

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

FUTURE MULTILATERAL TRADE NEGOTIATIONS:

Handbook for Trade Negotiators
from Least Developed Countries



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Least Developed Countries**



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MAP OF THE LEAST DEVELOPED COUNTRIES



The Least Developed Countries: Regional Distribution

Africa (33):

1. Angola
2. Benin
3. Burkina Faso*
4. Burundi*
5. Cape Verde**
6. Central African Republic*
7. Chad*
8. Comoros**
9. Democratic Republic of the Congo
10. Djibouti
11. Equatorial Guinea
12. Eritrea
13. Ethiopia*
14. Gambia
15. Guinea
16. Guinea-Bissau
17. Lesotho*
18. Liberia
19. Madagascar**
20. Malawi*
21. Mali*
22. Mauritania
23. Mozambique
24. Niger*
25. Rwanda*
26. Sao Tome and Principe**
27. Sierra Leone
28. Somalia
29. Sudan
30. Togo
31. Uganda*
32. United Republic of Tanzania
33. Zambia*

* Land-locked country

** Island country

Asia (9):

1. Afghanistan*
2. Bangladesh
3. Bhutan*
4. Cambodia
5. Lao People's Democratic Republic*
6. Maldives**
7. Myanmar
8. Nepal*
9. Yemen

Caribbean (1):

1. Haiti**

Pacific (5):

1. Kiribati**
2. Samoa**
3. Solomon Islands**
4. Tuvalu**
5. Vanuatu**

The Least Developed Countries: status in the World Trade Organization

(as of 10 November 1999)

1. Afghanistan	none	25. Liberia	none
2. Angola	member	26. Madagascar	member
3. Bangladesh	member	27. Malawi	member
4. Benin	member	28. Maldives	member
5. Bhutan	observer*	29. Mali	member
6. Burkina Faso	member	30. Mauritania	member
7. Burundi	member	31. Mozambique	member
8. Cambodia	observer*	32. Myanmar	member
9. Cape Verde	observer	33. Nepal	observer*
10. Central African Republic ..	member	34. Niger	member
11. Chad	member	35. Rwanda	member
12. Comoros	none**	36. Samoa	observer*
13. Democratic Republic of the Congo	member	37. Sao Tome and Principe	none**
14. Djibouti	member	38. Sierra Leone	member
15. Equatorial Guinea	none**	39. Solomon Islands	member
16. Eritrea	none**	40. Somalia	none
17. Ethiopia	observer	41. Sudan	observer*
18. Gambia	member	42. Togo	member
19. Guinea	member	43. Tuvalu	none
20. Guinea-Bissau	member	44. Uganda	member
21. Haiti	member	45. United Republic of Tanzania	member
22. Kiribati	none	46. Vanuatu	observer*
23. Lao People's Democratic Republic	observer*	47. Yemen	observer
24. Lesotho	member	48. Zambia	member

* Observer countries that have applied to join the World Trade Organization

** Observer status at the Third WTO Ministerial Conference.

Foreword

The active participation of the LDCs in the formulation of the rules governing the multilateral trade system is quite recent and remains limited. Their preoccupation has been mainly with preserving and improving preferential trade liberalization in their favour by major trading partners through various schemes such as the GSP and the Lomé Convention, paying little if any attention to multilateral trade negotiations under the GATT, traditionally confined to the reduction of tariff and non-tariff barriers to trade. The perceived limited interest in the GATT trade liberalization process could partially be explained by LDCs inability to supply competitive foreign markets and thus their limited capacity to take advantage of global trade liberalization on a most-favoured-nation (MFN) basis.

All this changed with the Uruguay Round of Multilateral Trade Negotiations (MTNs) with an agenda which extended beyond the traditional tariff reductions to the domestic economic policy-making arena such as more stringent rules on subsidies and incorporated new issues such as trade in services which included investment, movement of persons, communications, transport, etc., and intellectual property rights. The Uruguay Round also brought under increased multilateral disciplines two important sectors, viz. agriculture and textiles which have special implications for the LDCs. The new rules and disciplines resulting from the Uruguay Round negotiations ushered in a new institution, the World Trade Organization (WTO), and a new set of rights and obligations of WTO members which came to be known as "single undertaking" - which required that these had to be subscribed to in their entirety by all WTO members. This had major implications for the LDCs and their future international trade relations, and indeed, implied a change of attitude not only in terms of their future participation in shaping the rules of the multilateral trading system, but also by raising concerns about policy autonomy and flexibility in determining their economic well-being. Trade policy and trade negotiations thus occupied greater attention of LDCs' policy makers in the post-Uruguay Round phase than in the past.

The participation of the LDCs in the Uruguay Round negotiations was limited although individual LDCs took part in joint initiatives by developing countries, and succeeded in obtaining differential treatment in their favour in many of the Multilateral Trade Agreements, as well as the "Decision on

Measures in Favour of the Least Developed Countries". However, the awareness in LDCs' Governments of the numerous and complex provisions, not to mention the impact these would have on their development policy choices, remained limited. This is why immediately after the signing of the Final Act embodying the results of the Uruguay Round of Multilateral Trade Negotiations at Marrakesh, the need was immediately expressed by these countries for raising awareness of the Agreements as well as for assessing their impact on their economies and policy options. The response by international organizations has been through various training programmes including UNCTAD's Programme on Commercial Diplomacy and through the innovative joint ITC/UNCTAD/WTO technical cooperation training activities under the JITAP and the Integrated Framework. Experience in carrying out these programmes has revealed the dearth of knowledge of the Multilateral Trade Agreements in these countries and the need to create a network of trainers and a network of trade information dissemination within the countries in order to ensure the sustainability and upgrading of knowledge on the multilateral trading system (MTS) as a whole. This would be a prerequisite for informed participation of the LDCs in the system and indeed for their gradual integration into a rule-based MTS. This handbook is intended to make a contribution to these various endeavours.

The launching of the handbook is made to coincide with the preparations by the LDCs for the third WTO Ministerial Conference scheduled in Seattle, United States, from 30 November to 3 December 1999. Meeting at Sun City, South Africa, in June 1999 in a Coordinating Workshop of Senior Advisers to the Ministers of Trade organized by UNCTAD and sponsored by the Government of South Africa and the UNDP, the LDCs adopted "Proposals for a Comprehensive New Plan of Action in the context of the third WTO Ministerial Conference", which have been submitted in the preparatory process leading to the third Ministerial Conference. In its draft form, the handbook served as a working document for the deliberations at the Workshop. Thus, the handbook provides an explanation of the various features of the WTO Agreements; it also reflects the preoccupations of the LDCs discussed at the Workshop with respect to various imbalances and shortcomings in the Agreements, guided by the experiences gained in implementation, as well as the concrete proposals for addressing them.

The credibility of the MTS lies in its ability to ensure the full participation of the LDCs in particular and of the developing countries as a whole both in the rule-making process and in deriving an equitable share of the benefits

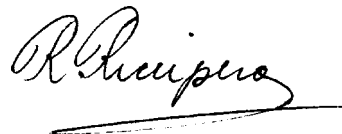
from global trade liberalization. Integration into the trading system and preventing further marginalization of the LDCs - and indeed their continued faith in the system - could mean nothing less. The willingness of the WTO membership to engage in genuine efforts to this end, will thus be judged by their response to the proposals submitted by the LDCs at Seattle and in the forthcoming negotiations. The concept of integration into the MTS is not confined to market access or flexibilities from which LDCs may have little or no capacity to derive advantages, as this would not correct asymmetries in the rights and obligations. Special and differential treatment provisions contained in the rules have not been able to address these asymmetries, partly because they are inadequate, and also because they are not being implemented seriously. Special and differential treatment provisions for these countries must therefore offer meaningful, identifiable and measurable benefits and be accompanied by concrete measures incorporated in trade agreements as obligations for ensuring their implementation. In particular, Ministers should take a decision at Seattle to establish a mechanism within WTO for granting bound, duty-free treatment to exports originating from the LDCs.

In this context, the LDCs face an even greater challenge. With limited human resources and institutional capacity compounded by shrinking national budgets, sustained presence in the negotiations in order to articulate their interests would demand special efforts. While technical assistance could narrow the capacity gap, it cannot substitute for actual representation at the negotiating table. The WTO membership and the international community at large, however, can facilitate their participation by being sensitive to their limited capacity when determining the structure of the negotiations and drawing up negotiating plans, including supplementing their resources and those already provided by the Swiss Government in meeting the high cost of maintaining adequate representation in Geneva. In addition to their participation in Sun City, the LDCs have been involved in the positive agenda exercise of UNCTAD. The clear identification of their trade objectives, in specific terms, is a cause for optimism.

Of the 48 LDCs, only 29 are WTO members. Out of the 29, only one (Myanmar) was an original GATT contracting party, while 28 LDCs acceded to GATT under article XXVI through simple declaration and thus have become also original members of WTO. By contrast, the LDCs which are presently acceding to the WTO are obliged to undergo a full-fledged and extremely complicated process of accession negotiations under Article XII

of the Agreement establishing the WTO. Facilitating the accession process of the LDCs seeking to accede to the WTO should be seen as a logical first step in integrating these countries into the global economy. This implies adopting transparent rules and criteria defining a simple admission procedure and the level of obligations of acceding LDCs. In any case, they should not be required to shoulder a higher level of commitment than those applicable to LDC Members of WTO. The proposal of the European Union (EU) to this end is welcome as a simplified “fast track” for LDCs accession and should also be among the “deliverables” in Seattle. UNCTAD is working with individual LDCs to assist them in the process of accession.

In conclusion, let me stress that success in the efforts to integrate LDCs in the trading system and avert their being bystanders in the globalization process will not be measured by increased knowledge of the system, nor the amount of influence they may be able to exert in the outcomes of trade negotiations. In saying this, I do not underestimate the value and contribution this handbook could make. I believe it is a widely shared view that improving LDCs’ trade performance and increasing their share in global trade from the current 0.4 per cent would be a most powerful instrument to overcome marginalization and offer prospects for graduation from LDC status. In percentage terms, this share is five times less than that of Singapore! On the eve of the new millennium, the international community must show solidarity with the poorest of the world, guaranteeing open markets for all products exported by the LDCs. This would be enlightened self-interest as it would be creating markets for increased imports from the industrialized countries in the long run. The rules should not impair or nullify the free market access granted, but should allow for “policy space” and flexibility to overcome supply-side constraints and other development bottlenecks inherent in the structural characteristics of LDCs economies to enable them to supply those export markets. I believe the proposals contained in the handbook and submitted by LDCs in preparation for the forthcoming WTO Ministerial Conference seek to achieve these genuine objectives and therefore they deserve serious consideration.



Rubens Ricupero
Secretary-General of UNCTAD

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It is my hope that this Handbook will assist trade negotiators from least developed countries in their preparations for the Third WTO Ministerial Conference in Seattle, as well as in forthcoming trade negotiations. I believe other developing countries will find it useful to the extent that they share common concerns in evolving a positive agenda in trade negotiations.



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Abbreviations

ABC	annual bound commitment
AMS	aggregate measurement of support
ATC	Agreement on Textiles and Clothing
BDV	Brussels Definition of Value
BOP	balance of payments
CAC	Codex Alimentarius Commission
CBD	Convention on Biological Diversity
CRF	clean report of findings
CRO	Committee on Rules of Origin
CTE	Committee on Trade and Environment
CTS	Council for Trade in Services
DPGs	domestically prohibited goods
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EC	European Community
EU	European Union
FAO	Food and Agricultural Organization of the United Nations
FDI	foreign direct investment
FTA	free-trade agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	gross domestic product
GPA	Agreement on Government Procurement
GSP	Generalized System of Preferences
GSTP	Global System of Trade Preferences among Developing Countries
HS	Harmonized System (Harmonized Commodity Description and Coding System)
IBRD	International Bank for Reconstruction and Development
ICC	International Chamber of Commerce
IFIA	International Federation of Inspection Agencies

ILO	International Labour Organization
IMF	International Monetary Fund
INR	initial negotiating rights
IPR	intellectual property right(s)
IRE	Independent Review Entity
ITC	International Trade Centre UNCTAD/WTO
ITU	International Telecommunication Union
JITAP	Joint ITC/UNCTAD/WTO Integrated Technical Assistance Programme in Selected Least Developed and other African Countries
LDC	least developed country
MAI	multilateral agreement on investment (OECD)
MEA	multilateral environmental agreement
MFN	most favoured nation
MTN	multilateral trade negotiations
MTS	multilateral trading system
NAFTA	North American Free Trade Agreement
NGO	non-governmental organization
OECD	Organisation for Economic Co-operation and Development
OMA	orderly marketing arrangement
PCT	Patent Cooperation Treaty
PPMs	process and production methods
PSI	preshipment inspection
RBPs	restrictive business practices
SCM	subsidies and countervailing measures (Uruguay Round Agreement on Subsidies and Countervailing Measures)
SPS	sanitary and phytosanitary (Uruguay Round Agreement on the Application of Sanitary and Phytosanitary Measures)
SPSM	Sanitary and phytosanitary measures
SSM	special safeguard measure
TMB	Textiles Monitoring Body
TBT	technical barriers to trade (Uruguay Round Agreement on Technical Barriers to Trade)
TCRO	Technical Committee on Rules of Origin

TMB	Textiles Monitoring Body
TRIMs	trade-related investment measures (Uruguay Round Agreement on Trade-related Investment Measures)
TRIPS	Agreement on Trade-related Aspects of Intellectual Property Rights
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNCITRAL	United Nations Commission on International Trade Law
VER	voluntary export restraint
WCO	World Customs Organization
WHO	World Health Organization
WTO	World Trade Organization

Overview

The agreements of the WTO (WTO agreements) provide a framework for the conduct of international trade in goods and services and also for the protection of intellectual property rights (IPR). The agreements generally contain the rights and obligations of governments and prescribe disciplines on the governments.

The WTO agreements include GATT 1994 (i.e., the original GATT of 1947 along with all its amendments, decisions, etc., up to 31 December 1994 and Understandings in some areas as a result of the Uruguay Round of Multilateral Trade Negotiations), 12 agreements in the goods area, the General Agreement on Trade in Services (GATS), the Agreement on the Trade-related Aspects of Intellectual Property Rights (TRIPS), and Dispute Settlement Understanding (DSU).

The rules of the General Agreement on Tariffs and Trade (GATT) apply to trade in goods. GATT emerged out of the Havana Charter after the Second World War. The charter could not be ratified and did not become operational, but its chapter on trade took the form of the GATT and was made operational. The text of GATT was revised from time to time to make it more responsive to the changing conditions of world trade. The present text is known as GATT 1994.

- (1) The general discipline in the GATT is that the export products of a country should have liberal and open access to the markets of other countries. A country is, of course, allowed to impose tariffs at the border, but no other restrictions are generally permitted. Under certain specific situations, non-tariff measures in the form of direct import control can be applied. Two specific situations in which such measures are allowed are: safeguarding the domestic industry against competition from sudden surge of imports (safeguard actions) and getting relief against balance-of-payment problems (balance-of-payment provisions). Besides, import control can also be imposed for some other reasons, e.g., for the protection of the life and health of human beings, animals and plants (Chapter 4, Sanitary and Phytosanitary Measures) or for the reason that a product does not satisfy certain prescribed standards (Chapter 5, Technical Barriers to Trade).
- (2) These rules are complemented by two basic principles of the GATT, viz., the most-favoured-nation (MFN) treatment and the national treatment.

The former implies that a country must not discriminate between one country and the other. Thus if two countries arrive at a compromise on lower tariffs on the products of their interest, the benefits of the new lower tariffs will not be limited to these two countries; the new rates will be applicable to all countries. The national treatment implies that there must not be any discrimination between an imported product and a like domestic product. Thus after a product is imported, it must get treatment not inferior to that accorded to a like domestic product.

- (3) The GATT also contains provisions against unfair trade, e.g., against the support provided by the government to the industry and trade (Chapter 6, Subsidies and Countervailing Measures) or against the supply of goods at prices less than their normal value (Chapter 7, Anti-dumping Measures). It also contains certain allied disciplines, e.g., in the area of customs valuation, i.e., determining the value of the goods on which the tariff rate is to be applied; rules of origin, i.e., determining the origin of imported goods; import licensing, i.e., the procedures for governments to require licenses for imports; trade-related investment measures (i.e., measures like import content requirements and government procurement), and state trading enterprises, i.e., the requirements in case the government has given exclusive trading rights to certain entities.
- (4) The rules of GATT, particularly those relating to prohibition on the use of quantitative restrictions, were not in the past applied fully by all countries in trade in goods in two sectors of trade in goods: agriculture and textiles. The reform programme that has been adopted under the Agreement on Agriculture and the programme for the [phased] abolition of discriminatory import restrictions applicable to textile products adopted under the Agreement on Textiles and Clothing, aim at ensuring that basic principles and rules of GATT become gradually applicable in these two sectors also. The GATT Framework also includes an Uruguay Round Agreement on Trade-related Investment Measures (TRIMs).

DISPUTE SETTLEMENT

An important feature of the GATT/WTO is that the framework contains the provisions for implementation of the rights and obligations. Thus if any country has a grievance against any other country, it can set in motion the dispute settlement process.

DECISION-MAKING PROCESS

The highest decision-making body of the WTO is the Ministerial Meeting which is held once in two years. Between these meetings, the highest body is the General Council which consists of all the members of the WTO. Then there are councils for different areas of subjects, viz., the Council for the Trade in Goods, the Council for the Trade in Services and the Council for the TRIPS. In addition, there are committees for some specific purposes, viz., the Committee on Trade and Development to look after the provisions relating to the developing countries, the Committee on Balance of Payment to monitor the use of the balance-of-payment provisions by the countries and the Committee on Budget to look after the budget and expenditure of the WTO. Finally, there is the Dispute Settlement Body (DSB), which looks after the settlement of disputes when Members have grievances against each other.

GATS AND AGREEMENT ON TRIPS

The Uruguay Round of trade negotiations, which was held from 1986 to 1994, has also resulted in the adoption of new set of rules governing trade in services and trade-related aspects of intellectual property.

The General Agreement on Trade in Services (GATS) applies the main principles and rules which apply to trade in goods to trade in services, with such modifications as are necessary to take into account the differences in their characteristics and the modes in which trade in goods and services takes place. The Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS), complements agreements on the protection of intellectual property rights developed by the World Intellectual Property Organization and prescribes minimum standards and periods for which protection should be granted for different intellectual property rights such as patents, copyrights, industrial designs and trade marks.

NEW SUBJECT AREAS

The first Ministerial Meeting was held in Singapore in September 1996, and the second in Geneva in May 1998. The third is to be held in

Seattle, USA, in November-December 1999. At Singapore, the Ministers decided to include in the WTO work programme for study and analysis six new subject areas which, in view of the countries suggesting their inclusion, have an impact on development of international trade. These are:

- Trade and environment;
- Trade and investment;
- Trade and competition policy;
- Trade facilitation; and
- Transparency in government procurement.

The study and analysis of the trade-related issues, problems and solutions in these subject areas are being undertaken by working groups and other bodies that have been specially established for this purpose. It is important to note that there is no commitment at this stage on the part of member countries on the desirability or otherwise of engaging in the WTO negotiations on rule making in these areas.

ORGANIZATION OF THE HANDBOOK

The handbook is divided into three parts:

- (1) *Part One* explains the rules contained in GATT 1994 and its associated agreements.
- (2) *Part Two* explains the rules contained in GATS, Agreement on TRIPS and those relating to dispute settlement.
- (3) *Part Three* describes the analytical work that is being carried out on new subject areas that have been included in the work programme of WTO.
- (4) *Annex I* contains a note on labour standards. Even though it was decided at the Singapore Ministerial Conference not to include this subject in the WTO work programme, it was thought desirable to cover it in the handbook, to assist negotiators in understanding fully the points that are being made for and against inclusion of this subject in the WTO work programme.
- (5) *Annex II* contains the document "Integrating Least Developed Countries into the Global Economy: Proposals for a Comprehensive New Plan of Action in the Context of the Third WTO Ministerial Conference", as adopted at the Coordinating Workshop for Senior Advisors to Ministers of Trade in LDCs in preparation for the Third WTO Ministerial Conference held at Sun City, South Africa, from 21-25 June 1999.

Part One

GATT 1994 AND ITS ASSOCIATE AGREEMENTS



Chapter 1

Tariffs

BACKGROUND

The tariff, i.e., customs duty, is the most traditional trade policy instrument for import control. It has been the subject of negotiations in GATT from the beginning. Several rounds of Multilateral Trade Negotiation (MTN) have taken place with the prime focus on the negotiations for tariff reduction. And over the years, tariffs have gone down significantly. The developed countries, in particular, have reduced their tariffs on industrial products to quite low levels, though they still have comparatively high tariffs on some products. The developing countries have also reduced their tariffs significantly, particularly in the Uruguay Round of the MTN.

USES AND EFFECTS OF TARIFF

There are three main uses of tariff, as described below:

- It is a source of revenue. For the developing countries, it is an important and convenient source of revenue.
- It is a means of protection to the local industry. The tariff adds to the price of the imported product; hence the prospects of the use of the like domestic product increases with higher tariff.
- The tariff is also used for rational utilization of foreign exchange in countries with scarce foreign exchange resource. Higher tariffs on luxury and non-essential products would discourage their imports, and lower tariffs on essential consumer goods, capital goods and industrial inputs would encourage their imports. This would result in desirable utilization of the foreign exchange based on the essential needs of the country.

The tariff has different effects on different sectors of the economy. A higher tariff on a product would increase the price of the product in the domestic market, hence the producer industry will see it with favour. On the other hand, the consumers of the product will be unhappy, as they have to pay a higher price for it. If it is an intermediate product for the use

in industry, a higher tariff will result in raising the cost of production of the final product, which, in turn, will result in reducing its demand both in the domestic market and foreign market. Hence, the determination of an optimum level of tariff for a product is a complex exercise, because the effects on various sectors of the economy have to be properly assessed and overall balance has to be aimed at.

STRUCTURE OF TARIFF

Types of tariff

There are generally three types of tariff, viz., *ad valorem*, specific tariff and combined tariff. Of these, the *ad valorem* tariff is now most prevalent, and countries are generally trying to convert other two types of tariff to *ad valorem* tariff.

