v) promotion of FDI; (vi) information diffusion.

In the discussions on country case studies within the region, it was recalled that the conclusions arrived at by studying four Southern Cone countries are not necessarily valid for all Latin American countries. Though findings would probably be largely similar if other South American countries were studied, the same does not hold true for Central American and Caribbean countries (apart from the case of Mexico, mentioned below). In these cases, the importance of the United States market is much larger than for Southern Cone countries, for which European and Asian export markets are equally important outlets as the US. Moreover, services represent a considerably larger share of total exports, as these smaller countries have developed comparative advantage in several service niche markets.

**The regional dimension**

One of the most striking features of trade policy and international trade negotiations in Latin America at present is the parallel developments at several levels: (sub-)regional, bilateral, hemispheric and multilateral. The regional (Mercosur for the countries analysed) and hemispheric dimensions of international trade relations and negotiations (and, to a lesser extent, the bilateral negotiations) are considered by these countries' policy-makers and private sector officials as their priority, in terms of preparations, discussions and actual policies and measures undertaken. At the same time, the multilateral dimension is seen as more distant.

Nevertheless, there are important links among these geographic spheres in several respects:

*Schedules of negotiations* - it is a novel feature of the negotiations scheduled for the near future that multilateral negotiations will be held in parallel with intra-regional negotiations. Sub-regional initiatives in Latin America are being strengthened and deepened (partly in preparation for) before the hemispheric and multilateral negotiations. The schedule for multilateral and hemispheric negotiations puts pressure for deepening the treatment of the same issues at the sub-regional level; *Learning experience* - the trading and negotiating experience acquired at the more immediate levels is perceived as a learning experience for the broader level, i.e. regional and bilateral integration initiatives in relation to both hemispheric and multilateral negotiations. This also holds true for private sector participation, which became stronger with the Mercosur process and, subsequently, with the FTAA, as well as, to a lesser extent, at the multilateral level (see hereafter); *Trade diversion* - there is also a "negative" relationship between regional integration initiatives and multilateral negotiations. While it is frequently argued that the former distract attention and resources from the latter, the Mercosur experience has shown that the cost of trade diversion (particularly in terms of the trade between Brazil and other Mercosur countries) lead directly to heightened interest in the multilateral dimension. This higher level of trade policy is seen as a way of mitigating the trade-diverting effects of the regional integration process;

*Negotiating power* - these countries' economies and trade flows are too small to have any decisive impact on multilateral negotiations; nevertheless, a common position defended in the name of Mercosur is seen by these countries' trade and private sector officials as bearing better chances of having an impact on negotiations.

## The process of formulating trade policy

The design, discussion and implementation of trade policy priorities and of international trade negotiations in the four Southern Cone countries studied is conditioned by several factors, such as their economic structure, the political hegemony of certain sectors, structural changes and the evolving nature of private-public sector relationship.

*The traditional economic structure*

Most of the Southern Cone countries studied have traditionally had a dual economic structure, which is reflected by a dual insertion in international trade. On one side there are the traditional export-oriented sectors, composed basically of commodity producers and the agroindustry. On the other hand, there are the majority of industrial sectors, which are oriented firstly to the domestic market and secondarily to the regional market. This is explained not only by the import-substitution policies which have been applied for a long period and by the more recent deepening of the regional integration process, but also by the sheer size of the domestic markets of member-countries[7]. A consequence of this economic structure is the low degree of internationalisation of these countries' goods and services. This is evidenced, for instance, by their low degree of trade opening, the small flow of outward FDI[8], the low coefficient of exports of transnational corporations installed in these countries (as compared to the trade performance of the same companies in other recipient countries). With minor exceptions, industries producing higher value added products (largely industrial goods outside the agroindustry, including for instance the automotive products) are competitive only in domestic and regional (i.e. Mercosur) markets. Therefore, foreign markets outside the region typically come as a third place in terms of priorities. The import-competing industrial sectors have been badly hurt by the unilateral trade opening that these countries have adopted since the 1980s and by the consequent surge in imports and increased international competition. They have lost market share and have been forced to reduce their mark-ups. They are not in a position to make significant inroads in foreign markets outside the region, despite the adoption of some aggressive export promotion policies.

For most industrial sectors in the countries studied, the basic problem in exporting outside the immediate region is one of supply, rather than one of market access (with the major exceptions of agroindustry and steel). The trade liberalisation policies adopted throughout the region since the 1980s have not been accompanied by policies conducive to structural transformation towards

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[7] This is a fundamental difference between the larger Latin American countries and most countries in other regions which have followed an export-led industrialisation strategy.

[8] Nevertheless, also in terms of investment flows, the development of Mercosur has brought some degree of (regional) opening, as the Common Market has been an important factor in inducing the emergence of outward FDI by Southern Cone countries, particularly from Chile into Argentina and Brazil and between the two latter countries.

greater productive efficiency and enhanced systemic competitiveness. Such policies would have to tackle pervasive problems such as: (i) lack of high-skilled labour and human capital development; (ii) low technological absorption and weak and/or inappropriate research and development; (iii) deficient physical infrastructure (particularly in terms of transport, telecommunications and energy). Even though countries have taken initiatives to tackle some of these problems, in many cases the adjustment of the domestic supply capacity has been hampered by difficulties like appreciated exchange rates, high domestic interest rates (frequently associated with scarce availability of long-term financing) and restrictive fiscal policies.

The situation of the trade and industrial development performance of Southern Cone countries contrasts sharply with the export performance of other countries at similar stages of industrialisation, like Mexico, Malaysia and the Republic of Korea. These countries have been able to integrate more effectively into the world economy and to expand significantly their exports of higher value-added manufactured products. While in the Mexican case this is largely explained by FDI flows arising in the wake of NAFTA, East and South-East Asian countries have achieved a wider geographical export diversification for their manufactured products and incorporated higher value-added to their exports.

Trade policy priorities of the four Southern Cone countries largely reflect the traditional dual economic structure and the transition from the import-substitution model to a more open economy. The traditionally hegemonic sectors are still decisive in setting the trade and industrial policy agenda. While globalisation is being dealt with by policy-makers through changes in domestic regulation (e.g. privatisation, liberalisation of FDI regimes), these changes have not always been taken into account by hegemonic trade-policy setting sectors. Thus, sectors targeted by governments are essentially import-competing and achieve preferential status with the following justification: (i) the supposedly high value added content of their products (e.g. electronics and the automotive sectors); (ii) being labour-intensive (e.g. clothing and footwear); (iii) the weight they have in the industrial structure (e.g. steel and chemicals). Their trade agenda is mostly defensive against imports (e.g. by making use of loopholes in national and international legislation) and focuses largely on regional initiatives. By contrast, it is mostly the traditionally export-oriented sectors that have been very active in trade policy formulation and in striving to open market access abroad; therefore, they have had a strong interest in the multilateral trade agenda. Nevertheless, the process of formulating and implementing trade policy priorities has been undergoing important changes, thanks to modification of the structure of the economy and to the evolving private-public sector relationships.

*Structural changes*

The difficulty of planning and executing trade policy and participating effectively in international negotiations has been heightened by structural changes through which Latin American economies have been undergoing during the last decade: opening up of the economy, deregulation, privatisation, new FDI flows, widespread merger and acquisitions process, restructuring of several industrial sectors and of inter-sectoral relationships. In this new context, trade strategies of firms within a single sector begin to diverge widely, thus producing a new dynamics of positions and coalition-building in trade policy matters, which increasingly competes with the traditional sectoral-led dynamics. This diversification of interests leads to quite differentiated demands to government in terms of protection and liberalisation, e.g. with representatives of industry at higher

stages of processing pressing for the liberalisation of imports of inputs, which is opposed by the domestic producers of these inputs which would be hurt by stronger competition from imports. This increased heterogeneity of interests implies increased complexity and sophistication in the formulation of a national position on specific issues. The process has become considerably more difficult than during the "pre-opening" phase, in which the definition of national trade policy interests was more straightforward. The dilemmas and tensions of the new situation must be faced by policy-makers, who now must strive to build domestic consensus ahead of international negotiations.

*Private-public sector relationship*

During the 1990s there has been a change in the private sector-government relationship and the involvement of the private sector with trade policy formulation has increased considerably. Until recently trade policy was mostly discussed and designed by governments, who defined "national interests" and were mostly followed by the private sector[9].

Along the 1990s, however, the private sector enhanced its organisational and technical capabilities in terms of trade issues and began to intervene as an autonomous actor defending its interests in trade negotiations[10]. Both business associations and labour unions have modernised themselves, are well informed about issues at stake and are prepared to defend their interests. In the case of Mercosur countries, the turning point was the establishment and deepening of this common market, which counted with the active participation of private sector representatives. This new form and degree of involvement of the private sector has also been taking place since the beginning of the discussions on the Free Trade Area of the Americas (FTAA). Here there was a convergence of views among government and the private sector (both business and labour) against the acceleration of liberalisation, as the risks were seen as overtaking the opportunities.

Still, private sector representatives are more concerned about the more immediate levels of international relations (i.e. Mercosur and FTAA), where they feel they can exert some direct influence. As for the multilateral dimensions, the private sector mostly feels that it is too remote for being able to influence the process. Major exceptions are agriculture, textiles, footwear, as well as, in the case of Chile and Uruguay, some service sectors. On these themes private sector associations closely follow developments and have a more pro-active stance.

This increased involvement of the private sector with trade policy matters has taken place not only in terms of international negotiations, but also with respect to the use of contingency measures. While for some sectors tighter disciplines over the latter in foreign market is seen as a priority (e.g. steel), Southern Cone countries have increasingly resorted to the same type of measures, particularly anti-dumping. This is a consequence of the heightened competition brought about by trade opening and of the political clout of import-competing industrial sectors.

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[9] Even the initial phase of trade liberalisation was largely driven by governments, in strong confrontation with vested interests opposed to the new policies.

[10] This may be seen partly as a consequence of the Uruguay Round, which expanded the international trade agenda well beyond border measures into areas formerly considered as the preserve of domestic policies. This enlargement of "trade-related" issues was also pursued by regional trade initiatives.

**Future negotiations**

As a result of the factors mentioned above, the trade policy agenda of the private sector and of policy-makers in these Latin American countries is largely traditional and defensive, consisting is some points of the unfinished business already present at the end of the Tokyo Round. The main elements of this trade policy agenda are (i) a defensive stance in import-competing sectors, which mostly plead for protection; (ii) an active interest in international trade negotiations on the part of traditional export sectors (basically agriculture and agroindustry); (iii) priority to market access in OECD countries and, secondarily, in other developing countries; (iv) importance to the existence and security of rules in the international trading context; and (v) a preoccupation with the room for manoeuvring left for trade and industrial policy.

The outlook for a comprehensive new round of multilateral trade negotiations starting in 2000 is met with a defensive stance on the part of these actors. Their main concerns with a new round of trade concessions and further liberalisation are (i) the wave of trade opening which already has been implemented has highlighted the weakness of domestic industry, which would be further jeopardised by further liberalisation. This is particularly the case where at present high tariffs are practised, which would certainly be targeted by major trading partners; (ii) a possible stronger multilateral discipline on investment would restrict even further the design and implementation of industrial policies; (iii) the possibility of inclusion of environmental and labour issues in a new round raises strong worries, since it is felt that several important export sectors would be targeted under these new issues.

The only major opportunity seen to be offered by the new set of negotiations is the continuation of the process of reform in agricultural trade and policies, which draws strong interest from the traditionally export-oriented sectors, i.e. agriculture and agro-industry.

In Latin American countries (as well as in other regions), there is a perception that multilateral trade negotiations should no longer be viewed from a North-South perspective, since developing countries have different priorities and view on several themes. Therefore, it is thought that these countries will need to build alliances with countries outside the region around specific issues of common interest.

## Africa

Eight country studies are being undertaken as part of the *Africa and the world trade system* project coordinated by the African Economic Research Consortium, covering the following Sub-Saharan African countries: Cameroon, Côte d'Ivoire, Ghana, Kenya, Mauritius, Nigeria, South Africa and Uganda (cf. Annex I)[11]. Their objectives are: (i) to analyse market access problems; (ii) to review domestic policies and possibly identify inconsistencies; (iii) to assess the capacity of African countries to comply with multilateral obligations and defend their rights; (iv) to identify priorities for future negotiations. Six further country studies on Africa are being conducted under the project *Country-specific studies on the impacts of the Uruguay Round*, conducted on behalf

[11] As of October 1998, several of these studies were still at a preliminary stage.

of UNCTAD by the Fondation Nationale des Sciences Politiques (Paris, France). It covers the following countries: Benin, Burkina Faso, Chad, Mali, Niger, Togo. Their objective is to analyse the impact of the URAs on these countries' economies and to assess their overall macroeconomic and sectoral policy framework.

**Market access**

The studies showed that most African countries do not face serious market access problems in the major export markets. Import tariffs in the EU are mostly zero and they are very low in Japan, while there are some problems in the United States. These market access conditions are the result of trade preferences granted under the following schemes in the main export markets: GSP, Lomé Convention and LDC preferences[12]. There are however, a number of problems associated with these preferences schemes. These include (i) the uncertainty and time limitation associated with these unilaterally granted preferences; (ii) these preferential schemes contain sectoral exemptions which constitute a market access barrier for African exporters, such as textiles in the United States and fisheries in the EU; (iii) the persistence of tariff escalation in products of export interest to African countries. In some cases (e.g. cocoa in the EU) this has even increased as the result of deeper tariff cuts on products at a lower degree of processing; (iv) the exclusion of Nigeria from the US GSP scheme; and (v) the use of voluntary export restraint arrangements against Kenya and Mauritius (in textiles and clothing).

Despite the shortcomings and limitations of these preference schemes, they are extremely important for African countries. Therefore, for them the main impact of the Uruguay Round in terms of market access is not MFN tariffs reductions, but the consequences of the URAs on preference schemes. Thus, the major concerns arising from the implementations of the URAs are the erosion of the preference margins as a result of cuts in MFN rates in the major export markets (although to a certain extent this may be compensated by contingency protection in the importing markets) and the status of the agreement which is likely to follow the Lomé IV Convention (including the future of the Sugar Protocol)[13].

The implementation of the Agreement on Textiles and Clothing is likely to have an indirect impact on the exports of countries like Mauritius and Kenya. Under the Lomé Convention, their exports into the EU market are unconstrained by quotas or tariffs, while other suppliers (e.g. Asian countries) are constrained both ways. The eventual integration of the sector under WTO disciplines will significantly alter competitive conditions for exporters. While all will enjoy quota-free access to the EU market, tariff market access conditions may still be differentiated under preference schemes (e.g. the successor of Lomé IV as opposed to the European GSP or even to the exclusion of this sector from the GSP). Although the final impact of the implementation of the ATC are very difficult to foresee, the smaller suppliers are likely to lose market share in the EU. However, this may be compensated by the fact that overall imports into the EU are expected to

[12] Until recently, South Africa was the only Sub-Saharan African country not benefitting from these preferences. However, it has been incorporated into Lomé and the major GSP schemes.

[13] An indirect impact of the URAs affecting some African countries is the change of the EU banana regime, which was forced by the strengthening of the dispute settlement mechanism.

increase significantly. Thus, smaller importers may achieve a growth in their total sales despite a fall in their market share. As for the United States market, African exporters would benefit from the implementation of the Africa Growth and Opportunity Bill, which foresees the elimination of quotas and tariffs for textiles and clothing. Under such conditions, a similar reasoning would apply (by analogy to the EU market).

Nevertheless, these and other studies have concluded that, although some specific market access problems remain in spite of existing preference schemes and of the URAs, for African countries the main problems in taking advantage of market opportunities are (i) deficient domestic supply capacity. The major export constraints stem from both the domestic policy environment and from variables internal to firms; and (ii) lack or inadequacy of information on foreign market conditions, such as (potential) demand, preference schemes, technical standards and other requirements.

**Trade policy and domestic policies**

Africa has not performed well in terms of trade and, therefore, in terms of overall economic growth over the last two decades. The continent's share in world trade has been shrinking and it has been virtually marginalised. In order to stop or reverse this process, increased importance is being given to trade policy and to the multilateral trade framework in providing a secure environment and in lowering market access barriers.

Most African countries are undertaking a fundamental shift from import-substituting industrialisation to more outward-oriented trade and development policies. This is motivated by the recognition of the difficulties and poor performance brought about by the policies followed so far; the apparent success of a different set of policies and institutional arrangements in other regions; and the pressure exerted by multilateral development agencies and bilateral donors, which condition development assistance on greater liberalisation on recipient countries' trade and payment regimes.

However, such a change is slow and, in many cases, not decisive, so that import barriers are still high, widely dispersed and largely unbound. In West African francophone countries, for instance, while import tariffs have been reduced, other measures and instruments continue being adopted that imply high import barriers, e.g. levying excess duties on top of import tariffs, exerting more stringent control on imported products for taxation than on domestic products, etc. This means that in some cases rates of protection may reach 140%[14]. The fact that for most African countries import tariffs are an important source of fiscal revenue poses an obstacle to further lowering these duties (unless this is accompanied by fiscal reform). The main problem with high import barriers is that they represent a tax on exports and, thus, hamper diversification and expansion of exports[15].

Many of the West African francophone countries studied have relaxed price controls, but other

[14] Nevertheless, extensive exemptions of import duties are granted, particularly to domestic monopolies and foreign investors. In some countries, these exemptions may amount to one fourth of total imports.

[15] It has been estimated, for instance, that 79% of the import tax in Ghana is transferred to exports.

forms of regulation remain extremely tight. Several monopolies are in place and regulation in most service sectors are very tight. Examples of this are: (i) some countries do not allow charter flights; (ii) there is no competition in maritime transport, which is dominated by European shippers; (iii) on most cases telecommunications and financial services are controlled by state monopolies. The result is that a significant portion of infrastructure services does not respond to price signals.

Under UNCTAD's CAPAS[16] programme, national research teams have conducted in-depth studies of the service sector in ten African countries. Under phase II of this programme, studies focused on the basic telecommunications and financial services sectors. The next phase is focusing on a wide range of services sectors with a view to assisting African countries to deepen their subregional integration and participate effectively in the GATS negotiations scheduled for the year 2000.

African countries generally did not engage adequately and effectively in the Uruguay Round negotiations. Partly for this reason, the results obtained were not so favourable for the region. It is felt that a better understanding of the multilateral rules will allow a better use of the same rules. The main shortcomings which have been found in African countries refer to their capacity to: (i) meet obligations; (ii) negotiate; (iii) compete internationally.

As for the latitude allowed for trade policy, the studies have concluded that the URAs pose a certain degree of limitations to policy autonomy in the Sub-Saharan African region. In the case of import tariffs, the obligations assumed are not very stringent because: (i) there is a considerable gap between applied tariffs and bound tariffs[17]; and (ii) few industrial tariff lines have been bound. The WTO could serve as an "agency of restraint" for African countries and thus promote adherence to sound development policies. A deeper understanding of the multilateral rules and a more innovative use of policy space available would be required if these countries are to use the new international environment to their advantage.

In relation to export regimes, all the West African francophone countries analysed levy duties on exports, particularly on raw cotton. Moreover, some of these duties have been raised recently. In many cases, exports of given products are handled by monopolies. However, in recent years the main economic factor affecting the external trade has been the devaluation of the CFA franc, adopted in 1994. It had an impact on their export structure, as some new products have emerged in which these countries have comparative advantage.

**Implementation of the URAs**

[16] Coordinated African Programme for Assistance on Services, supported by IDRC (Canada), the Carnegie Foundation (USA) and the Government of France.

[17] It is worthwhile noting, however, that in some countries that are undergoing structural adjustment programmes under the aegis of the Bretton Woods institutions, there is a commitment not to raise (applied) import tariffs beyond a given level. This means that as long as these countries have obligations towards these institutions, their ability to raise import duties is restricted by external financial constraints, rather than by the bindings done at the WTO.

The implementation of obligations flowing from the URAs by most African countries has been considerably slow in those cases in which compliance with the Agreements required legislative and/or policy changes. Several of the countries analysed have not yet eliminated WTO-inconsistent measures or even devised policy changes which would eliminate such inconsistencies. Given that tariff bindings in industrial products have been very few and that both industrial and agricultural tariffs have been bound well above applied rates, the main inconsistencies arise from the new disciplines on TRIMs, TRIPs and contingency measures. Other areas which have posed difficulties for compliance to African countries have been those of notification obligations and of trade policy reviews. These difficulties arise from (i) the lack of adequate knowledge of the multilateral trade rules and of the obligations implied by them. Hence these countries lack sufficient knowledge of the new procedures, legislation and institutions required; and (ii) the deficiency of the institutional capacity to carry out the changes required and to comply with obligations.

The difficulties faced in meeting obligations originating from the URAs explain the priorities of these countries for future trade negotiations (see below). At the domestic level, the intended response is to upgrade human resources (particularly in government), to introduce new legislation (especially on IPRs and contingency measures) and to set up new bodies/ task forces to monitor WTO obligations and their compliance.

African countries will also be indirectly affected by the implementation of the URAs by their trading partners. This is particularly the case with the Agreement on Agriculture. On one side, the reduction of domestic support and export subsidies may result in higher international prices and, therefore, in higher food import bills for the net food importing countries. The effective implementation of the Marrakesh Decision on the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries was essential. In the case of sugar, the cut of domestic support in the EU is likely to press downwards the internal EU administered price of the product. Since the latter is the price of reference for imports from ACP countries under the Sugar Protocol of the Lomé Convention, lower internal EU prices would result in reduced sugar export earnings on the part of ACP exporters.

**The regional dimension**

Until recently most African regional trade agreements (RTAs) have not been operative, contrary to what has taken place in other regions. This stems largely from the fact that they have been established for political reasons, rather than with the objective of fostering trade among members. Therefore, in many cases tariff preferences are not meaningful and intra-RTA trade is hampered by a series of non-tariff barriers, including deficient transport and communication systems connecting member countries. However, recently some initiatives have been taken which will effectively result in closer ties among member countries. One of the possibilities that are being considered for the negotiation of the follower to the Lomé IV Convention is that of "partial" reciprocity between the EU and regional blocs of ACP countries. This is putting pressure on the existing (and this far not very effective) African RTAs to restructure themselves and to become more operational.

The most important regional integration initiative taken by West African countries recently has

been the UEMOA (Union économique et monétaire ouest africaine)[18]. It was established in 1994, but there are some obstacles which prevent countries from reaping potential benefits, such as (i) the common external tariff is based on the averaging of two tariff systems: one of high duties, previously adopted by six of the members, and one of low tariffs, previously practised by Benin. Therefore, the resulting common external tariff is closer to the high level of most members, which may entail reduced welfare for Benin; (ii) contingent protection measures are largely accepted; and (iii) part of the rationale for establishing this agreement is the objective to achieve economies of scale. However, the potential for these economies is seriously limited by the size of the economies of member countries, which means that even when combined they still do not constitute a large market.

The most striking case of an African RTA which is taking effective steps towards closer integration is the Southern African Development Community (SADC), which is effectively advancing towards the establishment of a free trade area among its member countries. Member countries are presently actively involved in tariff negotiations aimed at this objective.

### Future negotiations

For the African countries studied, the priority for future multilateral trade negotiations is the implementation of the URAs, given the difficulties experienced in this field. Their main demand will be that the time-frame for compliance with obligations be substantially extended. It is expected that African countries will be more involved and active in future negotiations than in the past. Some experts have argued that African countries should give priority to services, rather than goods, since the former can potentially be more important for them than the latter.

## West Asia

The United Nations Economic and Social Commission for West Asia (ESCWA) undertook seven studies on the impact of the URAs on the economies of its member countries[19]. They focus on challenges and opportunities of the URAs for ESCWA member countries in selected sectors/issues including: crude oil, petroleum products and petrochemicals; financial services; agriculture; textiles and clothing; pharmaceuticals; implications of WTO for non-members in the region; and the WTO and trading blocs in the ESCWA region.

### Crude oil, petroleum products and petrochemicals

[18] Out of the six West African francophone countries included in UNCTAD's project, only Chad is not a member of UEMOA.

[19] The member countries and territories of ESCWA are: Bahrain, Egypt, Iraq, Jordan, Kuwait, Lebanon, Oman, Palestine, Qatar, Saudi Arabia, Syrian Arab Republic, United Arab Emirates, Yemen. In what refers to the WTO, these countries fall under three groups: (i) those which are already members of the WTO; (ii) those which are negotiating accession (at several stages of the process); and (iii) those which haven't yet considered membership.

Petroleum and petrochemical products exported from the ESCWA region to main developed markets do not face significantly high tariffs in their main export markets. The region's main issues of concern are (i) the lack of binding of the zero tariff on oil in the United States market; (ii) challenges to the dual pricing system and the threat of anti-dumping actions on downstream products; (iii) discriminatory taxation on environmental grounds, including subsidies to coal (especially in the EU countries), and the impact of future environmental measures ; (iv) the future of OPEC, which has not yet been referred to in the WTO; and (v) the possibility that the Chemical Tariff Harmonization Agreement may be raised although the Agreement has few signatories at the moment.

**Financial services**

The argument for liberalizing financial services is based on the ground that it would encourage competition and efficiency; enhance the inflow of foreign direct investment to finance the current account deficit, and secure market access abroad. However, the following questions must be raised within the regional context: Could individual country's financial institutions withstand competition from foreign firms? Is not internal reform and consolidation a precondition for freeing the financial market? Should liberalization be linked to internal restructuring or should it be implemented as shock therapy? How can liberalisation be used as a means to force reform on a reluctant sector? What lessons can be drawn from the East Asian crisis?

**Agriculture**

The impact of the Agreement on the region's agriculture is not likely to be as powerful as has been initially anticipated. There will be limited gains from improved market access in the developed countries. The rise in the world prices for temperate agricultural commodities is expected to be in general modest, but compensation for food-importing countries should not be considered, in the context of the relevant Marrakesh Decision. Moreover, the ESCWA-WTO members will themselves have to open their markets, cut their tariffs, and reduce their subsidies. The region's ability to produce agricultural products is limited by the shortage of water in most of the countries of the region. The Euro-Mediterranean Agreements offer opportunities to some ESCWA countries to specialize further in specific agricultural products, and the Arab Free Trade Area help should help competitiveness and stimulate intra-regional trade.

**Textiles and clothing**

The elimination of the Multifibre Agreement is of interest to several ESCWA countries, however, market access will be enhanced only very little by the ATC since for ESCWA exporters MFA export quotas are rarely reached. An additional problem is the increased competition from lower-cost East and South Asian producers once the lifting of the MFA quotas reaches its final stages. The recommendation arrived at, therefore, is to identify niche markets where ESCWA producers can remain or become competitive. Rules of origin remain a complex issue in relation to trade in textiles and clothing as, potentially, the issue of labour standards and environmental rules.

**Pharmaceuticals**

There is a small but relatively dynamic pharmaceutical industry in some ESCWA countries. The impact of WTO disciplines will be quite differentiated according to which Agreement is being examined. In terms of tariffs, import duties in major industrialised country markets are low and market access gained from reduction in tariffs is expected to be of little effect for the ESCWA pharmaceutical industry. In what refers to TBT, it is likely that pharmaceutical exports of the region will gain from the elimination of technical barriers to trade in partner countries.

However, the most important impact on the pharmaceutical industry derive from the TRIPs agreement and here mixed results arise. On one side, the strict application of the Agreement will have negative implications for transfer of technology and for research and development in the region. On the other side, enforcement of TRIPS protection could lead to increased investment in the member countries. The study also found that the protection of process patents would be much less important than that of product patents. It was also concluded that Section Super 301 of the United States Trade Act, though apparently inconsistent with WTO rules, may still be used to enforce the intellectual property right protection, and should be of concern to ESCWA countries.

ESCWA countries may have a comparative advantage in delivery techniques, "cocktail" treatment, biotechnology, clinical tests, and new products, in cooperation with international or outside firms. It is, therefore, suggested that the member countries encourage joint ventures among firms to deal with the problems pointed out; conduct a detailed inventory of products made in each country; and analyse their position with regard to TRIPs.

**Implications of WTO for non-members in the region**

The main negative effects of the URAs for ESCWA countries which are not members of the WTO are:

- exclusion from the new WTO regulatory regime, particularly lack of access to the trade dispute mechanism;
- this would make non-members also be first targets for protectionist intents in export markets;
- in services, lack of security and predictability of access for exports to markets where commitments had been made, as well as the opportunities for negotiating market openings among other members, and the value of using the agreement as a way of pre-empting vested interested;
- lack of improved access under the Agreements on Agriculture and Textiles and Clothing.

**The WTO and trading blocs in the ESCWA region**

The main advantages of establishing (a) trading bloc(s) in the ESCWA region are felt to be:

- it would help to boost political confidence and reduce tension;
- it would help to bring the gains from trade creation which would be secured more rapidly than

might be possible through the multilateral route;
- it would generate “dynamic” affects, i.e. achieving economies of scale and increasing inward investment;
- it would help to preempt the demands of vested interest groups in domestic reforms;
- it would increase negotiation leverage in the WTO and other international fora.

UNCTAD is actively assisting non-member Arab countries in their process of accession to the WTO, including through specific projects in Algeria and Jordan. Historically, only Egypt was an active GATT member, followed during the Uruguay Round by Morocco and Tunisia which also took an active role. The accession of Arab countries to the WTO will provide the possibility of coordinated Arab trade initiatives in that forum which could considerably enhance the role of the region in world trade and its participation in the trading system.

## AGRICULTURE

The Ad Hoc Expert Group meeting devoted a substantial amount of time to a discussion on agriculture. During the session, many contributions were made by panellists as well as other participants in the audience on issues relating to the future multilateral trade negotiations in the area of agriculture. They largely centred around the following broad issues, which will be discussed subsequently:

(1) Market access commitments, including (i) tariff peaks and tariff escalations, (ii) the administration of tariff rate quotas (allocation, quota under-fill), and (iii) the use of the special safeguard provision.
(2) Domestic support commitments, including (i) the use of the Aggregate Measurements of Support (AMS) instead of product-specific commitments; (ii) how to accommodate "excessive" rates of inflation; (iii) the legitimacy of including a "negative" AMS in the calculation of the total AMS; (iv) improper use of Green Box criteria; and (v) the elimination or extension of Blue Box measures.
(3) Export subsidy commitments, including: (i) the concentration of the use of export subsidies among a limited number of countries and on a limited range of products; (ii) circumvention of the export subsidy commitments (including inward processing, multi-pricing of products for exports and for domestic use, etc.); (iii) cumulation of unused export subsidies; (iv) disciplines over export credits; and (v) the elimination or extension of export subsidies beyond the current reform process.
(4) Other issues that were brought up during the meeting relate to possible negative effects on LDCs and net-food importing countries, the use of SPS measures and approaches to further negotiations in the area of agriculture.

## Background

The Uruguay Round Agreement on Agriculture (AoA) brought the agricultural sector under a new set of multilateral trade rules and disciplines that cover three major areas: market access improvement; reductions in domestic support; and reductions in export subsidies. Despite the limited extent to which the Agreement did actually reduce export subsidies and improve market access, its final text is nevertheless an important landmark in the liberalization of the agricultural sector: (i) it has brought transparency to trade policies in the agricultural sector; (ii) it has eliminated the use of non-tariff measures through the process of "tariffication"; (iii) it has subjected export subsidy competition and domestic support to the multilateral rules and specific limitation; and (iv) it commits its members to continue agricultural trade liberalization after the initial implementation period.

The AoA is one of the most complex agreements that resulted from the Uruguay Round negotiations due to the multi-faceted nature of agriculture. Political sensitivity as well as non-trade concerns related to agriculture led to the establishment of various provisions within the AoA which exempt agricultural trade from prevalent rules and disciplines specified in other UR Agreements.

The AoA provides for a continuation of the agricultural reform process in the multilateral framework. According to Article XX of the Agreement on Agriculture, new negotiations are to be initiated by 1 January 2000, taking into account: (1) the experience with the implementation of the reduction commitments; (2) the effects of the reduction commitments on world trade in agriculture; (3) non-trade concerns, special and differential treatment for developing-country members, and the objective of establishing a fair and market-oriented agricultural trading system; and (4) any further commitments necessary to achieve the long-term objective of substantial progressive reduction in support and protection.

With respect to this "built-in agenda" for follow-up negotiations, the WTO Singapore Ministerial Conference of December 1996 initiated a preparatory process of analysis and information exchange (the "AIE process") to allow all members to better understand the issues to be discussed in future negotiations and identify their own interests. This AIE process, which takes place around the meetings of the Committee on Agriculture, has provided a forum for Members to identify problem areas in the current Agreement as well as to discuss ways of resolving them in future negotiations. Since 1997, several informal open-ended meetings have taken place and discussed topics such as special and differential treatment, administration of tariff quotas, circumvention of export subsidies, "Green Box" measures, "Blue Box" measures, state trading enterprises, domestic support policy reform, special agricultural safeguard, non-trade concerns, and sectoral trade liberalization. In order to facilitate the work of the AIE process, the WTO Secretariat regularly provides background papers based on information and data submitted by Members.

Other regular reviews by the Committee on Agriculture include the annual monitoring of the follow-up on the Marrakesh Ministerial Decision taken on least-developed and net food-importing developing countries, and reviews (at each of its meetings) of the recommendations adopted by the Singapore WTO Ministerial Conference on the implementation of the Marrakesh Decision in relation to food-aid matters. In line with these recommendations, substantive negotiations on a new Food Aid Convention are to be concluded by the end of 1998.

## Key issues from the development perspective

### 1. Market access

While the market access commitments of the AoA have greatly increased the transparency and predictability of WTO Members' agricultural trade policies, the trade liberalizing impact of the Agreement has been uneven across different products. In developed countries, market access for "sensitive products" that were previously protected by non-tariff measures (NTMs) remain to a large extent restricted; in some cases, the degree of market protection has even increased. This is due mainly to (i) the manner in which NTMs were converted to tariff equivalents - resulting in "peak tariffs" often exceeding 100% ad valorem, (ii) the administration of tariff rate quotas, and (iii) the use of the special safeguard provision under the Agreement.

#### Tariff peaks and tariff escalation

Several of the experts made reference to the high level of tariffs and the tariff peaks prevalent in

many countries, and pointed in particular to the problem of tariff escalation in the food processing industry. This can be explained by the process of tariffication. When WTO Members converted their NTMs to tariffs, many of them engaged in what has been called "dirty tariffication". That is, they calculated tariff equivalents for NTMs that were much higher than the protective effects of the NTMs being replaced. As a result, tariffs in the agricultural sector are in general now higher than in other sectors. A recent joint UNCTAD/WTO study shows that more than half of the peak tariffs of developed countries are found in the agricultural, fishery and food industry sectors.[20] Among products with peak rates, those with rates that are prohibitively high (e.g. exceeding 100 per cent) are mostly the ones resulting from tariffication. Even for countries with few tariff peaks in the agricultural sector as a whole, certain "sensitive" sub-sectors (e.g. the dairy products and tobacco products) are more prone to have peak rates.

The problems of tariff peaks and tariff escalation were in a sense "allowed" by the tariff reduction approach utilized in the UR negotiations on agriculture. In earlier rounds of multilateral trade negotiations, three basic tariff reduction approaches were used in the industrial sector: (i) the linear reduction approach; (ii) the harmonization approach, and (iii) the item-by-item approach.[21] In the UR tariffication process in the agricultural sector, a linear approach was used, which aimed at an overall average reduction of 36 per cent (with a minimum of 15 per cent reduction) for each tariff line. WTO Members thus had the flexibility to reduce tariffs on "sensitive" products by the minimum of 15 %, while compensating with larger percentage reductions on other tariff lines in order to achieve the average 36 % reduction. This created a higher tariff dispersion than before, as reductions were more concentrated in low tariff rates than peak rates. Hence, tariff protection on sensitive (or highly protected) products increased relative to less protected products. Moreover, the tariffication of non-tariff measures by developed countries often led to prohibitively high rates on commodities of interest to some developing countries (e.g. sugar). The findings of the joint UNCTAD/WTO study referred to above indicate a greater degree of tariff dispersion in the agricultural sectors of developed than developing countries. For the latter countries, agricultural tariffs above 100 per cent are rare. Products of major export interest to developing countries such as sugar, tobacco and cotton, as well as those of potential export interest, such as prepared fruits and vegetables, have some of the highest rates and frequency of peak tariffs.

The importance of choosing an appropriate formula or approach for cutting tariffs was stressed by some of the experts. Under the harmonization approach, the higher the initial tariff rates the larger the reduction. This approach was generally applied to industrial tariff reductions in the Tokyo Round, which to some extent succeeded in reducing peak rates. An item-by-item approach is different from the other two approaches in the sense that it allows countries to negotiate tariff reductions on specific (sensitive) products of interest. It consists of bilateral/multilateral submissions of request lists followed by offer lists. It can be an appropriate approach if

[20] The study defines the peak rates as those tariff rates above the cut-off rate of 12 %. The study was made on post-Uruguay Round peak tariffs of the following countries: Brazil, Canada, China, EU, Republic of Korea, Japan, Malaysia and USA. *The Post Uruguay Round Tariff Environment for Developing Country Export: UNCTAD/WTO Joint Study* (TD/B/COM.1/14), 1997.

[21] For further discussion, see for example, Sam Laird, "Multilateral Approaches to Market Access Negotiations", in: Trade Rules in the Making, eds. M Rodriguez Mendoza, P. Low and B. Kotschwar, Brookings Institution, Washington, D.C. (forthcoming in 1999).

negotiations focus on several core products, however, it favours the liberalization of products of interest to major trading countries. One of the experts suggested that a minimum requirement of any country should be to reduce import duties (tariffs) to the same extent that domestic support prices are reduced, possibly backdated to 1986-88.

Taking into account developing countries' interests in tariff reductions, the following may be taken into considerations when choosing a tariff reduction formula for the next round of negotiations on agricultural products: (i) larger cuts on tariffied rates and peak rates (those rates resulting from tariffication could be subject to a more ambitious reduction formula); and (ii) larger tariff reductions on processed goods than on primary agricultural commodities in order to reduce tariff escalation. In addition, it should be noted that the preamble to the AoA maintains the need to provide special consideration to the improvement of market access for exports from developing countries. In this regard, developing countries may also wish to assess the possible link between future tariff reductions and current tariff preferences they receive under various schemes, including the GSP.

**Tariff rate quota administration**

The main purpose for introducing a system of tariff quotas under the AoA was to ensure that the tariffication process would not reduce the current level of imports ("current market access opportunities) , or prevent the achievement of an agreed upon level of access ("minimum access opportunities") for products previously subject NTMs.

Thus, against the background of tariffication, the principal objective of the provisions on market access opportunities was: (i) to maintain import flows (current access opportunities) at least at the same level as during the base period, 1986 to 1988; and (ii) to provide new market access for imports that were negligible before the UR (minimum access opportunities). More than 70 per cent of all tariff quotas (1,366) specified under the current AoA are on the following products: fruits and vegetables (25.6 per cent of the total), meat products (18.2 per cent), cereals (15.7 per cent) and dairy products (13.4 per cent). Nine OECD countries account for about 38 per cent of the total number of the tariff quotas.[22]

The discussion at the meeting addressed the experience so far with the implementation of the system of tariff rate quotas which reveals a number of problems that frustrated the market access provided under the TRQs and which needs to be solved in future negotiations.

*Quota allocation and administration*

There are two sets of tariff quotas indicated in WTO Members' Schedules - global, unallocated quotas which in principle are available on an MFN basis to all suppliers; and pre-allocated, bilateral, quotas to specific suppliers. The scheduled bilateral quotas reflect largely tariff quotas under "current access opportunities", which were allocated to traditional export suppliers on the

[22] The nine OECD countries are: Australia, Canada, the EU, Iceland, Japan, New Zealand, Norway, Switzerland and the US. When the five new members of the OECD are included (i.e. Czech Republic, Hungary, Republic of Korea, Mexico and Poland), the OECD share rises up to 60 per cent.

basis of historical market shares which were achieved within the limits of quantitative restrictions and voluntary export restraints (VERs). On the other hand, global, unallocated quotas reflect tariff quotas under " minimum access opportunities". However, distinctions between minimum and current access opportunities are not always clearly given in Members' Schedules of Commitments, and in some cases, minimum access opportunities have also been pre-allocated to individual supplying countries in countries' Schedules. The actual allocation and administration of the quotas are left to each individual member.

A further complication arises because WTO Members were allowed to incorporate their bilateral/regional/inter-regional preferential arrangements in the market access opportunities available through the tariff quota system. While preferential quotas under those trading arrangements are often counted as a part of the MFN tariff quota, the preferential treatment of designated exporters generally erodes the current and/or minimum access opportunities available on an MFN basis.[23] Moreover, in-quota imports from beneficiaries are also sometimes levied at a preferential rate, rather than the going in-quota MFN rate.[24] Should the preferential rate be lower than the in-quota rate, it would reduce the demand for in-quota imports from other countries. In addition, there have also been cases of quotas being allocated to non-WTO members which are counted as part of a country's MFN quotas raising questions of GATT-compliance.[25]

Experts stressed the importance of improving administrative procedures related to TRQs. Concerning unallocated quotas in countries' Schedules, in general six administration methods have been used for allocating such tariff quotas: "first-come, first-served", "licenses on demand", "auctioning", historical importers", "imports undertaken by state trading entities" and "imports undertaken by producer groups or associations". In practice, such methods are administered under a system of import licensing which varies from automatic licensing (e.g. as in the case of "first-come, first-serve") to discretionary licensing based on the prospective licence holder meeting certain conditions of eligibility.

One issue that could raise an immediate concern for developing countries is the treatment of preferences given to developing countries (e.g. GSP) with respect to current and/or minimum access quota allocation. Preference-receiving developing countries may consider advocating the introduction of ways and means which would provide them with enhanced access to the allocation of minimum access tariff rate quotas, or which would ensure that their preferential access (i.e.

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[23] For example, the 1998 tariff quota for refined sugar of the United states is 22,000 tons. Mexico receives 2,954 tonnes of this amount and an additional quota of 25,000 tonnes under the NAFTA arrangement. Thus the total 27,954 tonnes allocated to Mexico exceeds the total United States tariff quota for sugar. (WTO Summary Report of the Meeting, March 1998, G/AG/R/14.)

[24] For instance, Canada's tariff quotas are subject to the applicable tariff treatment depending on the origin of imports. That is, should there exist bilateral/regional arrangements, preferential rates prevail. (WTO Summary Report of the Meeting, June 1998, G/AG/R/15). Note, however, that preferential rates are not necessarily lower than in-quota MFN rates.

[25] The United States raised a question over Thailand's planned provision to corn imports from China of MFN tariff quota comparable to those applicable to imports from WTO Members. (WTO Summary Report of the Meeting, June 1998, G/AG/R/15)

preferential tariff rates and access quantities) would not be penalized by the rates and the quantity set for tariff rate quotas.

Several suggestions for a modification of the system have already been put forward in the AIE Process. The concern is to increase market access and to prevent tariff rate quotas from becoming "disguised" quantitative restrictions by modifying the rules in the tariff quota administration through: (i) increasing tariff quota quantities; (ii) sub-allocation of broadly-defined tariff quotas to specific products; (iii) elimination of non-performing tariff quotas (i.e. quotas which are not filled due to, e.g. a lack of domestic demand); (iv) stricter application of the MFN principle on the allocation of tariff quotas under minimum access opportunities; and (v) guidelines on the procedure for import licence allocation (e.g. public auctioning, validity and timing of licence periods).

*Quota under-fill*

There have been numerous cases of imports falling short of the volume specified under tariff quota commitments. In some cases, even while the tariff quota volume was under-filled, imports were levied at the higher above-quota tariff rate. Such a situation can occur when the government of the importing country considers that the quota was "filled" once all the import licences covering the total quota quantity were allocated to importer(s). Whether or not the licence holders actually make imports under the quota quantity is viewed as a “market choice”. Meanwhile, non-licence holders are charged the higher out-of-quota rate.

When the Committee on Agriculture reviewed the issue, several reasons were given by Members for quotas being under-filled. The most frequent were the following: a lack of domestic demand for in-quota imports; existence of competitive domestic products; applied rates being lower than the in-quota rates, etc.[26]

The quota under-fill problem is most likely related, directly or indirectly, to the method applied to tariff quota administration. For instance, a small quota quantity for each licence allocated would favour small cross-border trade, and would limit large scale imports, especially those from distant suppliers, due to missing economies of scale. A problematic situation is when imports are made at the above-quota tariff rate, even though quotas are under-filled. Such a situation could occur when import licence holders do not actually use up the quota quantity allocated to them. Such situations are more likely to occur when licences are allocated, exclusively or otherwise, to domestic producers of the same goods whose interest lies in maintaining a certain domestic price level. An import monopoly by a state trading enterprise (STE) could also reduce the basic principle of market access opportunities if such a STE has a price controlling (or stabilizing) role to play in the domestic market. One of the questions raised during the meeting was whether STEs

[26] An example of such cases include Canada’s quota under-fill of wheat and barley (WTO Summary report of the meeting of the Committee on Agriculture, March 1998 (G/AG/R/14)). Canada explained that competitive domestic prices account for the generally low fill rate, as Canadian wheat and barley production is competitive in the world market. In other cases, general lack of domestic demand as a reason for quota under-fill, however, is seriously challenged when domestic prices of those goods were clearly higher than the world prices.

should be obliged to fill the quota and compete with private importations.

Quota auctioning might be one of the most transparent methods of quota allocation, a high quota premium (the price paid for an import licence) would be a breach of the market access opportunities commitment, as importers would effectively be levied a higher rate than the bound in-quota rates.[27] This would hold whether or not the quota is transferable; that is, whether or not the quota rent accrues to the importing country or to a third party. The application of numerous types of quota administration methods, not only among countries but also among different products within a country, reduces the degree of transparency in the implementation of tariff rate quota system. New rules could be introduced to govern quota administration should be introduced, possibly by making it comply with the rules and disciplines under the Agreement on Import Licensing Procedures.

**Special Safeguard Provisions (SSG)**

During the meeting, it was also mentioned that further consideration should be given to the The Special Safeguard (SSG) Provisions which, as it is applied now, discriminates against most of the developing countries that do not have access to it.

The SSG allow an importing country to impose an additional duty on a product, if the country faces a sudden surge of import quantities or a substantial cut in import prices.[28] Or, in other words, a country may levy an additional charge on imports of a "tariffied" item whose price falls below the trigger price, or whose quantity exceeds the trigger volume.

Based on the notifications submitted to the WTO Committee on Agriculture, 7 countries took special safeguard actions between 1995 and 1997. In terms of national tariff lines, in total 175 national tariff lines were affected, of which the actions over 60 national lines were price-based, and those over 115 national lines were volume-based. Almost all the products on which price or volume-trigger SSG was initiated were those whose rates formed tariff peaks.

Price-based SSG trigger resembles closely the now-prohibited variable levies, as the size of an additional duty depends (but is not equal to) on the difference between the import price and the trigger (reference) price. With respect to volume-based SSG, it has been pointed out that the method of calculating the quantity trigger could lead to an extremely low trigger level. While an additional duty should not be imposed upon in-quota imports, the in-quota quantity can be taken into account when calculating the quantity trigger level. There was at least one incidence that a

[27] The issue has been raised on several occasions against Switzerland's application of tariff quota auctioning. In the March 1998 meeting of the Committee on Agriculture, for instance, some Members raised concern over the quota premium for white wine, at SwF 0.80 per litre (in 1997), would annul the in-quota advantage (where in-quota rate was 0.5 per litre).

[28] Note that the SSG for agriculture is different from the General Safeguards Provisions which are covered under the Article XIX of GATT 1994 and the Agreement on Safeguards. In effect, the conditions that should be met when a Member applies SSG on agricultural products are relatively less strict than those provided by the Agreement on Safeguards.

quantity-based SSG was invoked, even when tariff-quota was under-filled.[29]

The provision of the SSG, however, does not imply that agricultural products are exempted from safeguard actions under the general safeguard provisions of GATT 94, in cases where serious injury from imports or threat thereof to the domestic market is determined.[30] A recent case of a safeguard action on an agricultural product (which involved a quantitative restriction) demonstrated that, while Article 4 of the Agreement on Agriculture prohibits the use of quantitative restriction against agricultural imports, it would not prohibit quantitative measures that were taken in accordance with the provisions of the Agreement on Safeguards.[31]

New negotiations are likely to consider whether the SSG measures will be extended beyond the UR implementation period. Since only a few Members have made use of the SSGs so far, and on only a limited number of products, some Members have suggested that there is no need for its continuation. A pivotal question in this connection is whether the SSG was related only to the tariffication process (which implies that it could be phased out at the end of Uruguay Round implementation), or whether it is an integral element of the AoA as a whole. A report of a recent meeting of the AIE Process suggests that Members seemed to have adopted the latter argument, thus the SSG seems likely to remain in force for the duration of the reform process (i.e. beyond the year 2000) as determined under Article 20.

One of the experts suggested that one possibility could be to make the SSG available to all countries and more products, arguing that if countries know they have access to SSG they may be willing to reduce tariffs otherwise. Alternatively, the SSG could be made available for selected commodities that are sensitive to countries, based on their own judgement.

## 2. Domestic support

Several comments were made on problems arising from the implementation of domestic support commitments. The objective of the domestic support commitments in the AoA was to identify support measures that should be subject to reduction commitments, and to reduce the level of trade-distorting domestic support (namely market price support measures), and second, to define

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[29] Volume-based SSG measure was taken by Japan in 1998 against milk and cream, even when tariff quota that applied to the product concerned was not filled (though quota had been fully allocated to importers). (WTO Summary Report of the Meeting, June 1998, G/AG/R/15).

[30] The aspect which distinguishes the SSG under the Agreement on Agriculture from other safeguard actions under the general provision of the GATT 94 is that, in the application of a SSG action, Members are not required to prove any injury from imports or threat thereof to the domestic market.

[31] In June 1998, the United States imposed a safeguard action against imports of wheat gluten upon a preliminary determination of serious injury caused to the domestic industry as a result of increased imports of wheat gluten. The quota will be terminated in June 2001. The quota quantity is set at 126.812 million pounds, of which 62.425 million pounds (around 45 per cent of the total quota) is allocated to Australia, 54.041 million ponds to the EU, and the remaining 80 per cent of the quota to other countries. Imports from the NAFTA partners, Israel, countries under the Caribbean Basin Recovery Act and the Andean countries as well as developing countries which have a minor share in the wheat gluten imports are excluded from this safeguard measure.

other In most developed economies, agricultural is heavily supported by the governments. Subjecting these support policies to multilateral discipline was seen as central to any reform of agricultural trade measures. The Uruguay Round provided an opportunity for them to reform their domestic support policies, which has in many cases resulted in mounting surpluses and stockpiles.

For most developing countries, reductions in their domestic support was not a major concern since most of them, especially those that were under structural adjustment programmes, could not afford huge domestic support subsidies. 61 out of 71 developing countries notified that they provided no domestic support that was subject to reduction commitments. The "catch" is, however, that this restricts those countries' use of support measures in the future. If the need arises, they will be permitted to provide price support measures or direct income support measures only within the *de minimis* level (i.e. 10 per cent of the value of the production of the product concerned). Developed countries, on the other hand, are said to have inflated their reports on the values of domestic support in the base year period, which consequently allows them to maintain up to 80 per cent of their domestic support. More than 90 per cent of the total base-year Aggregate Measurement of Support (US$198 billion) was provided by OECD countries.

Notifications of domestic support commitments have received close scrutiny in the review process. Each Member has to notify a detailed breakdown of its non-exempt domestic support, which should be kept within the annual maximum level of the total Aggregate Measurement of Support (AMS), as well as exempt measures such as "green box" and *de minimis* measures. To adequately meet the notification obligation, substantial technical as well as administrative capacity are required. Notifying countries are often requested by the Committee on Agriculture to provide details on their notified measures such as the method used for the AMS calculation, breakdown of the values falling into the category of *de minimis* support, the nature/structure of support measures notified as green box measures, and so on.

In this context, the EU Agenda 2000 proposal was also mentioned and it was pointed out that it foresees the cutting of domestic support prices and their replacement by direct subsidies to producers, although it does not propose tariff cuts. However, this could be the basis for future tariff negotiations in the agricultural sector.

Four major issues of concern with respect to the implementation of the domestic support commitments were mentioned during the meeting: (i) the use of the AMS, instead of product-specific commitments, in the reduction commitments; (ii) how to accommodate an "excessive" rate of inflation into the reduction commitments; (iii) the legitimacy of including a "negative" AMS in the calculation of the total AMS; (iv) improper use of Green Box criteria; and (v) the elimination or extension of Blue Box measures.[32]

**The use of AMS in the reduction commitments**

The reduction commitments on domestic support are made on the total AMS, i.e. the total of

[32] A discussion paper submitted by New Zealand to the June 1998 meeting of the Committee on Agriculture (G/AG/W/34) provides a good summary of some of the points raised here.

domestic support measures provided to all the product categories. This provides Member countries with a flexibility in the implementation of the reduction commitments, for example to meet the ad hoc needs for domestic support that may arise in a particular product sector during the implementation period. On the other hand, it may also result in an increase, rather than a reduction, of product-specific domestic support in particular sectors, by shifting domestic support from other sectors within the AMS. One of the experts suggested that the AMS should (as had been provided in earlier drafts of the AoA) be made commodity-specific in order to strengthen the disciplines over domestic support.

**Accommodating an "excessive" rate of inflation or exchange rate depreciations in the reduction commitments**

AMS reduction commitments in terms of annual bound commitment levels are set in nominal terms. Hence, should a country experience a substantial rate of inflation during the implementation period, annual bound limitations on domestic support levels in real terms would be substantially reduced. A substantial depreciation of the exchange rate also reduces the value of the annual bound levels of support in foreign currency terms.[33] On the other hand, a currency depreciations reduces the calculated current AMS without any change in policy.

With a view to accommodating the inflation and exchange rate depreciation in the reduction commitments, several Members have modified external "fixed" reference prices as follows: adjusting the nominal reference price by taking into account the inflation rate (e.g. Argentina's conversion of the base period AMS to 1992 pesos); converting the external reference price into another more stable currency (e.g. to SDR in the case of Iceland, to US$ in the case of Pakistan and South Africa, etc.); or using a base period (on which the external reference price is based) different from 1986-88.

**"Negative" support in the calculation of the AMS**

With regard to market price support, the calculated value of such support for some products could be negative, should the administered price be lower than the external reference price. The question is whether such a figure could be subtracted from the current total AMS.[34] Some Members, in particular the Cairns Group, have argued that such a negative figure should be deemed to be zero in the AMS calculation. India, at the June 1998 Committee meeting, had stated that the AMS, by definition, was the sum of all subsidies and taxes. Since a negative AMS indicated an implicit tax on farmers, it should be reflected in the calculation as such by subtracting it from the total AMS.

**Green Box criteria**

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[33] The price support component of the AMS for each year is calculated as the gap between a fixed external reference price and the applied administered price.

[34] Pakistan subtracted the negative AMS reported for wheat from the total AMS of the year 1996, taking it as an implicit tax on producers Argentina, Australia, Canada and New Zealand registered their concern, at the March 1998 Committee meeting, with respect to such a practice.

There are two distinctly different views on whether or not the current set up of the Green Box criteria, as defined in Annex 2 of the Agreement, i.e. measures that have "no, or at most minimal, trade-distorting effects or effects on production", should be further tightened. Supporting arguments for tightening of the criteria stem from the experience during the review process, saying that, once a support had been declared as a Green Box measure, there was little scope to challenge it even when it was questionable whether the measure concerned had little or no trade-distorting effect. On the other hand, the argument against further tightening of the criteria was that narrowing the scope of the Green box might discourage further policy shifts from trade-distorting domestic support to less trade-distorting ones, which was one of the implicit objectives of the domestic support commitments.

**Elimination of Blue Box measures**

Blue Box measures, as defined in Article 6.5 (a), are direct payments under production-limiting programme, which should not be based on the production quantity, and are exempt from the reduction commitments regardless of their possible trade-distorting effects. Only four Members (the EU, Norway, the United States and Slovenia) have specified such measures in their Uruguay Round commitments. The Cairns Group favoured that the provision of Blue Box measures were to be transitional, and should totally eliminate the Blue Box exemption. The EU, on the other hand, is planning to maintain such Blue Box measures as its agricultural policy tools beyond the year 2,000.[35]

Possible future negotiating issues in the area of domestic support commitments include: (i) how much more cuts should be made in domestic support; (ii) whether the commitments should be product-specific rather than based on aggregations; and (iii) whether a more precise classification of the types of measures that are exempt from the reduction commitment is needed.

With respect to (i), the domestic support provided by developed countries is already substantially high even at the final level of the commitment. For many developed countries, expenditures on domestic support measures as specified in their Schedules (i.e. those subject to reduction commitments, excluding the measures under *de minimis* clause) amounts to over 50 per cent of their agricultural GDP. On the other hand, those of developing countries, including the measures under special and differential treatment, mostly fall in the category of less than 5 per cent of agricultural GDP.

With respect to (iii), further scrutiny will be made on measures that are currently exempt from reduction commitments, namely; the Blue Box measures (i.e. direct payments under production-limiting programmes) and the Green Box measures. The experience of four years of AoA implementation shows that many measures that were notified as Green Box measures were in questionable conformity with the criteria specified in Annex 2 of the AoA. The list of exempt measures, especially those included in the Green Box, mainly reflects those that are relevant to developed countries since most developing cannot provide costly domestic support. Developing countries might be interested in actively participating in a re-classification of the criteria for

[35] The planned CAP reform, as proposed by the European Commission in the Agenda 2000 (March 1998) includes Blue box measures in *** sectors.

exempt measures in order to have their developmental objectives better reflected. For instance, an analysis may be carried out on the question as to what extent the special and differential treatment given to developing countries has been relevant to their development objectives, and whether any improvement is desired in this regards (see the section below for more details on special and differential treatment).

## 3. Export Subsidies

Several experts noted that export subsidies are still high, mainly in the US and EU, and are disrupting markets. They could be eliminated through either a base reduction, giving up unused export subsidy entitlements, or setting up expiry dates for export subsidies altogether. It was also suggested that one could bind or reduce the level of export taxes. Developing countries should push on the issue of export restrictions in future negotiations.

Four main issues with regard to the implementation of export subsidy commitments were raised during the meeting: (i) the concentration of the use of export subsidies among a limited number of countries, and on a limited range of products; (ii) circumvention of the export subsidy commitments (including inward processing; multi-pricing of products for exports and for domestic use, etc.); (iii) cumulation of unused export subsidies; (iv) disciplines over export credits; and (v) elimination or extension of export subsidies beyond the current reform process.

### Concentration of the use of export subsidies among few Members

Under the current AoA, export subsidy commitments contain serious imbalances. First, countries that declared large export subsidies in the base year, can continue providing as much as 79 per cent of the value of export subsidies of the base-year period, even after commitments are implemented. By contrast, countries that reported zero subsidies in the base period have no leverage to provide new subsidies. In one of the AIE Process informal meetings, it was revealed that export subsidies provided by six industrial countries in 1995 accounted for more than three quarters of the global value of export subsidies under the reduction commitments. The share of about 100 developing countries combined, on the other hand, accounted for just over 20 per cent. Few developing countries had previously used export subsidies and hence did not include them in their Schedule of Commitments; these countries now no longer have the right to use export subsides. It is also to be noted that the use of export subsidies is concentrated on a few products, particularly cheese, butter, wheat and beef.

Therefore, further cuts in export subsidies that may result from new negotiations will have little implication for most developing countries in terms of their domestic policy adjustment, although they could bring major benefits to their agricultural exports. Of more concern may be a possible rise in agricultural commodity prices due to the fall in the quantity of subsidized exports and its impact on net food-importing developing countries.

### Circumvention of the export subsidies commitment

One example for circumvention that has been cited, is the EU's inward processing arrangement

(IPA) for cheese. Primary products for the production of processed cheese (butter, butter oil, natural cheese and skimmed milk powder) were "exported" to an export processing zone, which received export refund (EC regulation - EC 300/97 of 19/Feb/97). The processed cheese was then exported to countries outside the EU. Other Members considered that these refunds to input commodities should be counted against export subsidy commitment for cheese.

**The use of cumulated export subsidies**

Article 9.2 (b) of the AoA, or the so-called Flexibility Clause, includes several conditions under which a Member may provide export subsidies in excess of its annual bound level to a limited extent.[36] In light of this provision, some Members (including the EU, Israel, Poland and the United States), used an unused amount of the export subsidies in one year as a "deposit" to be used in the following year(s).[37] In the June 1998 Committee meeting, the Cairns Group countries (Argentina, Australia, Brazil, Canada, New Zealand, the Philippines - on behalf of the ASEAN countries, and South Africa) requested a halt to the roll-over of the unused subsides. They argued that: (i) an increase in export subsidies was contrary to the initial principal of a "progressive" reduction in agricultural support; (ii) the roll-over created an uncertainty in the trading environment; (iii) the roll-over undermines the benefits of non-subsidised exporters; and (iv) no discipline on the roll-over of subsidies would run the risk of leading to a subsidy and price war, as more and more Members might adopt the practice. India expressed the view from a developing country's perspective, saying that it became an issue of equity, when Members with resources could afford to roll over the unused portion of subsidies, whereas developing countries under budgetary constraint could not even fully use the support legally allowed under the Agreement. Brazil also noted that an increase in subsidies, especially when the commodity prices were on the decline, could severely distort the market price mechanism to which developing countries are more vulnerable.

**Export credits**

While Article 10.2 states that Members should agree on disciplines concerning export credits during the current reform process, no such agreement has yet been reached. The negotiations on export credits in the framework of the OECD had not yet reached a conclusion. As export credits are currently the most readily available policy tool for circumventing the export subsidies commitments, most of the Cairns Group members (Argentina, Australia, Brazil, Canada, Colombia, Chile, New Zealand and Philippines) and Japan pressed for an early conclusion of the

[36] Article 9.2 (b) reads as "In any of the second through fifth year of the implementation period, a Member may provide export subsidies ... in a given year in excess of the corresponding annual commitment levels...", providing that several criteria are met, including that "the cumulative amounts of budgetary outlay for such subsidies, from the beginning of the implementation period through the year in question, does not exceed the cumulative amounts that would have resulted from full compliance with the relevant annual outlay commitment levels specified in Member's Schedule by more than 3 per cent of the base period of such budgetary outlay" and that the total cumulative amount would not exceed the final commitment level of the export subsidies on the product concerned.

[37] For instance, the EU used unused export subsidies in the previous years in the selected product categories, including beef. As for the United States decided to use, in the subsequent years, the foregone amount of export subsidies, which had arisen from the cancellation the contact award to non-fat dry milk under the United States Dairy Export Incentive Programme for the 1995/96 and 1996/97.

negotiations of export credits in the March 1998 Committee meeting. Argentina expressed its concern that the US provision of financial support as export credits could trigger an increasing use of export credits in the near future.

## 4. Other Issues

### Food import bills and food security

The effects of the AoA on LDCs and net-food importing developing countries was mentioned by several participants during the meeting. In relation to basic cereal import bills, the role of food aid and subsidies was pointed out. Since these two declined substantially since 1995, these countries have faced higher food import bills.

One of the major concerns among net food-importing developing countries was the potential impact of the AoA on world food prices. For those products which were heavily subsidized before the UR (e.g. wheat), reductions in export subsidies are most likely to lead to higher world food prices. For example, there are reports from some food-importing developing countries that their usual discount on the price of imported grains from a particular supplier has been substantially reduced, based on the argument that this was necessary to comply with the supplier's reduction commitments on export subsidies. Reductions in domestic support are likely to lead to a greater food price instability, due to a fall in government-owned stocks as the intervention purchases of food stocks by governments are reduced. In addition, there is a concern that this fall in surplus stock may lead to a fall in food aid availabilities.

Although it is difficult to distinguish the effect of the AoA from those of other sources affecting world agricultural prices, many studies (using various quantitative models) predicted that world food prices would be in real terms higher by the year 2000, due to the UR effect, than they would otherwise be. For example, one of the exports reported on a study by FAO which predicts that the UR effect will be especially strong on the price levels of meat products (8 - 10 per cent rise in price due to the UR), wheat (7 per cent), rice (7 per cent) and milk (7 per cent).[38] The concerns over those price increases were reinforced by a surge in world cereal prices (e.g. wheat, maize and rice) in the period from 1995 to 1996. However, in the meeting of the WTO Committee on Agriculture (20 - 21 November 1997), it was reported that the 1995/96 price rise was most likely to have occurred independently of the AoA implementation, and that commodity prices fell considerably in the period from 1996 to 1997 owing to a good harvest. The price volatility is nevertheless of special concern, particularly to African net-food importers, as their volume of imports is projected to rise due to a high population growth.

Food security concerns of net-food importing developing countries were addressed by the Marrakesh Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries (NFIDCs). The Decision aims to provide mechanisms to: (i) periodically monitor the level of food aid under the

[38] FAO. 1995. *Assessment of the current world food security situation and medium term outlook*, CFS:95/2. Rome: FAO.

Food Aid Convention; (ii) adopt guidelines to ensure a sufficient level of food aid in fully grant form; and (iii) give full consideration in the context of the donors' aid programmes to requests for the provision of technical and financial assistance to improve agricultural productivity and infrastructure in LDCs and NFICs. In the four years of the AoA implementation, the pursuit of (i) and (ii) above seems to be on track. The donor members are obliged to annually notify the quantity of total food aid (either in fully grant form or not) provided to LDCs and NFIDCs and the technical and financial programme available under the food aid. Regarding (iii), developing countries may wish to pursue vigorously, in the remaining two years of the AoA implementation, the setting up of a well-structured mechanism, which coordinates the requests from developing countries for technical and financial assistance and the bilateral and multilateral provision of those, possibly within the framework of the Committee on Agriculture.

### Sanitary and Phytosanitary (SPS) measures

Problems related to the application of SPS measures were briefly mentioned in the meeting. SPS measures of major importing countries are becoming increasingly complex, and in some cases require a level of production technology that is not yet available to developing country exporters. Developing countries are in need not only of general information on what SPS regulations exist in major import markets, but also of practical information (a technical "manual") on how to meet such regulations. The current Agreement on SPS identifies developing countries' needs for technical assistance, but how such assistance is provided is left to each donor Member's discretion. As with other multilateral trade agreements (MTAs), the provision of technical assistance under the SPS agreement is on a "best effort" basis. Perhaps some mechanisms could be proposed for ensuring the implementation of the diverse provisions on technical assistance in the MTAs.