Ad valorem tariff

It means the rate of tariff expressed as a percentage of the value of the imported product and is exemplified by value added tax (VAT). For example, if the rate of tariff on a product is 10 per cent, and the value of the import in a consignment is US\$ 1500, the actual tariff will be US\$ 150. If the import price of the product is US\$ 500 per tonne, the tariff on one tonne of import will be US\$ 50. Hence the resultant price of the product in the country will be US\$ 550 per tonne.

Specific tariff

It means the rate of tariff expressed in terms of the amount per unit of the quantity of the product. For example, the tariff on a product could be US\$ 60 per tonne. If the import price of the product is US\$ 1000 per tonne, the resultant price in the country will be US\$ 1060 per tonne. It can be easily seen that the equivalent *ad valorem* tariff for this specific tariff will be 6 per cent.

Combined tariff

This type of tariff has two components, *ad valorem* and specific. For example, the tariff may be 10 percent plus US\$ 50 per tonne. If the import price of a product is US\$ 2000 per tonne, the tariff will be US\$ 250 for one tonne of the product. The equivalent *ad valorem* tariff in this case will be 12.5 percent.

CLASSIFICATION OF PRODUCTS

For convenience, products are classified in standard ways for the denomination of tariffs on particular products. Earlier, various systems of classification were used by different countries. This created considerable confusion in respect of comparison and assessment of implication. Hence the countries have now generally adopted a common system which is called the Harmonized System (HS) of classification of products. Those countries having other systems earlier, have been progressively converting their tariff to the HS system.

The products are denoted in the HS system by a set of numbers based on the decimal system of notation. Broad categories of products, smaller categories within a broad category, groups of products within a small category, subgroups of products within a product group, individual products within a subgroup, etc., are represented by digits in the decimal system. For example, the broad category may be represented by two digits. A small category will be characterized by addition of one further digit, and thus it will be represented by three digits. In this way new digits will be added so that four digits represent groups, five digits represent subgroups and six digits represent individual products. This is merely an example for clarification. In actual practice, the products get denoted sometimes by more digits.

If in any cluster, for example in a group, there is a possibility of more than 10 divisions, for example of subgroups, the subgroups will be represented by addition of two further digits, rather than only one digit; because one digit, going from 0 to 9, will be able to differentiate only up to 10 divisions.

BINDING OF TARIFF

A country has the right to determine its tariffs on different products. But in actual practice, tariffs get fixed by the country in negotiations with other countries. Each country is interested in having the tariff in other countries on the products of its export interest reduced. This enhances the export prospect of its product. Hence in tariff negotiations, which generally take place during the MTNs, each country tries to persuade the others to reduce their tariffs. The countries commit not to raise the reduced rates of tariffs

beyond the agreed levels. In this way a country “binds” its tariffs on some products, which means that it commits not to raise the tariff on these products beyond those specified levels.

The discipline that a country cannot normally raise the tariff beyond the bound level is contained in Article II of GATT 1994.

The bound levels of tariffs are recorded in a “schedule”, which is specific for each country, i.e., the tariff schedule of a country records its bound levels for various products. If a country has not bound the tariffs on some products, it is quite free to increase the rates of tariffs on these products. The country cannot normally increase the tariff beyond the bound level on a particular product that has been covered by the binding. There is a special procedure for increasing the tariff beyond the bound level, which will be explained later.

The tariff schedules of the countries are kept in bound volumes of the WTO and these are available as WTO publication.

Generally there are two methods for the negotiations on the reduction of tariffs, viz: (i) formula approach; and (ii) product-by-product approach. Usually the formula approach has been adopted in the recent MTNs.

The formula approach in the negotiation is aimed at the agreement of the Members for a general reduction of the tariffs by various Members on the basis of certain accepted principles. The main elements of the principles followed in the past are: reduction of tariff across the board by a certain percentage, laying down a peak level which will be the maximum level for the tariffs on bound items, overall reduction of the average tariff by a certain percentage with the added condition that there would be a certain minimum percentage reduction in individual tariff line, laying down a minimum percentage of the tariff lines to be covered by the binding.

In the product-by-product approach, a country gives an offer list of the products on which it is prepared to reduce the tariffs, and a request list of products on which it requests other country(ies) to reduce tariffs. Such lists are given by a number of countries, and then negotiations take place among them. Finally there is an agreement among the Members for the reduction of tariffs. These reduced tariffs, though agreed among a set of Members, would be applicable to the imports from all Members of the WTO in accordance with the most-favoured-nation (MFN) treatment principle of GATT 1994.

Modification of commitment on binding

When a Member wishes to raise the tariff on a product above the bound level, it has to give concessions on some other products by lowering the tariffs on these products. This is finalized through a negotiation with some Members that have main interest in the export of that product. A procedure has been prescribed for this purpose in Article XXVIII of GATT 1994, which is described in brief below.

The Member first informs the Council for Trade in Goods about its intention to raise the tariff on a product above the bound level. The Council authorizes the Member to enter into negotiations for this purpose.

The negotiation is held with the countries having initial negotiating right (INR) and principal supplying interest. Besides, consultation is also held with the Member having substantial interest. These terms need some elaboration.

The Member with INR is the one with which the negotiation was held at the time of binding of the tariff on this product.

The Member with the principal supplying interest is identified by the Council. Normally it is such a Member that has higher share of export of the product in that country compared to the one having the INR. Besides, in accordance with the Uruguay Round Understanding on the Interpretation of Article XXVIII of GATT 1994, some other Members will also be considered to be having principal supplying interest if they have the highest ratio of export of the product into the modifying Member country, compared to its total export of the product.

No precise criterion has been prescribed for identifying the Member with substantial interest in a product. But the practice is to include in this category those Members which have a significant share in the market of the modifying Member.

The modifying Member offers some concessions by proposing some reduction on the tariffs on some products. The Member holds negotiations and consultations and tries to come to an agreement. If an agreement is reached, the revised levels of tariffs will be applicable for the imports from all Members of the WTO; this facility will not be limited to the Members having INR, principal supplying interest and substantial interest.

If agreement is not reached, the modifying Member is free to act according to its proposal. The Members having INR, principal supplying interest and substantial interest will be free to withdraw equivalent concession from the modifying Member, i.e., they will be free to raise the tariffs on some products exported by the modifying Member into their countries.

SOME OTHER IMPORTANT MATTERS

Tariff schedule columns

The tariff schedule of a Member has usually six columns. In order to understand the schedule properly it is necessary to know what these columns contain. Column 1 contains the HS Classification number of the product. Column 2 contains the description of the product. Column 3 contains the base rate of duty, i.e., the duty before the start of the negotiations. Column 4 gives the committed bound rate of duty. Column 5 describes which Member(s) have INR. Column 6 gives other duties and charges. Columns 4 and 6 need further elaboration.

According to the Marrakesh Protocol, adopted by the Ministerial Conference in Marrakesh in April 1994, the commitment on tariff reduction would generally be implemented in five equal rate reductions. The first reduction would take place on 1 January 1995. Each successive reduction would be made on 1 January of each of the following years and final bound rate would be effective by the end of the four-year period following 1 January 1995.

According to the Uruguay Round Understanding on the Interpretation of Article II.1(b) of GATT 1994, the other duties and charges mentioned in column 6 are also bound. Thus a Member cannot on his/her own raise them beyond the levels mentioned in this column.

Tariff line

Sometimes certain information is required to be given for the “tariff lines”, or “tariff line wise”. It refers to the tariff schedule of the Member. The requirement in this case is to give information for the products covered by each line of the tariff schedule.

Preferential tariff

Sometimes Members apply lower tariffs for some Members in comparison to the general tariff (MFN tariff) mentioned in the schedule. These are called preferential tariffs. One important example of the preferential tariff is the Generalized System of Preferences (GSP), according to which a developed country Member maintains lower tariffs on some products of the developing countries. Another example is the lower tariff applicable to the members of a regional trading arrangement.

Tariff quota

Tariff quota is an arrangement by which a Member applies lower tariff on a product up to certain level of import. Beyond that level, the normal MFN tariff applies. It is done to provide higher market access opportunity to other Members up to a certain degree. A tariff quota mentioned in the schedule of a Member is binding on it.

Tariff escalation

Tariff escalation indicates that the tariff is higher on the products with higher level of processing in a product chain. For example, let us take the case of textiles. The various products in the product chain in this area in accordance with the degree of processing are: cotton, yarn, grey fabric, processed fabric and garment. Tariff escalation in this case would mean that the tariff on cotton is the lowest, there is higher tariff on yarn, still higher tariff on grey fabric, and so on, with garment having the highest tariff in this chain.

It has important implication for the development of developing countries. If there is tariff escalation in their main export markets, their prospect of exporting higher processed products will be lower. This will discourage the development of higher processing industries in the developing countries. Thus their prospect of producing and exporting comparatively higher value products will be constrained.

This has been considered in the multilateral trade forum for a very long time. Tariff escalation in major developed countries still continues to be a major trade problem for the developing countries.

CURRENT STATE OF TARIFFS AND THE PROBLEMS

The developed countries have reduced their tariffs on industrial products to significantly low levels in respect of the products of interest to them. In these countries, the tariffs on the products of interest to developing countries are still comparatively high.

The developing countries had high tariffs earlier, but they have carried out considerable lowering of tariffs in the industrial sector in the Uruguay Round. Since their tariffs are still high, there will be continuing pressure on them to reduce their tariffs.

Under the programme of the Global System of Trade Preferences (GSTP), developing countries have provided lower tariffs to imports of some products from other developing countries, which participate in the system.

Considering the comparatively low levels of tariffs on the industrial products in the developed countries, the importance of tariffs there lies more as a weapon for trade retaliation and as a means of getting concessions from developing countries, than as an instrument of protection of domestic industry.

SUGGESTIONS

Based on the discussion above, the following suggestions may be appropriate for developing countries:

- The developed countries should reduce the tariffs on the products of interest to developing countries significantly.
- The developed countries should eliminate the tariff escalation in their tariff structure.

In addition, imports from LDCs of all products should be allowed by developed countries on duty-free and quota-free basis under the generalized systems of preferences. The preferential access should further be bound against withdrawal or modifications.

Chapter 2

Safeguard Action

BACKGROUND

The provision of safeguard in the WTO enables a country to safeguard its domestic production against increased imports. If a sector of production in a country suffers because of increased imports, the country is authorized to restrict imports for a temporary period by imposing higher tariffs or by directly limiting the import quantity under certain conditions, as will be explained later.

The main rationale behind this provision is that the particular sector in the country should be allowed time to adjust itself to the new situation of competition faced from imports. However, if it is not able to adjust within a short time, it will naturally be phased out. Thus the safeguard action, by its very nature, has to be temporary.

The basic concept behind it was the overall theme of burden sharing in the multilateral trading system. If a country faces the burden of adjustment as a result of dealing with sudden international competition in a sector, this burden should be shared by all countries in the system by the reduction of their exports to that country. Hence the country was allowed to restrain its import in that sector.

Earlier, safeguard measures had generally been applied by developed countries since they had generally liberalized their imports and reduced their tariffs and thus their industries were very much exposed to competition from imports. There were, however, two main problems. First, these measures had to be applied against the imports from all countries, including the other developed countries. Second, compensation had to be given to the main exporting countries for the losses suffered due to restrictions on imports. The developed countries were not comfortable with these compulsions; hence they often circumvented the normal provisions of safeguard. They resorted to what is commonly called the grey area measures of import control. Either they would unilaterally impose

control on the imports from selected countries, mostly the developing countries, or they would persuade the developing exporting countries to restrict their export of the particular product. The latter came to be known as the voluntary export restraint (VER). In a sector of great deal of importance to the developing countries, viz., the textiles, the major developed countries persuaded the main exporting developing countries to have a special import and export regime in derogation of the general rule of GATT against impositions of restrictions on import and export. This type of measure is commonly called the organized marketing arrangement (OMA). The generic name “grey area measures” was given to all such measures as their legality in the GATT was doubtful.

Naturally it was a very unsatisfactory situation, and thus efforts were made to bring about an improvement in the system. The Tokyo Round (1973-1979) could not resolve the issue. The efforts continued thereafter. The main problem was whether the safeguard measures in the form of quantitative restrictions should be applicable against all exporting countries or only against some selected ones which had recently increased their exports substantially. Thus the conflict was between “non-discriminatory general safeguard” action and “selective safeguard” action.

Serious efforts were made in the Uruguay Round (1986-94) which resulted in the Agreement on Safeguard. It has tried to tackle the problem of selectivity and also of the compensation for safeguard action as will be explained later.

The need for safeguard action in the developing countries including the LDCs may arise quite frequently in future because of two reasons, viz.: (i) now they are engaged in the process of liberalizing their imports and reducing their tariffs; and (ii) there may be a special push for exports from the industry of other countries where there are unutilized capacities in certain sectors.

The provisions relating to safeguard are contained at two places, viz., Article XIX of GATT 1994 and the Agreement on Safeguard. The former continues to be applicable insofar as it does not conflict with the latter.¹

MAIN PROVISIONS

Preconditions for taking safeguard measure

A Member of the WTO may take safeguard measure and thereby restrict its import in a particular sector if it determines after following a prescribed procedure that the increase in import has caused serious injury to its domestic industry or is threatening to cause serious injury.

Thus the three following facts have to be established:

- (1) There has been an increase in import. It may either be an absolute increase or an increase in import relative to the domestic production;
- (2) Serious injury has been caused to the domestic industry or there is a threat of serious injury; and
- (3) There is a causal link between the increase in import and the serious injury, i.e., the serious injury is caused or threatened by the increase in import.

These facts have to be determined in an investigation conducted by a designated competent authority which a country must establish before starting the first safeguard action after 1 January 1995.

Here two terms need clarification, viz., domestic industry and serious injury.

Domestic industry

The domestic industry for this purpose means the producers of the product under consideration as a whole or those producers whose collective output of the product constitutes a major proportion of its total production in the country. What is "major proportion" has not been clearly defined. Sometimes even less than half the production has been treated as major proportion of production. What is clear, however, is that safeguard measures cannot be taken if only some units having a small share of the total production are suffering because of the imports.

Serious injury

Serious injury in this context means a significant overall impairment in the position of the industry. Quantitative criteria have not been specifically

laid down to determine the serious injury. The factors which should be evaluated for this purpose are: the increase in the import, the rate of increase, the share of domestic market taken by the increased import, changes in the levels of certain parameters, viz., sales, production, productivity, capacity utilization, profits and losses and employment.

The threat of serious injury means such injury being clearly imminent.

It is necessary to establish the causal link between the import and the injury as mentioned earlier. If some other factors are causing injury to the domestic industry at the same time, the injury cannot be exclusively attributed to the increased import and safeguard action cannot be taken. Such other factors, for example, may be: shift in consumer preference, production of better substitutes, etc.

Sequence of steps

The specific steps which should be followed in taking safeguard action are the following.

The domestic industry gives application to the government for taking safeguard action in a particular sector.

The government asks the competent authority to conduct an investigation. The competent authority gives notice to all interested parties. Opportunity is given to importers, exporters and other interested parties to present their views and evidence and also to respond to the presentation of other parties. Opportunity is also given to make presentation whether the proposed safeguard measure will be in the public interest.

Based on the evidence and the presentation, the competent authority determines whether the preconditions for taking safeguard action exist, i.e., whether there has been an increase in import, whether serious injury has been caused to the domestic industry or there is a threat of injury and whether the injury is caused by the increased import. The competent authority then prepares and publishes a report containing the findings and reasoned conclusions on the issues involved.

On receiving the report the Member decides whether to take safeguard measure. Even if the preconditions have been established in the

investigation, the Member may decide not to take safeguard measure. If the Member decides to take safeguard measure, it holds consultations with other Members having substantial export interest in the product. Thereafter the Member takes the safeguard measure.

The Member has to notify the Committee on Safeguard about: (i) initiating the investigation; (ii) the finding of the existence or threat of serious injury; and (iii) the safeguard measure which has been taken.

During the course of the investigation, the Member may also take provisional safeguard measure if the delay would cause damage difficult to repair. For such provisional measure, there has to be a preliminary determination of clear evidence of injury or its threat.

De Minimis provision

There is a *de minimis* provision applicable to the developing countries including the LDCs. No safeguard action will be taken against a developing country as long as its share of import of the product in the particular importing country does not exceed 3 per cent. If a number of developing countries have each a share lower than this *de minimis* limit but have a collective share of more than 9 per cent of the import of the product in that country, they can then be covered by the safeguard measure.

Nature of safeguard measure

A safeguard measure may either be in the form of: (i) increased tariff or imposition of additional charges of similar nature; or (ii) quantitative restriction on import.

Tariff type measure

The Member may take safeguard measure in the form of increasing the tariff on the product or other similar charges. It is important to note that a Member is free to raise the tariff on a product for which it has not bound the tariff in the WTO. In such cases it is not necessary to follow the procedure of safeguard measure if the tariff is to be raised. Even in cases where the tariff is bound but the actual applied rate is lower than the bound level, the tariff can be raised to the bound level without following this procedure. It is only when the tariff or other charges are to be higher

than the bound level that the procedure for safeguard action explained above has to be followed.

Quantitative restrictions

There is a specific procedure for applying quantitative restriction as a safeguard measure. The Member lays down the quantitative annual limit of import, i.e., the quota of import of the product in a year. This level should generally not be lower than the average import of the last three years. Where a member decides on allocating quota among the exporting Members, he has to hold consultation with other Members having substantial interest in supplying the product. If it is not reasonably practicable, the Member allocates the shares on the basis of the past imports during a representative period which is taken to be generally the last three years.

Departure from this general principle of non-discriminatory application of safeguard measures and the allocation of quotas to all supplying countries on the basis of their share in the imports during the previous representative period, has been provided in Article 5.2.b of the Agreement on Safeguard which is popularly called the quota modulation clause. Departure is allowed if imports from certain countries have increased in disproportionate percentage in relation to the total increase of import in the representative period. The implication of this special provision will be explained later.

Duration of safeguard measure

There is a limit on the duration for which a safeguard measure can be applied. The provisional safeguard measure must not exceed 200 days. If the provision of the modulation of the import quota as explained above has been applied, the maximum duration will be up to four years. In other cases, the duration can be initially up to four years. It can be extended further with the limitation that the total period, including the duration of the provisional measure, does not exceed eight years. A developing country, including an LDC, may extend the measure for an additional duration of two years beyond the general limit of eight years.

If the measure is to be taken for more than one year, the Member has to liberalize it at regular intervals. If the duration is to exceed three years, the Member has to review it by the mid-term and it has either to remove the measure or increase the pace of liberalization of the measure.

Repeated application of safeguard measure

There are also limits on taking safeguard measures repeatedly. A safeguard measure cannot be reapplied for a period of time equal to that during which it had been previously applied. A developing country, including an LDC, may apply a safeguard measure again after the time equal to half of the earlier duration of the measure. A further limitation in both these cases is that the period of non-application must be at least two years.

Compensation

The Member applying safeguard measure has to give compensation to other Members that have substantial interest in the export of the product to that country. The compensation is generally in the form of reduction of tariffs on the products of export interest to those countries. If the agreement is not reached with another Member on the compensation, the other Member has a right to take retaliatory action which is generally in the form of enhancement of tariffs or other similar charges on the import from the country taking the safeguard measure. However, there is a restriction that any such retaliatory action cannot be taken for the first three years of the application of the safeguard measure.

Grey area measures

In respect of the grey area measures mentioned above, there are very strict provisions in the agreement. No new measure of this type can now be imposed. Hence legality is no more in doubt. Any new measure of this type will be violating the Agreement on Safeguard. Further, all old measures had to be eliminated by 31 December 1998.

EXPERIENCE OF IMPLEMENTATION

As mentioned in the beginning, it was earlier the developed countries that were resorting to safeguard action. The incidence of safeguard measures reached a peak in the second half of the 1970s and the first half of the 1980s. Thereafter the incidence declined and now the developed countries seldom resort to safeguard measures. With their adoption of more sophisticated import restrictive measures in the form of anti-dumping

duties and restrictions for environmental reasons, they do not see much need for the safeguard measures. Besides, these new forms of restrictions do not involve giving compensation as would be the case with the safeguard measures; hence the latter is less attractive.

Since the beginning of 1995, several developing countries have initiated safeguard action. For example, the Republic of Korea initiated action on soya bean oil, dairy products, bicycle and their parts, Brazil on toys and video games, Argentina on footwear and India on acetylene black, styrene-butadiene-rubber, carbon black, propylene glycol and flexible slabstock polyol.

As mentioned earlier, the developing countries may find a need for safeguard measure in their process of removal of quantitative restrictions and reduction of tariffs.

POTENTIAL PROBLEMS AND NEED OF IMPROVEMENT

There are some aspects of the Agreement on Safeguard which are heavily loaded against the interest of the developing countries, particularly the LDCs. These need improvement. There are some other areas also where improvements are needed. Developing countries, including the LDCs may consider putting up their specific proposals in these areas. Some suggestions are given below.

Quota modulation

As mentioned above, the Member imposing quantitative restriction as a safeguard measure may depart from the normal practice of allocation of the shares of the quota among members on the basis of their share of imports during the previous representative period. One important situation justifying such departure is the disproportionate increase in the import from particular countries. This may operate very much against the interest of developing countries, particularly the LDCs, which may be in the process of building up their industrial capacity and starting their export of the particular product. Such newcomers may naturally be covered by the quota modulation provision and it would operate against their building up new capacity and developing trade in new sectors.

It is therefore necessary to lay down that in the operation of the quota modulation, the developing countries, particularly the LDCs, will not be covered by the reduction of quota share below the norm.

Determination of quota share

Even the normal determination of the quota share operates against the developing countries, particularly the LDCs. It is generally based on the import of the last three years. Thus the developing countries which are in the process of development of new sectors of production and export will have only reduced opportunities as higher shares would go to the countries which had been earlier exporting the product to the particular country.

It is therefore desirable to have a provision that the developing countries, particularly the LDCs, will have quota shares higher than the norm keeping in view their new capacities of production and development of export in the particular sector.