### Approach to negotiations

Finally, several comments were made with respect to approaches to further negotiations in the area of agriculture. One participant mentioned the importance of pursuing autonomous reforms on current existing commitments in the agricultural sector (as well as elsewhere), arguing that in particular reforms that anticipate the result of future negotiations could facilitate any adjustment to future negotiations, both from a political and economic point of view. This would also allow governments to take a more offensive stands when it comes to its own specific interests and concerns in the negotiations.

In relation to the negative impact of further agriculture reform on net-food importers, one participant emphasized the importance of a negotiation package where market access could be improved in other areas thus balancing the outcome for these countries. According to another participant, this could be the area of industrial tariffs. By contrast, yet another participant pointed out that the continuation of the reform process in agriculture should not be conditioned upon negotiations in other areas as part of the new "Millennium round".

## Priority areas for further research

Several broad topics are recommended as priority areas for further research and analysis:

- Country-specific studies on the implementation of the AoA, involving all important aspects such as market access impediments (tariff peaks, tariff escalation, tariff quotas; lack of transparency and complexity of import regimes; SPS issues; inability to meet consumer/supermarket requirements; etc.), implications of domestic support measures and export subsidies, situation of the least-developed countries and net food-importing developing countries, evolution of trade diversification in developing countries, etc. Modelling the effects of the implementation could provide a useful tool for such analysis;

- Provisions in favour of least-developed and net food-importing countries (Article 16 of the AoA and Marrakesh Decision) should be complemented by operational rules and disciplines. Therefore, there is a need to develop specific ideas and proposals that can be put forward in the new negotiations;

- Activities of state trading enterprises in agriculture are likely to be targeted in the new negotiations. These should be studied, but complemented with studies of similar activities conducted by major agricultural TNCs;

- Analysis of the impact of proposed reforms in the European Union and the United States, as well as new developments in other countries/regions, and implications for future multilateral negotiations;

- Economic analyses of the implications of various negotiating options affecting market access (tariffs and tariff quotas), domestic support and export subsidies;

- Implications of the extension or elimination of the so-called “Peace Clause” beyond the year 2003;

- Possible international disciplines on export credit, export credit guarantees or insurance programmes, with a view to preventing the circumvention of export subsidy commitments (as foreseen in article 10 of the AoA).[39]

[39] The Third Session of the UNCTAD Commission on Trade in Goods and Services, and Commodities requested UNCTAD to organize an expert meeting to “Examine trade in the agricultural sector, with a view to expanding the agricultural exports of developing countries, and to assisting them in understanding the issues at stake in the upcoming agricultural negotiations". The meeting will be held from 26 to 30 April 1999, in Geneva. The background note to this meeting has been circulated as TD/B/COM.1/EM.8/2.

**SERVICES**

At the Ad Hoc Expert Group meeting, several issues and themes that are relevant to further negotiations in the area of services, in particular for developing countries, were discussed. These include:

- The establishment of an emergency safeguard mechanism (ESM) to facilitate the liberalization process.
- Negotiations in the area of investment, electronic commerce and competition policy, all of which are closely related to trade in services and are built into the GATS.
- A new approach for further liberalization in the area of Movement of Natural Persons.
- Problems related to the application of Economic Needs Tests (ENTs), which is considered a particular limitation to market access.
- Sectors of export interest to developing countries and possible further sectoral negotiations, for example in the area of tourism, health, maritime transport and computer-related services.

## Background

Prior to the Uruguay Round, trade in services was not subject to multilateral discipline. In fact, the concept of "trade" in services was invented so as to bring services, and particularly investment, within the scope of multilateral trade disciplines. The General Agreement on Trade in Services (GATS) structure and its Annexes provide a set of rights and obligations for liberalizing trade in services and a framework for negotiating national market access commitments for services provided by foreign suppliers. Its main features include the definition of four modes in which the services trade takes place: (1) the cross-border movement of services; (2) the movement of consumers to the country of importation; (3) the establishment of commercial presence in the country where the service is to be provided; and (4) the presence of natural persons in another country, in order to provide the service there. The GATS consists of two main elements: (i) a framework of generally applicable rules and (ii) liberalization commitments specific to the service sectors and sub-service sectors listed in each country's schedules ("specific commitments"). The general obligations of GATS include unconditional MFN treatment. However, it is possible for a country to maintain for a period of 10 years measures that are not consistent with the MFN principle. Members are not obliged to grant market access or national treatment other than that specified in their Schedules of Specific Commitments. The GATS architecture is thus particularly suited to developing countries as they can select the sectors in which they wish to permit foreign participation and achieve reciprocal benefits in other services sectors (or goods) for doing so.

The GATS and its annexes and decisions contain several provisions which call for further negotiations in a number of areas:

The GATS provides that negotiations would continue on the question of emergency safeguard measures (Art X), government procurement (Art XIII) and subsidies (Art XV). Furthermore, at the end of the round, it was decided to conduct further negotiations on financial services (GATS Annex), maritime services (GATS Annex), movement of natural persons (GATS Annex), telecommunications services (GATS Annex) and the accountancy sector (Marrakesh Ministerial

Declaration).

Since the conclusion of the UR negotiations, progress has been made on several of the issues included in the "built-in" agenda. For example, negotiations on telecommunications and financial services resulted in major agreements in February and December 1997, respectively. On movement of persons, limited additional commitments were made in June 1996, and those on maritime transport were suspended. The deadline for negotiations on emergency safeguard measures has been extended until 30 June 1999. Progress has been made in gathering information on national procurement regimes, which will provide a basis for negotiations on disciplines. Little progress has been made on subsidies. The Working Party on Professional Services finalized (July 1998) the text of the disciplines on domestic regulation for the accountancy sector (as mandated by Article VI:4 of the GATS and the Decision on Professional Services of 1 March 1995). At its meeting of 4 December 1998, Members reached a consensus on the disciplines.

Article XIX of GATS provides for further negotiations to start before the year 2000. These new talks should work towards achieving a "progressively higher level of liberalization" in the area of trade in services. New negotiations will aim at the reduction or elimination of adverse measures affecting trade in services as a means of providing effective market access, and at increasing the general level of specific commitments, while promoting the interest of all participants on a mutually advantageous basis and securing an overall balance of rights and obligations.

The upcoming negotiations are expected to encompass all services sectors. In order to better identify areas for action, an information exchange - facilitated by WTO sectoral studies - is currently taking place among the WTO member countries (in the framework of the Council for Trade in Services). Discussions include market conditions in individual sectors and countries, technological change, the regulatory environment and the structure of current commitments as well as evolving trends in national policies. These discussions, which are expected to lead to an "assessment of services trade in overall terms and on a sectoral basis" (Art XIX:3), have to be completed by 1999, for the purposes of establishing guidelines for the next round of negotiations on services..

## Key issues from the development perspective

Developing countries face a double challenge in the future multilateral negotiations on services trade: on the one hand, they must identify barriers to their exports (or potential exports) of services which should be removed; on the other hand, they also need to ensure a coherence between their national development policy objectives and further commitments they would offer in terms of market access and national treatment. Liberalization of trade in services can provide benefits to the importing countries if a series of preconditions are met. For example, liberalization of financial services requires that strong prudential regulations be in place; in health services, an adequate supply of medical personnel and a well-functioning national health system is required; in environmental services, adequate financing and technically sound regulations are necessary.

### Safeguards

One of the experts gave high priority to the establishment of an emergency safeguard clause. Similar to the GATT rules (where safeguard measures are addressed in the Agreement on Safeguards), Article X of GATS foresees further negotiations on emergency safeguard measures governments may apply to respond to adverse effects resulting from trade liberalization.[40]

The WTO Working Party on GATS rules held a number of substantive discussions on the question of an emergency safeguard mechanism (ESM) with the objective of concluding negotiations by 30 June 1999. Negotiations have been difficult due to (among others) limited empirical work and reliable data on the use of safeguards in services and the question whether an ESM should be equally applied to all four modes of supply or whether it should be mode-specific.

From a development perspective, as was stressed in the meeting, the ESM is a high priority issue in the forthcoming negotiations. An effective ESM could facilitate the liberalization process since it would encourage Members, and especially developing countries, to commit to more significant market openings. As net service importers, developing countries often hesitate to agree to further liberalization commitments which could turn out to have negative impacts on their economies in case of unforeseen developments (especially in the financial, transport and professional services sectors). The ESM could therefore be a useful instrument for these countries to react to possible adverse effects resulting from further liberalization in services trade. It has to be kept in mind, however, that developing countries will not only be users but also targets or victims of such a safeguard mechanism. One participant mentioned in this context that the GATS already included many emergency and escape clauses and hence questioned the setting up of a safeguard provision. It was stated that with respect to the "commercial presence" mode, the ESM would define the conditions under which the government could intervene to protect the intents of domestically controlled enterprises against those of foreign enterprises' operations in the domestic market.

**Negotiations in other areas related to trade in services**

According to one panellist, the relationship between the initiatives taken in the areas of electronic commerce, investment and competition with the GATS needs to be further researched. Many aspects related to these areas are already covered by the GATS. Now the questions arises what would be the implication of new agreements in these areas on the GATS?

With respect to the discussion on a multilateral agreement on investment, one participant strongly opposed this proposal on the grounds that it would severely undermine liberalisation efforts made under GATS. He also pointed out that recent negotiations concluded on telecommunication and financial services covered many investment-related issues in those sectors and that the GATS provides much potential for further negotiations on investment. Mode three of GATS - commercial presence - covers investment in all services sectors. It reflects the desire of countries

[40] In the meantime (as an interim measure until mid-1999), in the case of "emergency", Members are permitted to modify or withdraw a specific commitment one year after the commitment enters into force instead of the usual three years provided for in Article XXI ("Modifications of Schedules"). If no agreement between countries is reached, the case is solved by arbitration. Compensatory adjustments have to be made on an MFN-basis to the country concerned.

The on-going negotiations on subsidies and government procurement do not seem to be as advanced as the negotiations on safeguards.

to attract investment in order to stimulate technology transfer, including management know-how, create employment and reduce foreign exchange payments for imported services. Many countries, including developing countries, have qualified their market access and national treatment commitments on commercial presence. GATS commitments of developing countries predominantly concern commercial presence and GATS has provided an effective mechanism for liberalizing investment in services. Recently, this has been taken a step further, when negotiations on financial and basic telecommunications services were finalized and further commitments made in the area of investment.

In the area of electronic commerce,[41] the WTO General Council has requested (among others) the Council for Trade in Services to address the topic of electronic commerce as part of its ongoing work programme. During the Ad Hoc expert group meeting, several participants discussed the relationship between services and electronic commerce. Electronic commerce will provide developing countries with potential opportunities to enhance their export capacities in services trade, taking advantage of low costs and overcoming problems related to the movement of persons. One participant stressed that a definition of electronic commerce should be limited to services trade and that further negotiations should therefore take place within the framework of GATS. Mode one of GATS - cross-border trade - encompasses electronic commerce to a large extent; the Telecommunications Annex of GATS and the agreement on Basic Telecommunication Services further address areas related to electronic commerce. The exponential growth of the Internet has increased the importance of mode one much beyond what had been imagined during the Uruguay Round. Areas where trade was technically not feasible in 1995 are now becoming commercially viable and will be subject to liberalization commitments in the new negotiations.

Decisions taken on the subjects of investment or electronic commerce could provoke renegotiations of the GATS framework, which could undermine the interests of developing countries. For example, new agreements in these areas could eliminate GATS mode one (partly) and three (fully). However, new negotiations on mode four (movement of natural persons, see below), which are of major interest to developing countries, are more likely to succeed if renegotiated as a package within the GATS framework rather than in isolation. New negotiations on all four modes of supply will provide developing countries with further leverage they would not have otherwise.

**Movement of Natural Persons**

Several comments were made during the meeting with reference to the area of movement of natural persons. The temporary "Movement of Natural Persons" refers to mode four of the modes of supply described as trade in services in GATS Article I. It includes the movement of independent service suppliers as well as labour employed by the supplier to the country of the consumer.

Future multilateral trade negotiations will have to take into account GATS Article IV calling for commitments on sectors and modes of supply of interest to developing countries. In this context,

[41] See Chapter on Electronic Commerce.

comprehensive negotiations on services will also include negotiations on the Movement of Natural Persons.

In the aftermath of the Uruguay Round, negotiations on the Movement of Natural Persons continued, resulting in modest commitments for selected services sectors or professions by six countries, of which four have specified these commitments.[42] Horizontal commitments concerning the presence of natural persons have been made by 92 WTO member countries, which usually include elements of their immigration and labour laws. It is unlikely that Members will agree to fundamental changes in their immigration policies; a further liberalization of mode four will have to be achieved through negotiations on specific sectors or selected categories of persons.

The present horizontal commitments do not refer to movement of natural persons in all categories and occupations. The main categories scheduled are the following: (a) intra-corporate transferees (covered in 62 schedules of commitments); (b) business visitors (included by 32 member countries); and (c) independent professionals, including those providing services within a service contract (commitments by 12)[43]. Most of the commitments do not take into account sectoral specificities. The occupations differ significantly with respect to their regulatory frameworks, including conditions for market access, and among countries (for example, accountancy vs. computer-related services).

A major goal in future negotiations could be to correct the existing imbalances and asymmetries in the treatment of modes of supply of export interest to developing countries. Furthermore, labor-intensive services sectors in which developing countries have a comparative and competitive advantage should be identified and favorable commitments from developed countries should be obtained, in particular from those countries that are major importers of labor-intensive services.

*Definition of Service Suppliers on the basis of Occupations*

It was suggested that the possibilities of achieving further commitments with respect to the movement of natural persons through the horizontal approach were rather limited. Instead, future negotiations should focus on sectors or categories of persons. For example, a new approach to the negotiations on the movement of natural persons could proceed along occupational lines supplemented by additional information on the conditions applying to specific sectors. The ILO International Standard Classification of Occupations (ISCO-88) has established an internationally adopted classification of nine major groups. The classification could be used for establishing a list of occupations relevant for international trade in services.[44] The list defines *major* and *sub-major* groups which are further divided into *minor* and *unit* groups. The following occupations could

[42] The six countries include Australia, Canada, EU, India, Norway and Switzerland. Commitment came into force in (DATE?)

[43] Numbers include those countries which have indicated the types of categories of persons in their commitment.

[44] Similar to the use of the UN Central Product Classification to establish a list of service sectors.

be initially suggested as the most likely to be traded internationally:

213. Computing professionals
214. Architects, engineers and related professionals
222. Health professionals (except nursing)
223. Nursing and midwifery professionals
241. Business professionals
245. Writers and creative or performing artists
31. Physical and engineering science associate professionals
347. Artistic, entertainment and sports associate professionals

**Economic Needs Tests**

Another issue pointed out during the meeting was the need for addressing economic needs tests (ENTs), given that many countries use ENTs in qualifying commitments regarding the movement of natural persons. It was suggested that countries could eliminate these tests for certain sectors or categories of professions. This would introduce greater predictability of a country's services trade through this mode of supply.

Article XVI of GATS, which deals with market access commitments, states that Members should not limit service operations by requiring a ENT, unless specified in their Schedules. However, only 12 countries indicated in their schedules of commitments that an ENT does not apply to certain categories of service suppliers, while at least 34 Members do require an economic needs test, or refer to legislation that may contain ENTs.[45]

The ENT or analogous requirements are features of several countries' regulations regarding selected service activities. The test implies that the relevant Government agency shall grant market access only if certain conditions are met which reflect economic needs of the population or their demand for such services. These conditions may be qualitative or quantitative, taking into account the local market conditions and the availability of local service providers, characteristics of the population, or any other criteria.

ENTs are usually justified by diverse historical circumstances and reflect the view that the sole interaction of competition and economic incentives cannot prevent the creation of imbalances in the social and demographic structure of countries. The adoption of more restrictive measures is justified by public policy reasons and the need to protect jobs in certain sectors or to encourage selectively foreigners with high skills and experience not available locally.

Due to its discretionary nature, ENTs pose a major barrier to trade in services. Economic needs tests are extremely prevalent in qualifying commitments regarding the movement of persons (mode four of GATS definition of trade in services). ENTs limit the predictability of a country's trade through this mode of supply and nullify the opportunities for market access otherwise specified in the commitments. This suggests that further progress in negotiating the removal of

[45] For the remaining countries, no information has been specified.

barriers for market access of natural persons depends on the extent to which the application of ENTs could be restricted or made more predictable.

It seems unlikely that WTO members will agree to dispense ENTs in their horizontal (i.e. non-sector-specific) commitments. A possible elimination of ENTs could be based on service sectors and/or categories of persons. For example, countries could agree on certain services sectors where the movement of natural persons would be excluded from an ENT. The horizontal commitments on mode four would thus be supplemented by a list of services sectors where the ENT would not be applied to the movement of natural persons supplying services in that particular sector (i.e. an "ENT exemption list"). In cases where this sectoral approach to establishing an ENT exemption list may seem too broad, since commitments in mode four would apply to natural persons of all professions supplying services in that sector, an ENT exemption list could be supplemented by a list of occupations (see below on "Movement of Natural Persons"). This list could include certain professions (or "trades" as they are defined in the ISCO) for which the ENT would not be applicable, no matter which service sector. The list could also be both occupation and sector- specific, indicating that the ENT barrier does not apply to selected professions in certain sectors.

**Facilitation of the movement of business visitors**

One of the participants pointed out problems (e.g. delays, unreasonable criteria) associated with the issuance of visas where no work permits or ENTs are required, which still present a barrier to the movement of business persons. These can have serious repercussions for the competitiveness of firms seeking business contracts or contacts or investment opportunities, or wishing to set up a new business. Thus, efforts should be made to streamline visa regimes when visa issuance is required for the trade-related movement of persons. Initiatives at the regional level that aim to improve the conditions under which business visitor visas are granted should be brought into the WTO discussions. The following topics could be taken into consideration:

1. All categories of natural persons and of occupations that are included in the schedules of commitments should qualify to obtain entry visas.
2. Establishing a special category of visas, "GATS-visas", to implement GATS commitments.
3. Issuance of automatic or multiple-entry GATS-related visas (for long duration)
4. Provisions for short-term exemptions from visa requirements for service providers in certain occupations
5. Simplification of administrative procedures and requirements

**Sectors of export interest to developing countries and further sectoral negotiations**

In general, experts stressed the importance of the identification of sectors of interest to developing countries and barriers to their exports for which further liberalization could be negotiated. However, one participant felt that this addressed only one side of the coin and not necessarily the most important one. Rather, the importance of infrastructure services in developing countries should be addressed in order to provide reasonable access conditions for investors and human capital and expertise in these infrastructural services (including transport,

telecommunications, financial services).

Sectoral negotiations should be built on the effective application of Articles IV and XIX of GATS and take into consideration three sets of interrelated issues important for developing a positive agenda of future negotiations on services:

First, in which sectors should developing countries undertake commitments in order to strengthen their domestic service sector capacity and its efficiency and competitiveness, inter alia, through access to technology on a commercial basis? In this respect, national policy objectives of individual members, both overall and in individual sectors are important in order to define sectors that will improve the infrastructure and the means of delivery of many services, such as basic telecommunications and transport. Here, due attention should be paid to the Annex and the protocol on basic telecommunications. Similarly, when formulating a negotiating position in transport, consideration should be given to the revision of the Annex on Air Transport and the negotiations on maritime transport. Further consideration should also be given to existing national strengths and weaknesses to improve market access for specific sectors and modes of supply highly dependent on such infrastructure).

The second set of issues relates to how to obtain substantial commitments from trading partners in the services sectors and modes of supply of export interest to developing countries. For the preparation of the next round of negotiations, a clear identification of those services sectors as well as existing and potential barriers to the dominant mode of supply is needed. It is also important to determine whether the limitations to market access (stated by Article XVI) and to granting national treatment (Article XVII), as shown by the existing commitments of developed countries, are consistent with the provisions of Article IV (Increasing participation of developing countries) and XIX (progressive liberalization).

Thirdly, competition policies are particularly important where a concentration of operators exists, given the exemptions from the competition rules that national operators may enjoy in certain markets, and also with respect to the port practices. For the latter, local content requirement could support liberalization of access to foreign operators as well as bringing them in line with the general trade practices.

The following sectors, which have been examined at UNCTAD expert meeting in 1997-98, could be of particular importance for building domestic supply and export capacities in developing countries:

**Tourism services**: Recent trends in the tourism sector show the importance of this sector for developing countries. A well-developed physical infrastructure is an important condition for accelerated growth of in-bound tourism. In addition, a well developed transport infrastructure for international access and modernisation and expansion of these services domestically would facilitate access to new destinations within each country. Many countries, in particular LDCs, are suffering from the lack of technology and skills to use new technology-based marketing tools and take advantage of new business techniques. Lack of access to the Internet in many developing countries is a barrier for an increasing number of independent travelers to electronically access relevant information on local services providers and to purchase the travel packages directly from them.

The movement of consumers is the dominant mode of supply in tourism. Many barriers in other sectors and other modes of supply affect consumption abroad. The limitation on air access for air carriers from many developing countries to the most important originating markets constitutes one of the most import barriers to overcome, especially for countries that are geographically distant from these markets, such as small island countries. However, the main barriers affecting the dominant mode are visa restrictions, foreign exchange controls and lack of access of developing country suppliers to GDS (General Distribution System) in order to sell directly their services. Business operators as well as individual service providers also face visa restrictions to conduct businesses. Anti-competitive practices affecting business operations from developing countries arise as a result of the dominant position of suppliers that own and control the GDS. Such practices include: lack of neutrality of screen display, high cost for non-members of GDS, limited access to information due to encrypting codes. In some developed countries licensing and ownership requirements give preference to nationals and restrict the commercial presence of foreign tour operators and travel agencies.

**Health Services**: For developing countries, this sector is particularly important because of its social dimension. Thus, in order to strike a balance between the social and commercial aspects of health services, equity, accessibility and efficiency have to be maintained, and foreign suppliers of health services need to be supportive of national health development programmes. The benefits derived from trade in those services could be used for improving the health and living conditions of the population. The situation in least developed countries requires special attention to prevent a further erosion of these countries' capacities in health services resulting from brain drain and lack of access to new technologies. Building export capacities in health services depends on policies aimed at identifying niches, i.e. specific health care services, technologies and products in which the country could have a comparative advantage. This could then result in an optimal mix of different modes of supply of these services. On the other hand, target markets have to be identified. In this regard, cultural and linguistic affinities and geographical proximity may play a very important role.
Most transactions in international trade in health services rest upon the movement of consumers for medical treatment and educational purposes, thus, consumption abroad is the dominant mode of supply. Some developing countries have established a link between tourism and the provision of health services. To improve access to local health institutions for foreign patients agreements need to be established with insurance companies that guarantee the portability of health insurance (i.e. the validity of the insurance abroad) which could be a subject for further negotiations.

As in the case of tourism, visa restrictions and foreign exchange controls are predominant barriers. The movement of natural persons as service suppliers, including medical, paramedical personnel and nurses, are of paramount importance in terms of both the number of providers moving across borders and associated trade flows. Main barriers include quotas, economic needs tests, recognition of qualifications, licensing procedures, and nationality and residence requirements. Restrictions to commercial presence range from the total exclusion of foreigners in the market to limitations on the type of legal entity or the participation the foreigners in the board of directors, as well as the ban of professional practice by foreigners in those establishments. Medical insurance companies also face the above limitations. Telemedicine, showing an increasingly growing trend, may be affected by restrictions on medical practice through electronic means. Many domestic regulations as foreseen by Article VI.4 need to be adapted to eliminate de facto restrictions to markets access.

**Computer-related services**: These services encompass software development, database management, Internet-related services, simple data entry, customer call centers, medical record management, hotel reservations, credit card authorizations, remote secretarial services, mailing list management, indexing and abstracting services, research and technical writing, or technical transcription. The introduction of information technologies in many sectors is leading to an absolute growth in demand for software and related computer and back-office services, where some developing countries have demonstrated a comparative advantage. The demand for these types of services is generated by foreign offshore services suppliers, airlines, brokerage firms, credit card processing companies, financial institutions, insurance companies, and marketing businesses. These trends contribute to a growing demand for software services exports from developing countries, including the demand for temporary visits of experts to offer on-site services. The production and delivery of computer-related services is affected by the development of telecommunication networks and the growth in interconnection facilities. All four modes are relevant for supplying these types of services.

The increasing international trade in computer-related services and the growing participation of some developing countries in these markets show that there are only few barriers facing suppliers from developing countries entering the developed country markets. As this sector matures, certain practices by established integrated services suppliers may affect the position and market entry for new service providers from developing countries. At present, market access and national treatment for cross-border trade has remained relatively open, but potentially new domestic regulations and anti-competitive practices may have a trade restricting effect. Commercial presence is important for building the physical capacities for the production and delivery of computer-related services. Therefore, all barriers contained in Article XVI of GATS are relevant in this respect. Mode four - movement of service providers as natural persons - is important as well, particularly for providing customized services; however, this remains the most restricted mode of trade in terms of market access, facing the typical problems for the movement of natural persons as services suppliers.

**Environmental services**: Trade in environmental services appears to be relatively free of restrictions compared to other service sectors. The preoccupation of exporters of such services would seem to be with the need to obtain greater market access in terms of commercial presence. Unlike in many other service sectors, exports of environmental services involve considerable investment in the importing country and thus ownership and control become a significant consideration. Movement of natural persons is also relevant. Thus, additional GATS commitments could offer developed country firms with new market opportunities and provide developing countries with greater access to such services.

As in other service sectors, trade in environmental services may be affected by lack of market access in other sectors. Engineering, consulting and analytical services almost uniformly serve as the vanguard of the provision on environmental services. Liberalization would therefore include several sectors in a package, where both developing and developed countries could find a trade interest.

However, the benefits from such liberalization, both in terms of the trade interests of the exporter and the objectives of the importing country related to environmental protection and building

domestic capacity, may not be realized if some pre-conditions are not satisfied. Appropriate domestic environmental legislation has to be developed and enforced and economic incentives have to be set up to generate a sustainable demand for environmental goods and services. A gap exists in developing countries between their environmental needs and the resources available to satisfy them. International cooperation and financing hold a key to enable developing countries to address their most pressing environmental problems.

Education and information may favour more sustainable approaches from public authorities, producers and consumers. Political willingness and leadership play a crucial role in making it possible to devote efforts and resources to environmental improvements. Governments have an interest in ensuring that environmental policy decisions are the result of a participatory process.

Strengthening capacities in the environmental services sector in developing countries - while primarily aimed at addressing and eventually solving environmental problems - may also result in their ability to become international providers in this field. It can also contribute to increase their capacities to meet environmental requirements in the importing markets, become more appealing destinations for foreign direct investments, have easier access to capital, and strengthen other domestic sectors, such as tourism.

Some developing countries have proved to be able to build up a solid environmental services sector which has helped them in dealing with environmental problems. As "by-product" they have also been able to export their services abroad.

The environmental services sector presents equity problems similar to those faced in the health services sector. In the environmental sector, as well as in the health sector, ultimately all considerations point to the need for governments to provide a strong and effective regulatory framework for the private actors involved in providing environmental services. Developing countries may therefore wish to set up some conditions under which domestic and foreign private companies can operate, which could be reflected in qualifications to GATS market access commitments. These could focus on measures to ensure equity (e.g. maximum prices for consumers, percentage of profits that should be reinvested in the infrastructure), or capacity building (e.g. technology transfer, training of personnel, minimum local content, etc.), in conformity with GATS Articles IV and XIX.

## Priority areas for further research

Further research on the liberalization of trade in services is needed to help developing countries identify their export interests, elements necessary for pursuing export-oriented development policies, and effective or potential trade barriers that could be negotiated multilaterally. On the other hand, the analysis could show the important infrastructural role that selected services sectors play for building human capital and attracting investment.

To summarize, the following topics have been suggested for further research and analysis:

- Identification of sectors of export interest to developing countries and barriers to their exports, for which further liberalization could be negotiated;
- ways of facilitating further commitments on services through the movement of natural persons with or without commercial presence;
- Identification of elements of an emergency safeguard clause from the developing countries' perspective;
- How to deal with government procurement in the services sector, from the point of view of developing countries;
- How to take into account the development dimension in future disciplines on the use of subsidies concerning services;
- Identification of actions to put the provisions of Article IV into practice and classification of its relation to Article XIX;
- Ways to overcome infrastructure deficiencies which hamper the development of some service sectors in developing countries.
- Under what economic conditions and regulatory regimes would developing countries be able to maximize gains from liberalization in the various services sectors.

## ELECTRONIC COMMERCE

In the context of possible multilateral negotiations in the area of electronic commerce, a number of issues of concern have been raised at the Ad Hoc Expert Group meeting and will be elaborated in the following:

- The scope and definition of electronic commerce;
- Possible approaches for including electronic commerce in the WTO framework (GATS Telecommunication Annex, GATS Art I, II, III, IV,VIII, IX, XIV, XVI, XVII; TRIPS, ITA, GPA);
- Legal aspects related to electronic commerce (recognition of electronic contracts and digital signatures, liability, privacy of information, security of the transaction);
- Intellectual property rights aspects (copyrights, trademarks, domain names);
- access to infrastructure necessary to participate in electronic commerce (in particular, for developing countries);
- human resource development and transfer of technology;
- financial (and other economic) implications of electronic commerce for developing countries (e.g. fiscal revenues).

## Background

Electronic commerce is currently understood as a way of conducting business mainly using the Internet.[46] It can involve (a) the transmission of information, products or services for sale, (b) the transactions for the purchase of a product or service which is delivered by other means, or (c) the actual provision of the service (and in some cases a good) by electronic means via the Internet. In 1997, Internet-based transactions were estimated at US$8 to 9 billion. Researchers have forecast that this number could rise to as much as US$ 400 billion by 2002.[47]

The exponential growth of the Internet has given more importance to electronic commerce than could have possibly been foreseen when the Uruguay Round Agreements were negotiated. Therefore, issues related to electronic commerce were only taken up in 1996 by the first WTO Ministerial Conference, which adopted the Ministerial Declaration on Trade and Information Technology Products. According to the Declaration, WTO will work towards achieving the objective of "maximum freedom of world trade in information technology products". The Agreement on Information Technology (ITA) removes a range of tariffs on products related to information and telecommunication technologies, including many infrastructure products essential to electronic commerce. At the second WTO Ministerial Conference (Geneva 1998), Ministers adopted the "Declaration on Global Electronic Commerce" and urged the General Council "to establish a comprehensive work programme to examine all trade-related issues relating to global electronic commerce". They reaffirmed that, at least until the next WTO conference in 1999,

[46] Other means such as telephone, fax or television can be (and are) also used for commercial electronic transactions. However, the advantages of the Internet such as its time- and spacelessness, high communication potential, low cost and multimedia features have made it the predominant instrument for conducting electronic commerce.

[47] See UNCTAD document "Implications for trade and development of recent proposals to set up a global framework for electronic commerce" (TD/B/COM:3/17, p.2).

members would "continue their current practice of not imposing customs duties on electronic transmissions".

At its Special Session in September 1998, the General Council established the work programme on electronic commerce, which will be carried out (under continuous review by the General Council) by the following WTO bodies: Council for Trade in Services, Council for Trade in Goods, Council for TRIPs and Committee for Trade and Development. Each of the bodies will examine a set of issues related to electronic commerce. The General Council will conduct an interim progress review by 31 March 1999. The bodies shall report or provide information on their work programme by 30 July 1999.

## Key issues from the development perspective

### Scope and definition of electronic commerce

According to one of the experts, electronic commerce (thereafter e-commerce) will rapidly become a significant component of international trade: a number of estimates indicate that, in the next four years, the value of international e-commerce flows could grow to US$ 400 billion, i.e. close to 10 per cent of total trade flows. According to a WTO estimate, the value of digitalised information produced could represent 30-35% of GDP in many economies. However, as one expert pointed out, its effects will be even more profound from a qualitative than from a quantitative point of view: e-commerce will affect the trade policies and trade competitiveness of developing countries in at least four aspects:[48]

(1) Market efficiency: significantly lower transaction costs, as well as increased market transparency (information on products, prices and contractual conditions being ubiquitously and instantaneously available to potential buyers and sellers) will challenge well-established hierarchies among competitors; smaller players (including small- and medium-sized enterprises) will have opportunities to compete on global markets; this will affect services markets first, but will soon trickle down to less information-intensive activities such as manufacturing and eventually commodities.

(2) Trade policies: participation in global markets will increasingly depend on access to information networks, and policy makers will need to include this element in their projections and decisions. The effect will be almost immediate in the area of trade policies (and will be accelerated by the process of preparations for the WTO Ministerial Meeting of 1999), but will rapidly affect other areas such as investment and fiscal and monetary policies[49]. Governments will also find themselves under considerable pressure to adapt their legal and regulatory environments to new ways of exchanging information and concluding contracts. Eventually, they will also need to consider the social dimension of e-commerce (for example in the area of education and training).

[48] For more details and analysis, see UNCTAD documents TD/B/COM.3/16 and TD/B/COM.3/17.

[49] For example, recent proposals in favor of a 'tax-free e-commerce' have direct and indirect consequences for developing countries; most of them are still largely unexplored. Similarly, the anticipated rapid expansion of electronic payments raises novel issues in terms of money creation, electronic flows of money, and possible subsequent prudential rules.

(3) Respective roles of governments and enterprises: in an area characterized by rapid changes (in underlying technologies, in regulations, and even 'business culture'), knowledge will mainly come from practice. For governments, a major source of information and understanding of e-commerce issues will be the enterprises of their respective countries that will have had some experience of e-commerce and the Internet. In designing their e-commerce strategies and policies, governments will need to rely on new types of partnerships (and enhanced mutual respect) with the enterprise sector.

(4) The relationship between electronic commerce and physical commerce: it was pointed out that it would be wrong to anticipate that the effects described above will limit themselves to trade in information-intensive services; a major reason why governments and enterprises enter the realm of e-commerce is that it allows significant reductions in transaction costs. In this regard, e-commerce issues cannot be delinked from trade facilitation issues, and adequate e-commerce policies and negotiating strategies will have to carefully weigh the roles to be played by trade-supporting activities such as customs, banking, insurance and transportation.

Given the dimension and potential future impact of e-commerce, it is not surprising that the topic has been added to the list of subjects to be considered in the WTO process of preparing for future multilateral trade negotiations. The following broad issues have been raised during the expert group meeting, and will subsequently be considered, in relation to e-commerce: how can the existing WTO framework accommodate aspects related to e-commerce; what are the legal as well as intellectual property rights aspects of e-commerce; and what are the implications of e-commerce for development?

**Treatment of e-commerce within the WTO framework[50]**

One question that was raised during the meeting was how e-commerce should be negotiated multilaterally: as a single separate issue or as part of a comprehensive negotiation package? Discussions largely focussed on the latter and on ways e-commerce could be dealt with within the WTO framework. Several participants thought that e-commerce should largely be considered under the GATS, although the question of how to define goods delivered electronically (e.g. books, recordings, CDS, software) still remains unanswered. In September 1998, the WTO General Council established a work programme requesting several WTO bodies to examine the treatment of e-commerce within their respective legal frameworks. These bodies are the Council for Trade in Services (GATS), the Council for Trade in Goods (GATT 1994), and the Council for TRIPs.[51]

*GATS framework[52]*

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[50] For a detailed discussion on WTO agreements and activities related to e-commerce, see "Electronic commerce and the WTO", WTO publication, 1998.

[51] In addition, the Council for Trade and Development has been asked to examine development implications of electronic commerce, taking into account the economic, financial and development needs of developing countries.

[52] Besides the bodies and treaties considered in this section, a number of issues related to electronic commerce may be addressed by other agreements and activities within the current WTO framework: (1) the Information

As several participants pointed out, a substantial range of transactions carried out through e-commerce is already covered under GATS. These include Internet services and products which can be delivered as digitalized information, such as financial services, telecommunications, computer-related services, entertainment, postal and courier services, air transport-related services, etc. Within the GATS framework, the most relevant modes of supply are "cross-border supply" (mode 1) and "consumption abroad" (mode 2). In particular, e-commerce has dramatically increased the relevance of mode 1 as a means of exporting services. One potential impact of e-commerce is, however, that if supply through the cross-border mode is preferred to commercial presence (i.e. the purchasing of the service abroad rather than the supplier setting up shop in the country), this could reduce the flow of FDI, transfer of technology and employment opportunities associated with the expansion of such activities.

On the other hand, since the Internet allows the transport of all goods and services that can be digitized, it blurs the distinction between goods and services and thus calls for effective cross-border regulation and monitoring. One of the topics that need to be addressed in future work on the subject is the definition of goods and services related to e-commerce (see above).

The following GATS articles are relevant to e-commerce:
- scope (including modes of supply), Article I
- MFN, Article II
- transparency, Article III.
- increasing participation of developing countries, Article IV [53]
- domestic regulation, standards, and recognition, Articles VI and VII
- competition, Articles VIII and IX
- protection of privacy and fraud practices, Article XIV
- market access commitments on electronic supply of services, Article XVI.
- national treatment commitments, Article XVII.
- trade in telecommunication services, including basic telecommunications and the pro-competitive principles and safeguards.
- customs duties
- classification issues related to the GATS classification.

Furthermore, as one of the experts noted, the successful conclusion of the negotiations on basic telecommunications and commitments on liberalization of trade in these services created an important basis for infrastructure development - a precondition for participating in e-commerce. Proposals made by the US, the EU, Japan, and the OECD on a global framework for e-commerce stress that the effective implementation of the two WTO Agreements (on Basic Telecommunication and Information Technology Agreement) could have beneficial effects on the development of the technology infrastructure necessary for e-commerce. Both the GATS

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Technology Agreement (ITA) (tariff reduction on information and telecommunications infrastructure products); (2) Agreement on Government Procurement (GPA); (3) Trade facilitation (as new topic on the WTO agenda concerning the simplification of trade procedures).

[53] This is particularly relevant for access to technology on a commercial basis, access to distribution channels and distribution networks and the implications on sectors and modes of supply of export interest for developing countries. This to be considered in the perspective of fostering a domestic competitive sector in developing countries.

Telecommunication Annex and the Agreement on Basic Telecommunication Services could provide a framework for further incorporating e-commerce-related issues. For example, the Annex could be enhanced to explicitly include the use of the Internet for transactions.

*GATT 1994*

The following topics that relate to e-commerce are addressed by the GATT rules and will be further considered by the Council for Trade in Goods:
- market access for and access to products related to e-commerce
- custom valuation, custom duties, other fiscal issues and licencing procedures, in particular on the implementation of Article VII of GATT 1994
- issues arising from the application of the Agreement on Import Licensing
- standards
- rules of origin
- classification issues.

At the WTO Ministerial Meeting in Singapore (1996), 42 countries signed the Declaration on Trade and Information Technology Products (ITA), which reduces tariffs to zero on a number of information technology-related products (computers, telecommunications equipment, semiconductors, semiconductor manufacturing equipment, software, and scientific instruments). This accounts for 93% of world trade in information technology products. Since then, two more Members joined the Declaration and several have expressed interest to join in the future. Discussions are currently held at WTO to extend the Agreement and include another major range of IT and telecommunications products. As one of the experts noted, these are steps in the right direction regarding the incorporation of e-commerce into the WTO framework.

*TRIPS*

The TRIPS Agreement addresses the following aspects of e-commerce:
- protection and enforcement of copyrights;
- protection and enforcement of trade marks;
- new technologies and access to technology.

The TRIPS Agreement includes the traditional principles of international copyright law of the Berne Convention, and enforces the application of, for example, the right of reproduction which is relevant even in a digital environment.

The advent of the Internet poses new problems which have not (yet) been addressed by the TRIPS Agreement. For example, although the Agreement covers the protection of copyright and trademarks, which apply to electronic transmissions, it does not specify how to deal with unauthorized downloading and distribution. Two treaties have recently been established in WIPO (see below) that are relevant to this and need to be taken into consideration by the TRIPS Agreement in future negotiations.

**Legal aspects related to e-commerce**

One of the experts elaborated on the main legal issues that arise in relation to e-commerce. These include: privacy of information, authentication of identity, security of the transactions, liability and the jurisdiction (of the buyer or seller) that applies to the transaction. The advent of e-commerce poses a considerable challenge to existing regulatory frameworks, given that is transcends space and therefore territorial jurisdictions. This makes it difficult to determine where a transaction has actually taken place. Jurisdiction is mainly an issue in business-to-consumer transactions since business-to-business transactions usually refer to the jurisdiction that applies to the business contract. [54]

According to one of the participants, legal obstacles to electronic commerce are mainly found outside the actual field of e-commerce. These obstacles and problems have to do with the increasing use of new technologies resulting in the gradual disappearance of paper, and the fact that traditional legal systems in all countries are based on the rule of written evidence as physical support, the production of documents, the existence of original and signed documents, and on concepts which have no direct equivalence in e-commerce.

Although relevant legislation is still pending in most countries, in 1996 UNCITRAL[55] has developed a Model Law on Electronic Commerce that could serve as a benchmark in developing national legislation. It provides a set of internationally acceptable rules which can be used by Governments to enact legislation in the area of e-commerce. It also provides guidelines to individual traders on preparing contracts and removing some of the legal barriers to electronic trading. The Model Law uses the term "electronic commerce" but refers to any electronic means of communication such as EDI, electronic mail, the Internet, as well as less sophisticated techniques of telecopy and fax. In this context, it "applies to any kind of information in the form of a data message used in the context of commercial activities". The Model Law does not cover every aspect of e-commerce, it is rather considered as a framework law that countries can use when establishing their laws and regulations on e-commerce. The Model Law is now to be complemented by a number of more specific devices dealing particularly with electronic contracting and authentication issues.

Besides the UNCITRAL efforts, there are other approaches towards facilitating the legal aspects related to e-commerce.[56] The main objectives common to all efforts is to develop approaches that can be adopted internationally concerning the legal validation of electronic contracting and electronic authentication procedures.

The setting up and implementation of a legal framework for e-commerce poses a particular problem for developing countries given that they often have weak regulatory frameworks and little enforcement capacity. Nevertheless, it is a key aspect in promoting participation in e-commerce at the domestic level. Hence, technical assistance provided in this areas (as well as in the

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[54] The EU, in a recently (November 1998) proposed new legislation to remove restrictions on electronic contracts, requires that companies offering online services should be regulated by the country where they are established ("country of origin"), and not, for example, where their web site host or computer is located or where the service is received.

[55] United Nations Commission on International Trade Law

[56] The UNCTAD document UNCTAD/SDTE/BFB/1 (1998) provides a good overview of the status of legal aspects related to e-commerce.

intellectual property rights area) is key to a successful integration of the developing countries.

In summary, experts stressed that in order to be able to make fully use of electronic commerce, a legal framework has to be established. This framework needs to be truly international since traditional law choices of jurisdiction based on territoriality are irrelevant in cyber space.

**Intellectual property rights aspects**

According to one of the experts, there are two key issues that are crucial in the intellectual property rights area for the future development of e-commerce: (a) the protection of copyright and related rights and (b) the protection of domain names and trademarks. As domain names are not yet fully protected under most trademark regimes, there is scope for misuse by external parties which can affect the value of trademarks. Other aspects include on-line business, such as online delivery of audiovisual and software services.

Many of the aspects related to intellectual property rights have a direct link to legal aspects. For example, which legislation (on copyrights, trademarks and related distribution and licensing arrangements) should be applied in a borderless global electronic marketplace?

Besides the WTO TRIPS Agreement, two international treaties that address these problems have been concluded under WIPO in 1996: (1) the WIPO Copyright Treaty, and (2) the WIPO Performances and Phonograms Treaty. They go beyond the Berne Convention and the TRIPS Agreement and include provisions on the right of communication, circumvention of technological measures and integrity of rights management information.

**Development aspects**

Several points were raised in the meeting which referred to the development dimension related to e-commerce. For example, it was mentioned that a number of Governments and intergovernmental organizations have put forward proposals to create a global framework for e-commerce. They stress the need for international coordination in the adaptation of existing commercial laws and regulations in order to provide a consistent and transparent legal environment for e-commerce. A common aspect of these proposals is that the private sector should take a lead role in developing this framework. In particular, self-regulation by the private sector is being encouraged in areas such as standard setting, information security, and content management.

Since these proposals were put forward by developed countries, they do not contain the development dimension of electronic commerce. However, in order to make sure that e-commerce becomes a beneficial tool for all countries, developing countries need to participate in these discussions from the early stage to make sure that issues important from a development perspective will be taken into consideration in any new proposal. These include the potential benefits of e-commerce for developing countries, infrastructural aspects and connectivity, human resources needs, and financial aspects.

*New business opportunities through e-commerce*

As has been pointed out by several experts, the potential benefits of e-commerce for developing countries could be considerable. The Internet will facilitate (and make available) many professional and business services, health and education, tourism, software, entertainment, and financial services. In some of these areas, developing countries could substantially increase their export capabilities. The Internet allows commercial activities to be conducted without the heavy cost of establishing and maintaining physical stores and inventories. Experts predict that the current trend towards global commodity pricing of telecommunications services (e.g. bandwidth) will equalize telecommunications costs much sooner than expected and thus make low-wage countries very competitive providers of a range of information technology services.

The Internet provides developing countries with the opportunity to obtain hitherto inaccessible and unaffordable information. For example, many governments and international agencies involved in trade promotion provide free access to a great deal of useful information on international markets. The resulting transfer of know-how could stimulate the expansion of exports of services from developing countries and assist in their integration into the world trading system.

E-commerce will allow people in developing countries to offer their skills in world markets without having to leave their countries. This reduces brain drain and allows countries to benefit from a low cost/high-tech comparative advantage. The Internet permits businesses to advertise their services globally and at low cost. Export opportunities for developing countries in long-distance labour-intensive services (such as computer-related services, back-office services) have been estimated to have the potential to double the total commercial services exports of developing countries from their 1993 level of US$ 180 billion.

Especially for SMEs, the advent of e-commerce provides new opportunities since they are now able to tap into global markets for suppliers and customers. In the virtual world of the Internet, business size is no longer an indicator of the geographical reach of a company's customers or activities. This could considerably improve the competitiveness of many companies in the developing world. However, as was pointed out by one of the participants, more research is needed in this area.

The current use of the Internet by SMEs in developing countries (and elsewhere) is still limited. They mainly use it for getting access to business information and for communicating with their customers (e-mail). Home pages on the web are maintained but with little content and mainly as a marketing tool. A major barrier for SMEs to developing e-commerce capabilities is their lack of in-house technical knowledge and expertise. The use of new technologies requires new skills which poses a greater problem for developing countries given their lack of training capacities.

*Infrastructure*

Participants agreed that access to telecommunications and information infrastructure is a key issue for developing countries, in order to be able to participate and benefit from e-commerce, since many developing countries suffer from inadequate infrastructure and insufficient information technology.

During the past few years, Internet connectivity has shown exponential growth rates, with higher growth rates in the developing world. It has improved in many parts of the developing world and nearly every capital city in Africa is connected to the Internet today.[57] Nevertheless, there are still significant disparities in the level of Internet penetration across regions which directly impact a country's ability to participate in e-commerce. The World Bank has estimated that US$ 50 billion is required in order to bring the average level of African teledensity to that of Southern Europe. New technologies (such as those related to the use of satellites) may provide cheaper solutions in the near future.

Besides the availability of a physical infrastructure, one of the experts stressed that high-priced services due to monopoly pricing in telecommunications severely restrict access to global networks. Economies with open competition in the telecommunications sector have on average five times more Internet hosts than economies without competition, and connection charges of less than half. Cost of access remains a barrier particularly in Africa.

Therefore, it was felt that it is important that governments provide a competitive telecommunications services environment featuring competition in services, infrastructure and facilities. As long as Internet connectivity remains scarce and expensive, the capacity to participate in e-commerce (and to, for example, produce, store and disseminate information) remains concentrated in the developed world. In this regard, an effective regulating body could ensure that no "natural" monopolies will result from deregulation and privatization (see Chapter on Competition).

*Macro-economic concerns*

The economic benefits resulting from e-commerce are said to be many and include a significant reduction in transaction costs and increased competition. This will improve efficiency, lower prices and increase quality, thus increasing economic growth and welfare.

Several issues related to the economic impact of e-commerce have been discussed and are of concern to developing countries. They include the impact on local labour markets and on customs and taxation processes, the latter directly influencing government revenues.

The impact of e-commerce on the structure and evolution of labour markets (particularly in developing countries) is not yet clear. As mentioned above, the spread of e-commerce to developing countries will create new business and employment opportunities in sectors where these countries have a particular advantage. These include back-office services, tourism, financial services, computer-related services, etc. Especially SMEs will gain easy access to global markets and thus improve their competitiveness considerably, which could lead to growth and employment creation. At the same time, the need for intermediaries may be reduced which would have a negative impact on employment. Also, the need for setting up shop in a developing country

[57] See African connectivity analysis in UNCTAD document TD/B/Com.3/16 Annex II. While in 1996 only 16 African countries were connected to the Internet, in 1998 75% of the 53 capital cities enjoyed full Internet access. However, connectivity in rural Africa still remains problematic. By contrast, Internet connection in Latin America (and Asia) has experienced explosive growth in the last few years and e-commerce activities are increasing rapidly.

(commercial presence) versus providing the service online may reduce the inflow of FDI, which could have negative effects on employment, technology transfer etc.

Revenues resulting from e-commerce are still modest and forecasts differ widely among research institutions, ranging from US$ 102 billion to US$400 billion by the year 2002. Nevertheless, all predictions point to double-digit increases in e-commerce revenues in the coming years.

In this context, the taxation of business transactions implemented through the Internet has been another important topic of discussion in the international community and was pointed out during the meeting. The cross-border nature of many electronic transactions raises issues of tariff treatment, double taxation and tax competition. OECD countries have already made efforts to address the issue and find an international agreement on Internet taxation.[58] The extension of existing tax regulations to cover Internet-based e-commerce is especially important to developing countries in order not to suffer from a loss of fiscal revenues. In addition, the subject of tax collection related to e-commerce causes concerns. Besides the importance of tax revenues for the national budget, developing countries with weak tax collection systems will have to face an additional challenge when addressing tax collection related to e-commerce.

With respect to customs duties, at the WTO Ministerial Meeting in May 1998, Ministers agreed to impose a one-year moratorium on customs duties for goods and services delivered online.[59] This has been extended until the next Ministerial Meeting to be held in November/December 1999 where the subject will be addressed further.

**Concluding remarks**

Developing countries will best reap the potential benefits of e-commerce, if they provide a conducive policy environment for electronic commerce without compromising public policy objectives; this includes the promotion of a competitive telecommunications services environment; the promotion of open standards and interoperability of networks; and the creation of a regulatory framework for electronic commerce at the domestic level. The private sector needs to take the lead in the development of technical standards and inter-operability of networks (because many key elements are still emerging, such as electronic payments; standards need to be consistent internationally otherwise they become a barrier to trade). Given that key decisions related to the definition of a global framework for e-commerce are likely to be taken in the near future, as well as the speed with which technology progresses, an active participation of developing countries in e-commerce from early on is crucial.

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[58] On October 7-9, 1998, ministers from 29 OECD countries agreed at a conference held in Ottawa on a number of general principles to guide the taxation of e-commerce. Among those is the agreement that indirect taxes are being levied on the basis of where goods or services are consumed, not where they are produced, thus following traditional tax principles. Major differences between national tax regimes among the countries have made it difficult to agree on more concrete subjects.

[59] This does not refer to physical goods purchased through the Internet and delivered by traditional methods. Here, existing rules continue to apply.

## Priority areas for further research

- What are the economic gains from using information technologies in trade (cost savings, access to information/markets/products, new market niches, technology transfer) from a development perspective?
- The potential of electronic commerce for SMEs entering international trade;
- The impact of electronic trade on other modes of supply, including the movement of natural persons and on commercial presence.
- What are the traded products and services of concern to developing countries affected by e-commerce (and to be discussed or defined in WTO)?
- What are the implications of using electronic means for (1) customs and taxation and (2) government procurement from a developing country perspective?
- What are the implications of e-commerce on intellectual property protection in developing countries?
- How can developing countries secure a legal framework for trade liberalization without infringing on their freedom to pursue legitimate domestic obligations (for example, with regard to the issue of self-regulation vs. government intervention, or the increased role of the private sector in e-commerce)?
- Which sectors of export interest to developing countries could be strengthened by the growing trend in e-commerce?
- What is the impact of e-commerce on commitments negotiated under the GATS cross-border mode of supply?

## ANTI-DUMPING

Although no major review of the Agreement on Anti-Dumping is foreseen, the discussions in the Ad Hoc expert group meeting showed that anti-dumping laws and regulations are among the most pressing areas for reform. The following concerns were raised during the discussions and will be elaborated in this section:

- The considerable number of loopholes left by the AAD, which have resulted in anti-dumping action becoming the preferred means of imposing restrictions on imports;
- The considerable increase in the number of anti-dumping cases (especially against developing countries) since the conclusion of the Uruguay Round;
- The issue of anti-circumvention;
- The relationship between anti-dumping and competition policies;
- The questioning of the economic reasoning behind and impact of anti-dumping actions.

## Background

Anti-dumping actions have been taken since the beginning of the 20th century, and Article VI of GATT sets out the basic rules under which countries are permitted to impose duties on imported products which are considered as "less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country". In order to have a clear interpretation of these rules with a view to obtaining a more uniform application, an anti-dumping code was negotiated in 1967 (Kennedy Round), and again in 1979 (Tokyo Round).

During the Uruguay Round of multilateral trade negotiations, efforts were made to address problems that had arisen in specific cases and from the interpretation of previous rules, largely aiming at harmonization; and to reform the existing legislation. The resulting Agreement on Implementation of Article VI of the GATT 1994, or simply called the Agreement on Anti-Dumping Measures (AAD), sets out new methodological (e.g. for the calculation of dumping margins) and procedural rules (e.g. for conducting anti-dumping investigations) and requires more transparency in undertaking anti-dumping measures.

The AAD does not foresee any substantive review nor the specific possibility of amendments. The Committee on Anti-Dumping Practices, set up under the AAD, only undertakes annual reviews which are routine as provided for under Article 18.6 of the AAD. Members are obliged to notify their national anti-dumping legislation to the Committee. As of 29 October 1998, 83 WTO members had submitted notifications regarding their national anti-dumping legislation, of which 25 had notified that they had no anti-dumping legislation.[60] The Committee reviews the notifications of legislation during its regular meetings. It refers technical issues regarding the

[60] See WTO document G/L/268 of 5 November 1998.

implementation of the Agreement to the Ad Hoc Group on Implementation, which holds biannual meetings to discuss the topics and makes recommendations for consideration by the Committee.

## Key issues from the development perspective

### Anti-Dumping action as the preferred means to impose restrictions on imports

Several participants commented on the fact that, among the various contingency protection measures (often termed "trade remedies") allowed under the GATT, anti-dumping action has become a preferred means to impose restrictions on a country's imports. This can be explained by looking at the nature of the AAD.

The AAD provides a series of procedural guidelines aimed at reducing the scope for arbitrariness and uncertainty. Nevertheless, there are still many ambiguities and "loopholes" which make it easy for countries to impose anti-dumping duties on imports. Anti-dumping investigations are normally initiated by the national authorities at the request of the private sector (i.e. the domestic industry concerned). This usually has led to a variety of competition-reducing outcomes, including the imposition of duties, undertakings to raise prices, replacing existing restrictions or acting as additional barriers to trade. The adverse impact is much greater than the actual trade involved; even the initiation of an anti-dumping investigation can have an immediate impact on trade flows as it prompts importers to seek alternative sources of supply. In some cases, the recourses to anti-dumping actions are just to "harass" importers as the petitioners know that the outcomes of the anti-dumping investigations would likely to be negative (e.g. no finding of material injury). In this context, one of the experts noted that some large firms in certain sectors have become the major users of anti-dumping measures and have incorporated anti-dumping practices into their overall strategies.

In order to limit the abuse of anti-dumping actions, the AAD provides for the determination of "standing of complainants" by the importing country's administering authorities. Although the AAD requires a more active involvement of the administering authorities of importing country prior to the initiation of an anti-dumping investigation,[61] it should be noted that while the AAD fixed thresholds for achieving "standing" to complain these are lower in practice then indicated in the AAD.[62] As a result, producers which are "related to the exporters and importers"are excluded from the calculation, this leaving the effective thresholds (i.e. standing) below the 50 per cent and 25 per cent as provided for in the AAD. As the process of globalization advances more firms will be involved in both domestic and foreign production of the same product and thus, there will be a tendency for these thresholds to be further eroded over time.[63]

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[61] See, Article 5.4 of the AAD.

[62] This is mainly due to the interpretation of the term "related" as provided for in footnote 11 to Article 4.1 (i) of the AAD.

[63] In this regard, particular concern should be expressed with respect to the footnote to Article 1 (2) of the WTO Agreement on Rules of Origin which explicitly excludes from its scope of the application the definition of domestic industry in anti-dumping proceedings as this may allow the administering authorities to continue to use arbitrary standards for determining whether a domestic producer is really "domestic".

The unique provision of the AAD regarding "standards of review " shelters domestic decision makers from the WTO dispute settlement mechanism to a greater extent than the other contingency protection agreements, thus adding to its appeal to protectionist interests.

As a result all of the above, anti-dumping measures have become the main instrument for dealing with adverse effects of trade liberalization.

Small firms, particularly new entrants from developing countries, are especially hurt by such measures: first, because as new entrants they usually are obliged to keep prices low and thus expose themselves to accusations of dumping; and second, because such enterprises are less able to (i) fight off such cases in the political and bureaucratic arenas, or (ii) absorb the economic impact that resulting from such measures.

One expert reported that an OECD study has shown that 95 per cent of the anti-dumping cases are actually related to safeguard aspects (i.e. increased imports), and that per cent of the cases are related to anti-competitive practices (i.e. predatory or strategic pricing). Another expert noted that anti-dumping measures are usually applied with long durations, for example, 95 per cent of the US measures, 28 per cent the EU measures and 67 per cent of Canadian measures lasted more than 5 years.

Several participants suggested that more problems with the implementation of the AAD will have to be expected once the Agreement on Textiles and Clothing (ATC) will be terminated. Therefore, solutions to prevent further misuse of anti-dumping measures should be found before that.

Another major problem with the use of anti-dumping measures is the uncertainty involved for the industry placed under a dumping order. The actual duty imposed is normally unknown until a late stage in the process and this has led in the past to bankruptcy of firms which expected a much lower duty. Hence, according to one participant, anti-dumping has a much stronger effect on trade based on this inherent uncertainty aspect. On the other hand, one participant argued that the actual effect on trade flows was not significant, citing the US as an example.

**Changing patterns of anti-dumping initiation**

One of the experts presented a short overview of the number of anti-dumping cases and their initiating countries. Before the UR, the four major users of anti-dumping measures were the United States, the EU, Canada and Australia. For example, between 1 July 1985 and 30 June 1992, these four accounted for more than 80 per cent of initiated cases. During the period 1987 to 1996, nearly 2000 anti-dumping cases were initiated and 70 per cent of those cases were initiated by the United States, the EC, Canada, Australia and New Zealand.

This pattern has changed considerably during the 1990s. Developing countries-initiated cases have increased sharply. Particularly since 1995, developing countries have actually overtaken industrialized countries and have initiated almost two-thirds of these measures, whereby most of

them are directed against other developing countries.[64] Of the 842 anti-dumping measures in force as of mid 1997, 307 can be attributed to the US, 200 to all developing countries and 157 to the EU.

Many developing countries have promulgated anti-dumping legislation (even though this is not required by the WTO), often with the encouragement of certain interests in developed countries, which wish to consolidate the anti-dumping system in the WTO. Many developing country producers view anti-dumping duties as a means of compensating for the liberalization of tariffs and quantitative restrictions and other non-tariff measures, and vested interests in the use of anti-dumping measures are rapidly evolving in developing countries. In this respect, they have followed the pattern of industrial countries which, in the past, also resorted to anti-dumping measures as they saw reductions in their tariffs and quota restrictions. In particular in Latin America, there has been a large increase in anti-dumping actions in the 1990s as a result of strong trade liberalizations.[65] In addition, in countries that appreciated their exchange rate regimes, anti-dumping was one way to reduce foreign competition in sensitive industries as well as current account deficits resulting from external shocks.

According to research carried out by one of the experts, while the number of anti-dumping actions taken by developing countries has gone up, that of developed countries has gone down since the mid 1990s. For example, US-initiated anti-dumping cases declined from more than 60 per year in 1992/93 to 16 in 1997. Similar trends can be observed in Australia and the EU. This is partly the result of an increasing realization in these countries that anti-dumping action can actually counter their own policies as well as an increasing number of industries using imported inputs and therefore with little interest in restricting imports.[66]

At the same time, there is an increasing split of opinion within developed countries' industries on the use of anti-dumping action, partly as a response to the increasing action taken by other countries. While the traditional users of anti-dumping measures (e.g. the steel industry in the US) still prefer weak regulation which permits easy use of anti-dumping action, exporters favour more strict regulation, especially with respect to their main export markets.

Recently, another major initiative by the United States steel industry has emerged to restrict low-priced imports through anti-dumping actions. These items are usually low-priced as a result of currency devaluations and thus, not dumped in the sense of the AAD; however, other countries may be forced to dump to compete. It is also expected that the phase out of the MFA-type of quantitative restrictions as provided for under the ATC will lead to a proliferation of anti-dumping duties in that sector.

The use of anti-dumping measures is highly cyclical and tends to correlate with the ups and downs

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[64] The main initiators among the developing countries are Mexico, Argentina, Brazil, South Africa, India, Korea, Colombia, Indonesia, Turkey, Peru, the Philippines, Malaysia, Thailand and Venezuela.

[65] See Guasch and Rajapatirana (1998). Another interesting observation is that an increasing number of cases in Latin America is against each other.

[66] See J.M. Finger (1998), "GATT Experience with Safeguards: Making Economic and Political Sense of the Possibilities that the GATT Allows to Restrict Imports", World Bank.

of specific commodity markets. So far, no signs of an increase of anti-dumping cases as a result of the Asian crisis have been noted. It was pointed out, though, that the currency devaluations in many Asian countries as a result of the crisis increases the risk for these countries of being charged with anti-dumping duties, thus aggravating their economic situation.

The majority of anti-dumping cases are directed against exporters from developing countries. In 1997, out of 239 initiated cases, 143 were targeted at developing countries and countries in transition.[67] Hence, the negative effects resulting from anti-dumping action is increasingly being felt by producers from developing countries.

The costs of implementation of these measures - related to the administrative procedures involved - are quite substantial for developing countries. It was pointed out that, in particular, for small developing countries, the implementation of anti-dumping action requires the establishment of appropriate regimes and institutions, which is costly.

**Anti-circumvention measures**

Globalization has seen an evolution in the strategies and motivations of firms in selecting the modes for penetrating foreign markets. As a response to globalization, anti-dumping measures have also been used by domestic, non-globalized firms to challenge multinational producers, in particular to different techniques employed by the multinational firms to influence corporate decisions on the location of production facilities. In this context, legislation dealing with the circumvention of anti-dumping duties has been a matter of particular concern. Anti-circumvention measures refer to situations where firms liable to pay anti-dumping duties are avoiding such duties by (a) establishing "screwdriver plants", i.e. an assembly operation in the importing country, from imported parts, (b) shifting the final stages of production to another country, and (c) introducing minor modifications to the product subject to dumping action.

The question of whether such measures should be permitted, and if so according to what rules, could not be resolved during the Uruguay Round and negotiations are continuing according to the Marrakesh Decision on Anti-Circumvention. So far, member countries have not even yet reached a conclusion on the definition of circumvention, in their discussions in the Committee. Opponents of anti-circumvention measures consider that there is no need for such legislation and that the problems of so-called "circumvention" can be addressed as a problem of rules of origin and/or customs classification.

**Lack of economic rationale behind anti-dumping**

The problem of justifying anti-dumping on economic grounds was raised by various participants during the meeting. According to one expert, although the concept of trade liberalization builds on economic theory, WTO rules do not take into consideration economic criteria for distinguishing contingency measures. For example, although the potential economic impact (on the national

[67] WTO Annual Report 1997.

economy) of using either safeguard measures or anti-dumping measures differs considerably, a country may use either one even if one implies higher costs for, for example, domestic users of imports. However, while safeguards cost much less in terms of national welfare, they also carry a higher threshold of proof of injury and must be applied against all suppliers. Thus, anti-dumping is the preferred instrument for imposing import restrictions.

From an economic point of view, there is no logic to anti-dumping measures: the costs are greater than the benefits for the domestic economy and the population. The AAD requires that injury to the domestic industry is demonstrated; however, the injury shown is not on national welfare, but a loss of profits to certain domestic producers. In a study reviewing anti-dumping cases, the OECD found that anti-dumping measures applied to non-monopolizing dumping have the effect of protecting suppliers at the expense of consumers and competition.[68]

There is little economic reasoning for anti-dumping law since, in open trade regimes, there is little opportunity to capture monopolistic profits through dumping because other foreign producers would follow and compete for the market share. In addition, the "dumping" industry would have to make up for selling below marginal costs.

On the other hand, the potential immediate effects of dumping such as loss of market shares or job losses are politically sensitive issues whereby governments are put under pressure by vocal national lobbies and interest groups. Anti-dumping action is often seen as an "escape valve" to prevent pressures tempting for protection in one or two sectors from degenerating into general protectionist initiative. In contrast, any immediate benefits of "dumping" such as lower prices, greater market discipline or a greater selection of products, are not as visible and thus carry little weight in the policy decisions.

**Anti-dumping and Competition policies**

To consider anti-dumping measures as part of competition policies was the view of several participants, although it was recognized that the combination of the two will be a difficult process. It was pointed out that anti-dumping practices contradict the fundamental principles and objectives of competition and provide companies with a ready-made instrument to limit foreign competition.[69] Reference was made to the same OECD study mentioned above, which looked at the extent to which anti-dumping duties would have been applied under competition-related policies. According to this study, 95 per cent of the reviewed anti-dumping cases related to situations which should have been dealt with by emergency safeguard measures, while 5 per cent related to predatory or strategic pricing that could be dealt with through competition policy. The study also argues that 90 per cent of the cases where import sales were found to be unfair under anti-dumping law would have been considered fair under competition law if traded domestically. Reality shows, however, that anti-dumping authorities communicate little with their respective

[68] OECD Economics Department 1996. Trade and Competition. Frictions after the Uruguay Round. (Note by the Secretariat). OECD, Paris.