Burden sharing by developing countries

As mentioned in the beginning, the rationale of the safeguard provision in the WTO is mainly the principle of the burden sharing in the multilateral trading system. But it is quite iniquitous to call upon the weaker trading partners like the developing countries, particularly the LDCs, to share the burden of adjustment of an industrial sector in a developed country. The current provision of exemption of a developing country through the *de minimis* provision of 3 per cent share of import is grossly inadequate. In fact there is justification for the bulk of the burden being shared by the developed countries.

It will be proper to exempt the developing countries, particularly the LDCs, from safeguard action, except if any of them has a very high share, say higher than 50 per cent, of the import of that product in the country.

Technicality in the procedure

The process of investigation is quite complex and technical. The developing countries, particularly the LDCs, which would need initiating safeguard investigation and taking safeguard measure, may not have

enough experience of conducting investigations and following the procedure meticulously. In such a situation it is likely that their action while taking safeguard measure may be challenged in the WTO through the dispute settlement process. There is a risk that even though the action may be justified on merits, it may still be pronounced incorrect technically if the details of the process have not been fully followed.

There is a need for an understanding that technical procedural deficiencies in case of developing countries taking safeguard action will be overlooked, if the deficiencies are purely of technical nature and do not substantively violate the process.

NOTE

1. In the agriculture and textiles sectors there are specific safeguard provisions, hence the provisions of the Agreement on Safeguard are generally applicable to sectors other than these two.

Chapter 3

Balance of payments

BACKGROUND

If a developing country, including an LDC, faces balance-of-payment (BOP) problems, it can take certain trade restrictive measures. Essentially this provision is contained in Article XVIII B of GATT 1994. It was further clarified and elaborated by the 1979 Declaration on Trade Measures Taken for Balance-of-Payments Purposes, adopted on 28 November 1979. This declaration was worked out in the Tokyo Round of MTN. The Uruguay Round also considered this subject and it came out with the Understanding on Balance-of-Payments Provisions.

This facility is provided to the developing countries in recognition of the fact that they sometimes face problems because of inadequate inflow and reserve of foreign exchange which may be detrimental to their development process. There is a similar (though not exactly same) provision in Article XII of GATT 1994 which is applicable to all countries in general, and thus applicable to the developed countries as well; but they have not used this provision for a long time. Of course, the countries in transition from a centralized economy to a market economy have been using this provision. Some important examples are: Bulgaria, Hungary, Poland and Slovakia, applying import surcharge, and the Czech Republic applying import deposit.

For the developing countries, particularly the LDCs, the use of Article XVIII B is very important. The external economies of most of these countries are very weak and they often suffer severe imbalance on external account. This problem is likely to be aggravated with their new wave of liberalization of import regime. Even those among the developing countries that have been comparatively better placed in respect of external balance have faced severe instability in this regard. Hence this provision will be an important tool for most of them from time to time in their process of development.

MAIN PROVISIONS

Article XVIII B of GATT 1994, supplemented by the Understanding on Balance-of-Payments provisions, provides the main framework for the measures under the BOP provisions. The essential elements are: the eligibility for taking BOP measures, the type of measures that can be taken, the limitations and conditions, required notifications and the consultation in the BOP Committee.

ELIGIBILITY FOR TAKING BOP MEASURES

The types of countries that can invoke provisions of Article XVIII B and the conditions that have to be fulfilled before taking such a measure have been specified in Article XVIII B.

To be eligible to invoke provisions of the Article, a developing country should: (i) have an economy that can only support low standards of living; and (ii) be in the early stage of development.

The specific criteria to determine these situations have not been laid out. However, such countries will not be only those that have just started their economic development, but also those that are undergoing industrialization in order to be free from excessive dependence on primary commodities. Further, any abnormal situation resulting from temporary and exceptional favourable conditions will be ignored in determining the weakness of a country in this context; only the normal situation of the economy will be taken into account.

Such countries can take BOP measures if they experience BOP difficulties arising mainly from their efforts to expand their internal markets and from instability of their terms of trade. The Article, however, lays down that the trade-restrictive measures introduced should not exceed those necessary to forestall the threat of serious decline in its monetary reserves, or where reserves are considered inadequate, those necessary to achieve reasonable increase in reserves. It does not, however, specify criteria for determining whether the country is facing a threat of serious decline in its reserves or if its reserves are inadequate. Article XV of GATT however lays down that in all these cases, the WTO shall accept the opinions given by the IMF.

TYPES OF BOP MEASURES

A Member may take: (i) price-based measures, e.g., import surcharge, import deposit requirement, etc., which have a direct impact on the price of the product; or (ii) quantitative restrictions, i.e., direct restrictions on the quantity of import of particular products.

The Understanding qualifies the provisions of Article XVIII B in this regard. It lays down that while applying quantitative restrictions on imports, a Member has to justify why price-based measures are not adequate to deal with the problem. Thus quantitative restrictions can be taken after the Member has considered the possible adequacy of the price-based measures and found them to be inadequate.

It should be noted that price-based measures in the form of raising the tariff, or applying other charges on products not covered by the binding of tariff, does not need the use of BOP provisions, as a Member is free to raise the tariffs and apply other charges on such products. A similar situation applies to raising tariffs and other charges up to the level of binding, in the case of the products which are covered by the tariff binding.

While choosing the products to which BOP measures could be applied, a Member has to justify the criteria used. For example, products which are essential for development may be exempted from the application of import surcharge or quantitative restrictions on imports. Such products could include consumption goods, capital goods or inputs needed for production.

LIMITATIONS ON BOP MEASURES

There are certain limitations on the use of the BOP measures. Some of the important ones are given below:

- (1) Only one type of restrictive measure can be applied to a particular product;
- (2) The restrictions on import should be commensurate with the BOP problems and should not be excessive;

- (3) These measures should not be taken for the protection of domestic industry; their sole purpose is to help the country to overcome the BOP problem;
- (4) The import of a product in a minimum commercial quantity should not be prevented;
- (5) The import of commercial samples should not be prevented;
- (6) The restrictions should not prevent compliance with patent, copyright, trademark or similar procedures; and
- (7) The restrictions must be progressively relaxed as the conditions improve, and must be eliminated when the conditions no longer justify their continuance.

NOTIFICATIONS

A member taking trade measures on BOP grounds has to make two types of notifications, viz., those to be sent annually and those to be sent when new situations arise.

The annual notification should give details of the types of measures, the criteria used for their application, the product coverage of the measures and the trade flow affected by the measures.

The new situations requiring notifications are when new measures are introduced, changes are made in the existing measures and modifications are made in the time schedule for the elimination of BOP measures.

BOP CONSULTATIONS

A Member applying BOP measures has to have periodic consultations with the BOP Committee, which is constituted of all the Members of the WTO that have expressed their desire to be the members of this Committee. The consultation essentially means that the BOP Committee examines the justification of the application of the BOP measures by the Member and the method of application of the measures.

There are two types of consultation: simplified consultation and full consultation which involves a detailed examination of the matter.

Simplified consultation

LDCs are required to use simplified consultation. In case of other developing countries, simplified consultation will be applied when they are pursuing the liberalization of BOP measures in pursuance of the time schedules given in previous consultations, or when the trade policy review of the Member is to be held in the same year as the BOP consultation. In addition, except for the LDCs, no more than two successive consultations will be held under the simplified procedure.

Three documents are prepared for simplified consultation, viz., a written statement by the consulting Member, a background paper prepared by the WTO Secretariat and a document on recent economic developments prepared by the IMF.

Such consultations, as the name suggests, are not detailed. The basic decision which the BOP Committee takes in such a consultation is whether or not full consultation is desirable in the case of the consulting Member. If the Committee is satisfied with the justification of the measures and the manner of application of the measures, it does not generally recommend full consultation.

Full consultation

The cases not covered by the simplified consultation, as explained above, are covered by full consultation.

Here again, three documents are to be prepared, viz., a basic document by the consulting Member, a background paper by the WTO Secretariat and a document on recent economic developments by the IMF. These are much more detailed than those prepared for the simplified consultation.

The consulting Member may give detailed information on the external factors which are relevant relating to the external trading environment. It may also indicate specific measures and products on which it considers action to be particularly important. This provision has a special significance. Very often, the BOP problems can be tackled if the Member has an adequate opportunity to export its products. There may be constraints on its export prospects because of the policies and measures of other Members, particularly the major importing country Members. It will be

relevant to give facts and information on this matter, clearly indicating what type of supportive action it needs from the other Members.

In full consultation, the consulting Member has to be prepared to answer detailed questions on the justification of its measures and also on the choice of the products and choice of the type of the measures. If it has applied quantitative restrictions, it should also be ready to explain why price-based measures will not yield adequate results.

The Committee prepares a report in respect of the measures of the consulting Member. If the Committee is satisfied with the measures taken by the Member, nothing more is to be done by the Member. However, if the Committee finds that the measures are not justified or that they are not applied in an appropriate manner, it will make recommendation to the General Council on what should be done by the consulting Member. The General Council then considers these recommendations, and if it decides to make specific recommendation for certain actions to be taken by any Member, it will operate as an obligation on the Member.

EXPERIENCE OF IMPLEMENTATION

Several developing countries have been taking action under the BOP provisions. Some examples are: Bangladesh applying import surcharges and action relating to agricultural products; Egypt on textiles, clothing and poultry; India on a large number of items; Nigeria applying import surcharges and action on poultry, cereal, vegetable oils, plastic materials, mineral, fabrics, etc.; Pakistan applying import surcharges and action on textile products; the Philippines on motor vehicles and parts, agricultural products and petroleum products; Sri Lanka on agricultural products; and Tunisia applying import surcharges and action on agricultural products, textiles, automobiles, etc.

For some years, a large number of developing countries have been persuaded to “disinvoke” Article XVIII B, which means that there is an understanding that they would not be seeking relief provided by this Article. Their right to take action under this provision has not been curtailed formally, but after such “disinvoking” they will have to make a very strong case if they want to resort to BOP measures. The persuasion of these developing countries to give up their option allowed under a substantive

provision of the GATT 1994 has been very unusual. As it is, the developing countries do not have much leverage in the WTO, and so to ask them not to exercise a particular right, which is normally allowed under a specific provision of an agreement, further erodes their options.

Recent uncertainties in the BOP situation of several developing countries have underscored the relevance and need of the use of the BOP provision. The main problem, however, in the application of this provision is that there are no criteria for determining whether the BOP problem exists in a country. Earlier, the BOP Committee was somewhat less rigid in this regard, but now the major developed countries are very active in the BOP Committee and have serious reservations on these issues. The main issues in determination of the existence of the BOP problem will be explained later in the next section.

There is also a potential for difficulties in using quantitative restrictions as a BOP measure in light of the Understanding explained above. The GATT Article XVIII B does not put any restriction on a Member in using quantitative restrictions. It allows a Member to “control the general level of its imports by restricting the quantity or value of merchandise permitted to be imported”. It further says that “in applying these restrictions, the contracting party may determine their incidence on imports of different products or classes of products in such a way as to give priority to the importation of those products which are more essential in the light of its policy of economic development..”. It goes on to provide that “...no contracting party shall be required to withdraw or modify restrictions on the ground that a change in its development policy would render unnecessary the restrictions which it is applying under this Section”. Thus this Article provides very wide discretion to the developing country Member in applying BOP measure and in choosing a particular type of the measure.

However, some restrictions started to be introduced, first in the Declaration after the Tokyo Round, which said that priority should be given to price-based measures, and then in the Uruguay Round where the Understanding made it more specific and rigid saying that quantitative restrictions should be used only if it is justified on the ground that price-based measures will not be adequate. This has severely curtailed the option for a quick choice of measures by a developing country.

Recently the consultations in the BOP Committee have been very difficult for the developing countries than in the past. They are very seriously questioned on the details of their measures and the measures themselves are very meticulously scrutinized. Hence the developing countries have to employ a lot of resources in preparing for the consultation in the Committee.

SUGGESTIONS FOR IMPROVEMENT

This is a very important provision of GATT 1994. It is located in the contractual part of the text, and not in the part containing the best endeavour provisions for the special treatment of developing countries. With their process of liberalization and integration in the world economy and trade, the developing countries will need to use this provision more and more to tide over their BOP problems. It is therefore necessary that they pay attention to the smooth working of this provision and the removal of its constraints and inconveniences.

Some suggestions for improvement are given below:

- (1) As mentioned earlier, the criteria for deciding on the existence of the BOP problem have not been specified. Generally a practice has developed that the total foreign-exchange reserve is taken to consider whether the position is satisfactory. But the foreign exchange reserve contains several elements which are extremely volatile, e.g., the investment in the equity market, short-term deposits, etc. These investments can be withdrawn instantaneously without any notice. Hence, this portion of the foreign exchange reserve cannot be utilized for meeting the foreign-exchange commitments. Any undertaking in obtaining loans, etc., based on such a volatile reserve, would be highly risky; in any case, hardly any responsible institution would provide foreign-exchange resources based on such elements of the reserve.

Hence, when deciding whether the country faces a BOP problem, it is important to consider the composition of the reserve, and keep out of the calculation such elements of the volatile.

- (2) When assessing the need for foreign exchange, a practice developed in the past where the use of foreign exchange in the previous few years is taken into account, a practice which is improper. The historical trend of the use of foreign exchange is not a good indicator of the need for foreign exchange in the future, in view of the fact that developing countries have to move on a fast track of development. Hence the method of assessing the requirement of foreign exchange needs to be modified.

The need of foreign exchange should be assessed on the basis of the future programme of development, and not on the historical trend of expenditure.

- (3) As mentioned above, some new constraints have been placed on the choice of the measures, particularly on the use of quantitative restrictions. The BOP measures are needed for quick and effective results on the level of imports. It is well known that the price-based measures may not be rapidly effective and predictable in its results. The quantitative restrictions will certainly yield quick and predictable results. Hence from the point of view of utility, quantitative restriction measures are preferable compared with price-based measures.

It is therefore necessary that the developing countries have full discretion in choosing the type of measures, and in particular should not be constrained in using the quantitative restrictions at their discretion if the conditions for taking BOP measures are satisfied. The BOP Committee should limit itself to determining whether the conditions are satisfied, and avoid examining the propriety of the type of measures.

Chapter 4

Sanitary and phytosanitary measures

INTRODUCTION

With the objective of protecting the human beings and flora and fauna, most countries of the world have put in place sanitary and phytosanitary measures. These measures include prohibition, restriction, prior permission for export, phytosanitary certification by the exporting country, post-entry quarantine, inspection, testing, treatment for making imported plants free from disease carrying vectors, etc. In framing these measures, some countries followed international standards, guidelines and recommendations, while others did not. These measures were applied bilaterally and sometimes plurilaterally, and some times in a discriminatory manner. As a result, application of these measures often turned into barriers to international trade.

The participants to the Uruguay Round, therefore, in the context of GATT Article XX(b), addressed the subject of sanitary and phytosanitary measures, with a view to bringing in more disciplines and injecting multilateralism in the application of these measures. During the initial period of negotiations, participants considered the options of appropriately elaborating the GATT Article XX(b) or improving the Agreement on Technical Barriers to Trade (TBT) so as to take on board their concerns over the application of sanitary and phytosanitary measures. However, finally necessary consensus emerged in favour of a separate agreement on the application of sanitary and phytosanitary measures (SPSM) which resulted in the present Agreement with the objective to: protect human, animal or plant life or health; and improve the human health, animal health and phytosanitary situation in all Members.

MAIN PROVISIONS

Definition of SPS measures

For the purposes of the Agreement, Annex A defines sanitary or phytosanitary measures as any measure applied to protect: (a) animal or plant life or health, within the territory of Members, from risks arising from the entry, establishment or spread of pests, diseases or disease causing organisms; (b) human or animal life or health from risks arising from additives, contaminants, toxins or disease causing organisms in foods, beverages or foodstuffs; and from diseases carried by animal, plants or products thereof from the entry, establishment or spread of pests. The definition also covers any measures applied to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.

Sanitary and phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including, *inter alia*, end products criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants or with materials necessary for their survival during transport; and packaging and labeling requirements directly related to food safety.

Agricultural products usually subject to sanitary and phytosanitary measures are: fresh fruits and vegetables; fruit juices and other food preparations; meat and meat products; dairy products; processed food products.

Annex A further defines appropriate level of sanitary and phytosanitary protection, pest-free or disease-free area and area of low pest or disease prevalence and elaborates international standards, guidelines and recommendations as well as risk assessment.

Main aims and objective

The Agreement reaffirms not to apply sanitary and phytosanitary measures as a means of arbitrary or unjustifiable discrimination between Members or as disguised restrictions on international trade. Towards these ends, the Agreement establishes a multilateral framework of rules and

disciplines to guide the adoption, development and enforcement of sanitary and phytosanitary measures in order to minimize their negative effects on trade.

In view of the contributions that international standards, guidelines and recommendations can make in this regard, the Agreement desires to further the use of harmonized sanitary and phytosanitary measures between Members on the basis of international standards, guidelines and recommendations developed by the relevant international organizations, including Codex Alimentarius Commission (CAC), the International Office of Epizootics and the relevant international and regional organizations operating within the framework of International Plant Protection Convention.

The Agreement specifies Members' rights and obligations in the application of sanitary and phytosanitary measures and urges them to base their sanitary and phytosanitary measures on international standards, guidelines or recommendations and to harmonize these measures on as wide a basis as possible.

Under the Agreement, Members are allowed to introduce or maintain SPSM which result in a higher level of protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, provided there is a scientific justification for the same.

Equivalence

The Agreement requires the Members to accept the sanitary or phytosanitary measures of other Members as equivalent, even if these measures differ from their own or from those used by other Members trading in the same product, if the exporting Member objectively demonstrates to the importing Member that its measures achieve the importing Member's appropriate level of sanitary or phytosanitary protection.

Enquiry points

The agreement requires each Member to establish one enquiry point to respond to all reasonable questions from interested Members as well as for providing relevant documents on any sanitary or phytosanitary regulations

adopted or proposed within its territory; any control and inspection procedures, production and quarantine treatment, pesticide tolerance and food additive approval procedures, risk assessment procedures, etc.

Notification procedure

When implementing the provisions of paragraph 5 of Annex B, i.e., proposing any sanitary or phytosanitary regulations different from the international standard, guidelines or recommendation, the concerned Member is required to notify to WTO the availability of the complete draft text of a proposed regulation well in time so that other interested Members can provide comments on the same.

Members submitting comments on a notified draft regulation are required to provide them without unnecessary delay to the authority designated to handle the comments. A Member receiving comments through the designated body is required to: (i) acknowledge the receipt of such comments; (ii) explain within a reasonable period of time, and at the earliest possible date before the adoption of the measure, to any Member from which it has received comments, how it will take these comments into account and, where appropriate, provide additional relevant information on the proposed sanitary or phytosanitary regulations concerned; (iii) provide to any Member from which it has received comments, a copy of the corresponding sanitary or phytosanitary regulations as adopted or information that no corresponding sanitary or phytosanitary regulations will be adopted for the time being; and (iv) where possible make available to other Members comments and questions it has received and answers it has provided, preferably through electronic facilities.

Members are required to give favourable consideration to requests for extension of the comment period, in particular with regard to notifications relating to products of particular interest to developing country Members, or where there have been delays in receiving and translating the relevant documents. An extension of the time-limit for comments of at least 30 days should be provided upon request, whenever possible.

Documents requested should normally be provided within five working days. If this is not possible, the request for documentation or information

should be acknowledged within that period and an estimate given of the time required to provide the requested documentation.

Developing countries

The Agreement provides that in the preparation and application of sanitary or phytosanitary measures, Members shall take account of the special needs of developing country Members, and in particular of the least-developed country Members. Moreover, it provides that, where the appropriate level of sanitary or phytosanitary protection allows scope for the phased introduction of new sanitary or phytosanitary measures, longer time-frames for compliance should be accorded on products of interest to developing country Members so as to maintain opportunities for their exports.

Further, under the Agreement, least-developed country Members could delay application of the Agreement, with respect to their sanitary and phytosanitary measures affecting importation or imported products, for a period of five years following its implementation (i.e., until 2000). Other developing country Members had the possibility to delay the application of the provisions of the Agreement, other than obligations pursuant to Articles 5.8 and 7, for two years following the entry into force of the WTO Agreement with respect to their existing sanitary and phytosanitary measures affecting importation and imported products (i.e., until 1997). Moreover, under the Agreement, developing country Members could request further time-limited exceptions with respect to any obligation under the Agreement taking into account their financial, trade and development needs.

The Agreement, under Article 9, requires Members to provide technical assistance to other Members, specially developing country Members either bilaterally or through the appropriate international organizations. Such assistance may be, *inter alia*, in the areas of processing technologies, research and infrastructure, including in the establishment of national regulatory bodies. Where substantial investments are required in order for an exporting developing country Member to fulfil the sanitary or phytosanitary requirements of an importing Member, the latter is required to consider providing such technical assistance as will permit the exporting developing country Member to maintain and expand its market access opportunities for the product involved.

Committee

The Agreement, under article 12, has established a Committee on Sanitary and Phytosanitary Measures (SPSM) to provide a regular forum for consultations and carry out the functions necessary to implement the provisions of the Agreement.

Some distinctions between agreements on TBT and SPS

Some of the distinguishing features of these two Agreements are briefly outlined below:

- First, the TBT Agreement requires that product standards should be applied on an MFN basis. The SPS Agreement permits standards to be applied on a discriminatory basis provided that they do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail. The rationale for this rule is that, owing to differences in climate, the incidence of pests or diseases, and food safety conditions, it is not always appropriate to impose the same sanitary and phytosanitary standards on animal and plant products originating from different countries.
- Second, the SPS Agreement provides greater flexibility for countries to deviate from international standards than is permitted under the TBT Agreement.
- Third, in assessing the risk to animal or plant life or health, economic factors such as the establishment or spread of pests or diseases; the costs of control or eradication in the importing member country and the relative cost-effectiveness of alternative approaches to limiting risks should be taken into consideration.
- Fourth, in determining the appropriate level of SPS protection, the objective of minimising negative trade effects should be borne in mind.
- Fifth, the SPS Agreement permits countries to adopt SPS measures on a provisional basis, as a precautionary step, in cases where there is an imminent risk of the spread of disease, but the scientific evidence is insufficient.