[69] See, for example, Guasch, J.L and S. Rajapatirana, "Antidumping and Competition Policies in Latin America and Caribbean: Total Strangers or Soul Mates", World Bank Working Paper, April 1998.

colleagues in the area of competition law. It was suggested that it would be interesting to do similar studies in developing countries where a sufficient large number of anti-dumping cases do now exist.

In this context, it has been argued that, in the same way that the application of competition law instead of the imposition of anti-dumping duties are used to deal with predatory measures at the national (and some cases regional) levels, a multilateral agreement on competition law could preclude the need for anti-dumping legislation. The possibility of such an agreement is implied by the TRIMs Agreement and is being advocated by the EU and certain other countries (see Chapter on Competition).

**Possible future approaches**

As referred above, the AAD does not include provisions for any substantive review nor foresees the specific possibility of amendments, although it includes a sunset review process to cut down on the "life expectancy" of anti-dumping measures. Nonetheless, the discussions in the meeting demonstrated that anti-dumping rules and procedures are among the most pressing areas for reform.

The experts discussed three approaches on how to deal with the question of anti-dumping in future negotiations. One approach to such a reform would be to simply abolish the anti-dumping regime. The second would be to replace it with a multilateral regime on trade and competition policy. For example, Hong Kong, Korea and Mexico have pointed out that an effective agreement on competition policy could substitute anti-dumping action (see also Chapter on Competition). The third approach would be the improvement of the existing agreement to reduce the initiation on anti-dumping actions as a measure to hamper trade.

Most support was expressed for substituting the rules by competition policy to have a credible alternative, although one participant favoured a slow move towards safeguards instead. One participant noted that the AAD itself was a loophole and therefore one should focus on the AAD as such and why it is needed (or not) rather than on trying to eliminate the loopholes within the AAD.

## Priority areas for further research

(i) Identifications of sectors where anti-dumping actions are frequent and examination of economic factors and corporate policies which may contribute to the targeting of these sectors;

(ii) Impact of contingency protection measures on trade of developing countries;

(iii) Study of the relationship between the principles and rules of the AAD and those used in competition legislation; implications of replacing anti-dumping measures with competition policy;

(iv) Experience with the use or abolition of anti-dumping measures in the context of regional agreements;

(v) Study of the use of anti-dumping actions, particularly anti-circumvention measures in the context of globalization and their impact on the location of production;

(vi) Costs to the consumers of using anti-dumping measures;

(vii) Implications of replacement of anti-dumping measures with safeguard measures;

(viii) The sunset review process: what is happening and what needs to be changed?

(ix) Why do developing countries initiate so many anti-dumping measures against each other?

## STANDARDS

One of the sessions at the ad hoc expert group meeting dealt with the subject of international standards (and in particular the SPS and TBT agreements). Here, a number of issues were raised:

- Problems related to the identification of international standards;
- Developing country participation in the process of formulating international standards;
- Conformity assessment and risk assessment;
- Equivalency and mutual recognition;
- Special and differential treatment for developing countries; and
- Transparency.

## Background

Countries require that domestically produced and imported goods conform to regulations on quality, health and safety and possibly adhere to standards. The number of technical regulations and standards is constantly increasing in most countries. Nowadays, standards and regulations aim not only at complying with their traditional task of providing information and facilitating market transactions, but they also respond to a growing public demand for products which are safe, of good quality and without health or environmental hazards. The number of stakeholders involved in setting-up standards and regulations is also increasing with the participation of groups, such as consumer and environmental organizations, that were previously not involved in these activities. While the legitimate interest of countries to set up standards and regulations is recognized, the SPS and TBT Agreements aim at making sure that standards and regulations do not have unnecessary negative effects on international trade and are not abused for protectionist purposes. This session of the Ad Hoc expert group meeting discussed a number of issues relating to the SPS and TBT agreements. At the outset of the session, a short overview of the agreements was given.

### The SPS Agreement

Article XX, (b) of GATT allows, under the general exceptions, measures necessary to protect human, animal or plant life or health[70]. However, during the Uruguay Round the need to have an agreement addressing explicitly sanitary and phytosanitary measures emerged and led to the adoption of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). The SPS Agreement covers measures adopted by countries to protect human or animal life from food-borne risks; human health from animal or plant-carried diseases; and animal and plant from pests and diseases[71]. Therefore, SPS measures aim to ensure food safety and to

[70] "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in the Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (....) necessary to protect human, animal or plant life or health (...)."

[71] Phytosanitary regulations include measures aimed at protecting importing countries from plant-borne diseases, while sanitary regulations cover measures aimed at ensuring food safety or at protecting importing countries from animal-borne diseases

prevent animal and plant-borne diseases entering the country[72].

The Agreement gives national authorities a framework to develop their domestic policies. It encourages countries to base their SPS measures on international standards, guidelines or recommendations; to fully participate in the activities of international organizations in order to promote the harmonization of SPS regulations on an international basis; to provide an opportunity to interested parties in other countries to comment on draft regulations when they are not based on international standards; to accept the SPS measures of exporting countries as equivalent if they achieve the same level of SPS protection; and, where possible, to enter into mutual recognition agreements. The SPS Agreement gives countries the right to introduce sanitary and phytosanitary measures that result in a higher level of protection than from measures based on international standards, if there is a scientific justification or where a country determines on the basis of risk assessments that a higher level of sanitary and phytosanitary protection would be appropriate. In carrying out risk assessments, countries are urged to use risk assessment techniques developed by the relevant international organizations.[73] The Agreement also permits to adopt SPS measures on a provisional base as a precautionary step in cases where there is immediate risk of the spread of diseases, but the scientific evidence is insufficient.

Members are required to submit advance notice of proposed new regulations or modifications to requirements if these differ from relevant international standards. By March 1999, 1100 such notifications had been submitted. LDC Members are permitted a delay until 2000 to implement the Agreement, with respect to their sanitary and phytosanitary measures affecting importation or imported products.

The SPS Agreement went through review in 1998, which was finalized in March 1999. The Committee did not recommend any modification of the Agreement as a result of the review. However, the SPS Committee agreed that the review had not been exhaustive; therefore, Members at any time could rise any issue for consideration by the SPS Committee. In order to have a clearer idea of the actual or potential problems faced by exporters in relation with SPS regulations in the

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[72] The TBT Agreement also covers measures aimed at protecting human health or safety, animal or plant life or health. To identify if a specific measure is subject to the provisions of the SPS or the TBT Agreement, it is necessary to look at the objectives for which it has been adopted. As a general rule, if a measure is adopted to protect *human life* from the risks arising from additives, toxins, plant and animal-carried diseases; *animal life* from the risks arising from additives, toxins, pests diseases, diseasing-causing organisms; *plant life* from the risks arising from pests, diseases, disease-causing organisms; and a *country* from the risks arising from damages caused by the entry, establishment or spread of pests, this measure is a SPS measure. Measures adopted for other purposes to protect human, animal and plant life, are technical regulations. For instance a pharmaceutical restriction would be a technical measure. Labelling requirements related to safety of food are usually SPS measures, while legislation recently implemented in the EC, which obliges food and food products produced from genetically modified organisms to be labelled, is a technical measure, since its main objective is to give consumers information about the characteristics of the products.

[73] Risk assessment can be defined as the scientifically-based process of identifying and estimating the risks associated with the importation of a commodity and evaluating the consequence of taking those risks, while risk management can be defined as the process of weighing policy alternatives in the light of the results of risk assessment and identifying and implementing those measures that can be applied to reduce the risks and their consequences. Since the drafting and entry into force of the SPS Agreement, a substantial amount of work has been undertaken in the area of risk analysis by the Codex Alimentarius Commission, the International Plant Protection Convention and the International Office of Epizootic.

importing markets, the WTO Secretariat has been requested to collect specific information through a questionnaire sent to member countries.

### The TBT Agreement

The TBT Agreement covers all technical regulations and voluntary standards and the procedures to ensure that these are met, except when these are sanitary or phytosanitary measures as defined by the SPS Agreement. While the SPS Agreement permits countries to apply measures on a discriminatory basis (taking into account such factors as the differences in the level of prevalence of specific diseases or pests), the TBT Agreement requires mandatory product standards to be applied on a non-discriminatory basis.

The TBT Committee meets several times per year to oversee the implementation and administration of the Agreement and to review measures taken by Members. As provided for in the URA built-in agenda, the TBT Agreement was reviewed in 1997. The main purpose of the review was "to determine how the Agreement had operated and how it had been implemented". While the TBT Committee reached the conclusion that no changes in the Agreement were needed, it singled out some areas requiring specific attention.

## Key issues from a development perspective

### International standards and international standardizing organizations

A number of points were raised relating to the process of setting international standards and its implication for developing countries.

The divergence of mandatory or voluntary standards creates costs for international trade. In some cases those costs are justified, since they arise from legitimate differences in societal preferences, technological development, environmental and health conditions. In these cases standards harmonization would not be a desirable solution, while mutual recognition of standards would provide a better option. On the other hand, where divergences are not justified, international harmonization of standards seems to be an appropriate solution: however, it is the efficiency and fairness of the international standard development process that is crucial for minimizing distortions to international trade. The benefits of harmonization may be impeded if the process is captured by special interests in order to exclude other market participants or if it is not adequately transparent.

Both the TBT and the SPS Agreements encourage countries to use international standards as a basis for their regulations, however, they do not define when a standard should be considered as an international standard and only the SPS Agreement spells out which bodies can be regarded as international standardizing bodies. According to the TBTAgreement, all standards, guidelines and recommendations developed by an international standardizing body are to be treated as international standards. A standardizing body is to be considered an international one if its membership is open to "at least all members of WTO". The TBT Agreement does not identify such bodies, while the SPS Agreement provides that the Codes Alimentarius Commission, the Office of Epizootic and the International Plant Protection Convention are to be treated as

international standardizing bodies. The meeting was also informed that in the area of agricultural standards, the UN/ECE sets international standards for a wide range of quality issues regarding various products, working in close connection with the Codex Alimentarius Commission. For example, quality standards covering about 85% of world trade in fresh and dried agricultural products is done under ECE standards. In addition, several ECE working parties set standards on a range of industrial products. In this context, the participation of the developing countries in the respective UN/ECE working parties was encouraged and stressed.

In the absence of more precise definitions, standards developed by a limited number of countries or approved by a thin majority of participants may get the status of international standards. For example, referring to the setting of standards by the Codex Alimentarius Commission, it was argued that standards were not adopted by consensus but by (often narrow) majority vote. This raises the question as to whether it is appropriate to request countries to develop domestic SPS measures on the basis of international standards which have been adopted by a slight majority only and, therefore, are not truly international in nature. However, according to another participant, there had been only two cases in the Codex Alimentarius Commission where a decision was taken based on vote (rather than consensus).

It was pointed out that developing countries have repeatedly expressed their concern about the way in which international standards are developed and approved, pointing out how limited their participation is from the point of view of both number and effectiveness. As a consequence of the inadequacy of the process, international standards are often inappropriate to be used as a basis for technical regulations in developing countries and those countries face problems when they have to meet regulations in the importing markets developed on the basis of international standards. In relation to the question of developing countries lowering their domestic standards, one of the experts argued that in certain cases developing countries would not favour the lowering of standards since it would depress market demand for their products. Harmonisation to meet international standards was considered important for developing countries wishing to get access to export markets on food and agricultural commodities.

Developing countries have also pointed out that standards formulation procedures vary among international standard-setting organizations, therefore, an initial step towards the establishment of a more coherent, effective and transparent system of international standardization would be the harmonization of the procedures. A second step would be to restate the principle that consensus should be pursued throughout the different phases of standard development and approval and that the presence of countries from different geographical regions and at different levels of development should be ensured.

As a result of the 1997 review of the TBT Agreement, some suggestions were put forward to eliminate or minimize these problems. In particular it was suggested to include in the exchange of information that member countries provide evidence about the difficulties that countries face in relation with international standards, to encourage international standardizing bodies to follow the rules spelt out in the Code of Good Practice, and to invite them to a session of the TBT Committee in order to give information on issues of particular concern to member countries.

The meeting was informed that the TBT Committee therefore invited the international

standardizing bodies which have observer status in the Committee[74] to give information on questions related to (i) membership and meetings (e.g. membership rules and relevant fees, working languages, venue of meetings, length of the process); (ii) transparency procedures (e.g. publications or notifications of draft standards, availability of work programmes); (iii) openness in drawing up programmes (e.g. responsive to the needs of the market and regulators, and reflection of trade priorities); (iv) procedures for comments and decision making (e.g. percentage of standards developed by consensus and the definition of consensus, processes to reconcile conflicting opinions, whether and how account is taken of the special problems of developing countries); (v) application of adopted standards, and (vi) coordination and cooperation with other bodies at the international level. The information session was held in November 1998. However, WTO members' participation in the session, and in particular developing members' participation, was quite limited. While the session was meant to be an occasion for a frank and open exchange of views between the international standardizing bodies and WTO member countries - where even specific cases and problems could be discussed - developing countries asked a limited number of questions and were unable to link their concerns about international standardization activities with specific examples where they felt that standards had not been developed in a fully transparent and fair manner or where their opinions had not been taken into due account. This may be due to the lack of appropriate linkages between national standardization bodies and WTO representatives. Developing countries may, therefore, consider to make the necessary efforts to strengthen these links, especially because the TBT Committee will discuss in one of its 1999 meetings the information provided by the standardizing bodies during the November 1998 session.

The EC has recently suggested that if international standards are to play the role assigned to them be the TBT and SPS Agreements, the international standardization bodies should remain accountable to the entire range of interested parties, and should achieve a high degree of effectiveness. The EC has spelled out some rules in this regard[75] and has suggested the establishment of some kind of formal code of procedures for observance by international bodies, along the line of the Code of Good Practice. The United States has stressed that international standardizing bodies should have established procedures to ensure that all interested parties have adequate notice, time and opportunity to provide input in the development of standards. It has also suggested that the TBT Committee articulate a set of principles and procedures for international standardizing bodies to follow.

Other ideas were informally discussed in 1997 in the framework of the TBT review. Considering that one of the main problems faced by developing countries in the international standard setting process is their inability to attend a large number of meetings spread around the world, it was suggested to increase the use of information technology, such as e-mail and Internet. Several meetings could be replaced by exchanges of opinions and comments by electronic means. Meetings could be held in different developing regions. This would facilitate the participation of the countries of the region and increase the interest for standard setting activities in developing

[74] FAO, IEC, ISO, OECD, OIE, UNECE, OIML, ITU, WHO and the Codex Alimentarius Commission

[75] Openness should be provided in the drawing up of programmes and in the approval of standards so as to ensure reconciliation of conflicting opinions. The work programme of international standardizing bodies should reflect trade priorities; up-to-date international standards should be delivered in due time; and the activities of international standardizing bodies and the standards they produce need to be coherent both internally and with other bodies, and kept up to date.

countries. Simultaneous interpretation during the meetings and translation of key documents into WTO official languages would also enhance the effectiveness of developing countries participation in the international standard-setting process. However, funds should be made available to allow developing countries to make use of information technology and to assume chairmanship's responsibility for the development of specific standards of interest to them.

In the framework of the triennial review of the SPS Agreement, it was pointed out that the process of international standards setting is becoming increasingly politicized, with the inclusion of a large number of non-traditional stakeholders. This trend makes the adoption of standards more complex and time-consuming and implies that considerations of non scientific nature may play a role. Some developed and developing countries have stressed in the SPS Committee the principle that domestic and international SPS measures must be based on science as a precondition for an effective implementation of the Agreement. While this principle may help prevent the introduction of protectionist measures, developing countries have to be ready to demonstrate the scientific soundness of their own SPS measures, also through carrying out risk assessments, and, eventually, challenge the scientific bases of importing countries' SPS measures.

Several participants commented on the role of economic considerations in the discussion on standards. One of the experts stressed that, besides using scientific evidence in setting standards, the economic impact of standards on certain traded products must also be analysed. Questions to be asked include: what is the cost of producing an export quality product, i.e. of meeting the standard? What is the effect on the importing country's market if standards will segment it from the world market? Who will bear the costs of adjusting production to standards and regulations of the importing country? Several experts agreed that the economic impact also has to be considered, in addition to sound scientific evidence and analysis. One participant cited a case where the German government had submitted a notification on a technical measure applying to certain chemical additives. He argued that if and when this will go through, it could virtually keep out all imports originating from developing countries, accounting for US$ 100 billion, which could have an enormous trade/economic impact. Another expert added that economic considerations are already in the discussions, at least in the developed countries' regulatory bodies.

It does not seem, though, that the SPS agreement allows to take into account economic considerations. This is one of the areas which could be discussed in the future by the SPS Committee. In this context, in particular regarding human health, one of the experts mentioned that it is important to keep in mind that it is consumers and not governments who make the decision on whether to buy certain goods. Many of the purchasing habits of large supermarket supply chains (such as strict requirements in terms of quality and safety of supply) are driven by consumer concerns about health. One obstacle which has been observed in developing countries is the lack of transparency where governments often make decisions without consulting consumers or industry.

On the other hand, as one expert pointed out, there are also very high costs often not considered by economists, which mainly relate to safety aspects in food. From this point of view, money spent on standards could be a good investment since appropriate health measures may imply a reduction in other public expenses, such as public health..

It was pointed out that the SPS agreement recognizes that regions within a country may be free

of pests or diseases existing elsewhere within the same country; however, the burden of proof is on the exporting country concerned. This poses a particular problem for developing countries, especially for those trying to access the developed markets for processed agricultural commodities. In this context, an example of Brazilian livestock exporters to the EU was given where imports were refused although that particular region of the country was free of the specific animal disease.

It was noted that the SPS Agreement has been successful in giving national authorities a framework for their SPS measures as they develop them; and, in some cases, it has helped to resolve trade conflicts.

**Risk assessment**

One of the experts thought that the risk assessment process poses a major problem for developing countries given that they often do not have the corresponding law (or it is outdated) and lack scientific knowledge to make the appropriate scientific decisions. Developing countries face two main problems: they may be asked to make a risk assessment of their own measures (if they are stricter than international standards); and they may need to challenge the risk assessment carried out by the importing countries as the scientific basis of their measures. Developing countries usually lack infrastructure and training personnel necessary to carry out the risk assessment. Finally, there is little coordination among the existing bodies at the domestic level which makes a coherent approach more difficult.
Since the drafting and entry into force of the Agreement, a substantial amount of work on risk assessment has been undertaken by the relevant international organizations. Countries are urged to use risk assessment techniques developed by these organizations.

**Conformity assessment procedures**

The TBT and the SPS Agreements encourage countries to accept the results of conformity assessment procedures carried out in other countries, even if the procedures used are different from their own. However, as one of the participants pointed out, in most cases foreign firms are requested to prove conformity to importing country standards and regulations according to the importing country procedures, with the involvement of third-party bodies located in that country. Multiple testing and conformity assessment procedures may have a restrictive effect on trade and contrast with the principle "one standard, one test". According to the TBT Agreement, compliance by the relevant conformity assessment bodies in the exporting countries with guides and recommendations issued by international standardizing bodies is regarded as an indication of the technical competence of such bodies. As a result of the 1997 review of the TBT Agreement, the WTO secretariat has been requested to compile a list of relevant guides, while countries have been requested to exchange information on the use of such guides. A study will be prepared on the contribution of international guides to solving the problems of multiple certification. The United States have stressed that an effective market surveillance system and national laws on manufacturers' liability may facilitate the acceptance of supplier's declaration of conformity. Conformity assessment is an area where technical cooperation is particularly needed, since the upgrading of the human and technical resources of conformity assessment bodies in developing countries could greatly contribute to the acceptability of the tests carried out by them.

**Mutual Recognition Agreements**

Several experts commented on the topic of mutual recognition agreements (MRAs). The SPS and the TBT Agreements encourage members to enter into MRAs. MRAs can take several forms. They can be limited to testing methods, they can cover conformity assessment certificates, or they can be full-fledged and include the standards themselves. MRAs of the first type entail only limited savings in international trade, but play an important role in building up confidence between laboratories in different countries and usually represent a necessary step towards the conclusion of broader MRAs. MRAs on conformity assessment can reduce transaction costs by avoiding duplicative testing and can also reduce discrimination against foreign products. MRAs of the third type entail that parties consider their domestic requirements as equivalent, with the consequence that a good which can be legally sold in one country may be legally sold in the other(s).

One of the participants pointed out that the costs related to entering into mutual recognition agreements (especially of conformity assessment certificates) are very high and therefore pose a particular problem for developing countries. For example, the United States and the EC have recently concluded two MRAs, one which covers six industry sectors and the other which is of relevance for a number of agricultural products, including red meat, dairy products, eggs, fish products and pet food. Both MRAs are expected to result in savings equivalent to several points reduction in tariff. In 1997, the EC concluded MRAs with Australia and New Zealand on a number of industrial products, while in October 1998 concluded a MRA with Canada covering a range of industrial sectors. Similar negotiations are going on between Japan and the EC. In the framework of APEC, the "Action Agenda" agreed in 1995 included the goal of concluding several MRAs, and a pilot project on food has produced the APEC Mutual Recognition Agreement for Food and Food Products. ASEAN also has announced MRAs as a goal.

Mutual Recognition Agreements require mutual understanding and mutual confidence. The present experience is that MRAs have been negotiated between countries at similar level of development and have not involved developing countries. However, this was one of the key question raised in the session: what happens to developing countries that may get left out of mutual recognition agreements? If MRAs end up forming exclusive arrangements between participants, they may reduce global welfare instead of increasing it. The interest for developing countries to get involved in MRAs is twofold: to avoid the risk to be left out (while expanding trading opportunities between parties, MRAs would relatively impede trade with non-participants); and to learn from other countries, since MRAs imply an intensive exchange of information and close contacts between relevant authorities. However, the costs in terms of the negotiation and implementation of such arrangements need to be taken into account. Moreover, the TBT and SPS Agreements reinforce the notion of unilateral recognition of equivalency, rather than the need for reciprocal bilateral agreements. The TBT Committee has decided to address the problems associated with MRAs and may draft guidelines on MRAs.

The following measures could enhance the beneficial role that MRAs can play in international trade: MRAs should be developed in a transparent way (i.e., the intention of two or more countries to negotiate a MRA should to be notified to the SPS or the TBT Committee, the draft MRA should be notified for comments, the adopted text should also be notified); they should be

open to other parties who wish to join them at a later stage; they should contain flexible rules of origin (i.e., the benefits of a MRA should be granted to all products which pass through the conformity assessment procedures of the contracting parties and not only to products originating in those countries).

**Equivalency**

Even though the TBT and SPS Agreements encourage countries to give positive consideration to accepting as equivalent measures of other countries[76], the experience of MRAs, as already mentioned, has been so far mainly limited to the recognition of conformity assessment results. The recognition of the regulations themselves is at present taking place in very special cases, like among the member countries of the European Union[77] and, more recently, between Australia and New Zealand under the 1996 Trans Tasman Mutual Recognition Agreement (TTMRA) [78]. TTMRA, which applies in the field of motor vehicles, was developed in recognition of the fact that trade and commercial transactions could be better facilitated by an equivalent approach. This approach helps avoid the potential for over regulation arising from harmonization efforts where divergent objectives and approaches can lead to more trade restrictive outcomes than necessary. At the same time the arrangement takes into account the fact that equivalency may not always be a possible solution where the circumstances applicable in one country in relation to a product are not materially similar to those in another. In New Zealand, equivalency has also been provided in some cases by referencing national standards from other countries as means of compliance for regulations. In the food sector, Australia and New Zealand signed in December 1996 an agreement to establish a system for the development of joint food standards to operate concurrently in both countries. The system is expected to enter into force by the end of 1999.

Equivalency may be the best option when harmonization of standards is not desirable or when international standards are lacking or are inappropriate. According to one of the experts, it is mainly an issue for developed countries. By contrast, another expert felt that it was important for developing countries since they could not meet the requirements put on them by developed countries. Equivalency would probably represent the best option for developing countries until their participation in international standard setting activities becomes satisfactory from a quantitative and qualitative point of view. Equivalency at regional level, in the framework of regional or sub-regional agreements, is easier to achieve. Developing countries may therefore have an interest in analyzing the possibility to include reference to equivalency of regulations in their regional and sub-regional agreements.

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[76] In the TBT Agreement, equivalency is foreseen for technical regulations, while a similar rule does not exist for standards. New Zealand has recently proposed to include such a rule in the Code of Good Practice.

[77] The concept of mutual recognition was made explicit in the "Cassis de Dijon" decision by the European Court of Justice in 1979. The decision explicitly stated that nations were free to maintain and enforce their own regulations for products produced within their jurisdiction but that they could not legally prevent their citizens from consuming products that met the legal standards of another member country of the EC.

[78] The key principle of this arrangement is that a good which can be legally sold in one country may be legally sold in the other, without having to meet further sales-related regulatory requirements. In effect, differing Australian requirements relating to sale are recognized as equivalent to meet New Zealand objectives and vice-versa.

**Transparency and notification provisions**

Transparency is vital to make sure that SPS measures, technical regulations and standards are sound and do not have an unnecessary detrimental impact on international trade. However, variations in the quality and content of the information provided by countries in their notifications, short comment periods, delays in responding to requests for documentation, absence, at times, of due consideration for the comments provided by other Members are recurrent problems limiting the effective implementation of the transparency provisions.

Some measures may be envisaged to improve transparency: first of all, Members shall allow a reasonable interval between the publication of a SPS measure, a technical regulation or a standard and its entry into force. This time frame is crucial for producers to adapt their products to the new requirements. Secondly, an adequate time frame has to be provided between the notification of a proposed measure and its adoption, since this allows other Members to provide comments on the draft. Language may be an obstacle to the effective capacity of countries to comment on draft regulations. Therefore, at least a summary of the proposed measure in one of the official languages of the WTO should be made available by the notifying country. At times, even when countries are able to provide comments on the draft, those comments are not taken in due account by the notifying country and the whole exercise becomes worthless. A possible solution to this problem could be that when comments and suggestions are not reflected in the final text of the measure, the notifying country has to explain the reason why.

As a means to improve the efficiency and the speed of the notification procedures, some countries, both developed and developing, have proposed to rely on the electronic exchange of information. While electronic means may in fact improve the system, it should be kept in mind that several developing countries still have limited access to INTERNET and that many enquiry points in developing countries do not have well-functioning e-mail systems. Therefore, not all countries would benefit from a switch from hard copy notification to electronic notification, therefore a possible solution could be to make the two systems complementary.

The SPS and TBT Committees represent privileged fora where countries can bring the difficulties they experience in the field of sanitary and phytosanitary measures, technical regulations and standards to the attention of other countries and challenge specific measures proposed or already implemented by them. Developing countries are, unfortunately, making limited use of these fora, as well as of the other transparency provisions included in the Agreements. This may be due to the fact that the links between public authorities and private sector are not tight, therefore public authorities are not fully aware of the difficulties that exporters face, while the private sector does not have appropriate channels to bring the difficulties it experiences to the attention of the competent authorities. Developing countries may, therefore, consider to make the necessary efforts to strengthen these links.

**Special and differential treatment and technical cooperation**

Both Agreements include specific Articles (Article 10 for the SPS and Article 12 for the TBT Agreement) on special and differential treatment (S&D) for developing countries and LDCs. However, the provisions of these articles have not yet been converted in specific obligations. In

order for these Articles to play a more effective role, some mechanisms could be used: for instance, when a SPS measure or a technical regulation is proved to create problems for several developing countries, the country which has introduced it could be request to reconsider it. If the country confirms the soundness of the measure, it may be requested to provide technical cooperation to those developing countries which face particular problems with that measure in order to help them to comply with it. Longer time frame for compliance with new SPS measures or technical regulations should be granted to developing countries for products of special interest to them.

Technical cooperation could be extended to cover capacity building of the officials in developing countries in charge of the enquiry points, since transparency is proving to be a key issue for the correct implementation of the Agreements. Technical cooperation should also be extended to professionals working in laboratories and certification bodies in developing countries, since their technical qualification is a precondition for the international acceptance of certificates issued by them and represents the basis for the negotiation of MRAs. Since LDCs are approaching the end of the transitional period granted to them under the provisions of the SPS Agreement (31 December 1999), special efforts should be made to enable them to comply with the requirements of the Agreement.

**Further negotiations**

While technical, health and safety standards and regulations are regarded as legitimate tools that countries may resort to, the risk that they become, at least in some cases, new tools for disguised non-tariff protection is growing. Consideration needs to be given to ways of strengthening WTO disciplines to prevent a protectionist abuse of standards and regulations, including through the TBT and SPS Agreements.

In relation to further negotiations on the subject, it was stressed that it would be important for developing countries to clearly formulate their position. For example, whether they wished substantive modifications in the rules, or whether they had specific concerns about standards, administrative procedures, conformity assessment etc. The problems could not simply be solved by providing technical assistance to developing countries to comply with the agreements, since technical cooperation is not a panacea and cannot replace the removal of trade barriers.

## Priority areas for further research

- Identification of standards and regulations which have been more trade restrictive than necessary;

- Development of precise criteria to define international standards and international standardizing organizations;

- Analysis of mechanisms to facilitate the international recognition of tests and conformity assessment certificates issued by developing country bodies;

- Mutual recognition agreements. The main questions to examine are transparency; third party accession; rules of origin; and situation of the non-parties;

- Experiences with equivalency of standards, including in the framework of regional and sub-regional agreements;

- Questions related to the implementation of the Code of Good Practice for the Preparation, Adoption and Application of Standards.

## INDUSTRIAL TARIFFS

The discussion in the session of the Ad Hoc expert group meeting focussing on industrial tariffs raised the following issues of concern, which will be discussed in the following sections:

- Tariff peaks and tariff escalation;
- Types of formula to be used to cut tariffs;
- Specific and nuisance rates;
- Simplification and harmonization of tariff structures;
- Approaches to future negotiations.

## Background

Tariffs have been at the center of negotiations since the inception of the GATT system in 1947 and continued to be an important subject during the UR negotiations. One of the most important outcomes of the UR was a substantial increase in bindings (fixing maximum tariff rates) on MFN rates by developing countries. While the overall percentage of developed countries' bound rates increased from 96 to 99 per cent, the developing countries' share of bound rates increased from 14 to 59 per cent (and that of transition economies from 74 to 96%). The MFN principle requires that tariff rates negotiated between particular trading partners are "concessions" available to all WTO members (except for regional preferential agreements). These MFN rates are bound and can only be increased through renegotiation under Article XXVIII of GATT; therefore, they provide secure and stable market access.

Tariff levels were also further cut as a result of the UR negotiations[79]: the average trade-weighted tariff rate on all industrial products was reduced by 38 per cent and the tariffs on imports from developing countries were reduced by 34 per cent. These tariff cuts even exceeded those achieved in both the Kennedy and Tokyo Rounds.[80] The implementation of tariff reductions is scheduled to take place during a transitional period of 5 years (some developing countries 10 years).

Since the end of the UR, sectoral negotiations to further reduce tariffs continue. For example, at the WTO Ministerial Meeting in Singapore, the Declaration on Trade in Information Technology Products (ITA), which reduces tariffs to zero on a number of information technology-related products (computers, telecommunications equipment, semiconductors, semiconductor manufacturing equipment, software, and scientific instruments) was signed by 44 participants, accounting for 93% of world trade in information technology products. Since then, several Members have expressed interest in joining the Declaration. Currently discussions are held to expand the ITA by a new range of products. Furthermore, 22 Members agreed recently on "zero for zero" commitments on a range of pharmaceutical products.

Besides these sectoral negotiations, tariff reductions are being implemented in the context of

[79] The seven rounds of GATT talks prior to the Uruguay Round had already succeeded in lowering the average trade-weighted MFN tariff rates on industrial goods from 40 per cent to 6 per cent (OECD, 1997).

[80] However, it should be noted, that the initial rates were much lower than at previous rounds, hence the economic impact of the previous cuts was much bigger than that of the UR tariff cuts.

regional preferential trade agreements. For example, APEC members have identified 15 products for early voluntary liberalization (including agricultural products); many other efforts have been made to unilaterally reduce MFN tariff rates in Latin America, Europe, and Asia. It has been argued that the continued expansion of preferential agreements may lead to trade diversion (and hence cause concern for MFN trading partners).

Despite these improvements in market access conditions, tariffs remain high in some sectors such as textiles and clothing, and above average in others such as steel, footwear, leather, travel goods and transport equipment, automobiles, and energy products. Tariff escalation, which provides additional protection to domestic industries, still widely exists among the developed countries.

Further negotiations to reduce industrial tariffs are not part of the built-in agenda, but they have been proposed for inclusion in the future negotiating agenda, mainly in sectoral negotiations and "across-the-board" tariff negotiations.

## Key issues from the development perspective

Although the WTO built-in agenda does not foresee new negotiations on industrial tariffs, experts agreed that the continuing importance of the subject makes it likely that WTO Members will include it on the future negotiation agenda. According to a study carried out by one of the experts, a 50% reduction in industrial tariffs would increase global welfare gains by US$ 270 billion per year, which is equivalent to estimated gains resulting from all URAs. The importance of manufacturing exports to developing countries was stressed. Whereas in 1980, only 20% of exports were manufactured goods, today they account for about two thirds of developing countries' exports. Hence, tariffs on industrial products are an important issue to these countries.

Tariffs are still high in certain sectors (textiles and clothing) and above average in others (leather, rubber footwear, travel goods and transport equipment as well as food industry products, steel, travel goods, or transport equipment (esp. automobiles)). Many of these sectors are of export interest to developing counties. Particular problems relate to tariff peaks and tariff escalation which are clearly an issue for further negotiations (see below).

During the discussion, one of the experts pointed out that it would be insufficient to only address tariff liberalisation in OECD markets, where tariffs are already fairly low. Rather, developing countries face more uncertainty and higher protection in other (e.g. neighbouring) developing countries' markets which increasingly become more important export markets and which will potentially be the most rapidly growing markets in the future.

Another issue that was discussed is the still wide gap between applied rates and bound tariff rates incorporated in the WTO schedules of concessions.[81] Since countries are allowed to raise applied

[81] In particular, many developing countries have unilaterally lowered their MFN-rates as part of structural adjustment programmes they were undergoing during the past 10 or 20 years.

rates up to the bound level, large gaps can create uncertainty to importers. This affects the reliability of tariffs for traders and investors. Hence, these "binding overhangs" need to be reduced to improve market credibility and provide continuous market access.

In general, it was emphasized that all tariffs have an anti-export bias reducing demand for imports, for foreign currency etc.

One of the experts reminded the meeting of the role regional economic integration efforts play in the discussion on tariff liberalization. For example, in the case of Latin America, a number of regional trade liberalization agreement have been concluded so that by the year 2002 86% of trade within the region (which is also the principal market for the majority of countries in the region) will be tariff-free. Hence, foreseeable gains from these regional negotiation efforts exceed those that would be attained from negotiations at the global level.

Finally, although tariff rates overall have been reduced substantially, in some developing countries they remain an important source of government income. These countries would need further advice on how to reduce their dependence on customs tariffs as a prime source of budget incomes.

**Tariff peaks and tariff escalation**

Although the reduction of tariff peaks and tariff escalation was one of the objectives of the UR, several participants pointed to the fact that average tariff numbers conceal substantial tariff peaks and tariff escalation which remain high. They affect largely products of export interest to developing countries, such as textiles and clothing, leather and footwear, travel goods, or certain food products.[82] Tariff peaks and escalation can be found in both developed and developing countries. It was noted that this was not a purely North-South issue but that many developing countries could benefit from major market access gains in other developing countries, especially those with rapidly growing markets.

On the other hand, one of the participants pointed to a joint UNCTAD/WTO study on tariff peaks and tariff escalation which found high tariff rates in sectors of export interest to developing countries in both developed and developing countries. Despite the GSP, even LDCs face high tariffs because some countries, such as the US or Canada exclude textiles, clothing and footwear from their GSP schemes.

With respect to the potential global welfare gains resulting from the lowering of tariffs, one of the experts referred to a number of studies carried out by the EC which found that by lowering tariff peaks (to 5-15%) and setting a low uniform tariff, almost all the potential welfare gains could be achieved without significant revenue losses for developing countries. In addition, this would lower administrative costs and remove incentives for contraband thus increasing imports and revenues further.

[82] For example, in the Quad countries tariff peaks of over 20% are found in textiles and clothing and the footwear sectors.

In the UR negotiations, tariff peaks were defined as tariff rates above 15%. However, given the overall low level of industrial tariffs, and in order to take into account the tariff dispersion, it has been argued that in future negotiations, tariff peaks could also be defined as (for example) higher than three times the average tariff.

The UR was not able to eliminate tariff escalation (i.e. an increase/escalation of tariffs at later stages of processing implying a higher effective rate of protection). By contrast, after the full implementation of the UR tariff negotiations, tariffs on processed goods will be eight times higher than those on primary products (compared to four times higher before the UR). Several experts confirmed that tariff escalation is a major obstacle to promoting local processing in exporting countries. If imposed by developed countries, tariff escalation poses a particular problem for developing countries which try to foster domestic manufacturing or any kind of further processing of raw materials at the domestic level, because these products would now be at a higher level of tariff protection than the previously exported primary products. Hence, by creating a bias towards trade of primary goods, tariff escalation clearly negatively effects the industrialization efforts of developing countries and should thus be targeted in future negotiations.

**Tariff cutting formula**

In the UR, three different approaches were used to reduce tariffs (in order of importance): (1) the request-and-offer approach, where negotiations were carried out on a (mainly) bilateral level between major trading partners and then extended to other members via the MFN principle; the basis was an overall target of 30% reduction; (2) the zero-for-zero approach, which was mainly used to reduce tariffs in particular sectors; and (3) the formula approach, which aimed to cut tariffs up to 50% (on products facing tariffs above 15% at the beginning of the UR) and up to 33% (on tariffs lower than 15% at the beginning of the UR).

The persistence of tariff peaks can partly be explained by the use of the request-and-offer approach as the dominant method for reducing tariffs. First, many of the products of export interest to developing countries were not considered sufficiently in the negotiations. Since developing countries were not required to make reciprocal offers, or since they were not participating due to the small size of their markets, certain products of export interest to them (but not to developed countries) were simply left out or had less reductions. Second, whereas a tariff-cutting formula would have targeted certain sensitive (i.e. highly protected) sectors more than others, under the simple request-and-offer approach lesser commitments were made.

Based on this, future negotiations need to find an optimal mix of approaches to further reductions of industrial tariffs among requests-offers, various tariff-harmonization formulas and the identification of specific sectors of particular interest to developing countries. One of the participants strongly recommended the use of the "Swiss" tariff harmonization formula to cut tariffs in the next round. The Swiss formula, which had already been used in the Tokyo Round, has proved to be the most successful in cutting high tariff rates. By contrast, he argued that the zero-for-zero approach increases effective protection and does not simplify the paperwork (as is often argued). Developing countries are thus strongly urged to press for a tariff harmonization formula in the next round. While developing countries would naturally wish to preserve preferential treatment, they should not block the process of cutting MFN rates, which are bound,

whereas autonomous granted preferences can be easily taken away.

**Elimination of specific and nuisance tariffs**

Specific duties are duties fixed as a value for a physical unit (e.g. US$3 per kilo), as compared to their *ad valorem* value. As a result, they tend to conceal high *ad valorem* equivalents, thus affording increased real protection against low-cost imports (such as those from many developing countries) as well as against those imported products whose prices have declined as a consequence of currency devaluation (eg. in SE Asia). Some specific rates are combined with *ad valorem* rates, either as a sum or as alternatives, which causes even a greater degree of confusion. The conversion of specific duties into *ad valorem* rates would be another topic in further negotiations.

Nuisance duties are usually duties at very low levels (e.g. 2% or less) which create administrative (i.e. collection) costs exceeding the actual value of the tariff. Therefore, it has been suggested by various Members to include the elimination of these duties in future negotiations.

**Future negotiations**

Two major approaches have been discussed for dealing with industrial tariffs in the future round: (1) sectoral negotiations (see for example the "zero-for-zero" and chemical harmonization initiatives in the UR and the ITA; or the 15 goods and services sectors for which liberalization has been proposed within APEC countries); and (2) "across-the-board" tariff negotiations.

From a development perspective, a full-fledged, "across-the-board" approach to negotiations on industrial tariffs would be preferable since it increases the possibilities for mutually beneficial trade-offs. Such an approach would allow countries to advance and defend their respective interests in any industrial product, as opposed to only sectoral tariff negotiations (which are likely to be promoted by some developed countries). In fact, there may a be combination of both approaches, but a balance between sectoral tariff reductions should be secured. Sectorial negotiations should not be self-standing since they would not allow for reciprocal liberalization; therefore, sectoral discussions should be linked to a broad liberalization package. According to one of the experts, a sectoral approach to future negotiations on industrial tariffs was not recommended. This would lead to a situation where "easy" sectors would be treated first and "difficult" ones would be left to the end and be hard to solve or left for later negotiations. As noted above, participants considered that the across-the-board formula should contain a harmonization element.

One participant suggested that negotiation efforts should not prevent developing countries from carrying out their own autonomous liberalisation and benefit from increased welfare and resource allocation. Most of the gains from tariff reductions will benefit developing countries, especially if this is combined with rapid growth rates in their markets. Furthermore, several experts mentioned that this would provide countries with important bargaining chips they can use in future negotiations given that tariff concessions remain a traditional negotiating instrument in multilateral trade negotiations.

In this context, it is also important for developing countries to shift the source of public revenue away from border measures (i.e. tariffs) which is currently a constraint for these countries to cut tariffs.

By contrast, another expert stressed that developing countries had already lowered their tariffs substantially in the previous round and focus in the next round should thus be on tariff peaks prevalent in developed countries.

## Priority areas for further research

- Analysis of dynamic sectors in international trade and analysis of the incidence of market access barriers (including tariffs) in the main importing markets. Analysis of underlying factors for persistent protectionism in several specific sectors in developed countries;
- Detailed studies of tariff peaks and escalation by sector and subsector;
- Analysis of how various tariff formulas would reduce tariff peaks and tariff escalation, and the subsequent trade impact on various countries;
- Examination of the interest of developing countries in the sectors singled out for liberalization by APEC and the developed countries;
- Identification of sectors for which the sectoral approach would be beneficial to developing countries;
- Analysis of how various scenarios of tariff negotiations would affect GSP schemes and regional trading arrangements of developing countries;
- Analysis of ways and means to simplify tariff regimes.

## THE TRIPs AGREEMENT

At the Ad Hoc Expert Group meeting, issues related to the built-in agenda as well as problems related to the implementation of the TRIPS Agreement were at the center of the debate in the session on the TRIPs Agreement. These include:

- Compliance with the Agreement; this is particularly difficult for developing countries, since most of them have to start work on intellectual property rights from scratch and thus lack the necessary human resources and expertise;
- Transfer and diffusion of technology has not yet materialized;
- Technical cooperation (provided for in Article 67);
- Future negotiations.

## Background

During the UR negotiations, countries committed themselves to adopting a set of universal standards of protection of intellectual property rights (IPRs). The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) provides, for the first time, a comprehensive protection of IPRs at the international level. It embraces the basic WIPO Conventions on intellectual property[83] and adds principles and disciplines of the international trade system, such as the most-favoured-nation principle and national treatment of foreign nationals. It also calls for substantial strengthening of administrative and enforcement procedures. The various IPRs covered by the TRIPS agreement are: patents, copyrights and related rights, trademarks, geographical indications, industrial designs, layout designs of integrated circuits, breeeders' rights, trade secrets and utility models. The Agreement came into effect on January 1, 1995. However, all countries were granted a one-year transitional period. Developing countries and, under certain conditions, countries with economies in transition were allowed to delay complying with any or all of the Agreement's obligations for up to five years from the date into force of the Agreement (i.e. until December 31, 1999), while the least-developed countries may delay implementation for up to 11 years (i.e. until December 31, 2005) and can request the Council for TRIPS to extend this term.[84]

Article 71.1 of the TRIPS Agreement calls for a review of the implementation of the Agreement after the expiration of the transitional period (1 January 2000) and at two-yearly intervals thereafter. The Council for TRIPs may also undertake reviews when new developments warrant modifications of the Agreement. According to TRIPs' built-in agenda, negotiations will have to

[83] The TRIPS Agreement incorporates most of the provisions of the Paris, Berne, Rome and Washington Conventions, which have both been developed under the auspices of WIPO and are administered by this organization.

[84] Since the beginning of 1996, the Council for TRIPS has reviewed legislation of developed country members in the areas of copyrights, trademarks, geographical indications, industrial designs, patents, layout-designs of integrated circuits, undisclosed information, the control of anti-competitive practices in contractual licences, and (since 1997) in the area of enforcement. Other notifications sent by Members and reviewed by the Council include those related to exceptions to the MFN rule and the establishment of contact points for the purposes of cooperating with each other with a view to eliminating international trade in goods infringing intellectual property rights. By the end of 1998, 87 members had notified such contact points.

take place over the development of a multilateral system of registration of geographical indications of wines, and eventually spirits, to be protected by participating countries (Article 24.2). In 1999 a review is mandated regarding exceptions to patentability in biotechnology and systems of protection for plant varieties (Article 27.3(b)). The Agreement also requires the TRIPS Council to study the scope and modalities of complaints to be allowed against indirect violations of IPRs under the dispute settlement mechanism (Article 64.3).

The links between intellectual property protection and other policy areas, such as investment and competition are issues under consideration that will contribute to the formulation of the future multilateral agenda. The relationship between these areas and intellectual property is a key point on the agenda of the WTO working groups dealing with the subjects. Furthermore, in December 1998, the Council for TRIPs agreed to take up the matter of trade facilitation, as requested by the Council of Trade in Goods. The WTO Secretariat produced in January 1999 a note on this issue. The note considers, first, the general aims of intellectual property protection as contained in the TRIPs Agreement, second, its provisions on enforcement of intellectual property, and finally, its provision on international cooperation to eliminate trade in goods infringing IPRs. A member country contributed an informal paper stressing that successful implementation of the border enforcement provisions and of the provisions related to international cooperation of the TRIPs Agreement could only be enhanced through measures to simplify and modernize customs procedures and to activate international cooperation within an overall framework of trade facilitation.

The links between electronic commerce and IPRs are also getting increasing attention. The work programme on e-commerce adopted by the General Council in September 1998 requests the Council for TRIPS to examine and report (by July 1999) on the intellectual property issues arising in connection with e-commerce (e.g. the protection and enforcement of copyrights and trademarks, new technologies and access to technology). At its meeting in December 1998, the Council started informal discussions on this matter. A proposal has been put forward to consider the incorporation of the new WIPO copyright treaties and the substance of those treaties into the TRIPs agreement, in the same way as some other WIPO treaties are already incorporated. The WTO Secretariat produced a note on the links between IPRs and electronic commerce in February 1999. WIPO has established a work programme in this area. The work programme is in evolution since developments concerning e-commerce are both radical and rapid. According to WIPO, electronic commerce is affecting, or will affect, every aspect of the protection and exploitation of intellectual property (see Chapter on electronic commerce).

## Key issues from the development perspective

### Experience with the implementation of the Agreement

The transitional period granted to developing countries to implement the Agreement is expiring at the end of 1999. Developing countries are introducing massive changes in their legislation to comply with all the obligations contained in the Agreement and most of them are still quite far from finalizing this process. As one of the experts pointed out, a number of IPRs covered by the Agreement are completely new for most developing countries so that they have to establish new legislation on these matters. Furthermore, the implementation of a discipline in these areas requires

a considerable amount of investment and time related to the design and drafting of the new legislation and the establishment of the institutional infrastructure. The TRIPS agreement requires also many changes and adjustments in terms of juridical and customs procedures that developing countries need to introduce; therefore, they have to quickly develop expertise, starting from the very beginning. Problems related to enforcement are particularly serious, especially the training of administrative, judicial, police and custom personnel. Moreover, in a number of cases, developing countries have been asked to go beyond the minimum standards provided for in the Agreement and to confer levels of protection higher than those required under the Agreement. This has made it even more difficult for them to complete a substantial part of the reform.

The TRIPS Agreement is expected to engender positive impacts in developing countries - including enhanced market access, more local R&D, increasing foreign direct investment and technology transfer - as well as negative impacts, especially in the short-to-medium-term, including higher prices for protected products and restrictions in developing production capabilities through imitation.

Even though several studies have been carried out on the impact of the TRIPs Agreement[85], it was pointed out that empirical evidence is still limited. In particular, it has not been demonstrated that strengthening IP protection is leading to transfer and diffusion of technology, which are among the goals of the Agreement[86]. On the other hand, one expert reminded the audience that it would be too early to be looking for results given that developing countries do not have to fully comply with the TRIPs agreement until the year 2000.

Article 66.2 of the Agreement requires developed country Members to provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed countries. At its meeting in December 1998, the TRIPS Council agreed that information on how Article 66.2 is being implemented be circulated in an informal document of the TRIPS Council to all Members. The developed country Members were invited to supply information in response to this question. A developing country recently made a proposal in the WTO General Council aimed at a more effective implementation of the provisions relating to transfer of technology in the framework of the TRIPs Agreement. According to the proposal, the agreement may be reviewed to consider ways and means to operationalize the objective and principles in respect of transfer and dissemination of technology to developing countries, particularly the LDCs.

Another aspect that was mentioned during the meeting was that part of the debate, especially

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[85] See, for example, the UNCTAD study "The TRIPS Agreement and the Developing Countries", 1997, United Nations Publications Sales No. 96.II.D.10.

[86] Though it is recognized that IP rights are "private rights", the public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives, are also recognized in the Preamble of the Agreement. More specifically, Article 7 of the Agreement stresses that enforcement of IPRs 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. Article 8 states that Members may, in formulating or amending their national laws and regulations, adopt measures necessary to promote the public interest in sectors of vital importance to, inter alia, their technological development, provided that such measures are consistent with the provisions of the Agreement.

related to patents, is becoming very controversial. A recent study by the WHO, which was concerned with the public health implications of patents, has been challenged and strongly criticized by the multinational pharmaceutical industry, based on its own perception of the benefits that patents may bring about.

In light of these difficulties, one of the experts emphasized the need for technical and financial assistance to help developing countries fully implement the agreement. In this context, it was mentioned that WIPO is providing technical cooperation to developing countries and is in particular supporting the drafting of the necessary new legislation. On 1 January 1996, WTO and WIPO entered into an Agreement in order to enhance their existing cooperation in the field of technical cooperation in the area of intellectual property rights, in particular given that the general transition period for developing countries expires on 1 January 2000. By the end of 1998, 30 Members had expressed interest to participate in the initiative put forward by the two organizations. WIPO has also started a massive awareness-raising campaign in developing countries about the legal implication of the Agreement. A data-base on national laws and regulations in the field of property rights has been developed by this organization

**Built-in agenda**

Several comments were made in relation to the topics included in the TRIPs built-in agenda. It was reported that several developing countries had suggested to extend the high level of protection granted to wines and spirits to other products, such as (Basmati) rice and (Darjeeling) tea. As one expert pointed out, a number of developing countries see the scope for some important benefits under the TRIPS agreement from the extension of geographic indications into product areas of interest to them to facilitate the marketing worldwide of products with special characteristics due to their geographic location.

In the area of biotechnology, according to one of the experts, limited progress in substance can be expected during the course of 1999. The patentability of plants and animals seems to be highly controversial since it impinges on issues such as food security, sovereign rights over genetic resources, rights of indigenous peoples and local communities, and biosafety. The Council for TRIPs decided at its December 1998 meeting to proceed to an exchange of information on Article 27.3(b), as a first step in the review process. Member countries which were already under the obligation to apply Article 27.3(b) were invited to provide information on how they were addressing the issue of patent protection of plant and animal inventions and of protection of plant varieties in their national legislation. Other members were also invited to do so on a best endeavors basis. FAO, the Secretariat of the Convention on Biological Diversity and UPOV were invited to provide information on their activities of relevance. At March 1999, 14 countries, including the EC and its member countries, had provided information, as well as UPOV and the Secretariat of the Convention on Biological Diversity. However, several developing countries have underscored that the review is not a review of the implementation of Article 27.3(b) but is a review of the provision itself. It seems unlikely that the Council will agree on any significant steps regarding the provisions of Article 27.3(b) in 1999. However, the issue of patentability of plants and animals could be included in the first general review of the Agreement or in the next round of negotiations. The debate about the patentability of plants and animals embraces also the issue of the compatibility between the provisions of the TRIPs Agreement and those of the CBD Convention.

The third issue of the built-in Agenda - non-violation disputes - was discussed for the first time at the Council meeting of December 1998[87]. Since then, the Secretariat has provided a note on non-violation complaints and the TRIPs Agreement and a member country has contributed a paper. During the preliminary discussion, some developing and developed countries have expressed concerns about the use of the non-violation remedy in the context of the TRIPs Agreement. In their view, it would be unreasonable to let the moratorium expire at the end of the transitional period and undertake binding commitments without having examined a number of key issues.

**Future negotiations**

The best possible scenario for developing countries (and the one that most likely will materialize), as stressed by one of the experts, is that the Agreement is not reopened for negotiations and discussions remain limited to the built-in agenda. This scenario would give developing countries time to put their legislation in line with the TRIPs' obligations without having to address new facets of IP protection.

However, in case the Agreement were opened for review, a number of issues were proposed which could be of interest to developing countries: the protection of expression of folklore as recommended by the UNESCO model law of 1989; a clarification of the dispositions of Article 6 on parallel imports; the non-patentability of substances that exist in nature; the interface between IP protection and biodiversity; a clarification of the concept of novelty in order to avoid the patentability of knowledge that has been developed and used by indigenous local communities; the inclusion of exceptions to exclusive rights due to research needs, even for commercial purposes, in the patent chapter (Article 31) in connection with environmental and sound technologies (as proposed by India); and the use of the multilateral dispute settlement mechanism.

Another expert proposed that developing countries should go beyond the issue of intellectual property rights and look at issues relating to other property rights as well. These could include transportation, forests and other environmental issues related to trade where developing countries could benefit from improved property rights.

## Priority areas for further research

Limited empirical evidence is available at the moment on the impact of the TRIPs Agreement. The fact that developing countries are still benefitting from the transitional period, with the exception of some countries which have undertaken early implementation, makes the analysis of the actual or potential impacts of the Agreement even more difficult. However, research is most needed,

[87] A "non-violation" measure is one which, while it does not conflict with the provisions of the agreement, has the effect of nullifying or impairing a benefit ensured under the agreement. According to the terms of Article 64, recourse to non-violation complaints concerning IPRs will become available on 1 January 2000, unless there is a consensus among all WTO members to the contrary.

particularly on:

- The institutional, administrative and economic challenges that compliance with the Agreement poses for many developing countries and ways of dealing with them, including through means already foreseen in the Agreement (e.g. technical assistance; reenforcing legislation against anti-competitive practices; providing incentives to industries which need to convert their outputs in order, for example, to find alternatives to the production of goods which become patentable or to obtain licences from patent-holders);

- The best possible options for developing countries, meaning how to minimize the potential economic and social costs of the reinforced and expanded protection of intellectual property and how to benefit from it. In this framework, WIPO is going to start analytical work on the protection of folklore and indigenous knowledge;

- Effects of strengthening IP protection on transfer of technology, local innovation and foreign direct investment.

## TRADE AND COMPETITION

One of the sessions at the Ad Hoc Expert Group meeting was devoted to the topic of trade and competition policy. The debate focused on a number of broad issues, including:

- The need for addressing competition issues at the international level;
- How existing agreements address competition;
- Different proposals for future negotiations of competition issues .

## Background

In recent years, with the intensification of trade and investment liberalization efforts, which have sharply reduced Government-induced barriers to trade, greater attention is being given by the international community to barriers imposed by the private sector, such as those related to competition. For example, international cartels with effects in several countries, or the transborder dimension of the anti-competitive abuse of a market position by enterprises often cannot be addressed fully by the anti-trust or competition policy of a single authority. Concern about such anti-competitive behaviour led, in the early 1980s, developing countries to become the driving force behind an initiative in UNCTAD to draw up international rules to control restrictive business practices. This resulted in a non-binding legal instrument known as "The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices". However, differences in national approaches to competition policy as well as the discretionary nature of much of the application of competition policy have made it difficult to agree on harmonized rules and multilateralized decision-making in specific cases.

Several WTO Agreements have provisions that relate in some way to competition:

- TRIPs, GATS and the Results of Negotiations on Basic Telecommunications Services refer explicitly to the issue of competition;
- The TRIMS Agreement provides for possible future negotiations on multilateral rules on competition policy
- The Anti-Dumping Agreement, which is aimed at action to prevent injury arising from unfair import competition is alleged to be applied at the national level, sometimes in a manner which is anti-competitive;
- Rules on safeguards and subsidies have direct links with competition issues;
- Other Agreements and provisions also have provisions with a bearing on competition: TBT, Art. XVII of GATT (State Trading Enterprises), SPS, and the Agreement on Preshipment Inspection

At the Marrakesh Ministerial meeting, trade and competition policy was identified as an item for consideration on the WTO future work programme. Since then, trade and competition policy has become a major issue in the international trade debate, its main proponents being the European Union.

At their first WTO Ministerial meeting in Singapore (1996), Ministers agreed to establish a Working Group to study issues relating to the interaction between trade and competition policy, including anti-competitive practices, "in order to identify any areas that merit further consideration

in the WTO framework". The Working Group was set up in parallel to that on trade and investment.[88] Their mandates, however, did not imply that any negotiations would eventually be launched; this would only occur after an explicit consensus decision was taken to that effect by WTO members.

Up to the end of 1998, the substantive work of the Group focused on four items, following a "Checklist of Issues Suggested for Study": (1) The relationship between the objectives, principles, concepts, scope and instruments of trade and competition policy; (2) Stocktaking and analysis of existing instruments, standards and activities regarding trade and competition policy, including of experience with their application, and (3) Interaction between trade and competition policy. The Group's work has largely been based on written contributions by Members (a total of 104 at the end of 1998). In its Report (1998), the Group recommends that the General Council decides that the Group continue its work in 1999, focusing on the following issues: (1) the relevance of fundamental WTO principles of national treatment, transparency, and most-favoured-nation treatment to competition policy and vice versa; (2) approaches to promoting cooperation and communication among Members, including in the field of technical cooperation; and (3) the contribution of competition policy to achieving the objectives of the WTO, including the promotion of international trade.

## Key issues from the development perspective

### Is there a need for multilateral negotiations on competition?

As trade and investment liberalization grows, competition policies become more important, particularly when liberalization is accompanied by privatisation and domestic deregulation[89]. All of these policies aim to increase economic efficiency and welfare, which are achieved, *inter alia*, through stronger competition. However, if not carried out properly, they also run the risk of not having these desired effects. This is particularly the case when private companies replace public monopolies[90] without the necessary regulatory structure in place or when foreign companies attain or abuse a dominant position in a domestic market despite the existence of pro-competitive legislation. Competition policy aims to prevent this kind of market power abuse and dominance through protecting the process of competition (not competitors). This is expected to have a beneficial impact on the economy and local consumers.[91] However, as one of the experts pointed out, many countries do not have competition statutes and regimes and when they do have them, they are extraordinarily different from each other.

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[88] The Singapore Ministerial Declaration points out that the working groups "shall draw upon each other's work if necessary and also draw upon and be without prejudice to the work in UNCTAD and other appropriate intergovernmental fora" (paragraph 20, WT/MIN(96)/DEC). See also Chapter on Investment.

[89] See UNCTAD, *World Investment Report 1997. Transnational corporations, market structure and competition policy*. New York and Geneva, 1997 (Sales No. E.97.II.D.10), part two, and WTO, *Annual Report 1997*. Geneva, 1997, chap. four.

[90] A good example for how simply liberalizing without regulating can create new monopolies is the telecommunications industry.

[91] The WTO Annual Report 1997 gives an excellent overview of the conceptual framework for trade and competition policy.

The risks of not benefitting from trade and investment liberalization, privatisation and deregulation is greater in developing countries due to the persistence or emergence of anti-competitive practices of private national or foreign companies. Often, these countries have small domestic markets, inefficient institutions and no national competition laws. Under such conditions, as was stressed several times, a foreign company can easily gain a dominant position, and abuse such a position, in the national market of these countries; these, on the other hand, have no policy instruments to deal with this case either through their national legislation or within the legislation of the country where the company originates from (given the issue of extra-territoriality or that of the lack of will to intervene of the government of the originating country).

It was explained that developing countries are also affected by large international mergers which are normally reviewed by the competition authorities of major industrialised countries (i.e. the originating countries). The latter are concerned with their own economic interests and competition policy objectives (e.g. improving efficiency, welfare, or the competitive position of its firms), but not with those of the developing countries, which are not consulted in the process even though they may be greatly affected by it. Moreover, there are cases where anti-trust actions are taken in some countries, which would result in positive welfare effects, while the same action could have negative welfare effects in other countries. These are clear cases for international action in the area of competition policy.

An example of how competition policy could benefit developing countries was given from an expert from Africa. In the case of Africa, although most countries do not yet have competition policy regimes, experience has shown that in cases where competition regimes were put in place they were found to be useful instruments in dealing with shocks resulting from liberalisation efforts. For example, in the case of Kenya, the introduction of competition policy led to the opening of the market; in most other cases, competition started to develop as a result of market barriers being broken through the implementation of competition policy. Competition policy has also helped in the privatization process of public enterprises, when they had to be transformed from public to private monopolies. The expert stressed that in order to negotiate at the multilateral level, it would be important for developing countries to have these competition frameworks in place.

*Competition in services sectors of interest to developing countries*

Different economic sectors are affected differently by competition policies, given the characteristics of market structures and regulatory regimes and the influence of technology. For example, the increasing importance of electronic commerce will raise new issues in the area of competition that will have to be addressed in the future. A number of services that were non-tradable in the past are now becoming tradable as a result of technological developments in the fields of information technology and telecommunications. This provides developing countries with new opportunities to enter international competition. Examples of such services include accountancy, telephony, engineering and architectural design, medical diagnosis, surgery, haute-couture, as well as back-office services for banks, insurance and most financial services. The use of new information technologies has increased the level of competition in these sectors, since the number of potential service suppliers has increased dramatically.

According to one of the experts, two examples of how this could increase competition are :
- at the intra-firm level, TNCs, such as Swissair's accounting department in Bombay would situate their back-office work in developing countries, to take advantage of existing skills at lower costs, thus increasing efficiency and competition among them;
- more suppliers from emerging countries would be able to make offers in international bidding procedures, in sectors such as engineering, architecture etc.

For developing countries, the presence or absence of a competitive environment is especially important in some key service sectors, whose operations impinge on the activities of many other sectors of the economy. This is the case particularly in sectors such as telecommunications, financial services and maritime and air transport.

There are, however, important differences in the level of competition developing countries have achieved in different sectors. During the 1990s, some developing countries have succeeded to become highly competitive and efficient in telecommunications and financial services, through a combination of domestic policy instruments which included privatisation, enhanced market access, some degree of opening towards foreign direct investment and strengthening of regulatory mechanisms. Again, this has been significantly boosted by technological change. The same level of competitiveness could not be achieved, however, in other sectors such as air or maritime transport.

Maritime transport is one of the sectors of interest to developing countries where competition plays an important role. One participant provided the example of the Dominican Republic where 15% of export revenues pay for maritime transport costs, due to the lack of competition in maritime transport in the North Atlantic where the shipping industry was exempted from the application of United States competition legislation. These sectoral exemptions in the competition legislation of many developed countries also extend to other services sectors of interest to developing countries, such as air transport. These sectors are, however, essential for international trade since they provide the main means of transport of goods (cargo, courier, etc.), tourists and other passengers. Internationally, these sectors are characterised by oligopolistic market structures and by a low level of competition. This is due to both characteristics inherent to these industries (e.g. very high sunk and capital costs, high technological content, long payback periods of investment) and the international regulatory framework in which they operate. At the international level, they are subject to strict regulation, while domestically many national legislations (including those of developed countries) provide for the total or partial exemption of these sectors from competition rules and policies. These sectors also largely escape GATS treatment: air transport is the only major service sector which has been explicitly excluded from the disciplines of the Agreement, while negotiations on maritime transport held after the Uruguay Round have not reached any conclusion. The international dimension of the sectors implies that developing countries suffer from anti-competitive practices which take place internationally in air and maritime transport, while there is limited scope for their domestic competition policies to prevent these practices. Therefore, as the expert explained, the need for international competition rules is very important for developing countries.

**How the WTO MTAs address competition**

The need for addressing competition issues in the context of trade policies has been recognized during the UR negotiations. However, as one of the experts pointed out, the resulting WTO rules refer to competition concepts in a patchwork of Agreements. This approach to competition does not provide for a definition of complex concepts, such as dominance, abuse of market power or monopoly power, and does not provide a framework for integrating competition and trade policies. In particular those countries that are new to competition are therefore lost in such agreements.

The following agreements have incorporated provisions that relate somehow to competition: the Anti-Dumping Agreement, the agreements on Safeguards and Subsidies, TRIMs, TRIPs, GATS and the Results of Negotiations on Basic Telecommunications Services, TBT, Art. XVII of GATT (State Trading Enterprises), SPS, and the Agreement on Preshipment Inspection.[92]

Part of the debate focused on how competition policy could replace contingent protection regimes (e.g. anti-dumping). Although the Agreement on Anti-Dumping was originally considered to be an instrument dealing with anti-competitive practices, it has become the main policy instrument for implementing anti-competitive practices resulting in markets less contestable than before. As discussed above (see Chapter on Anti-Dumping), anti-dumping action contradicts the fundamental principles of competition and provides companies with a ready-made instrument to restrict foreign competition. Many anti-dumping cases would have been considered "fair" under domestic competition law. Therefore, there is an urgent need to reform the ADA by introducing concepts and principles from competition law. In fact, it has been argued that a multilateral agreement on competition policies could substitute multilateral disciplines on anti-dumping, or at least could counteract the widespread abuse of the ADA.