EXPERIENCE OF IMPLEMENTATION

Review of implementation by the Committee

The Committee on Sanitary and Phytosanitary Measures, as per its mandate given under the Agreement, reviewed the operation of the Agreement for a period of three years from its entry into force. Some of the activities in connection with this review and findings thereof are presented below:

- Some SPS-related trade problems have been resolved through discussion at formal meetings of the Committee or bilaterally.
- The Agreement has significantly improved transparency in the application of sanitary or phytosanitary measures. This is borne by the fact that Members are progressively, and in a more comprehensive manner, meeting their notification obligations.
- Significant progress has been made in the establishment of Enquiry Points and National Notification Authorities. As of March 1999, over 1100 notifications were submitted by 59 Members; 91 Members established National Notification Authorities; and 100 Members established National Enquiry Points to respond to requests for information.
- Some importing Members provided technical assistance to developing country Members when substantial investments were required in order for these countries to fulfil the importing Member's sanitary and phytosanitary requirements.
- The Secretariat provided technical assistance to developing country Members in the areas of its competence.
- International organizations, including the World Health Organization (WHO), the Food and Agriculture Organization (FAO) and the International Trade Centre (ITC) provided considerable technical assistance to developing country Members.
- No information on the extent to which the special and differential treatment was provided to developing country Members is available, nor, information on the extent to which developing country Members have made use of any special and differential treatment accorded to them.

- As required by the SPS Agreement, a preliminary procedure to monitor the process of international harmonization and the use of international standards, guidelines or recommendations have been adopted.
- Recommended notification procedures, as well as formats for routine and emergency notifications have been adopted.
- No specific requests has been submitted to the Committee under Article 10.3, although there had been some suggestions to extend the period for application of the Agreement by all developing country Members.
- Since the entry into force of the Agreement, Codex, OIE and IPPC have undertaken a considerable amount of work in the area of risk assessment and their work has significantly progressed. These international organizations have begun work on guidelines, on risk analysis, including on relevant terminology, facilitating Members' compliance with obligations under the Agreement. Other international organizations, including the WHO and the FAO, are also working in this area.
- In accordance with the provisions of Article 12.2 of the SPS Agreement, there had been a number of bilateral consultations between Members which had facilitated the clarification of misunderstandings or otherwise resolved the issues involved.
- Issues concerning transparency, technical assistance and cooperation; the needs of developing countries and special and differential treatment; equivalence; regionalization; harmonization; risk assessment; and resolution of trade disputes were discussed.

Some concerns of developing countries

Application of sanitary and phytosanitary measures, allowed under Article XX(b) of GATT 1994, is within the sovereign rights of a country to safeguard its economic and commercial interests, meet its legitimate concerns for national security, public safety, human and animal life and health, plant and environmental protection as well as preservation of biodiversity. However, in the developing countries, particularly in the least developed countries, where institutional capacities are weak and inadequate in terms of personnel strength and efficiency, level of scientific and technical knowledge, examination and testing facilities, and where all physical and socioeconomic infrastructure are underdeveloped, adequate enforcement of these measures is obviously extremely difficult.

It is in the above context that a strong case has to be made for technical assistance – both bilateral and multilateral, to strengthen the enforcement capacity in the developing countries, particularly, in the LDCs. The technical assistance should cover areas of human resources development, institutional development as well as development of physical facilities for inspection and testing.

Because of lack of technical and financial resources, the developing countries, particularly the LDCs are not able to participate effectively in the standard setting processes of the international organizations. Thus there is the risk that their special situations and their concerns may not get reflected in this process.

SUGGESTIONS

- It is important to enhance effective participation in the standard-setting process in the international bodies. The technical bodies and also the WTO bodies should consider this problem and ensure that the special situations of the developing countries, particularly the LDCs and their special concerns are fully taken into account in the standard-setting processes.
- The need for enhanced technical assistance and cooperation to developing country Members, in particular with regard to human resource development, national capacity building and the transfer of technology and information, particularly by way of concrete, 'hands-on' assistance has to be pursued.
- The need for further assistance in connection with standard setting which, due to the expertise required, could best be provided by the relevant standard-setting international organizations will have to be emphasized and this matter is required to be brought to the attention of Members, keeping in mind that this could have a significant impact on the resources of these bodies and of Members' resources.
- The progress in the application of the concept of equivalence of sanitary and phytosanitary measures, as illustrated by the increasing number of instances where equivalence has been accepted, and of negotiations aimed at the recognition of equivalence have to be carried on. Here again, the developing countries, particularly the LDCs, are likely to be

left out, as they may not have adequate expertise and financial resources to participate in the negotiations on the recognition of equivalence. Hence, the WTO bodies have to ensure that the developing countries, particularly the LDCs, are enabled to participate in these negotiations and take full advantage of the equivalence provisions.

- Adaptation to regional conditions, including the recognition of pest-free or disease-free areas or areas of low pest or disease prevalence, is of significant importance for trade in agricultural products. The application of these concepts by an increasing number of Members is welcome development, though certain difficulties in the implementation of this Article persists. Such difficulties, including divergences in interpretation and implementation of international guidelines should be duly addressed.
- Information on technical cooperation and assistance programmes by international organization needs to be furnished on a regular basis.
- With a view to further enhancing transparency, Members need to be encouraged to submit information on their bilateral equivalency agreements and determinations.

Chapter 5

Technical barriers to trade

BACKGROUND

Countries often formulate technical regulations and standards in the interest of security, safety, health, environment and quality. They benefit both the producers and consumers. At the same time there are risks of their misuse as instruments of import restriction. Hence efforts have been made for some time to have detailed multilateral disciplines in this area.

This subject was considered in the Tokyo Round (1973-1979), which came out with a Code on the Technical Barriers to Trade (TBT). But, as with all the Codes of the Tokyo Round, only a small number of countries adopted it.

Then the Uruguay Round (1986-1994) took it up as an important subject for negotiations. Two agreements emerged in this area in this Round, viz., the Agreement on the Technical Barriers to Trade (Agreement on TBT) and the Agreement on Sanitary and Phytosanitary Measures (Agreement on SPS). In this chapter, the former is being discussed.

This subject is of importance to the developing countries, including the LDCs, because the formulation of technical regulations and standards (these terms will be explained later) and their enforcement may result in barriers to their exports, and thus they have to be careful about it and take corrective measures.

In the Agreement on TBT, there is a primacy of the international standards, and they are being formulated without effective participation of the developing countries. Hence there is a fear that the international standards may be misaligned to the production structure in the developing countries. The international standards essentially hinge on the materials to be used and the processes to be followed in production. It is quite likely that the materials and processes usually used in the developing countries, even though quite appropriate, may be overlooked, as the people involved

in formulation of the international standards may not be familiar with them. This will put the industry in the developing countries at a tremendous disadvantage.

Further, there is also the fear that some developed countries may set their national technical regulations and standards unnecessarily high, which may result in constraints on the export prospects of the developing countries. For all these reasons, it is important for these countries to take an active interest in this subject so as to minimize these risks, and at the same time align their production structure to reasonable international standards.

There is yet another important angle. Often the objectives of the enthusiasts for environmental considerations and those of the domestic industry in the developed countries converge; this could result in pressure on governments to take trade restrictive measures, ostensibly for environmental considerations. The victims of such moves in most cases are the industry and trade of the developing countries. Currently there is a tendency to expand the scope of trade restrictions for environmental reasons. The developing countries have to be very alert about such moves, so that their interests are not harmed.

MAIN PROVISIONS ON TECHNICAL REGULATIONS

It is necessary to understand the difference between the technical regulations and standards, the two topics which are discussed in this chapter. The technical regulations are formulated by governments, and their adoption is mandatory in accordance with the domestic law. Standards are formulated by the standardizing organizations in the country and adherence to them is voluntary. This section will explain the main disciplines related to the technical regulations. Standards will be discussed in the next section.

Elements of technical regulation

The technical regulations generally lay down the characteristics of a product (product standards) and related processes and production methods (PPM). It is important to note the qualification "related". Generally it is meant to convey that only those PPMs, which have an impact on the quality and characteristics of the product, will be covered by the technical

regulations. An example will make the implications of the qualification clear. A country prohibits imports of a pharmaceutical, as it considers that the norms laid down in its regulations regarding standards of cleanliness in the manufacturing plant have not been followed. Since as a result the quality of the product may be affected, prohibition would be justified. If, however, the country decides on prohibiting imports of steel on the grounds that the producing plant in the exporting country has pollution standards which are lower than those enforced by it, the prohibition would not be justifiable under the provisions of the Agreement, as the quality of steel is not affected.

There are efforts to broaden the coverage of these rules, as will be explained later.

The provisions of the Agreements apply to all products – industrial and agriculture; however, in the case of agricultural products, provisions of the Agreement on SPS would be applicable, where the measure is considered to be a sanitary or phytosanitary measure.

Formulation of technical regulations

International regulations as a basis for national regulations

Members are obliged to follow international standards and base their national regulations on them, if they are there in a specific area. The only exception to this obligation is when the international standards will be ineffective or inappropriate for a country. The burden of proving these standards ineffective or inappropriate is on the country that ignores or bypasses them.

Along with this obligatory requirement, some incentives have also been given in this regard. As will be explained later, one important condition in formulating a national regulation is that it should not create unnecessary obstacles to international trade. If a country follows international standards, there will be presumption that there is no unnecessary obstacle to international trade.

Procedure in forming national regulations

The main objective for national regulations should be: protection of human health or safety, protection of animal life or health, protection of

plant life or health, protection of environment, national security requirements and prevention of deceptive practices. This is not an exhaustive list.

If the national regulation is not based on the relevant international regulation, a Member has to follow a prescribed procedure in its formulation. A notice should be sent to the WTO Secretariat giving details of the products to be covered, the elements of the proposed regulation, the objectives sought to be fulfilled and the rationale of having the regulation. A public notice is also to be issued so that the interested parties in other countries know about it. The Member should allow reasonable time for the interested parties to make comments. If so requested, there should also be discussions with them. The Member takes into account the comments and discussions and then finalizes the regulation.

The Member should allow reasonable time to elapse between the adoption of the regulation and its being put into practice, so that the producers in exporting countries are able to adapt themselves to the new requirements.

Conditions and limitations

There are certain conditions and limitations on the nature and content of the regulations. They should be based on product requirements in terms of performance, rather than design or descriptive characteristics.

They should not create unnecessary obstacle to international trade, i.e., they should not be more trade restrictive than what is necessary to fulfil a legitimate objective and they should not be disproportionate in light of the risks involved. The assessment of risks should be based on rational considerations, e.g., available scientific and technical information.

The principle of MFN treatment is to be followed, i.e., there must not be any discrimination between the like products of different Member countries. Hence, there cannot be different sets of regulations applicable to different countries.

The principle of national treatment is to be followed, i.e., imported products must be accorded treatment no less favourable than that accorded to like domestic products. Hence more severe regulation cannot be applied to an imported product than what is applicable to a like domestic product.

Disciplines on Assessment of Conformity

Disciplines have been prescribed for the examination as to whether a product conforms to the technical regulation of the Member.

The conformity assessment must follow the discipline of MFN treatment, national treatment, not creating unnecessary obstacles to international trade, prior publication of the procedure, consideration of the comments of interested parties and allowing reasonable time after adoption of the procedure and before enforcement.

Besides, there are also some procedural requirements in the working of the conformity assessment process, for example, the selection of samples for testing conformity and location of the facility where testing is done should not cause unnecessary inconvenience to the parties concerned.

Obligation Regarding Central Government, Local Government and Others

Members have to ensure that their central government bodies comply fully with the disciplines relating to the formulation of technical regulations and assessment of conformity.

In respect of the local government at the level directly below the central government, the Member is obliged to ensure that the notifications are sent to the WTO Secretariat as required. In respect of other matters at this level, the obligation of the Member is to take reasonable measures as may be available in order to ensure compliance.

In respect of the local governments at lower levels and non-governmental bodies, the obligation of the Member is to take reasonable measures as may be available in order to ensure compliance.

MAIN PROVISIONS ON STANDARDS

The guidelines for formulation of standards are given in the Code of Good Practice for the Preparation, Adoption and Application of Standards (Code of Good Practice), which is contained in Annex 3 of the Agreement on TBT.

The main substantive requirements are: MFN treatment, national treatment, not creating unnecessary obstacles to international trade, obligatory use of international standards except when they are ineffective and inappropriate, etc.

There are also some procedural guidelines. For example, the standardizing body is required to make efforts to achieve a national consensus on the standards, it should issue once every six months a publication containing the standards which have been adopted since the last issue of the publication, it must allow at least 60 days for comments of interested parties and take into account the comments before finalizing the standards and it must give adequate opportunity to other bodies that have accepted the Code for consultation on their representations regarding the operation of the Code.

The Members are obliged to ensure that their central government standardizing bodies adopt the Code of Good Practice and implement it. In respect of the local government bodies and non-governmental bodies, the Member has the obligation to take reasonable measures as are available to ensure that they adopt and implement the Code of Good Practice.

The disciplines regarding the process of assessment of conformity are similar to those applicable to the technical regulations.

DEVELOPING COUNTRIES

There is a provision for delayed implementation by the developing countries, including the LDCs. The Committee on TBT may grant specified time-limited exceptions from obligations in their case.

Further, special problems of the developing countries in participation in international standardizing bodies should be taken into account to facilitate their participation in such bodies. However, no specific measures have been prescribed towards this goal.

ENQUIRY POINTS

A Member is obliged to establish an enquiry point which should be able to respond to enquiries from other Members and interested parties and provide relevant documents relating to technical regulations and standards.

EXPERIENCE IN IMPLEMENTATION AND EMERGING PROBLEMS

As mentioned earlier, the role of the international bodies in setting standards is very important. But the developing countries do not have the financial and technical resources to participate in this process. Thus their special situation may not be taken into account in formulation of international regulations and standards. This will put them to immense disadvantage in the matter of market access to developed countries, which are generally guiding the process. It is relevant to note that though the formulation of regulations and standards is basically a technical process, the implication of this process has a significant impact on the market access of goods.

As mentioned earlier, the current position about the PPM is that only related PPMs are considered for regulation. There are efforts in several quarters in the developed countries for other PPMs also to be included in the discipline. The idea is to have disciplines on the PPMs which, while not affecting the quality or characteristics of the product, adversely affect the environment at the place of production. If this move succeeds, the developing countries will be adversely affected, as their exports may be frequently targeted for restraints on this ground.

PRECAUTION AND ACTION

The developing countries, including the LDCs, have to be careful so that they are not put to harm in the process of formulation of international standards and expansion of the coverage of the PPM in the discipline. Some suggestions are given below:

- It will be necessary to ensure that the current connotation of the “related” PPM is not expanded. Thus whenever such a proposal is made, the developing countries have to remain vigilant and oppose it effectively.
- The developing countries may request the General Council to consider the problems arising from the formulation of standards by the international bodies without their effective participation. The General Council should work out modalities to protect the interests of the developing countries in the formulation of international standards.
- The developing countries may also remain vigilant to ensure observance of the discipline that the technical regulations and standards do not create unnecessary obstacles to trade, particularly in the developed countries.

Chapter 6

Subsidies and countervailing measures

BACKGROUND

A subsidy is financial assistance provided by the government to industry and trade. It has been a concern for a long time in the GATT/WTO, as it could distort competition in international trade. Earlier, even the developed countries provided subsidies to their industry and trade, but now direct subsidies have been reduced, if not totally eliminated, in the industrial sector in most of these countries. However, subsidies are still prevalent in these countries in the area of agriculture, which is described in the chapter on agriculture.

Industry and trade in the developed countries, having reached an adequate level of development, are really not in need of government subsidy, but those in the developing countries still suffer from some severe handicaps and thus government subsidies for diversification and development of technology in industry and trade. The problem is that most of them do not have enough resources for this purpose. However, their lack of financial capacity to provide subsidies does not detract from the importance of these measures in their development process.

The GATT provided disciplines on subsidies earlier, but the provisions were not detailed and specific, and over the years, different countries developed their own processes for applying subsidies and taking countermeasures against the subsidies of other countries. A common set of disciplines evolved in the GATT. The Tokyo Round of MTN (1973-1979) spent a lot of time on it and reached an agreement, popularly called the Subsidy Code. But as in almost all the codes from the Tokyo Round, this Code was adopted by only a limited number of countries, and very few developing countries. In the mean time, major developed countries had evolved their own elaborate systems and methods for taking countermeasures against subsidies. This created considerable uncertainty in

international trade and hence the Uruguay Round took a keen interest in this topic. Finally a detailed agreement on subsidies was concluded, called the Agreement on Subsidies and Countervailing Measures.

The Agreement on Subsidies has introduced more clarity, specificity and objectivity in this area. However, the Agreement has certain basic imbalances, as will be explained later, which need to be corrected.

For the developing countries, subsidies continue to be an important instrument in the development process. Their industry and trade suffer from many handicaps in international competition and thus they need the direct support of their governments. Hence it is important for the developing countries, particularly the LDCs, to know about the disciplines in this area, specially the flexibility that they have in providing subsidy to their industry and trade. These disciplines are described in brief in this chapter.

The disciplines explained here generally apply to the industrial sector. In respect of the subsidies for agriculture, the provisions mentioned in this chapter should be modified by those in the Agreement on Agriculture, which are explained in the chapter on agriculture.

MAIN PROVISIONS

The disciplines on subsidies are mainly contained in Article XVI and Article VI of GATT 1994 and the Agreement on Subsidies and Countervailing Measures (Agreement on Subsidies). The provisions of Article XVI and Article VI of the GATT 1994 are applicable insofar as they do not come in conflict with the Agreement on Subsidies. This Agreement is very complicated and various parts have to be read in order for it to be understood.

Broadly, the Agreement classifies the subsidies into three groups, viz., those which are prohibited, those which are allowed and those which are allowed within certain limitations. Detailed provisions have been made in describing these groups of subsidies. The Agreement then prescribes the procedures for taking countermeasures against the prohibited subsidies and others which have certain undesirable results. Detailed domestic procedures have been prescribed for taking these countermeasures.

DEFINITION OF SUBSIDY

Subsidy has a specific definition in the Agreement on Subsidies. If the government confers a benefit for production or export, either through a financial contribution or through an income or price support, it is said to provide subsidy. Even if a financial contribution is not made by the government directly, but through payments to a funding mechanism or through directions to a private party, it will still be considered to be a subsidy if it confers a benefit for production or export.

Financial contribution

A financial contribution may be in any of the forms described below:

- Direct transfer of funds, for example, grants, loans and infusion of equity or potential transfer, e.g., loan guarantee;
- Revenue foregone or not collected, e.g., tax credits; and
- Provision of goods and services, other than infrastructure, or purchase of goods.

There is, however, a qualification. If normal commercial practices are followed in granting the loans, equities and guarantees, they will not be considered to be subsidies. Likewise, if goods and services or purchase facilities are provided by the government at adequate prices according to the market conditions, they are also not treated as subsidies.

Income or price support

Income or price support is referred to in Article XVI of GATT 1994. An example is fixing the domestic producer price at higher levels than the world price level.

Basis of calculation of subsidy

The subsidy may be calculated either in terms of the benefits to the recipient or cost to the government, depending on the specific purpose for which it is calculated. For example, for countervailing duty calculations (to be explained later), the former is the basis, while for determining serious prejudice (to be explained later), the latter is the basis.

Prohibited subsidy

Two types of subsidy are generally prohibited. These are:

- Subsidies contingent on export performance, i.e., export subsidy. A list of such subsidies has been given in the Annex I to the Agreement on Subsidies.

Some examples are: direct payment for export performance, permission to retain foreign currency as a bonus for export, exemption of taxes on profits related to export, lower transport and freight charges for export, etc.;

- Subsidies contingent on the use of domestic product in preference to imports, i.e., import substitution subsidy.

Examples of this type of subsidy may be: waiver for taxes or cheaper rate of credits, etc., if domestic products are used.

The LDCs are permitted to use export subsidies. However, when the export of a product for an LDC reaches a level of 3.25 per cent of the world export of that product and continues at this critical level or higher levels for two consecutive years, it is said to reach the level of export competitiveness, and then the export subsidy on that product has to be phased out in eight years.

Some other developing countries, mentioned in Annex VII of the Agreement on Subsidies (those having per capita annual income less than US\$ 1000) have a similar facility.

Other developing countries have to phase out their export subsidies by the end of 2002 and they cannot increase the level of their export subsidies. If such a country reaches the level of export competitiveness in a product earlier, i.e., if its export has reached the level of 3.25 per cent of the world export of that product and continues at that level or at a higher level for two consecutive years, it has to phase out the export subsidy on the product in two years.

The LDCs are permitted the use of import substitution subsidy till the end of 2002. Other developing countries can use it till the end of 1999.

Non-actionable (permissible) subsidies

Two broad types of subsidies are non-actionable, i.e., normally no action will be taken against them, and in that sense are permissible. These are:

- Subsidies of a general nature, i.e., those that are not specific to any sector or any enterprise

- Subsidies, though specific, are for: (i) research; or (ii) development of disadvantaged region; or (iii) environmental purposes.

A subsidy is considered to be of general nature and not specific, if the eligibility of the sector or the enterprise is based on objective criteria that are: (i) neutral, i.e., they do not favour any sector or enterprise over the other; (ii) of economic nature; and (iii) horizontal in application, e.g., number of employees, size of the enterprise, etc.

The specific subsidy for research has a maximum limit. It must not cover more than 75 per cent of the cost of research or 50 per cent of the pre-competitive development activity.

The condition in respect of a permissible subsidy for the development of a disadvantaged region is that it should be of a general nature within the region. The disadvantaged region has to be defined on the basis of objective criteria. The GDP per capita of the region should not be above 85 per cent of the country's average, and the unemployment rate should be at least 110 per cent of the country's average.

The permissible subsidy for environmental purposes is for promoting adaptation to new environmental requirement of law. It is limited to 20 per cent of the cost of adaptation and is of one-time non-recurring nature.

The subsidies which are prohibited as explained earlier cannot be given even if they are of general nature.