Article 40 (sect.8) of the TRIPS Agreement, on Content of Anti-Competition Practices in Licences, states that "nothing in the Agreement shall prevent member countries from specifying in their national legislation licensing practices that may constitute an abuse and prevent such anti-competitive practices". But countries that do so in their national legislation are often subject to unilateral pressure, when their rules displease large trading partners. Such pressures are felt by developed as well as developing countries.

A multilateral agreement on basic competition rules to complement the multilateral trading system could avoid the present loopholes and uncertainty in the existing Agreements. Experts thought that this could be of benefit to developing countries, especially if the concept of S&D would be maintained in a WTO framework on competition, subject to WTO dispute settlement system.

**Proposals for future treatment of competition in the multilateral trade system**

A precondition for setting up the Working Group on Competition by Ministers at their meeting in Singapore in December 1996 was that this would not "prejudge whether negotiations [on the subject of competition] will be initiated in the future". This reflects the understanding that the area

[92] However, it is mostly countries having competition legislation that are best equipped to deal with these competition-related provisions, while those countries which lack this type of institution (i.e. many developing countries) are not prepared.

of competition policy was a complicated one which required considerable further information and discussion. So far, three possible approaches on the future treatment of competition in the multilateral context have been proposed which were briefly recalled during the meeting:

(1) Competition is a domestic policy issue; as such it should be dealt with by national governments and hence should not be treated multilaterally; cross-border cases may be dealt with bilaterally, or under bilateral cooperation agreements[93];
(2) The provisions of existing multilateral trade agreements (anti-dumping, subsidies) should be reviewed in the light of competition principles and strengthened, so as to render the MTAs more pro-competitive[94];
(3) A multilateral agreement on minimum competition standards should be negotiated[95].

Several contributions were made with respect to each of the proposals which will be elaborated in the following:

*No treatment at the multilateral level*

The first proposal points to the number of competition-related provisions already included in the MTAs (as mentioned above) and argues that no further negotiations should be held on explicit competition rules separate from other substantive issues (e.g. investment, anti-dumping or services). International action on competition policy would be restricted to bilateral agreements, such as the ones concluded by the US and the EU and the US and Canada, and to voluntary bilateral cooperative action (positive comity), as is done between OECD countries[96].

However, most of these agreements and cooperative actions are taken among developed countries, based on a process of mutual confidence building, while the same mechanisms are generally not available to developing countries' competition authorities. Moreover, the limitation imposed by the main objectives of national competition policies (e.g. domestic efficiency, welfare or other priorities) is likely to be stronger in cases involving both developed and developing countries, as their national priorities differ much more than those among developed countries.

*Treatment within MTAs*

The second proposal recommends to pursue future negotiations in the area of competition within the context of multilateral agreements that already exist or may be negotiated in the future. Regarding the former, the most important agreements where the topic may be dealt with are TRIMs, GATS, TRIPs and the Agreement on Anti-Dumping.

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[93] This view is defended, *inter alia*, by the United States.

[94] Such as position is held by Japan and some developing countries.

[95] This line has been backed by the EU and some developing countries.

[96] The next step in the direction of widening international co-operation on competition policies would be the adoption of common rules in the context of regional trade agreements. As in other areas, the countries that have advanced most in this direction are those of the EU, through its common competition policy.

The TRIMs Agreement is due for revision in 1999 and one of the tasks of the revision process (as foreseen by Article 9) is to consider whether the Agreement should be complemented with provisions on competition policy. This provides an opportunity for the discussion and adoption of multilateral disciplines on competition. The extent to which this will be carried out will largely depend on the degree of consensus reached in the discussions of the WTO Working Group on the Interaction between Trade and Competition Policy. The mandate of this Group was extended at the end of 1998; however, although it has examined several issues as foreseen in its mandate, no consensus has emerged so far on ways to advance towards multilateral rules on competition.

One of the experts felt that there is a danger of including competition under other issues, such as investment or TRIMS. In this case, those countries which oppose the multilateral discussion of competition will emphasise other TRIMs-related issues during the revision of the Agreement (e.g. the expansion of the list of prohibited TRIMs), thereby avoiding the treatment of competition issue, the latter being mainly of interest to developing countries. Therefore, dealing with competition issues under the TRIMs agreement would run the risk of linking progress toward a multilateral competition agreement to further concessions on investment. On the other hand, it had been the developing countries which had insisted on this link in the TRIMS agreement between investment and competition. This was based on the agreement that TRIMS were necessary to preempt anti-competitive practices and any new multilateral developments in the area of investment should be accompanied by disciplines on competition policy.

While there would be the possibility of strengthening GATS Article IX, it might be more feasible to treat the issue of competition in the context of sectoral negotiations, e.g. by the inclusion of pro-competitive clauses in sectoral annexes. As already mentioned, this has been done to some extent in the negotiations on basic telecommunications services where a pro-competitive framework was included in the final agreement. In future negotiations on services, commitments may include provisions conducive to strengthening competition, e.g. by giving market access in sectors hitherto reserved for a limited number of suppliers. This has been specifically suggested as a solution in the tourism sector. Another important subject refers to sectors which are virtually excluded from GATS disciplines - air and maritime transport - and whose meaningful and effective incorporation into the provision of the Agreement might contribute to a higher degree of competition. The review of the GATS Annex on Air Transport Services is scheduled to take place in 2000, when the issue of the possible further application of GATS in this sector is due to be discussed (Article 5 of the Annex on Air Transport Services). If any action is taken on these sectors, it will be likely be done in the context of the coming round of negotiations on services.

The ADA has been cited most frequently in the context of competition policies. It has been suggested that the incorporation of competition policy principles into the ADA could reduce the use of anti-dumping action to restrict and harass trade (see Chapter on Anti-Dumping).

*A multilateral agreement on competition policy*

The most ambitious proposal for dealing with the issue of competition (and, hence, of preventing anti-competitive practices) in future negotiations is the adoption of multilateral disciplines on competition. This is a complicated subject and, as can be seen from the discussions held by the WTO Working Group on the Interaction between Trade and Competition Policy, it is not yet clear

which issues of competition policy should be dealt with multilaterally: harmonisation of national policies, extra-territoriality, the relationship between competition and contingent protection regimes (particularly anti-dumping), domination of small domestic markets (particularly those of developing countries), etc. All of these issues could be addressed by competition policies (seen in a much wider context than strict anti-trust rules), given the long list of anti-competitive practices which has been brought into the discussions.

As one of the experts explained, the EU has proposed to initiate discussions leading to a multilateral framework on competition with the following characteristics:

- discussions should start at the plurilateral level;
- they should concentrate on issues where consensus exists, such as hard core international cartels;
- an undertaking should be made by countries to adopt and implement national competition rules;
- more difficult issues, such as vertical restraints and dominance, should be left for discussion at a later stage.

The main advantage of advancing towards a set of multilateral rules on competition is that it would avoid some of the problems associated with the present treatment of the subject in the WTO, particularly:

- references to provisions on competition are scattered among several of the existing MTAs. This does not allow for a definition of complex concepts addressed by competition policy, such as dominance, abuse of market power, monopoly power, etc.;
- such a set of rules would treat the question of competition in a more transparent way, while at present competition clauses are mixed with several other substantive issues;
- there would be a multilaterally agreed set of criteria to resolve trade conflicts among countries in the field of competition policy;
- the compliance with multilateral competition rules would be subject to the WTO dispute settlement mechanism, which provides a guaranty for smaller trading partners against unilateral action by major traders;
- the adoption by developing countries of specific competition rules even in cases where they are foreseen in the multilateral framework (e.g. TRIPs) and the way in which they are implemented could give rise to unilateral pressure from major trading partners. This would not be the case in the presence of explicit multilateral competition rules, which would be subject to multilateral action, if required;
- developing countries would have a better chance to control international mega-mergers, which at present is only done by competition authorities of major trading partners.

There are a number of ways in which these multilateral rules can be negotiated, e.g. their scope can be limited to specific issues or sectors. The adoption of such rules would imply some degree of transfer of competition oversight from national governments to a supra-national body. Here a further question would arise: which body would that be - the WTO or a global competition authority? The answer naturally would depend on the substantive provisions of the rules.

This proposal received broad support among the experts in the meeting addressing all of the above

listed advantages. In addition, one of the experts (coming from a developing country) pointed out that if the TRIPs Agreement was possible even though a large number of countries were without IPR legislation, then an agreement on competition should also be possible. He argued that in the light of further trade liberalisation, if no minimum standards of regulation on competition policy exist, companies are at the mercy of other companies applying anti-competitive practices thus loosing all potential benefits resulting from increased trade.

Whichever of the three options discussed above (and its respective variants) prevails in coming multilateral negotiations, from a development perspective it is important to ensure that the special conditions of developing countries are taken into account. This might be done, for instance, by adopting some form of special and differential treatment for development in competition issues. This principle is present in the non-binding legal instrument negotiated internationally under the aegis of UNCTAD known as *The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices* (adopted in 1980) and should be defended by the developing countries in any negotiation of a multilateral framework on competition, in order to ensure that developing countries, and especially LDCs, maintain the necessary flexibility in their competition regimes in accordance with their development objectives.

## Priority areas for further research

The main areas in which further research needs to be undertaken in view of future trade negotiations are:

- examination of various MTAs (e.g. Anti-Dumping, safeguards, rules of origin, GATS etc.) to assess their impact on competition;
- ways of dealing with situations where foreign firms have a dominant position in a national developing country market but are not fully under national jurisdiction;
- the role of competition in network industries and in "natural" monopolies in developing countries and determination, on a sectoral basis, of the minimum conditions necessary for competition rules to work;
- the way in which competition policy addresses IPRs;
- international anti-competitive practices in service sectors and how they impinge on economic efficiency and trade of developing countries;
- alternative ways, and their relative merits, of including competition clauses in the coming negotiations on services;
- the importance of competition policy implementation in ensuring the success of market-oriented economic reforms, particularly in the present financial crisis situation in some developing countries;
- determination, in specific countries/regions, of what is the better level for competition policy: national or regional (the latter option may be particularly relevant in the case of small domestic markets) and, in this connection, examination of the question of whether it is indispensable to have national competition policies before they can be treated at the (sub-) regional and/or multilateral level;
- lessons to be learned from international cooperation on competition policy and the mechanisms used;
- development of a measure of the incidence of anti-competitive practices on international

trade;

- establishment of indicators (or proxies) of the likelihood of anti-competitive practices in specific sectors;
- competition issues raised by the emergence and expansion of electronic commerce.

## TRADE AND INVESTMENT

At the UNCTAD expert group meeting, several topics dominated the discussions on possible future negotiations in the area of trade and investment (also in the light of the discussions on the OECD-proposed MAI), which will be presented in the following sections:

- Issues related to the implementation of the TRIMS agreement;
- The surge of BITs and FDI in the 1990s and the emergence of the MAI;
- The need for combining foreign direct investment with national policy objectives by making it part of an overall strategy supportive of economic growth, industrialization and transfer of knowhow; the costs and benefits of FDI;
- Investment-related competition issues;
- Possible approached to address the subject in future negotiations.

## Background

At the launching of the UR negotiations, investment issues were brought into the debate by a United States proposal, which suggested - among others - to eliminate a range of investment measures that distort trade and to introduce national/MFN treatment for new and established foreign direct investment. The proposal received only limited support, and in particular developing countries argued that negotiations on investment were outside the GATT's mandate.[97] As a result, negotiations focussed on a narrowly defined concept of "trade-related investment measures" (TRIMs) or measures taken by governments to attract and regulate foreign investment (investment policies).

In fact, investment has been brought into the WTO framework, not by the TRIMS agreement, but in GATS which provides a framework for negotiating commitments on "commercial presence". Negotiations conducted under the GATS framework have made substantial progress in the liberalization of access to markets and the extension of national treatment to foreign enterprises (e.g. the recent agreements on financial services and basic telecommunications).

The TRIMs Agreement prohibits the use of measures that are inconsistent with Article III (national treatment on international taxation and regulation) or Article XI (prohibition of quantitative restrictions) of GATT 1994. It contains an "Illustrative list" of such measures, including local content requirements, export performance, trade-balancing, domestic sales, technology transfer, manufacturing, and product mandate requirements.

WTO Members were required to notify any measure that is incompatible with the Agreement no later than 90 days after the entry into force of the Agreement (1 January 1995). Grace periods for the elimination of such measures were given to developed countries (2 years), developing countries (5 years) and least-developed countries (7 years after the Agreement went into force). By 31 July 1998, the WTO had received notifications from 26 Members, mostly developing

[97] Developing countries were also concerned about lumping negotiations on services and investment together as "trade" subjects and insisted that trade in services was negotiated on a separate track from negotiations on investment.

countries, which use TRIMs to promote their development objectives. The Committee on TRIMs reviews the notifications and discusses them in its meetings.

Article 9 of the Agreement requests the Council for Trade in Goods to review the Agreement no later than 5 years after the date of entry into force (i.e. by 31 December 1999) and consider whether it should be complemented with provisions on investment and competition policy. At the Singapore Ministerial Conference (1996), the Working Group on the Relationship between Trade and Investment was established[98] "on the understanding that the work undertaken shall not prejudge whether negotiations will be initiated in the future..." (Paragraph 20, WT/MIN(96)DEC). The latter reflects the concern by some developing countries, which oppose future negotiations on this issue.

In its two years of existence, the Working Group has discussed four items listed on a "checklist of issues": (1) Implications of the relationship between trade and investment for development and economic growth; (2) The economic relationship between trade and investment; (3) Existing international instruments and activities regarding trade and investment; and (4) identification of common features and differences, and the advantages and disadvantages of entering into bilateral, regional and multilateral rules on investment, including from a development perspective. In its Report (1998), the Working Group recommends the General Council to continue the Group's work which "shall be based on issues raised by Members with respect to subjects identified in the Checklist of Issues Suggested for Study".

## Key issues from the development perspective

### The TRIMs Agreement and issues related to its implementation

Several comments were made relating to the TRIMS Agreement and experiences with the implementation of the Agreement. The TRIMs Agreement did not introduce any new disciplines with respect to investment policy. It merely clarifies or restates the use of measures which are inconsistent with GATT Articles III (National Treatment on Internal Taxation and Regulation) and XI (General Elimination of Quantitative Restrictions). This limited scope of the Agreement reflects efforts made by the developing countries to prevent the extension of trade obligations into the field of investment and the incorporation of principles such as "right of establishment" and "national treatment" for investors into the trading system. Countries maintain their sovereign rights to regulate foreign direct investment as long as the TRIMs Agreement is not infringed. The preamble of the TRIMs Agreement recognizes that certain investment measures can cause trade-restrictive and distorting effects. TRIMs relates to trade in goods, whereas GATS mode 3 covers investment liberalization in trade in services.

The TRIMs Agreement does not give a definition of a TRIM or an objective test for identifying such measures. It is therefore up to the notifying country to judge which of its TRIMs are illegal

[98] in parallel to the Working Group on Trade and Competition, see Chapter on Competition.

under the Agreement. Although the TRIMs Committee has examined many notifications and measures, there is still no clear guidance on which measures are, strictly speaking, prohibited. There are naturally different interpretations and differences of opinion. It is clear that export performance requirements remain permissible under the WTO Agreements.[99] Most developing countries have export requirements, which are normally mandatory for most investments in free trade zones or exclusive economic zones. Several other measures that may appear controversial can be maintained by host countries because there are no explicit legal prohibitions against them. In this context, one of the experts posed the question of lost benefits by discriminating against foreign investors (in favour of domestic ones) by applying performance requirements or providing investment incentives. On the other hand, it was pointed out that these performance requirements were important for developing countries' industrialisation process and capacity building (see below).

*Difficulties faced by Developing Countries in the Implementation of TRIMs*

The implementation of the TRIMS Agreement has posed the following problems for developing countries: (i) the identification of TRIMs and the timely notification to WTO, (ii) the importance of local content requirements in development policies of several countries, in particular in relation to the automotive sector, (iii) the adequacy of a transitional period for phasing out of TRIMs, and (iv) the need to rethink the approach taken in the TRIMs Agreement by concentrating on adverse effects on trade, rather than outright prohibition of certain measures and to provide special and differential treatment in key sectors.

According to Article 5.1 of TRIMs, Members are required to notify any TRIM inconsistent with the Agreement within 90 days after the entry into force of the agreement. The time limit causes a problem for some developing countries which need longer to identify and notify their TRIMs, given their institutional constraints, whereas developed countries are not flexible with respect to the time limit set. This is one of the disadvantages resulting from the negative list approach to market access and national treatment; if countries do not include their reservations prior to entry into force they will not be able to do so at a later stage. Delaying notification of a measure in the context of special and differential treatment should not diminish the benefits that should accrue to developing countries in terms of e.g. additional time granted to adjust and implement obligations contained therein.

Measures which have required further clarification mainly relate to the automobile sector, to agriculture and to general provisions on local content in investment laws. Moreover, the relationship between TRIMs, SCM, GATT, and the Agreement on Agriculture also requires clarification. It can be expected that the countries most opposed to TRIMs will initiate litigation in order to determine the frontiers of the Agreement (such as the case brought against Indonesia in relation to the automotive sector). Developing countries lack the capacity to identify TRIMs used by developed countries, particularly at the sub-national level.

[99] Although subsidies linked to such requirements would be covered by the discipline of the Agreement on Subsidies and Countervailing Measures.

Since neither the GATT nor the URAs address the wide range of investment policy measures currently in effect in many countries, the status of several of these is unclear. A narrow interpretation of the rules would imply that any measure that is not covered in the TRIMs text, or the Agreement on Subsidies and Countervailing Measures and is not inconsistent with basic GATT principles, would be acceptable or legitimate. But the question is particularly complicated for voluntary programmes since the TRIMs Agreement specifies measures that are "mandatory or enforceable under domestic law or administrative rulings", but it also refers to obtaining an advantage. This "advantage" may not be formally linked to the investment measure concerned.[100] However, Article 6 provides for transparency in the administration of TRIMs, and TRIMs that are not transparent are likely to face challenges from trading partners.

There is no reference to a case-by-case effects test or measures at sub-national levels. Article 6, however, does provide for the notification to the WTO secretariat of the publications in which TRIMs may be found, including those applied by regional and local governments and authorities within their territories. It seems that there is a need to include a requirement for establishing adverse effects of a particular TRIM on a case by case basis, particularly given new empirical research which demonstrates concrete benefits accruing to developing countries by use of certain performance requirements. Such adverse effects should be greater than the positive impact of such requirements on development of particular sectors in developing countries to entail the removal of the particular measure.

Developing countries are allowed five years and LDCs seven years for eliminating the prohibited TRIMs. This transitional period could be extended if Members demonstrate particular difficulties in doing so, and taking into account their individual developmental, financial and trade needs. TRIMs introduced less than 180 days before the entry into force of the Agreement will not benefit from the transitional arrangements, and members should not modify the terms of any notified TRIM so as to increase the degree of inconsistency with Article 2. Such provisions amount to a standstill on the prohibited TRIMs. The TRIMs text, however, permits TRIMs to be levied on new investors in the transition period, to protect existing investors. This addresses a major concern of current investors, particularly in the automotive sector, regarding possible serious disadvantages vis-à-vis new investors. Local content requirements and domestic sourcing are most prevalent in the automotive industry. Many countries experience difficulties in removing such measures in the transitional period. Therefore, consideration needs to be given to the extension of this period for some developing countries, in relation to specific sectors.

Compared to the range of policy instruments at a government's disposal, the TRIMs Agreement does not significantly constrain the ability of any government to regulate foreign direct investment

[100] The 1990 Panel on EEC-Regulation on Imports of Parts and Components suggested a broad scope for the application to Article III. The Panel ruled that the comprehensive coverage of all laws, regulations or requirements affecting the internal sale, etc., of imported products suggests that not only requirements which an enterprise is legally bound to carry out, such as those examined by the FIRA Panel, but also those which an enterprise voluntarily accepts in order to obtain an advantage from the government constitute requirements within the meaning of that provision. The Panel noted that the EEC made the grant of an advantage, namely the suspension of proceedings under the anti-circumvention provision, dependent on undertakings to limit the use of parts or materials of Japanese origin without imposing similar limitations on the use of like products of EEC or other origin, hence dependent on undertakings to accord treatment to imported products less favourable than that accorded to like products of national origin in respect of their internal use. GATT, *BISD*, Thirty-seventh Supplement, pp. 132, 197.

in its territory. However, import-substituting measures of many developing countries are now more explicitly prohibited. In any event, the above investment measures were inconsistent with GATT principles and could have been challenged in a dispute. The WTO and the single undertaking clarify the application of these obligations to developing countries and transition economies, but further challenges will no doubt be made to establish the exact "frontier" of the prohibition beyond the scope of the "illustrative list".

**The surge of BITs and FDI in the 1990s**

It was pointed out that the liberalization of FDI regimes has been complemented with the signing of an increasing number of bilateral investment treaties (BITs). According to a recent UNCTAD study[101], more than two-thirds of the 1,513 bilateral treaties signed by the end of 1997 came into existence during the 1990s. In 1997 alone, 153 BITs were concluded. Most significantly, the number of BITs concluded between developing countries themselves, and between developing countries and economies in transitions, has also risen substantially during the 1990s. For example, where as in 1980, 322 out of 386 BITs were concluded by developed countries, in 1997 27% of the treaties concluded were between developing countries. If adding the BITs concluded between developing countries and transition economies (18%) and those among transition economies (7%), in 1997 the total number of BITs among developing and transition countries (52%) even outpaces those BITs involving developed countries (48%).

FDI flows have also grown considerably during the 1990s, including among developing countries. For example, between 1990 and 1996, total outward FDI stock of the Group of 15 (G-15) developing countries grew at an annual average rate of 17 per cent; it was estimated at US$ 44 billion, compared to a total FDI outward stock of US$ 3,178 billion in 1996. Outward FDI flows from all developing countries have increased from 3% of total global flows in 1980 to 13% in 1997. Inward FDI flows of the G-15 countries have grown from US$ 59 billion in 1980 to US$ 457 billion in 1997, representing 13% of the total FDI stock in developing countries.

The practice in the BITs and NAFTA may have been the point of departure for the MAI.[102] The scope of any agreement on investment is determined by the definition of investment.[103] The definition of investment is an important aspect in any discussion on investment flows. As one

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[101] UNCTAD, Bilateral Investment Treaties in the mid-1990s, United Nations publication, Sales No. E.98.II.D.8 (1999).

[102] The negotiations in the OECD on a Multilateral Agreement on Investment (MAI) have met with difficulties. In May 1998, ministers decided to suspend negotiations until October 1998 and subsequently decided to discontinue them. It seems that the MAI, which draws heavily on the investment provisions of NAFTA, is expected to be much less ambitious than envisaged by the main proponents of such an agreement, and thus may not be acceptable to them, while opposition is beginning to mobilize, particularly at the provincial and state levels in federal countries. The United States' Helms-Burton and D'Amato legislation (involving the issue of extra-territoriality), the United States' proposals to include labour and environmental standards, the proposal by France and Canada on cultural exception, and the EU's insistence on exception for regional integration agreements have created difficulties in completing the MAI. OECD members seem reluctant to accept further commitments to liberalize restrictions on foreign investment that go beyond what they have already accepted in the WTO or in free trade agreements.

[103] For a more detailed discussion, see UNCTAD, Scope and Definition. UNCTAD Series on Issues in International Investment Agreements, United Nations publication, Sales No. E.99.II.D.9.

expert pointed out, the difference between FDI and portfolio investment is of particular importance as the two kinds of flows behave differently. FDI is defined as an investment involving a long term relationship and reflecting a lasting interest and control by a resident entity of one country (the foreign direct investor or parent enterprise) in an enterprise resident in a country other than that of the foreign investor (foreign affiliate). This enterprise-based definition is contained in the GATS, saying that a foreign investor is in a position to exercise direct control or influence over an investment and the investment is generally viewed as a corporate entity. Attempts to define investment broadly to include portfolio (given the volatility of short term capital) raises a number of issues, particularly in view of the recent financial crisis resulting from the instability of these capital flows. According to one of the expert, the Asian crisis showed that FDI and portfolio investment are different; hence, they should be treated differently and under separate agreements or in different fora (e.g. the IMF to deal with portfolio investment). On the other hand, examples from Latin America showed that the Asian crisis also affected FDI flows to the region; even though FDI was not at the center of the crisis, its impact on trade and FDI flows led to instability in the economic environment.

Most BITs have a broad definition of investment which is asset-based. This broad approach has been followed by the MAI which includes portfolio investment, IPRs, licenses, franchises etc. The definition covers not only capital that crosses the border, but also any kind of asset. It should be noted that the MAI approach of providing right of establishment by applying national treatment to the pre-establishment phase does not reflect general practice in most BITs.[104] Moreover, the application of national treatment in respect of entry of foreign investment is far more difficult than its application to trade in goods in terms of establishment of similar situations. The BITs usually provide limitations to national treatment and apply the principle where domestic and foreign investor find themselves in "identical" or "similar situations", or "in like circumstances" or even to " similar activities". The MAI provides for application of national treatment and MFN in like circumstances. The MAI deals with issues going beyond strictly market access issues e.g. protection of investment.

National treatment would be a basic objective in any investment agreement and exceptions to national treatment would need careful examination.[105] On the other hand, it is important to examine why there is a need to provide protection for property which goes far beyond what is offered to nationals in the MAI. The MAI endorses a negative list approach which provides for an obligation to grant national treatment across the board with respect to establishment and acquisition, with the possibility of taking reservations to national treatment. In contrast, GATS follows a positive list approach to scheduling of commitments on market access and national treatment in respect of commercial presence which allows gradual opening of markets by scheduling bindings on market access and national treatment, including limitations and qualifications to such access. This takes into account asymmetries between host and home country economies (see below).

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[104] For further elaboration, see UNCTAD, Admission and Establishment. UNCTAD Series on Issues in International Investment Agreements, United Nations publication, Sales No. E.99.II.D.10.

[105] See UNCTAD, National Treatment. UNCTAD Series on Issues in International Investment Agreements, forthcoming and UNCTAD, Fair and Equitable Treatment. UNCTAD Series on Issues in International Investment Agreements, forthcoming.

Examples were given from Latin America where many bilateral, intra- and extraregional and subregional investment agreements have been concluded. In this region, investment is a less sensitive issue since concepts like MFN[106] or national treatment applied to investment are already included in the national legislations. The question here is how to combine a multilateral agreement with the large number of regional and subregional agreements already existing?

Also, the case of Mexico was discussed where investment flows from the US increased rapidly after the conclusion of NAFTA. This has had a negative effect on neighbouring countries where industrial production in certain sectors has declined. This is largely due to the strict rules of origin contained in NAFTA. It was mentioned that similar developments could occur after the conclusion of the FTAA and investment flows will be deviated to Latin America, away from other regions, due to these specific rules of origin of NAFTA.

**FDI and national development policy objectives**

From a development perspective, investment should help countries integrate in the world economy through the transfer of technology, manufacture and export performance.[107] Several experts commented on the important question as to what extent international investment agreements allow sufficient flexibility for developing countries (at various levels of development) to pursue their own development objectives. A basic policy dilemma that developing countries face is to combine their economic and development objectives (which often imply a limited application of the principles of market access and national treatment) with policies that promote their international competitiveness based on more liberal FDI policies.

Moreover, with the reduction of official aid, developing countries' need for private investment has increased. In this context, the issue of attracting FDI was raised. One of the experts, coming from Asia, mentioned that despite the Asian crisis, FDI flows to the region are still very high and that it would be important to investigate the reasons for this inflow given that it took place in the absence of any international rules on investment.

TNCs normally favour countries with the least number of restrictions.[108] Liberalization of investment will not, however, guarantee the inflow of FDI or development. This is demonstrated through the existence of regional imbalances in development, when examining national markets

[106] See UNCTAD, Most-Favoured Nation Treatment. UNCTAD Series on Issues in International Investment Agreements, United Nations publication, Sales No. E.99.II.D.11.

[107] See UNCTAD, Foreign Direct Investment and Development. UNCTAD Series on Issues in International Investment Agreements, United Nations publication, Sales No. E.98.II.D.15 and UNCTAD, Transfer Pricing. UNCTAD Series on Issues in International Investment Agreements, United Nations publication, Sales No. E.99.II.D.8.

[108] Removal of restrictions, however, is not a sufficient condition for attracting investment. Important factors relating to locational decisions include the size of the market, geographical location, political and social stability, appropriate legal and physical infrastructure, and the quality of the labour force.

where perfect mobility of factors of production exists.[109] Moreover, empirical research[110] demonstrates that the impact of FDI on the development process is not always positive. Out of a sample of 183 foreign investment projects in some thirty countries, a majority did result in increasing the host country's economic growth and welfare (over a time period of two decades). But in a large minority of cases (twenty -five to forty five percent) foreign investment projects had a negative impact on host growth and economic welfare. This can be explained by an important distinction to be made between investors producing solely for domestic consumption in the host country and investors using the host country as a location (integrated into the global sourcing network of the parents) from where they can strengthen their competitive position in the world market. Once the parent investors commit themselves to incorporate the output from a host country into a larger strategy to meet global or regional competition, a dynamic "integration effect" can be observed, providing new technology, more rapid technological upgrading, best management practices and high industry standards.

An important question to address is what are actually the global benefits of FDI? For example, one of the experts pointed out that there was no credible estimate of the global benefits that result from FDI (apart from sales, stocks of direct investment, assets etc), such as increase of world GDP.

*Investment incentives and performance requirements*

Incentives/subsidies, often in combination with performance requirements, are used to attract and direct FDI flows to certain priority sectors and/or regions.[111] The situation of competition over FDI has led to a growing concern about the cost of incentives and the impact of incentives on trade. Performance requirements are considered important by a number of countries for ensuring that benefits are obtained from investment flows, such as the transfer of a package of assets conducive to human capital development including managerial skill, as well as the transfer of technology.

As mentioned above, views concerning the use of investment incentives or performance requirements differed among the experts. While some experts pointed to the lost benefits from discriminating against foreign investors in favour of domestic ones, others stressed the importance of these measures to the countries' industrialisation processes and capacity building efforts.

Performance requirements that are considered essential for development strategies and therefore need to be maintained include export performance, a minimum level of local equity, joint venture, hiring of a given level of local/national personnel, transfer of technology, nationality requirement for senior management, achieving a given level or value of production, investment, sales, employment or research and development.

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[109] See Trade and FDI Policies: Pieces of a New Strategic Approach to Development, Manuel R. Agosin and Francisco J Prieto, March 1993

[110] See for example T. Moran, Foreign Direct Investment and Development, Institute for International Economics, 1998, p.3.

[111] For a ten-year review of the use of incentives to attract FDI, see UNCTAD, Incentives and Foreign Direct Investment. UNCTAD Series on Issues in International Investment Agreements, United Nations publication, Sales No. E.96.II.A.6.

Many developing countries use a combination of investment incentives and performance requirements to pursue a variety of development objectives: to direct resource allocation to sectors considered to have a particular growth potential, to build up a viable domestic private sector, to promote vertical integration, to attract foreign technologies or export-oriented investment, or to improve access to major markets and export marketing capacities. Moreover, in many cases countries rely on investment measures to correct market distortions created by these enterprises since policy instruments to ensure free domestic competition are not sufficiently effective or enforceable vis-a-vis large foreign enterprises.

Given the tendency of TNCs to internalize technological assets, developing countries use incentives and performance requirements to seek an externalization of such assets and domestic capacity building. Therefore, retaining the flexibility in using these policy tools is of particular importance to sustainable development. The combination of a variety of incentives and performance requirements is aimed at securing a balanced regulation and enhancement of foreign direct investment in the host country.[112] Furthermore, the same mixture can ensure an adequate compromise between the interests of the host country and those of the investor.[113] For example, the availability of a diverse set of incentives and conditions could provide flexibility in negotiations with potential investors and allow a bargain to be struck in which an incentive with high value to the investor and low marginal cost to the host country (such as access to an existing free-trade zone) is traded for a performance requirement of low marginal cost to the investor but high real or perceived value to the host country (e.g. an agreed commitment for local expenditure on research and development).[114]

The TRIMs, the OECD MAI negotiations as well as regional and some bilateral treaties have demonstrated that whereas countries are more open towards disciplines on certain types of performance requirements, they are more reluctant to discipline investment incentives. The MAI prohibits a list of performance requirements relating to goods and services which covers measures beyond not only those listed in the TRIMS Agreement, but even beyond those prohibited under Article 1106 of NAFTA.[115] The MAI provides that a party shall not in connection with the establishment, acquisition, expansion, management, operation or conduct of an investment in its territory of an investor of a party or of a non-party, impose, enforce or maintain any of the requirements listed, or enforce any commitment or undertaking. These provisions limit the

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[112] United States Department of Commerce, *The Use of Investment Incentives and Performance Requirements* (Washington, D.C.: 1977), pp. 1-2. The 1977 benchmark survey of the United States Department of Commerce, which provided elements for the formulation of a United States negotiating position on this issue, found that 27 per cent of United States affiliates in the developing countries received one or more incentives to invest, while the figure was 25 per cent for developed countries. However, developing countries imposed performance requirements on United States firms more often than developed countries - 29 per cent compared to 6 per cent.

[113] Hardeep Puri and Delfino Bondad, "TRIMs, Development Aspects and the General Agreement", *Uruguay Round: Further Papers on Selected Issues* (UNCTAD/ITP/42), 1990, p. 55.