Actionable subsidies

Subsidies that are neither prohibited nor non-actionable, as explained above, can be applied within certain limits. They should not cause adverse effect to any other Member. The adverse effects are of three types, viz.: (i) material injury to the domestic industry; (ii) nullification or impairment of benefits under GATT 1994; and (iii) serious prejudice to another Member.

Material injury

The examination of the existence of material injury involves examination of the relevant factors having a bearing on the condition of the domestic industry, for example, decline in output, sales, market share, profit, productivity, return on investment, capacity utilization, etc. Besides,

the effects on domestic prices as also on cash flow, inventories, employment, wages, growth, ability to raise capital or investment, etc., have also to be examined.

The term “material injury” has three alternative elements, viz., material injury to the existing domestic industry or material retardation of the establishment of domestic industry or the threat of such material injury.

The domestic industry for which the material injury is to be examined means that part of the domestic industry whose collective output of the product under consideration constitutes a major portion of the total domestic production of that product. Hence, injury caused to only a small portion of the production is not considered to be injury in the sense of the Agreement on Subsidies.

Nullification and impairment of benefits

Nullification or impairment of benefits is used here in the sense of Article XXIII of GATT 1994 which is a precondition for initiating a dispute settlement process. A basic principle which has been introduced in the Dispute Settlement Understanding of the WTO is that nullification or impairments of benefits to another Member is presumed to occur when a Member violates a provision of any of the WTO agreements.

Serious prejudice

For establishing the existence of serious prejudice, it is examined whether the following situations exist.

- The subsidy displaces or impedes the imports of a like product of another Member into the market of the subsidizing Member.
- The subsidy displaces or impedes the exports of a like product of another exporting Member to a third country market.
- The subsidy results in significant price undercutting or significant lowering of price or significant prevention of price rise or in lost sales in a market.

In case of subsidy to a primary commodity, it should be determined whether the subsidy has resulted in an increase in the subsidizing Member’s world market share of the product, compared to its average market share during the previous three years. Of course, in case of the

agricultural products, any provision regarding subsidy has to be considered along with the relevant provision in the Agreement on Agriculture.

In the case of a developed country, there is a presumption that its subsidy causes serious prejudice, if the following situations exist:

- the subsidy on a product exceeds 5 per cent of the value of production;
- the subsidy is given to cover the operating losses of an industry (here the reference is to an industrial sector having different individual enterprises);
- the subsidy is given to an enterprise to cover operating losses, other than a one-time, non-recurring measure;
- the subsidy in the nature of direct forgiveness of debt.

Such presumption does not exist in case of the developing countries. In case of the developed countries, it is a rebuttable presumption; thus the subsidizing Member may try to show that serious prejudice is not caused even if any of these conditions exists.

REMEDIES AGAINST SUBSIDY

There are different types of remedies against non-actionable subsidy, prohibited subsidy and actionable subsidy. Even though non-actionable subsidy is immune against counteraction, such action can be taken under certain conditions, as will be explained shortly. In the case of the prohibited subsidy and actionable subsidy, there are two routes for relief, viz., the dispute settlement route and the countervailing duty route, as will be discussed in detail later.

Remedy in case of non-actionable subsidy

There are two situations in which relief may be sought against a non-actionable subsidy as explained below.

- In case a Member considers that another Member does not satisfy the conditions and criteria for a non-actionable subsidy applied by it, the matter will be raised in the Committee on Subsidies. If the Committee considers the complaint justified, it will ask the Member to take corrective action. In case of dissatisfaction with the decision of the Committee, a Member may ask for arbitration, and then the process of

arbitration will follow. The Member will take action, if necessary, according to the recommendation in the arbitration.

- In case a Member considers that a non-actionable subsidy of another Member is causing serious adverse effect to its domestic industry in such a manner that there is damage difficult to repair, the former may ask the latter for consultation. If consultation does not result in satisfactory solution of the matter, the Committee examines the issue. If it determines that serious adverse effects exist and there is damage difficult to repair, it will ask the subsidizing Member to take corrective measures. If this Member does not take action accordingly within six months, the Committee will authorize the complainant Member to take retaliatory measures in the form of suspension or withdrawal of concessions against the other Member.

Remedy against prohibited and actionable subsidy

As mentioned earlier, there are two alternatives for action against prohibited and actionable subsidy, viz., through the dispute settlement route or through the countervailing route. The latter route, however, can be adopted only in case of material injury to the domestic industry. A Member can take recourse to the former route in all cases, i.e., whether or not there is material injury. Thus in cases of material injury, a Member has both the possibilities, whereas in other cases, the only possibility is the dispute settlement route.

It is to be noted that in case of a prohibited subsidy, mere existence of the subsidy is enough for taking action through the dispute settlement route. In this case, the countervailing duty route can be adopted if the prohibited subsidy causes material injury to the domestic industry.

In the case of actionable subsidy, no action can be taken merely for the existence of subsidy. Action can be taken only if the subsidy has certain effects as explained above. In this case, the dispute settlement route can be taken in the event of material injury or nullification or impairment of benefits or serious prejudice. And countervailing duty route can be taken if there is material injury to the domestic industry.

These two routes are described below briefly.

Dispute settlement route

In the dispute settlement route, the process of the dispute settlement as contained in the Dispute Settlement Understanding is followed. The difference, however, is that the time frame for various stages has been made shorter. Wherever specific time frames have not been prescribed, the normal time frame of the DSU will be halved. To know the details of the various stages, it will be appropriate to consult the chapter on the Dispute Settlement Process.

The process starts with the complainant Member requesting the respondent Member for consultation. If it does not result in a satisfactory solution of the matter, the complainant Member asks for formation of a panel which will examine the complaint. The Dispute Settlement Body forms the panel. The panel examines the issues and gives its recommendations. At this stage if the complainant Member or the respondent Member decides to appeal, it informs the DSB. If there is no request for appeal, the DSB adopts the report of the panel. If the complaint had not been upheld by the panel, the matter ends there. If, however, the panel had found at least some of the elements of the complaint justified and had made recommendations in this regard, the respondent Member would be expected to take appropriate measures to implement the recommendations.

If any party had given option for an appeal, the Appellate Body considers the case and examines the panel report from the angle of the law involved and gives its recommendations. Thereafter the same process as above applies.

If the respondent Member is required to implement the recommendation fails to implement it in an approved time frame, the complainant Member asks for compensation from it. If there is no agreement on compensation, the complainant Member is authorized by the DSB to take retaliatory measure in the form of suspending or withdrawing concessions against the respondent Member.

Countervailing duty route

As mentioned earlier, this option can be exercised by an aggrieved Member only if there is material injury to the domestic industry. Very

detailed procedure has been laid down in the Agreement on Subsidies, which has to be followed before the countervailing duty can be imposed.

Investigation

The process generally starts with an application by the domestic industry for imposing countervailing duty on the imports of a particular product from a country. For determining whether the application has been filed by the domestic industry, the government finds out the support and opposition to the application among the domestic producers of the product. If those supporting the application have a higher share of the total domestic production of the product than those opposing it, the application will qualify as given by the domestic industry.

There is a provision for mandatory preliminary examination of the application. Here it is determined whether the materials provided in the application justify the initiation of an investigation. If there is no such justification, the matter ends here. Otherwise, the government proceeds with further action on the application.

The Member has to give an opportunity to the Member(s) whose products are the subjects of the application for consultation. The consultation is aimed at finding out a mutually acceptable solution to the problem. In case no solution is found, the application is taken up for investigation.

The investigation is carried out by the authority established by the government for this purpose. The objective of the investigation is to examine whether: (i) the measure in question is a subsidy against which an action can be taken; (ii) the extent of the subsidy; (iii) existence of material injury to the domestic industry or a threat of such injury; and (iv) existence of causal linkage between the subsidy and the injury.

The subsidy and the injury have been explained earlier. It is important to note that no countervailing action can be taken unless the casual link between subsidy and injury is established. No countervailing duty can be levied, if injury is caused by factors other than subsidy.

The authority gives notice to all the interested parties. The parties present their case and also respond to the presentations of others. Then the authority gives its reasoned findings on subsidy, injury and causal linkage.

Imposition of countervailing duty

If the investigation has established the existence of subsidy, injury and the causal linkage, the Member may impose the countervailing duty. The maximum limit of the duty is the extent of the subsidy, it may however be less at the discretion of the Member. The Agreement on Subsidies provides a guideline that the duty would be less if a smaller duty is adequate to remove the injury. The duty will be imposed on a non-discriminatory basis on the products of all countries that have been found to be providing subsidy. The rates of duty will of course be different, depending on the extent of subsidy of the particular country.

The duty may be continued as long as it is necessary to counteract the injurious effect of the subsidy. Normally the duty will be terminated within five years of its imposition. Before the expiry of this period, the Member may have a review of the situation to examine whether the removal of the duty is likely to result in continuation or recurrence of subsidization or injury. In such a situation, the duty may continue longer.

Provisional measure

After the start of the investigation, if a preliminary determination of the subsidy, injury and causal linkage has been made, the Member may impose provisional duty, which will be in form of cash deposit or bond. If the final determination does not justify imposition of the countervailing duty, this provisional duty will be refunded.

Undertakings

There is a provision in the Agreement on Subsidies for undertakings from the subsidizing Member or from the exporters from the subsidizing country. The former may give an undertaking to eliminate or limit the subsidy, whereas the undertaking of the latter may be to revise the price to the extent that the injury is eliminated.

Undertakings can be suggested by the Member only after a preliminary determination of subsidy, injury and causal linkage. The undertaking is purely voluntary and its acceptance is at the discretion of the Member starting the investigation.

De minimis levels

There are some *de minimis* levels for subsidy and the volume of the subsidized import. No countervailing duty can be imposed if the subsidy or the volume is lower than the respective *de minimis* levels.

The amount of subsidy is *de minimis*, if it is less than 1 per cent in general cases. It is less than 3 per cent in case of LDCs and other developing countries listed in Annex VII of the Agreement on Subsidies (those having per capita annual GDP less than US\$ 1000). It is less than 2 per cent for other developing countries.

The *de minimis* level for the volume of import is applicable only to the developing countries, including the LDCs. It is 4 per cent of the total import of the product in the importing country considering action against subsidy. If more than one developing country is under investigation and individually they do not account for 4 per cent of the import, action can still be taken if collectively they account for more than 9 per cent of the total import.

SPECIAL PROVISIONS FOR DEVELOPING COUNTRIES

Some special provisions for the developing countries have been mentioned above, in addition to others. All are being consolidated here for the sake of convenience.

The developing countries are classified into three groups in this Agreement, viz.: (i) LDCs; (ii) other developing countries listed in Annex VII of the Agreement having per capita annual GDP less than US\$ 1000 (the initial list includes Bolivia, Cameroon, Congo, Côte d'Ivoire, Dominican Republic, Egypt, Ghana, Guatemala, Guyana, India, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka and Zimbabwe); and (iii) other developing countries.

Export subsidy

The LDCs and other developing countries in Annex VII are exempted from the prohibition on export subsidy. They can continue with such subsidy and also introduce a new subsidy of this type. However, if a country in this category reaches the stage of export competitiveness, i.e., if

the export of the country reaches the level of 3.25 per cent of the world export of the particular product and continues at this level or more for two consecutive years, it has to phase out this subsidy over eight years.

Other developing countries are exempted from the prohibition on export subsidy until the end of 2002. They cannot increase the level of their export subsidies and they have to phase out the subsidies existing on 1 January 1995 by the end of 2002. Besides, if a country in this category reaches the stage of export competitiveness as explained above, it has to phase out its export subsidy in two years.

If a developing country Member considers that it should continue with its export subsidy beyond the prescribed period, it should enter into consultation with the Committee on Subsidies which will decide whether an extension should be allowed.

Import substitution subsidy

The prohibition on the use of the import substitution subsidy does not apply to the LDCs until the end of 2002. For the other developing countries, it will not apply until the end of 1999.

Dispute settlement route against prohibited subsidy

The period during which the prohibited subsidies, i.e., the export subsidy and the import substitution subsidy, are allowed, no action through the dispute settlement route will be taken against a developing country merely for maintaining these subsidies. However, such action can be taken if these subsidies cause material injury or nullification or impairment of benefits or serious prejudice.

Actionable subsidy

In case of the developing countries, there is no presumption of existence of serious prejudice, as contained in Article 6(1) of the Agreement. Remedy through the dispute settlement route may be had for such a subsidy of a developing country Member if the subsidy causes material injury or nullification or impairment or serious prejudice.

For other types of actionable subsidies, this route for remedy can be used only if a subsidy causes nullification or impairment of benefits under GATT 1994 in such a way that: (i) it impedes or displaces the imports of another Member into the market of the developing country Member applying such subsidy; or (ii) it causes injury to a domestic industry in the market of an importing Member. Thus the third element of the serious prejudice, i.e., adverse effect in the third country market is not included here.

Such a remedy cannot be used against a developing country Member if some such subsidies are linked to and granted within the privatization programme of the Member. The types of subsidies covered by this immunity are: direct forgiveness of debt, subsidies to cover social costs and other transfer subsidies.

Countervailing duty route

Action against the prohibited or actionable subsidies of developing countries through the countervailing duty route is possible, if there is existence of subsidy, injury and causal linkage. The only immunity is the *de minimis* provision.

The *de minimis* limit for subsidy in case of the developing countries is as given below:

- It is 3 per cent for LDCs and other developing countries in Annex VII. It means that countervailing duty action cannot be taken if the extent of subsidy is less than 3 per cent of the value of the product.
- It is 3 per cent also for such other developing countries that have eliminated their export subsidy prior to the expiry of the maximum eight-year period allowed to them.
- It is 2 per cent for the other developing countries.

The *de minimis* level of the volume of import from a developing country is 4 per cent of the total import of the product in the importing country. If the shares from individual developing countries are less than 4 per cent, but the collective share of the subsidised imports from all these countries is more than 9 per cent, action for countervailing duty can be taken. This provision is applicable to all developing countries, including the LDCs.

BUILT-IN AGENDA

The Agreement on Subsidies prescribes reviews on three topics, as explained below.

Non-actionable subsidy

The provisions relating to the non-actionable subsidy are applicable until the end of 1999. A review is prescribed before that period to decide whether to extend the application either in the present form or in modified form. In this review, the developing countries, including the LDCs, may take into consideration the following suggestions:

(1) The generally applicable subsidies should continue to be non-actionable subsidies. However, there should be a distinction as between the developed countries and developing countries in this case. The enterprises of the developed countries are generally capable of facing international competition; hence they do not need any subsidy from their governments. In fact, provision of subsidies distorts the environment of competition significantly against the interests of the enterprises of the developing countries. Hence, the developed countries should not be giving any general subsidy to their enterprises. Such subsidies in developed countries should be classified as prohibited subsidies.

(2) The same approach applies to the three specific subsidies which have been made non-actionable, viz., the subsidies for research and development, disadvantaged region and environmental purposes. These should continue as non-actionable subsidies, but there should be a difference between the treatment given to the developed countries and developing countries. As the industries of the developed countries are generally quite capable of facing international competition, they do not need such subsidies from the governments, in particular the subsidies for research and development and for environmental purpose. It is unfair that the industries of the developed countries have been allowed this facility in the Agreement which puts the industries of the developing countries at serious handicap. There is full justification for such subsidies of developing countries being non-actionable, but there is really no justification for the developed countries having a similar facility. Hence, such subsidies of developed countries should no longer be considered non-actionable. In fact they should be classified as prohibited subsidies.

(3) It is to be noted that these three specific subsidies which have been made non-actionable are generally used by the developed countries. But the subsidies generally needed by the firms of developing countries for expansion, development and diversification, have not been made non-actionable. It is patently unfair. Hence it is proper that the subsidies used by developing countries in the process of improving their productive capacity and technological development should be made non-actionable.

Presumption of serious prejudice

The presumption of serious prejudice under certain conditions as explained earlier in the section on non-actionable subsidy is valid until the end of 1999. A review is prescribed to decide whether it should continue or should be modified.

It is to be recalled that the developing countries are exempted from this presumption. It will be proper to continue the presumption in respect of the developed countries and exemption from presumption in respect of the developing countries.

Export competitiveness of developing countries

As mentioned earlier, the LDCs and other developing countries in the Annex VII of the Agreement on Subsidies have to phase out their export subsidy in eight years, if the export of the particular product from such a country reaches the level of 3.25 per cent of the total world export. For other developing countries, the phase out period is two years. This provision is to be reviewed in the beginning of 2000.

This obligation is imposed if this critical level of export continues for two consecutive years. However, there is no provision for automatic reversal of a developing country to the earlier facility if its exports fall below that critical level. There should be a provision for an automatic enabling provision for the use of export subsidy if the export falls below the critical level.

Experience of implementation

Generally the developed countries do not use the direct subsidy very much. They of course use some subtle and hidden subsidies mainly

through their support for basic and applied research, the results of which can be profitably used by the industry. The industry and the trade in the developed countries are generally quite developed and enjoy tremendous advantages of highly developed infrastructure and other supportive environment. The industry and trade in the developing countries, however, suffer from severe handicaps in international competition. Hence they are generally in need of government subsidies. The fact that the governments in several of these countries do not have financial resources to provide subsidies should not detract from the importance of the need of subsidies in these countries. Hence it is important for the developing countries to retain their current flexibility in this area and expand the flexibility further.

Generally the Agreement has worked well. The disputes relating to this subject have declined significantly. Earlier, there were a lot of problems of differences among the countries regarding the use of countervailing duty, but the rules are now much more specific and clear and hence the disputes have been much less recently.

SUGGESTIONS FOR IMPROVEMENT

While discussing the built-in agenda, some suggestions have been given for improvement. There are some other areas which need improvement from the angle of developing countries. All these are being consolidated below for convenience.

- (1) As mentioned earlier, some subsidies, like those for research and development, regional development and environmental improvement, which are mostly prevalent in developed countries have been made non-actionable. However, the subsidies normally needed in developing countries for expansion, diversification and technological upgrading, do not have this facility. It is patently unfair. Also since the industry and trade in the developing countries suffer severe handicaps, they need a lot of support from their governments. Therefore, the subsidies used by developing countries for development, diversification and upgradation of technology should be made non-actionable.
- (2) As the industries in developed countries are generally quite developed compared to those in developing countries, providing them with subsidies is not in the interest of fair competition. Hence the general

subsidies which are at present non-actionable should be put into the category of prohibited subsidy for the developed countries.

- (3) The same consideration should apply to the specific subsidies for research and development, regional development and environmental improvement. For developed countries, they should be categorized as prohibited subsidies.
- (4) As mentioned in the section on prohibited subsidy, the import substitution subsidy is permissible for developing countries. But some doubts have been raised lately on this matter in respect of the domestic content requirement on the ground that it violates the Agreement on TRIMs. This confusion should be removed by a clarification.

There should be a clarification in the Agreement on Subsidies that this type of subsidy is permissible for developing countries irrespective of the provisions of the Agreement on TRIMs.

- (5) A developing country is required to phase out its export subsidy in a prescribed period if it has reached the level of export competitiveness. There is no provision authorizing such a country to reintroduce export subsidy if its exports fall below the critical level, as has been mentioned in the section on a built-in agenda.

This disability should be automatically removed if the export of a developing country falls below the critical level of export competitiveness.

- (6) The criterion for inclusion in Annex VII of the Agreement on Subsidies is that per capita annual GDP should be less than US\$ 1000. A country gets excluded from this list if it reaches this critical level of GDP per capita. It would be unreasonable to exclude a country from this list unless the higher per capita GDP becomes stable. Besides, there is no provision for automatic inclusion of a country in this list, once its per capita GDP again falls below this critical level.

There should be a provision that a developing country will be excluded from this list only if its per capita GDP continues above the critical level consecutively for two years. Further, a developing country should be automatically included in the list if its per capita GDP falls below the critical level.

Chapter 7

Anti-dumping measures

BACKGROUND

Firms sometimes resort to dumping of their products in outside markets with the objective of eliminating competition in the long term. In the WTO it is treated as an unfair trade practice; hence it is discouraged and remedial measures have been prescribed. If a Member finds that firms from other countries are dumping their products causing harm to its domestic industry, it can impose anti-dumping duties on these products to offset the effect of dumping. Elaborate procedures and disciplines have to be followed before a Member imposes anti-dumping duty.

Earlier there were immense problems in the process of imposition of an anti-dumping duty. The developed countries mostly resorted to this practice, and they had a variety of domestic rules and procedures for this purpose. There was a considerable degree of subjectivity in this process with the result that the exporters often faced very unstable and unpredictable situations. It was clearly an unsatisfactory state of affairs. The Tokyo Round (1973-1979) established a code on anti-dumping which tried to codify the practices, but only a small number of countries accepted this code. Also, the provisions of the code did not fully clarify the complex issues nor address the problem of uncertain subjective actions.

This subject was dealt with seriously in the Uruguay Round (1986-1994) which led to an agreement on anti-dumping, which helps to clarify and tighten the disciplines.

The anti-dumping action involves determining a very low export price, which in turn hinges on comparing export price with the domestic price. Major developed countries which were taking anti-dumping actions had their own methods of calculating the export price and the domestic price and also for comparing the two. The main problem was to work out a common method for these calculations, which was not easy as different countries tried to support the provisions in the proposed rules that were

aligned to their own domestic legislation. The result is a complex set of rules in the Agreement on Anti-dumping.

Until recently, the developing countries were often the targets of anti-dumping, but now, several have started anti-dumping action themselves. With the removal of quantitative restrictions and reduction of tariffs in the developing countries, it is very likely that their industries will face competition from dumped imports, and hence will need to take more anti-dumping action in future.

MAIN PROVISIONS

The provisions relating to anti-dumping are contained in Article VI of GATT 1994 and the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, more commonly called the Agreement on Anti-dumping. The provisions of Article VI of GATT 1994 remain applicable insofar as they do not conflict with the Agreement on Anti-dumping.

These provisions lay down the procedure and disciplines for determining dumping and imposing anti-dumping duty. Generally, dumping is considered to exist if the export price is lower than the domestic price. More technically, there is “dumping” if the “export price” is lower than the “normal value” (i.e., comparable price for the like product when destined for consumption in the exporting country). The difference between the two is the “dumping margin”. As a remedial measure, a Member can impose anti-dumping duty up to the extent of the dumping margin.

There are three pre-conditions for the imposition of anti-dumping duty, as follows:

- (1) Dumping exists;
- (2) There is material injury to the domestic industry; and
- (3) There is a causal link between the dumped import and the injury, i.e., the injury is caused by the dumped import.

DETERMINATION OF DUMPING

Since the dumping is caused by the difference between the export price and the normal value, three elements are involved in its determination, viz.:

- (1) Calculation of the export price;
- (2) Calculation of the normal value; and
- (3) Comparison of the export price and the normal value.

Export price

The export price is generally determined on the basis of the books of the exporter.

There may, however, be situations in which it is not practical or reliable. For example, the exporter and the importer may be associated or they may have some mutual compensatory arrangement. In such a situation, a constructed export price is taken into account. It is calculated on the basis of the price at which the imported product is first sold to an independent buyer. There sometimes may be difficulties in this calculation. For example, the product may not be resold to an independent buyer or it may not be resold in its original imported condition. In such situations, the constructed export price may be calculated on some reasonable alternative basis.

Normal value

The normal value is generally the comparable sale price of the like product in the exporting country in the ordinary course of trade. It may not always be practical or possible to calculate this sale price, for example: there may not be any sale of the like product in the exporting country in the normal course of trade; there may be strict government control on the prices in the exporting country; there may be a different pattern of demand of the product in the exporting and importing countries, etc. In such situations, alternative methods are adopted for calculating the normal value.

The normal value could be determined as a comparable price of the like product when exported to a third country. Or a constructed normal value could be worked out on the basis of the cost of production in the country

of origin, plus reasonable amounts for administrative, selling and general costs and for profits. Which of these two alternatives will be adopted depends on the discretion of the importing country proposing to take anti-dumping action.

In calculating the normal value, one issue which has been controversial is whether the sales below cost in the domestic market should be included in this calculation. The argument in favour of this is that it is not uncommon for firms to sell goods at comparatively lower prices considering overall trade interests. The opposite argument is that the firm may be consistently resorting to predatory pricing even in the domestic market. The Agreement lays down that the prices below cost should generally be included in calculating the normal value. However, some exceptions have been allowed. These can be excluded if the sales below cost are made in an extended period of time (normally one year) and if such sales have been made in substantial quantities.

Comparison of the export price and normal value

When comparing the export price and the normal value, the following basic rules must be followed:

- (1) The comparison should be made at the same level of trade, e.g., the ex-factory level or wholesale level or retail level;
- (2) The comparison should be of sales made, as closely as possible, at the same time;
- (3) The rate of the currency exchange on the date of sale should be considered;
- (4) The comparison should normally be made between the weighted average of the normal value and the weighted average of the export price, or between these two on a transaction-to-transaction basis.

It is important to understand the implication of the last clause as it has a significant impact on the margin of dumping. Some countries had the practice of comparing the average export price with the individual normal values. In this process, whenever the normal value was lower than the export price, the difference was ignored as there was no dumping (this would in fact be a case of negative dumping). In this manner, only positive dumping was calculated without deducting the negative dumping from it. It

resulted in an inflated dumping margin and it is for this reason that the agreement now prescribes the comparison of the average or of the individual transaction, and not of the average on one side and the individual transaction on the other. However, there are still some problems in several developed countries which will be explained later.

DETERMINATION OF INJURY

Injury to domestic industry means: (1) Material injury to the existing industry; or (2) Material retardation of the establishment of new units; or (3) Threat of injury.

The factors relevant for determining injury are:

- (1) Decline in output, sales, market share, profit, productivity, return on investment, capacity utilization;
- (2) Negative effects on cashflow, inventories, employment, wages, growth, ability to raise capital or investments; and
- (3) Factors affecting domestic prices.

There has to be an objective assessment of the volume of the dumped import, the effect of the import on the prices of like products in the domestic market of the importing country and the resultant impact on the industry.

The threat of material injury requires assessment as to whether the injury is foreseen and imminent.

The domestic industry in respect of which the injury is to be examined is defined differently from what is applicable, when the application for anti-dumping filed by the domestic industry is being considered. When determining injury to the domestic industry, it should be ascertained as to whether there is injury to the whole of the domestic producers of the like products, or at least those whose collective output of the products is a major proportion of the total domestic production. Normally, the term "major proportion" should mean more than half, but in practice, even lower proportions have been considered to be a "major proportion". The definition of the domestic industry when determining whether the application for anti-dumping action has been filed by the domestic industry will be explained later.

DETERMINATION OF LINKAGE BETWEEN IMPORT AND INJURY

It is necessary to determine whether the injury is due to the dumped import if there are other factors contributing to the state of the industry. Such factors could be: contraction in demand, change in the pattern of consumption, trade restrictive practices of foreign and domestic firms, development in technology, export performance of the domestic industry, productivity of the domestic industry, etc. If there are other factors causing injury, the injury will not be attributable to dumping and anti-dumping duty cannot be imposed.

DE MINIMIS PROVISION

The margin of dumping is *de minimis* (no anti-dumping action can be taken) if it is less than 2 per cent of the export price. The volume of dumping from a country is *de minimis* (no anti-dumping action can be taken) if it is less than 3 per cent of the import of the like products in the importing country. However, if enterprises from a number of countries are resorting to dumping and the collective import is more than 7 per cent, anti-dumping action can be taken.

STEPS IN THE INVESTIGATION

The anti-dumping process generally starts with the domestic industry making an application to the government. The government may also initiate the investigation without receiving an application, but this is not normally the case. The application of the domestic industry should contain sufficient evidence of the existence of dumping, injury and causal linkage between the dumped import and injury.

There is a specific provision regarding the criterion as to whether the application will be considered to have been made by the domestic industry. The government has to assess the part of the industry that supports it and the part that opposes it. If the former has a higher share of the domestic production than the latter, it will be assumed that the application has been made on behalf of the domestic industry.

The government is required to make a preliminary examination of the application. The accuracy and adequacy of the evidence have to be assessed at this stage to determine whether the required part of the industry has supported it and also whether the evidence is sufficient to justify an investigation.

Thereafter, the government gives the application to the designated authority to conduct the investigation. Before investigation starts, it is necessary to inform the Member whose exporters are alleged to be resorting to dumping. Public notice is to be given about starting the investigation and notices are to be given to all interested parties. During the investigation they are given the opportunity to provide evidence and make a presentation and also to respond to other presentations.

The designated authority presents its findings in detail covering all relevant points and provides reasons for drawing specific conclusions on different relevant matters. In the event that the dumping, injury and the causal linkage between the two exist, the authority is required to determine the margin of dumping in each individual case of the exporter or producer under investigation. If there are many cases and individual determination is impractical, the determination may be limited to a reasonable number of parties and products by using statistically valid samples.

There is a strict time limit set for completion of the investigation, of normally one year. In special circumstances, the period can be extended, but no more than 18 months.

PROVISIONAL AND FINAL ANTI-DUMPING DUTY

If a preliminary examination establishes the existence of dumping and injury and the causal linkage between the two, provisional anti-dumping action can be taken if the Member is of the opinion that such a measure is necessary to prevent injury during the investigation.

The Member can also suggest to the exporters under investigation to accept a price undertaking, i.e., one that they would not export below a particular price. The Member cannot compel the exporters to accept any such undertakings, but only make a suggestion. If the price undertaking is given by the exporters, the investigation can be terminated, but can

continue if the exporters so desire, or if the investigating Member decides to continue it.

If the investigation results in finding the existence of dumping, injury and the causal linkage between the dumping and injury, the Member has to decide whether to impose the anti-dumping duty. If the Member decides to impose the duty, it can be imposed up to the extent of the margin of dumping.

There is a time limit for the continuation of the duty imposed. There is a general provision that the duty will remain in force only as long as it is necessary to counteract the dumping that is causing injury. Further, regarding the amount of the duty, it is provided that the duty will continue only to the extent necessary for this same purpose. In addition, there is a provision for terminating the duty stating that it must be terminated on a date not later than five years from its imposition. It can continue beyond this period only if the Member determines in a review that the termination of the duty is likely to lead to the continuation or recurrence of dumping and injury.

DISPUTE SETTLEMENT PROCESS

The dispute settlement process in the case of anti-dumping is significantly different from the normal process. There is a strict restraint on the role of the panel which is formed to examine the complaint. Here its role is limited to determining:

- (1) whether the authority has established the facts properly; and
 - (2) whether it has evaluated the facts in an unbiased and objective manner.
- If the panel makes such a determination, the findings of the authority will not be challenged even if the panel itself might have reached a different conclusion had it conducted the evaluation.

There is a further limitation. If more than one interpretation is permissible, and if the authority has acted in accordance with one of them, its conclusion will be deemed to be right, even though the panel itself might not agree to it.

BUILT-IN AGENDA

The follow-up action on two points have been prescribed in the Ministerial Decisions at Marrakesh (April 1994), viz., on anti-circumvention and on review of the provision relating to the role of the panel in the dispute settlement process.

ANTI-CIRCUMVENTION

The problem of circumvention of anti-dumping measures was covered by the negotiations in the Uruguay Round, but no agreement was reached. The Ministerial Decision refers this matter to the Committee on Anti-Dumping.

The Committee has established an informal group for the consideration of this matter and its work is progressing.

Circumvention generally refers to the attempt by firms subject to anti-dumping duties to avoid paying the duty by formally moving outside the scope of the anti-dumping duty in operation, although substantially engaged in the same production activities as before. The conflict arises mainly because of the shift of the location of the production or part of the production to countries not covered by the application of the anti-dumping duty. Thus the countries that are vitally involved in this negotiation on one side are those which have the capacity to switch production from one place to another; on the other side there are those countries where the existing domestic industries suffer because of such operations.

ROLE OF PANELS

As mentioned earlier, the role of the panels in the disputes related to anti-dumping is very limited. The Ministerial Decision on this subject calls for a review of this provision after 1997 in order to consider whether this provision is capable of general application.

The process of dispute settlement is very weak in this area. Extending this provision to other areas will weaken the process there as well. It is

desirable to remove it altogether, even from the area of anti-dumping, so that anti-dumping is covered by the normal dispute settlement process.

EXPERIENCE OF IMPLEMENTATION

Action by developing countries

Anti-dumping actions were taken mainly in developed countries, particularly the United States, EU, Canada and Australia, but now several other countries have started taking such actions. Even several developing countries have enacted legislation in this area and have created domestic mechanisms infrastructure for this purpose. Among the developing countries, Brazil, the Republic of Korea, India, South Africa and Indonesia have started investigations of anti-dumping and have also imposed anti-dumping duties in some cases. Developing countries, including the LDCs, may find the need to take more anti-dumping action in view of the liberalization of their import regime and the reduction of their tariffs. However, in order to make use of the WTO provisions on anti-dumping, it is necessary to have domestic legislation which is compatible.

Harassment of developing countries

There has been a tendency in the major developed countries to initiate many anti-dumping investigations of imports from developing countries. In fact the developing countries have complained that anti-dumping investigations and anti-dumping duties are being used by major developed countries for protectionist purposes, and have resulted in harassment of the developing countries.

Investigations into anti-dumping activities disrupt the exports from developing countries because it creates uncertainty. The trade links of developing countries, particularly the LDCs, are generally fragile, and once disrupted, they may take a long time to recover.

Some specific problems

Some specific problems in the operations of the anti-dumping process in major developed countries are the following:

Best information available procedure

The major developed countries ask the developing country firms under investigation to supply very detailed information within a short time. They base their findings on the best information available, but often this information is not adequate because for the firms of developing countries it is almost impossible to meet this demand. The respondent firms, particularly of the developing countries, are thus not being dealt with fairly.

Comparison of normal value and export price

As mentioned earlier, the Agreement prescribes that normally the comparison between the normal value and the export price should be based on weighted average to weighted average or on transaction by transaction. Departure is permitted in difficult cases. However, the authorities in developed countries sometimes take this departure from the provision as the method of comparison, which results in an assessment of a higher margin of dumping.

The problem of "like products"

Like products are not specifically defined. Sometimes the major developed countries include a number of products in the category of like products and start an investigation of dumping.

Cumulation of subsidy and dumping

The effects of subsidy and dumping cannot be cumulatively considered in order to examine the existence of injury. These are two entirely different matters. The subsidy is the action of governments, and dumping is the action of firms. Yet some developed countries sometimes consider these two different items together to determine injury.

Comparison of export price with domestic sale price of other firms

In order to determine dumping, normally the export price of a firm should be compared to its domestic sale price. However, some developed countries have a provision to compare the export price of a firm with the domestic sale price of other firms, if the particular firm does not sell in the domestic market. In such cases, the correct process is to use the constructed normal value.

SUGGESTIONS FOR IMPROVEMENT

Process of investigation

Price below cost in domestic price

Although there is a general provision that the price below cost is to be included in calculating the domestic price, the developed countries often resort to the exception to this provision, which results in inflation of the dumping margin.

There should be a strict provision that the price below cost must not be excluded from the calculation of the domestic price.

Comparison of average with average

Some developed countries at times compare the average export price with the individual transactions of the domestic price and in this way the transactions with lower domestic prices are excluded, thus leaving out “negative dumping” cases. It unduly increases the dumping margin. Although there is a general provision that there should be a comparison of average with average or transactions with transactions, major developed countries often use the exception to this rule.

In comparing the export price with the domestic price, average-to-average comparison or transaction-by-transaction comparison should be made a strict norm.

Cumulation of subsidy and dumping

Some major developed countries consider subsidy and dumping together to determine injury in an anti-dumping investigation. This is entirely wrong as the two are totally different. For anti-dumping action, it is necessary to establish the causal linkage between the dumping and injury, and hence it is not permissible to combine other possible causes to the injury, e.g., subsidy. Yet some countries at times adopt this practice, which must be stopped.

Costly defence

When major developed countries start anti-dumping investigations against exports from the developing countries, the exporters are severely handicapped because they often have to engage the law firms of these major developed countries which is very costly. Frequently, the information sought by the authorities is difficult to collect. This puts the developing countries in a particularly weak and unfair position, and they are not able to defend themselves because of the cost and complexity involved.

The Council for Trade in Goods should find solutions to this problem.

Harassment by unsubstantiated applications

Applications for anti-dumping action are sometimes made by the industry in developed countries with inadequate evidence. Even if no dumping or injury is proved, the investigation itself damages the exports. The Agreement, of course, provides for a preliminary examination of the application by the government, but this has not prevented the harassment of developing countries by unsubstantiated applications. Defence is very costly for the developing countries and they need to be protected against such harassment.

When the complaints are unsubstantiated, the developed countries should financially compensate the developing countries.

Harassment by repeated applications

Developing countries have often been harassed in developed countries by repeated applications for anti-dumping. There have been cases when a new application for anti-dumping with minor changes has been filed immediately after the previous application was found to be untenable. Naturally, this results in harassment of the developing countries' exporters and needs to be remedied immediately.

One solution would be to punish the industry which has repeatedly applied for anti-dumping action.

De Minimis provision

Considering the harassment faced by developing countries, they must be given a broad exemption from anti-dumping processes. In particular, LDC firms should be totally exempted from anti-dumping action. For other developing countries, there should be a *de minimis* limit of a 15 per cent dumping margin of the import, and dumped volume of 10 per cent of the volume of import of the product in the country.

Presumption of dumping

With the new trend of liberalization of import restrictions and reduction of tariffs, the developing countries now face the risk of dumping by the firms of the developed countries. Undertaking a complex anti-dumping action procedure is very burdensome and they need to be protected against dumping.

One solution may be to deal with cases of presumption of dumping of exports from the developed countries to developing countries, if certain conditions are fulfilled. In the case of subsidy, there are provisions for presumption of serious prejudice against exports from developed countries. Similar provisions could be made in the case of dumping. The Council for Trade in Goods could work out the conditions.

Role of panels

The developing countries have been the main victims in the area of anti-dumping and this area has been excluded from the normal dispute settlement process, as mentioned above. This has curtailed the right of the developing countries to seek solutions - a situation that should be corrected.

Article 17.6 of the Agreement curtailing the role of the panels in anti-dumping cases should be abolished.

Article 15

Article 15 of the Agreement recognizes that special regard must be given by developed country members to the situation of developing country members when considering the application of anti-dumping measures.

Constructive remedies provided for by the Agreement must be explored before applying anti-dumping duties where they affect the essential interests of developing country. It has seldom been put into practice by the developed countries. The Agreement does not specify the type of action to be taken by the developed country Members.

The developed country Members should provide specific action when implementing this provision. The council of Trade in Goods should work out the relevant provisions and it should be obligatory for the developed country that takes anti-dumping action against a developing country to explain to the Council for Trade in Goods how it has followed the provisions of this Article in the case of anti-dumping action.

Initiation of anti-dumping action by LDCs

The existing procedures for the initiation of anti-dumping action should be simplified for adoption by LDCs.

Chapter 8

Customs valuation

INTRODUCTION

In all cases where customs duties are levied on ad valorem basis, the actual incidence of the duty on an imported product depends on what the customs authority determines as the dutiable value of imports. Hence the determination of this base value is very important for both the trade and customs administration.

Article VII of GATT 1994 contains certain principles for the valuation of goods for customs purposes. Using these principles, countries developed in the earlier years various methods for the valuation of goods for the assessment of duty. The one widely used system has been the Convention on the Valuation of Goods for Customs Purposes, more commonly known as the Brussels Definition of Value (BDV), which came into force on 28 July, 1953. The valuation systems of most of the LDCs are at present based on BDV. The Tokyo Round Agreement, however, resulted in adoption of valuation method that is significantly different from BDV. The BDV is based on "notional concept". The concept assumes that in relation to imported goods, there is a price "which the goods would fetch" which customs officers could determine, taking into account, inter alia, the circumstances of relationship between the importer and exporter and the information available on prices of identical or similar goods. The concept of valuation embodied in the Tokyo Round Agreement is, on the other hand, based on a "positive concept". It lays down in precise terms the prices which must be taken into account in determining the value of imported goods. The basic rule of the Agreement is that customs must ordinarily accept the "price paid or payable" by the importer in the transactions being valued as "true value" of goods.

A large number of developing countries, however, considered that the application of such binding rule to accept the transaction value, except in very limited number of situations provided in the Agreement, may present

for their customs administrations problems in dealing with practices adopted by traders to deliberately undervalue imported goods, in order to keep down incidence of customs duties. Such practices were more prevalent in developing and least developed countries as the rates of customs duties are higher than those levied by developed countries. These considerations resulted in large number of developing countries deciding not to become a member of the Agreement.

The Marrakesh Agreement establishing the WTO provides that all countries which are members of WTO would automatically become members of all multilateral agreements. As a result, the Agreement on Customs Valuation has become binding on all member countries. As would be explained later, the Decisions adopted in the Marrakesh is expected to provide discretion to customs administrations to reject the transaction value declared by the importer, when they have reasonable doubts about its truth or accuracy. This may considerably improve the ability of customs administration to deal with cases of deliberate undervaluation of imported goods and other customs malpractices.

MAIN PROVISIONS

As stated earlier, the primary basis for customs valuation under the Agreement is “Transaction Value” defined in Article 1 as the price actually paid or payable for imported goods.

Article 8 provides, inter alia, for adjustments to the transaction value for certain specific elements of cost which are considered to form a part of the value for customs purposes and are incurred by the buyer, but not included in the invoice. It also provides for inclusion in the transaction value of certain considerations which may pass from the buyer to the seller in the form of specified goods or services, rather than in the form of money.

Article 8 further clarifies that no additions other than for the elements mentioned above shall be made to the price paid or payable in order to arrive at the transaction value. In addition, it enumerates charges or costs that should not be added to customs value, if they can be distinguished from the price actually paid or payable. These are:

- (1) Freight after importation into the customs territory of the importing country;

- (2) Cost of construction, erection, assembly, maintenance or technical assistance occurring after importation; and
- (3) Duties and taxes of the importing country.

The inclusion in or the exclusion from the transaction value in whole or in part of certain elements will depend on the legislation of the country concerned. These elements are: the cost of transport to the port or place of importation; loading, unloading and handling charges associated with the transport of the imported goods to the port or place of importation; and the cost of insurance.

The Agreement lays down five other different methods which are to be used in determining value of imported goods, where customs decide that transaction value declared by the importer is not acceptable. These methods are to be used in sequential order in which they are listed. If the customs value cannot be determined under the provisions of Article 1, i.e., on the basis of the transaction value of the imported goods, the provisions of Article 2 are to be applied which means determining it on the basis of the value for identical goods. If even that is not possible, the determination to be made on the basis of Article 3, which provides for determining it on the basis of the value for similar goods.

The difference between the concepts of identical goods and similar goods are important to understand. The "identical" goods are those which are the same in all respects, including physical characteristics, quality and reputation. The "similar" goods are those which have like characteristics and like components, which perform the same functions and which are commercially interchangeable.

In applying the transaction value of the "identical goods" or "similar goods" to the goods being valued, sale at the same commercial level and in substantially the same quantity shall be used. Where no such sale is found, transaction value of "identical goods" or similar goods" sold at a different commercial level and in different quantities shall be used subject to adjustment to take account of the differences attributable to commercial level or to quantity on the basis of demonstrated evidence. If more than one transaction value of identical goods or similar goods is found, the lowest such value shall be used to determine the customs value of the imported goods.

Articles 5 and 6 provide two bases for determining the customs value where it cannot be determined on the basis of the transaction value of the imported goods or of identical or similar imported goods. Article 5 provides the basis for 'deduced value', under which the customs value is determined on the basis of the unit sale price at which the identical or similar goods are sold in the country of importation, after making deductions for such elements as profits, customs duties and taxes, transport and insurance, and other expenses incurred in the country of importation, with the proviso that the goods are sold in the condition as imported to an unrelated buyer in the country of importation.

An alternative is given in Article 6, which permits 'computed value' to be used as the customs value. In this method, the value is calculated as the sum of: (i) the cost of production, including the value of materials and fabrication or other processing employed in production; (ii) profit and general expenses; and (iii) necessary amounts for transport, loading, unloading and handling charges.

Article 4 gives the importer the right to choose the order of application of the these two methods, viz., the deduced value and computed value methods.