[114] Theodore H. Moran and Charles S. Pearson, "Tread carefully in the field of TRIP (Trade-Related Investment Performance) measures", *The World Economy*, Vol. 11, No. 1 (1988), p. 121.

[115] The NAFTA list is supplemented by certain concepts of limitations to market access taken from Article XVI of GATS ( e.g. hire a given level of local personnel, to establish a joint venture, to achieve a minimum level of local equity participation) as well as others which are currently permitted under TRIMS and GATS (e.g. transfer of technology requirements, to locate its headquarters for a specific region or the world market in the territory of that contracting party).

flexibility of countries in respect to their industrial policies and would mean that investment would not lead to learning effects and the important externalities in the rest of the economy (e.g. building of domestic capacities through TOT, strengthening of management techniques, human resource development).

GATS legitimizes the use of a list of performance requirements as subjects for liberalization negotiations in accordance with Article XVI and Article XVII. Article XIX:2 provides for "appropriate flexibility for individual developing country Members for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available to foreign suppliers, attaching to such access conditions aimed at achieving the objectives referred to in Article IV". The TRIMS agreement only confirms that local content requirements and some trade balancing requirements are prohibited by GATT, but does not prohibit other performance requirements.[116] In the negotiations on TRIMS, developing countries considered performance requirements necessary to channel FDI according to their national development policy objectives, to offset the preferential treatment/incentives and to offset or preempt the anti-competitive practices of TNCs.

Recent studies indicate that the location of FDI, in particular in the automotive, petrochemical and computer/electronic industries has not taken place so much along the lines of comparative advantage. The host governments' forceful use of policies such as export subsidies and export performance requirements "played a crucial part in impelling international investors to establish sourcing networks that included (...) developing countries."[117] The successful use of export performance requirements in these three sectors demonstrates that it has generated a new structure of internationally competitive production. This puts in question whether one could categorically prohibit any performance requirement without actually examining whether such a measure has significant and direct adverse effects on trade which outweighs its beneficial effect on development.

**Investment and competition policies**[118]

Some experts commented on the relationship between investment and competition policies. The use of protectionist and investment-diverting trade measures, most notably rules of origin and anti-dumping regulations in a discriminatory and demonstrably distorting manner is a major area of concern. Both EU and NAFTA rules of origin require that a substantial portion of inputs originate in their member states to qualify for preferential treatment - to protect local industries and to shift foreign investment into member states. Anti-dumping actions are considered to divert investment by generating uncertainty for international firms interested in investing in potential export operations and causing the redeployment of production to the market protected by anti-dumping regulations. Locational incentives, rules of origin and anti-dumping regulations are used to recast

[116] The MAI widens the list of performance requirements including many currently permitted under GATT and GATS, but some of them would be allowed if linked to the grant of an advantage. The MAI prohibits local content and export performance requirements.

[117] See T. Moran, Foreign Direct Investment and Development, Institute for International Economics, 1998, p6.

[118] See Chapter on Competition.

the international economic landscape hindering economic activity from moving along the lines of comparative advantage.[119] The need to offset these investment diverting policies on the part of developed countries explains the crucial role of export subsidies and particular performance requirements in inducing companies to include developing countries in their regional or global sourcing networks.

Developing country interests and concerns in the area of investment and competition policy, which could be reflected in any future disciplines, include: (i) the non-discriminatory application of competition legislation, which might serve developing host countries to remedy their major FDI concerns in case they adopt a liberal FDI regime; (ii) allowing (small) economies to control possible abuses of dominant positions of TNCs; (iii) exempting SMEs when the impact of their RBPs is insignificant in the relevant market, by the applying de minimis rules; (iv) granting time limited exceptions to certain dynamic and growth-oriented sectors which need temporary shielding from full-fledged competitive forces to allow infant industries to progress along the learning process; (v) the extent to which restraints linked to licensing arrangements should be deemed anti-competitive and prohibited; (vi) the possibility of prohibiting bans of parallel imports under certain conditions; and (vi) the adoption by governments of substantive provisions to control horizontal and vertical restraints, abuses of dominant positions, and export cartels.

Consideration could be given to home countries of foreign firms to assume some responsibility for assisting developing countries in establishing their competition machinery, as well as taking action to deal with RBPs by their firms which adversely affect markets of developing countries. To this end, developed countries might take the initiative at the national level to apply their own competition laws to RBPs of their firms affecting international trade and development, along the lines of paragraph E:4 of the Multilaterally Agreed Set of Principles and Rules for the Control of Restrictive Business Practices.[120]

One of the experts felt that future negotiations on competition should be kept under the TRIMS framework. It should be stated clearly, though, that any expansion of the TRIMs Agreement to include other trade-related investment measures should include in parallel, and as a *quid pro quo*, elements of competition policy. These relate in particular to the control of restrictive practices for which TRIMs are used by developing countries. The provisions of the UNCTAD Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices, and draft codes of conduct on transnational corporations and transfer of technology could provide elements for disciplines on anti-competitive behaviour.

**Future treatment of investment in the multilateral trading system**

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[119] See UNCTAD, Investment-related Trade Measures. UNCTAD Series on Issues in International Investment Agreements, United Nations publication, Sales No. E.99.II.D.12.

[120] This states that "States should seek appropriate remedial or preventive measures to prevent and/or control the use of RBPs within their competence when it comes to the attention of States that such practices adversely affect international trade, and particularly the trade and development of developing countries", and might also extend to developing countries the terms of bilateral cooperation which a few developed countries already extend to each other (thus accepting an MFN obligation).

It was noted that at this stage of the discussion at the WTO, no consensus has been achieved which will make it improbable that negotiations on a comprehensive framework will start soon. It was felt that the discussions on the MAI will have repercussions or negative effects on the discussions of international investment rules at the WTO. One participant also considered that the introduction of such a politically charged issue on the trade agenda could divert attention from further trade liberalization efforts.

From a developing country point of view, it was suggested to continue the education process in the WTO working group on investment, in particular in the light of the Asian crisis and the potential negative effects of unregulated investment flows. The safest way would be to negotiate investment in the framework of TRIMS and GATS, which provide the basic principles such as national treatment and right of establishment or the asymmetries in the development levels between countries; the positive list approach should be maintained.

A key issue in future negotiations on trade and investment related to the question of national treatment. This was one of the central and most controversial issues in the MAI. National treatment assumes that domestic enterprises are similar to transnational cooperations; however, in the case of many developing countries, differences could be significant and give reason for an exception to national treatment through the introduction of a development clause, although such exceptions would not be necessary if a positive list would be adopted.

As a result of the Asian financial crisis and a lack of agreement amongst major trading partners, it is uncertain whether there will be comprehensive negotiations on a framework for investment. The TRIMs review and the GATS negotiations in the year 2000, as well as the Agreement on Subsidies and Countervailing Measures, provide an opportunity to take up the issues preoccupying both developed and developing countries, such as protection of investors, national treatment, performance requirements, and incentives.

It would appear that the extended list of TRIMs to be disciplined, as well as principles put forward by the US, namely non-discrimination, right of establishment etc. which were proposed during the TRIMs negotiations (and which were taken up during the MAI negotiations) would be considered as the objective for further negotiations on TRIMs by developed countries. Therefore, developing countries need to consider alternatives which could be pursued during the review process. One alternative would be to confine the review to discussions relating to problems of phasing out the prohibited TRIMs and/or extension of the Agreement to include other performance requirements. Developing countries could aim at a "carve out" of the performance requirements which were shown to be essential tools in development strategies. Another alternative would be to deal with broader aspects of investment policy which are appropriate to be taken up in the context of WTO. This could involve the negotiation of GATS style market access and national treatment commitments and/or negotiating disciplines on investment in the context of other Multilateral Trade Agreements.

One approach to dealing with trade and investment issues in the WTO could be to examine the extent to which investment issues are already dealt with in the WTO agreements and the possibility of incorporating additional provisions on investment policy into these Agreements. In fact, attempts to incorporate a comprehensive multilateral investment agreement into WTO might distract negotiations from trade liberalization and market access issues. Instead, one way to

facilitate negotiations could be to dissect the MAI proposal, in the sense that the various elements lumped together in the MAI could be addressed separately in the trade context. For example, establishment issues are covered by the definition of market access through the commercial presence mode of supply in GATS; national treatment is also covered by the GATS (commitments in these areas could be exchanged for reciprocal commitments). Other aspects of the MAI also relate to WTO Agreements such as movement of persons (GATS) performance requirements (TRIMs), and fiscal incentives (Subsidies Agreements).

The question arises as to whether a comprehensive set of principles dealing with all aspects of investment policy could appropriately be linked to trade obligations, or whether specific provisions could be elaborated in the Multilateral Trade Agreements to ensure that their objectives were not frustrated by restrictions or conditions on investment. Examples of such obligations could be provisions where denial of right of establishment and national treatment could frustrate trade objectives, for example in the allocation of agricultural tariff rate quotas,[121] or disciplines with respect to subsidy measures which distort the flow of investment, and not just investment measures which distort the flow of trade in goods, could be incorporated into the Agreement on Subsidies and Countervailing Measures. Provision for establishment and national treatment could be linked to duty free tariff treatment to reduce the possibility of attracting investment behind a tariff wall. This approach would have the advantage of confining the new trade obligations to those necessary to deal with trade problems, without requiring countries to harmonize their policies across the board with the risks this might entail.

From a development perspective, it is important to consider whether a multilateral agreement on investment would, among other things, allow to attract foreign direct investment that is compatible with national policy objectives, such as promoting economic growth, industrialization and transfer of knowhow. This could be done by drawing up a checklist of issues that have to be taken into account, including issues relating to the progressive liberalization of investment and the promotion of growth and development, performance requirements, anticompetitive practices, transfer of technology and technological capacity building. To ensure a sustainable participation of developing countries, international investment agreements need to strike a balance between providing stable and predictable conditions for investors and allowing host countries the flexibility and opportunity to pursue their development objectives in the context of their own national economic situations.

## Priority areas for further research

(i) Under what conditions does foreign direct investment contribute the most to the development process, what kind of rules would ensure sufficient flexibility to allow application of national policy objectives,
(ii) Analysis of the negotiating positions of OECD countries in the context of the TRIMs negotiations during the Uruguay Round and the MAI;
(iii) Study of impact of performance requirements on building domestic capacity;

[121] See Stefan Tangermann, Implementation of the Uruguay Round Agreement on Agriculture by Major Developed Countries, UNCTAD/ITD/16.

(iv) Impact of Asian financial crisis on trade and investment flows;
(vi) Analysis of differences between portfolio investment and FDI;
(vii) What are the benefits of a multilateral agreement on investment and what would be the losses without such an agreement;
(viii) Analysis of reasons for surge of FDI to specific countries and sectors;
(ix) Impact of regionalism on investment flows, particularly as a result of rules of origin;
(x) Impact of trade restrictive measures on flows of investment;
(xi) How could a balance be achieved between the treatment of disciplines governing government practices and corporate practices in the context of the review of TRIMs;
(xii) Identification of investment-related instruments and policies which are effective development instruments in the experience of certain developing countries (including as an instrument for the transfer of technology), as well as those which are less effective;
(xiii) Identification of the impact of such measures on investment flows, trade and social and cultural objectives;
(xiv) Analysis of the experience of the Uruguay Round negotiations on investment as well as other negotiations (e.g. the International Code of Conduct on the Transfer of Technology) and lessons for the future;
(xv) What kind of international investment agreement would best serve the interests of development?
(xvi) Identification, analysis and discussion of key elements of international investment agreements from a development perspective;
(xvii) Relevance of elements of the OECD multilateral agreement on investment, the work of the WTO study group, and other international investment negotiations for the TRIMs Agreement;

# SPECIAL AND DIFFERENTIAL TREATMENT

The last session of the Ad Hoc Expert Group meeting was devoted to a discussion on the concept of "special and differential treatment" or S&D. A number of issues related to the future treatment of S&D were raised and will be presented in this chapter. They broadly address:
(a) the relevance of a continuation of S&D in its present form;
(b) possible new forms of S&D called for by an increasing liberalization and globalization and ways to address S&D in future negotiations.

## Background

As early as the 1947-48 Havana Conference, developing countries (mainly Latin America at the time) challenged the assumptions that trade liberalization on an MFN basis would automatically lead to their growth and development. Their position gained greater political force with the independence of the developing countries of Asia and Africa. They argued that the peculiar structural features of the economies of developing countries and distortions arising from historical trading relationships constrained their trade prospects. This development paradigm was based on the need to improve the terms of trade, reduce dependance on exports of primary commodities, correct balance of payments volatility and disequilibria, industrialize through infant industry protection, export subsidies etc.

To a certain extent GATT rules reflected elements of this paradigm. Article XVIII of GATT, "Governmental Assistance to Economic Development", under which developing countries enjoyed additional facilities to enable them (a) to maintain sufficient flexibility in their tariff structure to be able to grant the tariff protection required for the establishment of a particular industry and (b) to apply quantitative restrictions for balance of payments purposes in a manner which takes full account of the continued high level of demand for imports likely to be generated by their programmes of economic development.

Developing countries thus enjoyed considerable flexibility in their trade regimes, primarily due to Article XVIII:B, but also to low levels of tariff bindings (although the latter could have been attributed to the lack of benefits received in the earlier rounds of GATT negotiations). Many developing countries acceded to GATT under Article XXVI which enabled them to largely escape the negotiations of bound tariff rates as part of their terms of accession. This flexibility was facilitated by the incorporation in 1964 of the "non-reciprocity" clause (Article XXXVI:8) of Part IV into GATT.

The UNCTAD II Conference (New Delhi 1968) led to the introduction of GSP schemes by developed countries. These were covered by a GATT waiver (not Part IV). During the Tokyo Round, developing countries' efforts to legitimize preferential treatment in their favour across the whole spectrum of trade relations resulted in the "Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries" (usually described as the "Enabling Clause"). This instrument pertains specifically to (a) GSP, (b) NTMs in the context of GATT instruments, (c) regional or global arrangements among developing countries, (d) special treatment for LDCs. The Tokyo Round resulted in enhanced disciplines in the form of detailed

Codes (e.g. subsidies, technical barriers to trade, customs valuation), but these were not accepted by the majority of developing countries.

Thus, S & D treatment rested on two operational pillars:

1) Enhanced access to markets (a) through preferential access under the GSP, (b) the right to benefit from multilateral trade agreements, particularly on tariffs in accordance with the MFN principle, without being obliged to offer reciprocal concessions; (c) the freedom to create preferential regional and global trading arrangements without conforming to the GATT requirements on free trade areas and custom unions (Article XXIV).

2) Policy discretion in their own markets concerning (a) access to their market (i.e. a right to maintain trade barriers to deal with BOP problems and to protect their "infant" domestic industries), and (b) the right to offer governmental support to their domestic industries using various industrial and trade policy measures that otherwise would be inconsistent with their multilateral obligations.

In the WTO MTAs, with few exceptions, S&D treatment is expressed mainly in terms of transitional periods, differences in threshold levels (as compared with those applicable to developed countries) and technical assistance, rather than substantive exemptions. Because of considerable MFN tariff cuts, the UR resulted in an erosion of the GSP, an important tool that gives developing countries preferential access to developed countries' markets. In addition, the extensive bindings of tariffs, restrictions on the use of trade policy measures (e.g. subsidies, TRIMS, etc.) have further reduced the flexibility previously enjoyed by developing countries. Thus the MTAs provide, with some exceptions (e.g. subsidies), that S&D treatment will be phased out by 2005.

## Key issues from the development perspective

A large number of S&D provisions were incorporated into the Multilateral Trade Agreements (MTAs). However, this was accomplished in a somewhat ad hoc manner, not as a result of an underlying consensus as to how the trade needs of developing countries emanating from the development paradigm should be reflected in trade principles and rules. On the contrary, this earlier paradigm did not enjoy a consensus even among developing countries, it was viewed as "ideological baggage" from the past by some, or described as a"crutch" which developing countries no longer needed and which was actually hindering their competitiveness. S & D was thus considerably eroded during the UR, because it was addressed separately in each negotiating group without an underlying conceptual framework. There was no overall consensus as to the trade measures required by developing countries as essential elements of their development programmes. Thus, the challenge facing developing countries in future negotiations would seem twofold, (a) to stave off the continued attack of existing S&D measures where these are crucial to the success of development programmes, and (b) adapt the concept of S&D to the realities of globalization and liberalization.

*Relevance and continuation of S&D*

The arguments against S&D tend to emphasize the differences among developing countries with respect to their resource endowments, their production capabilities, their economic and social institutions and their capacities for growth and development. It is claimed that while some are economically weak, lacking the human and the material resources on which to base a sustained strategy of economic and social development; others have reached the "take-off stage" where the economy begins to generate its own investment and technological improvement at sufficiently high rates so as to make growth virtually self-sustaining; others are seen to advance further to a stage of increasing sophistication of the economy and are "driving to maturity". These categories are used to justify “graduation” and to abandon S&D.

However, what appears to have changed is more the political attitudes to S&D than the underlying reality. In general, the disparity in per capita income between developed and developing countries has actually increased since 1980, and many developing countries have fallen into the "least developed" category. In addition, many newly independent "countries in transition" would fall into the GATT definition of a "less developed" country, in that they "can only support low standards of living". In fact, many of the developing countries "driving for maturity" have had their vulnerability and developing country status demonstrated by recent events. As a result, arguments against S&D based on the “heterogeneity” of developing countries have lost considerably in credibility.

In this context, it was pointed out that despite the current debate against a continuation of S&D, the reason for its existence in the global trade system has not ceased to exist. In other words, S&D was introduced for a particular reason and that reason continues to be valid. Hence, the discussion should not focus on its abolition but on a closer look at the concept itself and an analysis of its benefits and limitations, and if there are limitations, to address those limitations. Another expert mentioned that one of the problems linked to S&D, though, is how to assess the economic impact of preferential treatment for development.

Two main purposes of S&D are still valid: (i) to establish equity and fair competition where structural conditions are different, and (ii) to avoid distortions due to the negotiating powers of industrialized countries in the international trading system.

Several examples were given on how S&D (or asymmetries or non-reciprocity, as it is called in Latin America) is addressed in various regional agreements that have been concluded or are envisaged in the Americas. For example, in the case of NAFTA, Mexico had to concede not to be treated as a developing country, so no special preferential trade status has been provided. Nevertheless, in the two years since NAFTA concluded, the benefits Mexico experienced in terms of trade and investment have overcome these restrictions. This can partly be explained by the already high level of integration of the Mexican economy into the US market before NAFTA so that the elimination of S&D treatment did no major damage to the Mexican economy. In the case of Mercosur, the absence of S&D for the smaller economies also appears not to do any damage. The only concession made was in terms of the tariff time table which gives smaller countries additional time to adjust to the new rules. The only country still pressing for S&D treatment in Mercosur is Paraguay. Compared to Uruguay, Paraguay has less benefitted from the regional opening, due to - according to the expert - the persistence of an economic model which does not

match well with the new opportunities offered by Mercosur.

The topic of non-reciprocity is currently being discussed in negotiations on a free trade area between the Andean block communities and Mercosur where the Andean private sector is concerned about the risk of competition from Brazilian and Argentinean industries. Also, in the context of the negotiations of the FTAA, non-reciprocity is on the agenda and a group on small economies at the hemispheric level is trying to identify how their needs could be translated into some kind of S&D.

In relation to the various examples of regional agreements, it was stated that regionalism has been one response to the failure of the URAs or the global system to take into account the differences in capacity to compete among countries; regional agreements addresses this by providing countries the possibility to compete with countries at more or less their own level of development.

Although the progress in multilateral tariff liberalization and the extension of the regional agreements among developed, and between developed and developing countries has and will continue to erode preferential tariff margins, GSP and other unilateral schemes are needed to maintain access to markets and to reduce marginalization. All developing countries cannot participate in North-South free trade areas, and thus GSP treatment should be maintained or extended to ensure that the most vulnerable of them are not adversely affected, and that their access conditions are maintained (e.g. "NAFTA parity"). This process of conversion of unilateral schemes into FTAs could have the effect of eroding the efforts of developing countries to consolidate sub-regional integration agreements, and have the effect of exacerbating distortions of trade flows along North-South lines. Therefore S&D in the sense that North-South regional FTAs do not necessarily have to involve reciprocity by the developing countries should be established as a principle. Developing countries should have the opportunity to share in the dynamism demonstrated in the import growth of certain developing countries, thus the GSTP should be expanded within the framework of the "enabling clause".

The GSP can also play an important role in sectors where it has so far been applied on a very limited scale. The tariffication of QRs, VERs, etc. in the agriculture sector, and the high MFN tariffs in the textiles and clothing sector provide an opportunity for meaningful preferential tariff margins, and/or special tariff quotas which could provide a major impetus to the trade of developing countries.

*Possible ways of addressing S&D in future negotiations*

The GATS establishes a different approach to S&D than other MTAs, which could provide a model for future agreements. The GATS structure provides for the integration of development objective throughout the text of the Agreement. Market access and national treatment are negotiated concessions relating to a particular service sector/subsector on the basis of a positive list approach allow for a more gradual liberalization, and the possibility for tradeoffs and obtention of reciprocal benefits. Moreover, Article XIX.2 provides for flexibility for developing countries for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and when making access to their markets available to foreign services suppliers, attaching to such access conditions (e.g. transfer of technology,

training, etc.) aimed at achieving the objectives referred to in Article IV which provides that the increasing participation of developing country Members in world trade shall be facilitated through negotiated specific commitments, by different Members... relating to: (a) strengthening of their domestic services capacity and its efficiency and competitiveness, inter alia, through access to technology on a commercial basis; (b) the improvement of their access to distribution channels and informational networks; and the liberalization of market access in sectors and modes of supply of export interest to them.[122]

It has been the structure of the GATS which has proven to be of greater utility to developing countries rather than declarations in their favour, such as GATS Article IV, which has not been effectively implemented. The Annex on Telecommunications also recognizes the essential role of telecommunications for expansion of trade in services of developing countries and provides in section 6(c) and (d) that members shall make available, where practicable, to developing countries information with respect to telecommunications services and developments in telecommunications and information technology to assist in strengthening their domestic telecommunications services sector. The GATS thus contains concepts of a certain avant-garde nature in that they foresee the type of S & D treatment required in the context of globalization. Access to distribution networks is virtually a prerequisite to participating in international trade, while the exponential expansion of Internet and electronic trade has given much greater relevance to access to information networks. The vital character of access to technology is also recognized, than could have possibly been foreseen in the early 1990's. The GATS also legitimizes investment performance requirements.

The view was expressed that it would be important for future negotiations to move GSP preferences into the multilateral disciplines so that they become binding for all countries rather than leaving it to individual countries to choose who gets preference and who doesn't. This would require developing countries to come up with a proposal to determine graduation. One expert suggested to use the concept of graduation for sectors rather than countries, depending on their competitiveness. Another expert thought that rather than looking at transitional periods in the next round, it would be more useful to reflect the asymmetries among developing countries and different levels of development.

It was also pointed out that developing countries should provide a form of reciprocity for S&D treatment. One suggestion on what developing countries could offer referred to the nature of the policy commitment; in other words S&D could be negotiated dependent on the setting of sound economic policy by the beneficiary countries. It was argued that this was an important aspect since the purpose of obtaining the benefits was to improve economic and trade performance in such a way that within a given time period special provisions are no longer needed. Sound economic (and trade) policies would be one way of ensuring that this would take place. They would also provide a more stable environment and incentives to which investors could react.

In terms of market access, certain MTAs (e.g. Agreement on Subsidies and Countervailing Duties) provide thresholds under which imports from developing countries cannot be subjected to countervailing duties. There would also be a possibility of negotiating new thresholds in the

[122] The negotiations on movement of natural persons yielded limited results. Access to distribution channels and information networks e.g. CRS and technology has not been facilitated.

MTAs, notably in the Agreement on Anti-Dumping.

While the transitional periods will result in most S & D treatment in the form of exemptions from the obligations being phase out by 2005 (with the exception of rules on export subsidies), Article XVIII, Part IV and the Enabling Clause remain as integral parts of GATT 1994. S & D treatment can be pursued through seeking extension and revision of the relevant provisions of the MTAs in the context of the "built-in" agenda. Some agreements foresee the possibility that the transition periods could be extended, e.g. subsidies, TRIMs, etc. With respect to other agreements, the experience with the S & D provisions may be such as to indicate that there could be considerable room for improvement.

In the case of subsidies, it was suggested that a bias against developing countries existed. The "non-actionable" categories are those most available to developed countries, while subsidies of key importance to developing countries fall in the "actionable" category. Furthermore, the non-actionable nature of the R&D subsidies permits firms in developed countries to have access to subsidies for the development of new products, for which they are subsequently given a monopoly under the TRIPs Agreement. In addition, the fiscal investment incentives offered by developed country governments to attract investment, often at sub-national levels are not effectively disciplined . As the continuation of the "non actionable" category requires consensus, developing countries have the opportunity of correcting this imbalance.

The importance of focussing on the supply side in future discussion was stressed by several experts. For example, one expert reported on surveys carried out with the business community in least developed countries and informed that the key problems businesses face relate mainly to inappropriate infrastructure (e.g. unreliable power supply) or customs delays rather than market access barriers. Hence, enterprise development programs to support the private sector could be one solution to tackle the problems faced domestically. Any new multilateral disciplines should not impede the use of key tools of development policy, such as investment performance requirements.

Finally, it was pointed out that trade-related technical assistance accounts for less than 2% of ODA among the OECD countries which does not correspond to the promises that are usually made during the multilateral trade negotiations. It was also noted that 80% of the WTO technical assistance funds come from four small norther European countries, not form the large trading partners one would assume.

## Priority areas for further research

- the evolution of S&D in general over time, its usefulness and limitations, which countries have benefitted and which have not, the reasons behind the success or failure, with a view to proposing areas for improving S&D and strengthening the impact on developing countries.

- the specific implementation of S&D provisions in WTO agreements to assess the extent of their impact, if any, and propose areas for further improvement. In this respect also, the

need or not for S&D in trade-related aspects of intellectual property rights could be analyzed.

- defining S&D on the basis of objective economic criteria and measurable parameters, the translation of these concepts into practical and meaningful development-oriented provisions in international trade agreements, and follow up measures for their effective implementation.

- measures for introducing greater stability and predictability into autonomous trade preferences such as the GSP, including by way of multilaterally binding instruments.

- an objective criteria for sector and country graduation from S&D that could contribute to a better understanding of this sensitive subject and enable developing countries to participate determining the relevant criteria.

- improving the scope and extent of trade-related technical assistance measures for the expanding supply and infrastructure capacities of developing countries for external trade.

- definition of special S&D provisions for small landlocked and island developing countries to help them overcome the handicap to trade development posed by a their high vulnerability to a host of economic and non-economic factors.

- possible S&D measures for conferring WTO membership to LDCs.

- the divergent experiences with S&D measures at the regional level of integration groupings and trade agreements with a view to assessing appropriate S&D provisions that could be contemplated, legislated and implemented. Lessons could be drawn from these regional investigations for further elaboration of S&D at the WTO level.

- case studies (country studies) of some selected developing countries, especially LDCs, to see the results of S&D treatment before and after the Uruguay Round, as well as the needs of these countries at regional and multilateral levels

- definition of the "problematique" of development in the face of globalization so as to identify the specific problems of developing countries which could call for S&D treatment, including:

  (a) the low level of industrialization in developing countries,

  (b) inability to access advanced technologies,

  (c) lack of domestic savings to invest,

  (d) excessive dependance on primary product exports, declining terms of trade, volatility of export earnings,

(e) vulnerable BOPs situations, requiring sufficient reserves , not only to cover current imports, but for long term stability,

(f) high cost of capital, which is not taken into account for example in dumping cases against developing countries, nor in the rules on export subsidies,

(g) inefficient infrastructures, with the same implications,

(h) inefficient taxation systems in which it is difficult to calculate the rebate of indirect taxes, thus penalizing exporters, which is not taken into account in the Agreement on Subsidies (reminiscent of the “taxes occultes” debate of the late 1960's)

(i) inability to meet standards of developed countries and difficulties in preparing, and enforcing the required technical regulations,

(k) import bias of foreign investors in developing countries leading to reduced positive impact of FDI , as well as BOPs problems,

(l) lack of access to distribution channels,

(m) high percentage of the population employed in the agricultural sector, mostly at subsistence levels,

(n) need to ensure food security for low income groups,

(o) lack of resources for subsidization,

(p) difficulties in protecting against theft of traditional and indigenous technologies.

## PROGRAMME OF THE MEETING

***Day 1 - Monday, 21 September 1998***

| | | |
|---|---|---|
| **9:00 - 9:15** | **Registration** | |
| **9:15 - 9:30** | **Opening remarks and overview**<br>**Rubens Ricupero, Secretary-General of UNCTAD** | |
| **9:30 -11:30** | **Session 1:** | **Overview of the results of country-specific studies on the implementation of the URAs, the built-in agenda and new issues** |
| 9:30-10:30 | Latin America | *Presentations:*<br>Diana Tussie, FLACSO, Argentina<br>Pedro Da Motta Veiga, LATN<br>Vivianne Ventura Dias, ECLAC, Chile |
| | | *Discussion* |
| 10:30 - 10:45 | Coffee Break | |
| 10:45 - 11:30 | Africa | *Presentations:*<br>T. Ademola Oyejide, University of Ibadan, Nigeria<br>Patrick A. Messerlin, Fondation Nacionale des Sciences Politiques, France |
| | Middle East | Zeki Fattah, ESCWA |
| | | *Discussion* |
| **11:30 - 12:45** | **Session 2:** | **Agriculture, Services and Electronic Commerce** |
| 11:30 - 12:45 | (1) Agriculture | *Presentations:*<br>Timothy Josling, Stanford University, U.S.A.<br>Panos Konandreas, FAO<br>Alan Swinbank, University of Reading, U.K.<br>Frank Wolter, WTO |
| | | *Discussion* |
| **12:45 - 14:15** | **Lunch Break** | |
| **14:15 - 16:15** | **Session 2:** | **Agriculture, Services and Electronic Commerce (continued)** |
| 14:15 - 15:30 | (2) Services | *Presentations:*<br>Luis Abugattas, LATN<br>Rolf Adlung, WTO<br>Murray Gibbs, UNCTAD |
| | | *Discussion* |
| 15:30 - 16:15 | (3) Electronic Commerce | |
| | | *Presentations:*<br>Federico Cuello, Dominican Republic<br>Bruno Lanvin, UNCTAD<br>Patrick Low, WTO |

Renaud Sorieul, UNCITRAL
Richard Wilder, WIPO

*Discussion*

16:15 - 16:30 Coffee Break

**16:30 - 17:30 Session 3: Rules, Standards and Market Access**

16:30 - 17:30 (1) Rules - WTO Agreements on Anti-dumping, Subsidies and Safeguard

*Presentations:*
J. Michael Finger, World Bank
Joseph Francois, University of Rotterdam, Netherlands
Patrick A. Messerlin, Fondation Nacionale des Sciences Politiques, France
Dean Spinanger, University of Kiel, Germany

*Discussion*

**17:30 Cocktail**

***Day 2 - Tuesday, 22 September***

**9:15 - 11:00 Session 3: Rules, Standards and Market Access (continued)**

9:15 - 10:00 (2) Standards - WTO Agreements on TBT and SPS

*Presentations:*
Timothy Josling, Stanford University, U.S.A.
Patrick Low, WTO
Anthony Whitehead, FAO

*Discussion*

10:00 - 11:00 (3) Industrial tariffs

*Presentations:*
Joseph Francois, University of Rotterdam, Netherlands
Samuel Laird, WTO
Will Martin, World Bank

*Discussion*

11:00 - 11:15 Coffee Break

**11:15-13:00 Session 4: TRIPS, TRIMs, Investment and Competition Issues**

11:15 - 12:15 (1) TRIPS

*Presentations:*
Carlos M. Correa, University of Buenos Aires, Argentina
Assad Omer, UNCTAD
Adrian Otten, WTO
Narendra Sabharwal, WIPO

*Discussion*

12:15 - 13:00 (2) Trade and Competition Policy

*Presentations:*
Philippe Brusick, UNCTAD
Federico Cuello, Dominican Republic
Elizabeth Gachuri, Kenya
Patrick A. Messerlin, Fondation Nacionale des Sciences Politiques, France
John Whalley, University of Western Ontario, Canada

*Discussion*

**13:00 - 14:15 Lunch Break**

**14:15 - 15:15 Session 4: TRIPS, TRIMs, Investment and Competition Issues (continued)**

14:15 - 15:15 (3) Trade and Investment

*Presentations:*
Edward Graham, Institute for International Economics, U.S.A
Karl Sauvant, UNCTAD
Magda Shahin, Egypt
Manuela Tortora, SELA

*Discussion*

**15:15 - 16:30 Session 5: Special and Differential Treatment**

*Presentations:*
Yee Che Fong, ESCAP
J. Michael Finger, World Bank
Fernando Masi, LATN
T. Ademola Oyejide, University of Ibadan, Nigeria
Manuela Tortora, SELA

*Discussion*

16:30 - 16:45 Coffee Break

**16:45 - 18:00 Session 6: Summing-up: Elements of a positive agenda and research needs**

*Presentations:*
Rubens Ricupero, UNCTAD
Patrick Low, WTO
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*Discussion*

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