Article 7 provides a 'fallback method' to determine the custom value in cases where it cannot be determined under the provisions of any of the preceding Articles. Under this fallback method, customs value can be determined by using any reasonable means consistent with Article VII of the GATT 1994. The value so fixed should not, however, be based, *inter alia*, on the following factors: the price of goods for export to a third country market, the price of goods when produced in the importing country, the price of goods in the exporting country, minimum customs values, arbitrary or fictitious values, a system which provides for the acceptance of the higher of two alternative values and the cost of production other than what is employed in the method of computed values.

MINISTERIAL DECISION OF MARRAKESH

As mentioned earlier, normally the transaction value declared by the importer should be taken as the customs value. Only when it is not

considered proper, the other methods can be adopted in the prescribed sequence. The Ministerial Decision adopted at Marrakesh clarifies the situation in which the transaction value will not be taken to be the customs value. It prescribes a two-stage process. The transaction value declared by the importer will be examined by the customs authority. If it has reason to doubt the truth or the accuracy of the documents or the particulars, it may ask the importer to provide further explanation, evidence or documents. If the customs authority, after considering all this, has still reasonable doubts about the truth or accuracy of the documents or the particulars, it will be deemed that the customs value cannot be determined on the basis of the transaction value.

After such two-stage examination, there will be a presumption about the transaction value not being appropriate for calculating the customs value.

OTHER PROVISIONS

The Agreement also contain other provisions concerning currency conversion, the right of appeal to a judicial authority, publication of laws, regulations, judicial decisions and administrative rulings of general application concerning customs valuation and prompt clearance of goods.

The Agreement provides for the establishment of WTO Committee on Customs Valuation to supervise its implementation and allow Members to consult on matters concerning its management. Similarly, it also provides for a Technical Committee on Customs Valuation under the auspices of the World Customs Organization (WCO) with a view to rendering assistance, at the technical level, towards uniformity in interpretation and application of the Agreement.

EXPERIENCE OF THE OPERATION OF THE AGREEMENT

Article 20 (paragraph 1) provides the developing countries a time of five years to implement the provisions of the Agreement. Therefore they will need to apply the Agreement only either by the beginning or middle of 2000.

This delay is intended to provide them with sufficient time to take gradual steps to change over from their current systems to the Agreement's valuation system. In order to facilitate such change-over, technical assistance is being provided by international organizations like WTO and WCO as well as by developed countries on bilateral basis for assisting these countries in adopting the necessary legal framework, in training of officials in applying the valuation methods prescribed by the Agreement and for modernization and computerization of their custom procedures. Despite the provision of such assistance some 50 countries (which include most of the LDCs) have not been able to adopt the valuation system of the Agreement.

Developing countries which have been applying the rules of the Agreement have also encountered a number of problems. The Annex lists these problems.

SUGGESTIONS

- As noted above, about 50 developing countries, most of which are LDCs, have not been able so far to implement the Agreement. The transitional period available to them for changing over to the use of the Agreement's rules, is expected to expire for most of the countries either by the beginning or middle of 2000. It would be, therefore, necessary to extend the transitional period available to them for a further period of three to five years.
- Simultaneously, they would have to be provided technical assistance for adopting institutional and legal framework required for the application of the valuation rules of the Agreement, for training of officials in the application of methods for determining value of the imported goods prescribed by it and for modernization and computerization of customs procedures.

ANNEX**Problems encountered by developing countries applying the Agreement**

In pursuance of a request from the developing country Members applying the provisions of the Agreement, Technical Committee on Customs Valuation (established at the World Custom Organization) conducted in 1995 a study on legislation, regulations and administrative practices of Members vis-a-vis implementation of the WTO Valuation Agreement. The study identified some of the problems encountered by the Members in the implementation of the Agreement as well as the inadequacies and weaknesses of the institutional infrastructure for customs administration in addressing the implementation requirements. Some of these problems are mentioned below:

- (i) *Indirect Payments*: First, indirect payments related to the goods being valued, which are undeclared by importers, cannot be easily discovered. Second, the same situation would arise with respect to payments involving third countries and third parties (especially in cases involving further manufacture or repairs)
- (ii) *Discounts*: Some difficulties in identifying the existence of discounts and in distinguishing them from indirect payments as well as with deferred discounts and discounts effected after importation are encountered. In some cases, importers deduct discounts granted for other goods or those not relating to the imported goods. Discounts in transactions between related persons gives rise to difficulties. Besides, exorbitant discounts represents some concerns.
- (iii) *Transactions between related parties*: Very often, the importers fail to submit documentation on relationship. Besides, often they are not clear whether or not the prices can be said to be influenced by the relationship. Difficulties, therefore, are faced in identifying whether parties are related or not, and in determining whether the relationship has influenced the price.
- (iv) *Transactions by sole agents, sole distributors and sole concessionaires*: There are some difficulties with contracts involving sole agents, sole distributors, etc. Frequently commissions for these intermediaries are not included in the invoice.

- (v) *Transactions by intermediaries*: In regard to transactions by non-resident importers, it is difficult to determine what is the relevant price for valuation purposes. Besides, fees charged by such intermediaries are invariably shown as buying commissions which is difficult to disprove. The prices re-invoiced by intermediaries are much less compared to the prices observed in similar transactions involving of other parties.
- (vi) *Transfer prices*: In cases of transactions between related parties or transactions by intermediaries, very detailed examination of the prices has to be done.
- (vii) *The costs for advertising* and other activities paid for by the buyer after purchases but before importation are not considered as forming part of the customs value of the goods. Difficulties arise in determining whether such costs result from a condition of the sale of the imported goods or from activities undertaken by the buyer on his own account.
- (viii) *The cost of technical assistance* rendered by the seller is not ordinarily to be included in the customs value, provided it is distinguished from the price actually paid or payable for the goods and the fact can be documented. Problems are encountered in determining whether the technical assistance is related to the imported goods and forms part of the actual customs value of the imported goods, especially in cases where a wide range of activities are involved. Where the technical assistance is rendered in relation to the imported goods by the seller, it is difficult to establish the incidence of its cost on the imported goods.
- (ix) *Transactions including financing arrangements*: It is arguable whether a financier of imported goods should be considered a party to the transaction as a buying agent. When the seller, the buyer and the financial institution are all related, some difficulties may arise in verifying which share of the gross amount represented the financial cost, especially in cases when the financial institutions issued the invoices in their own name and on their own behalf.

Chapter 9

Preshipment inspection (PSI)

INTRODUCTION

Preshipment inspection (PSI) is the practice of employing specialized private companies to check shipment details, essentially, price, quantity and quality of goods ordered from overseas. Several developing countries, including some LDCs, use PSI services, with the purpose of safeguarding national financial interests, such as prevention of capital flight, commercial fraud, customs duty evasion, and to compensate for inadequacies in their administrative infrastructure. The list of the LDCs using the PSI and the purposes for which it is used is given in Box 1.

The best practice for a country is to use its own customs agency for carrying out the inspection of the imports. But several developing countries do not have a well-developed customs administration which could detect effectively customs-related malpractices; hence they utilize the services of external inspection agencies for this purpose. The Agreement on PSI lays down the disciplines on the countries using the PSI process, the PSI agencies and the exporting countries.

Contracts entered into by the governments using PSI and the PSI agencies can be grouped into two broad categories: foreign exchange contracts (forex), and customs contracts, according to the purpose for which the services of PSI companies are employed. Forex contracts are usually employed by governments to prevent the flight of capital through over-invoicing, while the latter is used to prevent slippage of customs revenue as a result of undervaluation or deliberate misclassification by traders of goods to be imported under low-duty headings. Until recently, the main objective of governments was to prevent the overvaluation of imports. Traders tend to overvalue imports when the import trade and foreign exchange transactions are subject to restrictions. The liberalization of trade and foreign exchange regimes, in developing countries, has curtailed the desire of traders to overvalue imported goods. Now, most PSI contracts are custom contracts, the aim being to ensure that the revenue due is fully collected, thus bringing under control.

While PSI services are mainly used for preshipment inspection of imports, a few governments also utilize them to control the flight of capital through the undervaluation of exports.

The main utility of the PSI is in the context of the following elements:

- Physical identification of the goods in the country of supply/export ensures that the goods are in accordance with the description declared by the exporter.
- Verification of the contract price, ensures that the price is reasonably in line with prevailing export prices from the supplying country or where applicable, with world market prices.
- Verification of the contract price provides Customs with accurate data for the collection of import taxes and levies.
- Verification of the Customs classification applicable to each imported item allows Customs to apply the correct tariff rates and facilitates the checking of the item against any list of items subject to import regulations.

Where well applied, PSI provides trade monitoring services to governments on a global scale. The scope of the intervention varies according to the governments' requirements, but is mainly oriented towards: improvement of the trade balance; optimization of customs revenues; enhancement of domestic tax revenues; compliance with government regulations; fighting fraud and thwarting abuses of trade incentives; trade facilitation; provision of reliable trade statistics; conservation of foreign exchange; and consumer protection.

There are several companies that provide preshipment inspection, five of which are prominent. These include; the Societe Generale de Surveillance (SGS) based in Geneva;; BIVAC International, Paris; COTECNA, based in Geneva; Inchage Testing Services International (ITSI), London; and Inspectorate of the United States. The five companies are members of the Preshipment Inspection Committee of the International Federation of Inspection Agencies (IFIA).

In order to ensure that PSI companies do not arbitrarily reject the price agreed voluntarily between exporters and importers, the Agreement lays down the principles and rules which must be followed by these companies.

Box 1:
***Least Developed Countries using PSI Services**

Country	Nature of contract
Afghanistan	
Angola*	Forex
Bangladesh	
Benin*	Customs /Forex
Bhutan	
Burkina Faso*	Customs /Forex
Burundi*	Forex
Cambodia	
Cape Verde	
Central African Republic*	Customs /Forex
Chad*Customs	
Comoros	
Djibouti	
Equatorial Guinea	
Eritrea	
Ethiopia*	Forex
Gambia	
Guinea*	Customs /Forex
Guinea-Bissau	
Haiti*	Customs /Forex
Kiribati	
Lao People's Democratic Republic	
Lesotho	
Liberia	
Madagascar*	Customs /Forex
Malawi*	Customs /Forex
Maldives	
Mali	
Mauritania*	Customs /Forex
Mozambique*	Customs /Forex
Myanmar	
Nepal	
Niger	
Rwanda*	Customs /Forex
Samoa	
Sao Tome and Principe	
Sierra Leone*	Customs /Forex
Solomon Islands	
Somalia	
Sudan	
Togo*Customs	
Tuvalu	
Uganda*	Customs
United Republic of Tanzania*	Customs /Forex
Vanuatu	
Yemen	
Zambia*	Customs/Forex

MAIN PROVISIONS

Objectives and scope

The PSI Agreement attempts to strike a balance between concerns expressed by exporting enterprises in developed countries and the need to safeguard the essential interests of developing countries that consider PSI services useful. It clarifies that its provisions apply only to pre-shipment activities carried out in exporting countries that are “contracted or mandated by the government”. The term “pre-shipment inspection” is defined as “all activities relating to the verification of the quality, the quantity, the price, including currency exchange rate and financial terms and/or the customs classification of goods to be exported.”

The Agreement recognizes that several developing countries use PSI services, and allows their use “for as long as and in so far as” they are “necessary to verify the quality, quantity or price of imported goods”. The basic aim of the Agreement is to lay down a set of principles and rules for countries using PSI services and for exporting countries to ensure that their activities do not cause barriers to trade.

Main obligations

The main obligations of the country using PSI are the following:

- extension of MFN (most favoured nation) and national treatment
- protection of confidential business information
- avoidance of unreasonable delays, and
- the use of specific guidelines for conducting price verification

These are explained in Box 2.

The main obligations of exporting members towards PSI-using countries include non-discrimination in the application of domestic laws and regulations, prompt publication of those laws and regulations and the provision of technical assistance when requested. An independent review procedure has been established to resolve disputes between an exporter and an inspection agency (Box 2).

Box 2:
**Main Obligations of the Countries Using PSI Services
and of the Exporting Countries**

A) Obligations of countries contracting PSI services

Non-discrimination

Laws and procedures and criteria should be applied on equal basis to all exporters. There should be uniform performance of inspection by all inspectors. PSI, Article 2.1

National Treatment

Countries using PSI services should not apply national regulations in a manner that will result in less favourable treatment of the goods being inspected in comparison to the like domestic product. PSI, Article 2.3

Site of Inspections

Physical inspection should be carried out in the exporting country and only if this is not feasible, in the country of manufacture. PSI, Article 2.3

Standards

Quality and quantity inspections should be conducted according to the standards agreed between buyer and seller or, in their absence, international standards.

PSI, Article 2.4

Transparency

Transparency should be ensured by providing exporters with information inter alia on the laws and regulations of user countries regarding PSI activities, and the procedures and criteria used for inspection. PSI, Article 2.5 to 2.8

Protection of Confidential Information

Confidential information should not be divulged to third parties. PSI, Article 2.14

Delays

Unreasonable delays should be avoided. PSI, Article 2.15 to 2.19

Price Verification

See Box 3

B) Obligations of exporting countries in relation to PSI activities

Non-discrimination

Laws and regulations should be applied on a non-discriminatory basis.

Transparency

All laws and regulations should be published.

Technical Assistance

Technical assistance should be provided to user countries with a view to reducing gradually, their reliance on PSI services for prior verification of prices.

The Agreement lays down the guidelines and rules which PSI companies must follow when verifying prices of the products to be imported. In particular, it states that, in order to determine whether the export price reflects the correct value of goods, it should be compared with the prices of identical or similar goods offered for export from the same country of exportation to the country of importation, or to other markets.

Where, for the price comparison purposes, the prices charged for export to countries other than the country of importation are used, the economic and other factors that influence the prices charged to different countries should be taken into account. PSI rules recognize that firms often charge varying prices in different markets, taking into account demand and growth potential as well as other factors such as per capita income and living standards in these markets. The Agreement stipulates that when a third-country prices are used for price comparison purposes, the factors responsible for variations in the prices charged to importers in different countries should be considered and PSI companies should not arbitrarily impose the lowest price upon the shipment (Box 3)

Appeal, revision and dispute settlement

One of the major criticisms of PSI activities made by exporters was the absence of an institutional mechanism for considering complaints. When they regarded a decision to revise prices as arbitrary or wrong, and the PSI company concerned refused to review its decision, the exporters found it difficult to obtain a hearing for their grievances. To facilitate consideration of such complaints, the Agreement establishes a three-tier mechanism. First, it calls on PSI entities to designate officials to whom exporters can appeal against the decisions of PSI inspectors. Second, it establishes an Independent Review Entity (IRE) to which both exporters and PSI entities can submit grievances. Third, it recognizes that governments of countries using PSI services and exporting countries could bring disputes on any matter related to the operation of the Agreement to WTO for settlement.

The Agreement imposes an obligation on user member countries to require PSI entities whose services they employ to designate one or more officials “who shall be available during normal business hours in each city or port in which they maintain a preshipment inspection administrative office, to receive, consider and render decisions on exporter’s appeals or grievances”. The designate officials are expected to take decisions on such complaints promptly.

Box 3: Price Verification

User Members shall ensure that, in order to prevent over and underinvoicing and fraud, pre-shipment inspection entities conduct price verification according to the following guidelines:

- (a) preshipment inspection entities shall only reject a contract price agreed between an exporter and an importer if they can demonstrate that their findings of an unsatisfactory price are based on a verification process which is in conformity with the criteria set out in subparagraphs (b) through (e);
- (b) the preshipment inspection entity shall base its comparison for the verification of the export price on the price(s) of identical or similar goods offered for export from the same country of exportation offered for export from the same country of exportation at or about the same time, under competitive and comparable conditions of sale, in conformity with customary commercial practices and net of any applicable standard discounts. Such comparison shall be based on the following:
 - (i) only prices providing a valid basis of comparison shall be used, taking into account the relevant economic factors pertaining to the country of importation and a country or countries used for price comparison;
 - (ii) the preshipment inspection entity shall not rely upon the price of goods offered for export to different countries of importation to arbitrarily impose the lowest price upon the shipment.
- (c) when conducting price verification, preshipment inspection entities shall make appropriate allowances for the terms of the sales contract and generally applicable adjusting factors pertaining to the transaction; these factors shall include but not be limited to the commercial level and quantity of the sale, delivery periods and conditions, price escalation clauses, quality specifications, special design features, special shipping or packing specifications, order size, spot sales, seasonal influences, licence or other intellectual property fees, and services rendered as part of the contract if these are not customarily invoiced separately; they shall also include certain elements relating to the exporter's price comparison for the verification of the export price, such as the contractual relationship between the exporter and importer;
- (d) for the price verification purposes, the selling price in the country of importation of goods produced in such country; the price of goods for export from a country other than the country of exportation; the cost of production, arbitrary or fictitious prices or values, shall not be used.
- (e) the following shall not be used for price verification purposes:
 - (i) the selling price in the country of importation of goods produced in such country;
 - (ii) the price of goods for export from a country other than the country of exportation;
 - (iii) the cost of production;
 - (iv) arbitrary or fictitious prices or values.

Where a dispute cannot be settled through mutual consultations between exporters and PSI entities, either party can, within two days after its submission under the appeals procedures, refer it to the Independent Review Entity established under the Agreement and administered jointly by IFIA and the ICC. This entity is required to establish a list of experts who can serve as members of panels considering the complaints brought to it.

A panel will consist of three experts. One member is to be nominated by the exporter; the second by the PSI entity. The experts so nominated should not, however, be affiliated to these two nominating parties. The third expert, who is to be nominated by the Independent Review Entity, should be a trade expert and will act as chairman.

The decisions of the panel will be taken by majority vote and in eight working days of the request for independent review. The panel decisions are binding on the parties to the dispute.

IMPLICATIONS

By laying down rules on PSI activities, the PSI Agreement seeks to reduce, if not completely eliminate, the difficulties exporting enterprises experience in regard to transactions with countries using PSI services. In addition, the Agreement has created a mechanism for the consideration of complaints, as explained earlier.

Governments of PSI-using countries benefit from the increased customs revenue resulting from the detection of undervaluation and from the decline in the flight of capital through overvaluation. The employment of PSI services also brings indirect benefits to business enterprises.

- First, by speeding up the clearance of goods, it greatly reduces the inventories which manufacturers have to maintain and thus enables them to cut costs.
- Second, the use of PSI services are expected to lower the level of customs-related malpractices.
- Third, when verifying prices, PSI companies carry out physical inspections of all goods to be imported in order to ensure that they conform to the conditions stipulated in contracts between importers and exporters in

regard to quality and quantity. Thus the importers have reasonable assurance that the goods they will receive will be in conformity with the terms of their contracts. However, as PSI companies enter into contracts with governments, importers have no right of recourse to these companies if they (the importers) ultimately find that the imported goods do not, in fact, meet the terms of their contract.

BUILT-IN AGENDA

Article 6 of the Agreement provides for a review by 1996. It states: “ At the end of the second year from the date of entry into force of the WTO Agreement and three years thereafter, the Ministerial Conference shall review the provisions, implementation and operation of this Agreement, taking into account the objectives thereof and experience gained in its operation. As a result of such review, the Ministerial Conference may amend the provisions of the Agreement.”

A Working Party was established by the General Council in November 1996, following a recommendation by the Council for Trade in Goods, to conduct the first review provided for in Article 6. The Working Party's report was submitted in December 1997. The General Council approved recommendations of the Working Party and agreed to extend its life for one year to examine issues which the Working Party considered were in need of a further exchange of views.

The working party which was established to undertake this review has come up with the following recommendations:

Responsibility for determining dutiable values rests with customs

Price verification by entities for customs purposes shall be limited to provision of technical advice to facilitate the determination of customs value by the user Member. In this regard, the ultimate responsibility for customs valuation and revenue collection rests with user Members. All activities of PSI entities should be monitored by user Members who should be encouraged to reflect this in national legislation or administrative regulations.

Making publicly available price verification criteria

A user member is required to:

- (a) Make publicly available a single set of price verification criteria; and
- (b) Inform exporters and importers of the applicable valuation methodology.

Price verification criteria should include the customs valuation methodology, as specified in user Members' national legislation or administrative regulations, used when providing technical advice on customs valuation. In this regard, user Members should encourage PSI entities to utilize electronic means for purposes of providing required information to exporters and importers.

User members shall ensure that requests for information do not go beyond that required by the Agreement on PSI. Reciprocally, exporter members should inform user members when they become aware that PSI entities' requests for information go beyond these Articles.

Site for inspection

User members should ensure that PSI entities are encouraged to establish focal points in countries where they do not have physical on-site representation.

Use of electronic means

The establishment of web-sites by IFIA and by PSI entities with on-line services would enhance efficiency of PSI operations in such areas as procedures, methods, inspection criteria, responses to inquiries, and dissemination of other usable, essential information by importers and exporters. In addition to providing hard copies, PSI entities should be encouraged to communicate clean report of findings (CRFs) to importers and exporters through electronic means.

Avoidance of delays

User Members shall ensure that PSI entities issue CRFs to importers and exporters immediately on receipt of the final documents and completion of inspection. In no case must the issuance of CRFs exceed five working days

after an inspection. In the event that a CRF has not been issued, the user Member shall ensure that the PSI entity issues a detailed, written explanation, specifying the reason(s) for non-issuance.

Protection of confidential information

User Members shall ensure that contracts with PSI entities or national implementing legislation, or administrative regulations specify procedures to be undertaken by such entities to limit the confidential business information they seek from exporters to that provided for under the Agreement and to ensure that any such information obtained by PSI entities is not used for any other purpose than PSI activities for user Members.

Fees structures

User Members shall ensure that contracts with PSI entities or national implementing legislation, or administrative regulations provide for fee structures that do not create incentives for potential conflicts of interest in any way that may be inconsistent with the objectives of the Agreement. Additionally, contracts with PSI entities or national implementing legislation, or administrative regulations shall specify that PSI entities should not inspect transactions involving products in which a PSI entity, or its related company may have a commercial value.

Consideration of complaints from exporters

Members shall ensure that the PSI entity, when responding to a dispute on price verification, provides a detailed written explanation within ten days of receipt of the complaint, setting forth the basis of its opinion of value by reference to the specific applicable elements of the price verification criteria.

Other elements

- Governments must ensure that PSI contracts are in conformity with the provisions of the WTO/PSI Agreement, and should encourage Members to consider following the model contract wherever possible;
- Governments should examine incorporating the principles of selectivity and risk assessment in their contracts;

- Governments who consider having their PSI programmes audited should be guided by principles contained in an annex to the report, or ensure that the principles in the Agreement such as non-discrimination and national treatment are respected; and
- Developed countries ensure that the developing countries receive the necessary assistance for domestic capacity building in order that the transition away from PSI can be made.
- The future monitoring of the Agreement should be undertaken initially by the WTO Committee on Customs Valuation.

SUGGESTIONS

In cases where problems of corruption and smuggling are potential causes of the customs duty loss and where there is need to protect the consumers, PSI services may be useful. In such cases, there is need for PSI services in the short term. But it is not a substitute for real reform of the customs administration. Improved and efficient customs administration services have to be built in the LDCs. The technical assistance that is being provided to these countries to modernize their customs services would have therefore to be strengthened.

Chapter 10

Import licensing

INTRODUCTION

Import licensing is an administrative procedure requiring the submission of an application or other documentation to a government body and obtaining a licence as a prior condition for importation. While import licensing can have some uses, its inappropriate application can be a barrier to the flow of international trade. In order to facilitate trade, the general approach of GATT/WTO is that formalities and documentation for importation and exportation should be kept to the minimum. It is, however, recognized that countries may require importers to obtain import licences. For example, a licensing system may be adopted to administer quantitative restrictions and for surveillance of trade statistics or the prices of goods.

The basis for the consideration of the subject of import licensing is Article VIII of the GATT 1994, entitled "Fees and Formalities connected with Importation and exportation". Paragraph 1(c) of this article recognizes "the need for minimizing the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements".

The improvement in import licensing had been under consideration in the GATT/WTO for a long time. The GATT Council, through its Committee on Trade in Industrial Products and a Working Group, had kept it under consideration during the 1960s and 1970s. An agreement on import licensing was worked out in the Tokyo Round, but as in case of all Tokyo Round agreements, it had only limited participation. Finally the subject was taken up for negotiation in the Uruguay Round and the Agreement on Import Licensing was finalized. The main considerations during the negotiation on this subject in the Uruguay Round were that: import licensing procedures should not impede the flow of trade; that import licensing, particularly non-automatic licensing, should be implemented in a

transparent and predictable manner; and that governments should observe strict time limits in notifying changes in their licensing procedures.

MAIN PROVISIONS

Objectives

The main objectives of the Agreement are to simplify and bring transparency to import licensing procedures, and to ensure fair and equitable application and administration of such procedures. The Agreement aims at ensuring that the procedures applied for granting both automatic import licences (licensing used normally for trade statistics and monitoring of prices) and non-automatic import licences (which usually serve to administer quantitative or other restrictions on imports), do not in themselves restrict or distort trade.

The Agreement establishes disciplines on the users of import licensing systems. The Agreement lays down certain principles and rules to ensure that the flow of international trade is not impeded by the inappropriate use of import licensing procedures, and that procedures are administered fairly and equitably (Box 1).

Automatic import licensing

In systems where administrative authorities do not exercise any discretion and “licences are granted in all cases”, the Agreement requires that, in such cases, approval or licence be granted automatically, on receipt of the application, and in any case “within a maximum period of ten working days.”

Notifications by Members under automatic licensing procedures are meant to provide information such as purposes for which automatic import licensing procedures are maintained; product coverage; eligibility of importers to apply for automatic licenses; period of submission and processing of import licenses; administrative body to be approached; refusal of applications; application forms and other documents required on application; and availability of foreign exchange for imports. All these headings are covered in the Questionnaire on Import Licensing Procedures, which is to be submitted every year by a Member to the WTO.

Box 1: General Provisions of the Agreement [Article 1]

- WTO Members shall ensure that administrative procedures implementing import licensing regimes are in conformity with the relevant provisions of GATT 1994 [Article 1.2].
- Members shall apply import licensing procedures neutrally and administer them in a fair and equitable manner [Article 1.3].
- Rules and all information concerning procedures for the submission of applications and lists of products subject to import licensing shall be published, whenever practicable, 21 days prior to the effective date of the requirement but in all events not later than the effective date [Article 1.4].
- Application forms and renewal forms shall be simple [Article 1.5].
- Application and renewal procedures shall be simple; applicants shall be allowed a reasonable period to submit license applications; where there is a closing date for applications such as a period should be at least 21 days; the number of administrative bodies which an applicant has to approach in connection with an application shall be limited to a maximum of three [Article 1.6].
- Applications shall not be refused for minor documentation errors and shall not be penalized heavily for any omissions or mistakes in documentation or procedures obviously made without fraudulent intent or gross negligence [Article 1.7].
- Licensed imports shall not be refused for minor variations in value, quantity or weight from the amount shown on the licence for reasons consistent with normal commercial practices [Article 1.8].
- Foreign exchange for licensed imports shall be allocated on the same basis as for goods not requiring import licences [Article 1.9].
- Security exception provisions of Article XXI of GATT apply [Article 1.10].
- Members are not required to disclose confidential information contrary to the public interest or which would prejudice the legitimate commercial interests of particular enterprises [Article 1.11].

Non-automatic import licensing

Non-automatic import licensing systems are used in implementation of the government's policy to restrict some imports. (Governments sometime

impose restrictions on imports for various reasons, e.g., balance-of-payment difficulties, safeguard measure, etc., which have been explained in the relevant chapters.)

Where import licensing is utilized for the administration of quotas in pursuance of the implementation of import restrictions, the Agreement requires the publication of the overall amount of the quota (quantity and/or value) and its opening and closing dates, so that all interested parties, viz., importers, exporters, producers and governments, are fully aware of them. Further, where a quota is allocated among supplying countries, the country granting the quota is required to publish information on the shares allotted to each country, and also to specifically inform the particular governments of the distribution of shares of the quota.

The Agreement requires import licences to be issued within 30 days of the receipt of the application where the procedures provide that licenses should be issued “on a first-come first-served basis”, and within 60 days, where applications, which have been received, are considered simultaneously.

While allocating the quotas to the importers, the import performance of the applicant should be considered. But care should be taken to ensure that importers who have not been able to use their licenses for legitimate reasons are not unduly penalized by denial of a license or by unduly reducing the value or quantity of the import. Licensing authorities are further required to give special consideration in distributing licenses to new importers, particularly those who import from developing and least developed countries.

Notifications by Members to WTO under non-automatic licensing procedures are meant to provide information such as purpose; product coverage under each non-automatic licensing system; distribution of licensing among supplying countries; size of quota; eligibility of importers to apply for non-automatic licences; allocation of licences to applicants; period of processing applications; period of licence validity; application forms and other documents required on application; administrative body to be approached; refusal of application; and availability of foreign exchange for imports. All these headings are covered in the Questionnaire on Import Licensing Procedures which has to be submitted every year by a Member.

Notifications

Members are required to submit copies of publications containing information on import licensing procedures and the full text of relevant laws and regulations in effect on entry into force of the WTO Agreement.

In cases where the publications and legislation are not in a WTO official language, such notifications should be accompanied by summary in one of the WTO official languages.

Common rules

The Agreement obliges member countries to publish all information on import licensing procedures, so that importers, exporters and their governments are fully aware of:

- The eligibility of persons, firms and institutions to make applications;
- The administrative body responsible for the issue of licenses; and
- The products subject to licensing.

To protect the interests of importers, and to facilitate speedy and prompt issue of licenses, the Agreement further stipulates that:

- Application forms and procedures, including procedures for the renewal of licenses, should be as simple as possible;
- Applications should not be refused for minor documentation errors which do not alter the basic data contained therein;
- Penalties imposed for such errors, except where fraudulent intent or gross negligence is involved, should not be more severe than required to serve as a warning;
- Licensed imports should not be refused for minor variations in value, quantity or weight from those designated in a license, where such differences are consistent with commercial practice or are due to losses in weight and quantities occurring in shipping or bulk loading.

Obligations of national licensing authorities

The rules require national licensing authorities to ensure that licensing procedures:

- are not more burdensome than absolutely necessary to administer the licensing system, taking into account the purpose for which they are adopted;
- are transparent and predictable;
- protect the interests of importers and foreign suppliers from unnecessary delays and arbitrary actions;

Members which institute licensing procedures or changes in these procedures are required to notify the Committee of such procedures or changes within 60 days of publication. Information to be included in such notifications are as follows: products subject to licensing; contact point for information on eligibility; administrative bodies for submission of applications; date and name of publications where licensing procedures are published, together with copies of such publications; whether licensing is automatic or non-automatic; the administrative purpose of automatic import licensing procedures; measure implemented through non-automatic import licensing procedure; expected duration of the licensing procedures.

Members have the possibility of making reverse notifications of non-notified import licensing procedures maintained by other members.

Least Developed Countries

In allocating licenses among importers, members should give special consideration to those importers of products originating in developing country members and in particular LDCs countries.

REVIEW AND IMPLEMENTATION

Article 7.1 of the Agreement on Import Licensing Procedures provides that 'the Committee shall review as necessary, but at least once every two years, the implementation and operation of this Agreement, taking into account the objectives thereof, and the rights and obligations contained therein'. Article 7.2 further provides that as a basis for the review, the Secretariat shall prepare a factual report based on the information provided in responses to the annual Questionnaire on Import Licensing Procedures

and other relevant reliable information which is available to it. The Committee has to inform the Council for Trade in Goods of the developments in this area during the period covered by such reviews.

The first biennial review of the implementation and operation of the Agreement was conducted in 1996 and the second one in 1998. The Committee has reported annually to the Council on Trade in Goods.

The Committee on Import Licensing which is open to all Members, was established to meet and to deliberate on any matters relating to the operation of the Agreement or the furtherance of its objectives. According to the reports compiled on its work, the Committee has reviewed various notifications submitted by Members over the years since the agreement came into force in 1995. The overall rate of implementation with respect to notifications has been low. So far only 54 members (the European Commission and its member states are counted as one) have notified their laws, regulations and administrative procedures while 53 Members have replied to the Questionnaire on Import Licensing Procedures. Only 9 out of 29 LDCs that are Members of WTO have complied with this obligation.

The LDCs have not been able to comply with the requirements of notification mainly because of their inadequate capacity for such work. The poor record of notification by other countries, at the same time, puts them at some handicap regarding information on the other countries' licensing process. It would have been a good source of information on import regimes of their trading partners; and it would have been very useful as they themselves do not have the means of collecting such information. A paucity of information on trading opportunities in foreign markets constrains LDCs' export possibilities.

SUGGESTIONS

- The LDCs have a big administrative burden in making notifications under this Agreement. The Council for Trade in Goods should consider this problem and work out ways to reduce this burden.
- The other Members that have not provided notifications or are not implementing the Agreement in other ways should provide the notifications timely and implement the Agreement fully.

- In the case of non-automatic import licensing, special consideration should be given to LDC suppliers. In their cases, non-utilization of licences should be specially examined and their special situations taken into consideration in allocating licences for new periods. They should not be penalized for failing to utilize their licences fully. Further, in cases where licences are being allocated to new importers, special consideration should be given to the importers getting the products from LDCs.
- LDCs may have difficulties in fully implementing the provisions of the Agreement; in such a situation, they should be allowed longer transition periods for implementation.
- For the LDCs, financial and technical assistance for designing and installing new import licensing systems should be provided.

Chapter 11

Rules of origin

INTRODUCTION

General

Rules of origin are essential for the implementation of country-specific measures in trade and also for compiling economic statistics and marketing a product. They are trade policy instruments, the main task of which is to ensure that the preferential policies or the restrictive measures are confined to the targeted countries. Once the origin of a product is known, the importing country can apply specific trade preferences or restrictions (such as duty free entry for goods originating in a free trade area, quantitative restrictions on goods originating in a country subject to a quota, or anti-dumping duties on goods from a targeted company that originate in a targeted country).

Many LDCs find rules of origin requirements complex and, in many cases, over-restrictive. The diversity of rules results in severe problems in market access. Rules of origin thus may impede the achievement of GSP objectives. Many LDCs have been adversely affected by changes to rules of origin by the developed countries, particularly with regard to agricultural products and textiles. Hence, LDCs have a crucial interest in seeking the harmonization of the rules of origin.

For LDCs, the difficulties in complying with the rules of origin (which often require that high percentage of the value must be added through processing in the exporting country) and built-in limitations (such as tariff quotas) have further resulted in exporters being unable to take advantage of the GSP.

Types of the rules of origin

There are two basic kinds of rules of origin:

- (1) Non-preferential rules of origin; and
- (2) Preferential rules of origin

Non-Preferential rules of origin apply to most-favoured-nation (MFN) trade as a means to determine the origin of goods within the framework of WTO trade policy instruments, such as anti-dumping proceedings, quantitative restrictions, Agreement on Textiles and Clothing and quotas that do not include preferential treatment.

Preferential rules of origin apply in the context of preferential tariff regimes such as the GSP, Free Trade Areas (FTAs), and regional integration. The purpose of preferential rules of origin is to confer preferential treatment such as preferential duties, special quotas, etc.

Preferential rules of origin are of two types: contractual and autonomous.

Contractual rules of origin often result from bilateral negotiations. Their aim is to regulate the trade patterns of the contracting parties and avoid third countries taking advantage of their agreement by, for example, transshipping goods.

Autonomous, commonly known as GSP rules of origin, are the expression of the autonomous character of GSP concessions as a whole. This autonomous nature has been recognized in the common declaration annexed to the WTO Agreement on Rules of Origin.

GSP and the rules of origin

Entry into a preference-giving country at GSP rates of duty requires goods to have originated in a preference-receiving country in accordance with the rules of origin prescribed by the importing country. The purpose of these rules is:

- (1) To prevent or limit possible “deflection of trade” i.e., the undermining of the customs tariff of a preference-giving country. This would be the case if preferences were granted to third country goods that had merely transited through or undergone only nominal processing in a preference-

receiving country. All preference-giving countries require goods to be either wholly produced in a preference-receiving country or, where goods are produced from materials imported from outside that country, those materials must have undergone “substantial transformation” in the exporting preference-receiving country.

- (2) To encourage genuine manufacturing in preference-receiving countries so as to promote exports thus increasing foreign currency earnings and promoting industrialization and employment.

Although origin must in principle be acquired in a single preference-receiving country, certain preference-giving countries permit the “cumulation” of materials supplied by other preference-receiving countries or within subregional integration groupings. Further, in some origin systems, materials supplied by a preference-giving country may be used in a preference-receiving country for manufacture into a product that is then exported to the supplying country. This arrangement is referred to as the “donor country content” concept.

The term “substantial transformation” is defined either by means of a “percentage criterion” (Australia, Canada, New Zealand and the United States) or a “process criterion”. Both criteria place limitations directly or indirectly on the use of imported materials. The process criterion is expressed by means of a basic rule that requires imported materials to undergo a change of classification (at the four-digit level) in the course of manufacture in a preference-receiving country. In the case of exempted products, separate rules specific to those products must be satisfied. Many of those rules place a percentage limit on the use of import materials.

At the start of the GSP, preference-giving countries decided to implement their national schemes independently. Given that preferences are granted unilaterally as well as non-contractually, donor countries retained the general principle that they were free to decide on the rules of origin which they thought were appropriate for beneficiary countries. This has resulted in a large number of the sets of rules being in operation. The technical nature and the diversity of rules of origin have brought additional complexity to the GSP schemes and their utilization.

Throughout its almost three decades of existence, preference-receiving countries have identified numerous shortcomings in the origin system and consequent obstacles to GSP utilization. Some improvements have taken

place, but major problems still persist with respect to harmonization, liberalization and simplification of the rules.

The main shortcomings of the various GSP origin systems encountered by preference-receiving countries are:

- (1) Over-restrictive origin criteria in respect of the use of imported materials and components;
- (2) Frequent additional requirements restricting the use of third country inputs attached to process and percentage criteria - such as requirements for "double or triple tariff jumps" instead of a simple change in tariff positions and the specification of components or additional inputs that have to originate in the beneficiary country;
- (3) Diversity of rules applied by preference-giving countries with respect to the basic criteria (e.g., process and percentage criteria); differing versions of the percentage criteria or requirements in virtually all GSP origin systems; as well as substantial differences between individual schemes regarding additional origin requirements. Such diversity creates difficulties for exporters, as products may qualify in one preference-giving country, but not in a neighbouring market necessitating additional administrative adjustments;
- (4) Detailed and complex ancillary origin criteria, direct consignment requirements, administration, documentation and verification, which may imply substantial additional costs for GSP transactions.

MAIN PROVISIONS OF THE AGREEMENT

Prior to the Uruguay round of Multinational trade Negotiations, the GATT did not attempt to harmonize rules of origin; instead, it left each contracting party free to determine their own rules of origin.

The WTO Agreement on Rules of Origin applies exclusively to non-preferential trade. There is no work programme at the WTO that includes preferential rules of origin. However, a Common Declaration with Regard to Preferential Rules of Origin is annexed to the Agreement on Rules of Origin, and as such, the general principles and requirements applicable to non-preferential rules also apply to the preferential rules.

The application of the WTO Agreement on Rules of Origin covers all rules of origin used in non-preferential commercial policy instruments such as in the application of: most-favoured-nation treatment; anti-dumping and countervailing duties; safeguard measures; origin marking requirements; and any discriminatory quantitative restrictions or tariff quotas, including rule of origin used in government procurement and trade statistics.

The WTO Agreement on Rules of Origin stipulates that members should harmonize all non-preferential rules of origin into a single set of international rules. The main objective of the harmonization is to clarify rules of origin and ensure that they do not create unnecessary obstacles to trade. To this end, negotiations are currently under way.¹

The harmonization negotiations are being conducted in two bodies – in the Geneva-based Committee on Rules of Origin (CRO) at the WTO and the Technical Committee on Rules of Origin (TCRO) based in Brussels. The TCRO is serviced by the Origin Project that operates under the auspices of the World Customs Organization (WCO). The TCRO scrutinizes technical/customs aspects of the negotiations for origin-conferring processes and forwards its interpretations and opinions to the CRO. The CRO thereafter undertakes negotiations to resolve issues, principles and product sectors on which no agreement was reached by the TRCO.

The negotiations for the harmonization of non-preferential rules of origin are divided into three stages according to three basic issues:

- (i) definitions of goods wholly obtained in one country and minimal operations and processes which in themselves do not confer origin;
- (ii) substantial transformation by way of a change in tariff classification as defined by the Harmonized Commodity Description and Coding System (HS)²; and
- (iii) substantial transformation via supplementary criteria such as ad valorem percentage and/or manufacturing or processing operations in those instances when the exclusive use of the HS nomenclature does not allow for the expression of substantial transformation.

Although there is no work programme within the WTO on preferential rules of origin, GSP preference-giving countries are under increasing pressure to liberalize, harmonize and simplify their rules of origin.

The WTO Agreement on Rules of Origin seeks to harmonize all the non-preferential rules of origin used by signatory countries into a single set of international rules. The Agreement contains a number of its objectives reflected in the proposals by preference-receiving countries for improvements in the GSP rules of origin. For example, the need to ensure that “rules of origin are prepared and applied in an impartial, transparent, predictable, consistent and neutral manner” and that rules of origin shall not pose unduly strict requirements.

Furthermore, the Common Declaration with regard to Preferential Rules of Origin annexed to the WTO Agreement on Rules of Origin takes over many of the general rules established by it. The Declaration, *inter alia*, requires preference-giving countries to define clearly origin criteria, to ensure transparency and predictability in the application of the rules and to notify to WTO their preferential rules of origin and changes made in them.

ONGOING WORK

Developing countries, including the LDCs, have been adversely affected by changes in rules of origin by the developed countries, particularly those relating to the determination of origin of textile products. Developing countries thus have a crucial interest in the harmonization of rules of origin. However, at present, only a few LDCs take an active interest or participate in the harmonization negotiations taking place at the WTO. This situation needs to be urgently corrected in the light of the importance of the subject and opportunities to participate resulting from the extension of the deadline for the completion of negotiations.

The negotiations are, of course, of a very technical nature; but the developing countries, including the LDCs should not be discouraged for that reason from participating in them. If the rules are framed without taking full account of their special features of production collaborations, the market access for their goods would get constrained. Thus vital interests in the field of market access are involved and their effective participation is of great importance.

The developing countries, including the LDCs, can draw upon the ongoing work in the UNCTAD in this area. In this work there has been a realization of the importance of further liberalization of rules of origin,

particularly for the benefit of LDCs. It has been considered important, for the purpose of increasing the developmental impact of the GSP, that rules of origin be better adapted to the production capabilities of beneficiary countries and provide, in particular, a more liberal cumulation of imported production inputs. Moreover, the administrative procedures and documentary requirements associated with rules of origin needed to be simplified significantly.

In these considerations in the work in the UNCTAD, there has been a general feeling that the erosion of preferential margins following the conclusion of the Uruguay Round called for simplification and improvements of the GSP rules of origin if the economic significance of such systems was to be assured.

SUGGESTIONS

The developing countries, including the LDCs, should take active part in the work relating to the harmonization of the non-preferential rules of origin. These have important bearing on the market access. Besides, these will guide to a great extent the application of the preferential rules of origin.

In these negotiations, the developing countries, including the LDCs, should ensure that the particular nature of their production structure, e.g., production collaboration etc., gets fully reflected in the newly evolving rules of origin.

In addition, to enable LDCs to take full advantage of the preferential access, the rules of origin applicable under the GSP should be simplified and harmonized.

NOTES

- 1 The negotiations were initiated on 20 July 1995 and were to have been completed by 20 July 1998. However, difficulties encountered have necessitated an extension of the deadline to November 1999.
- 2 The HS was developed by the WCO and is used by almost all countries for the setting of tariffs.

Chapter 12

Agriculture

BACKGROUND

The discipline in the GATT on the government policies in the area of agriculture was initially at a much lower level than in the area of industrial products. This was mainly because of the influence of the farm lobby in the United States, the United Kingdom of Great Britain and Northern Ireland and France, which wanted its Governments to retain the freedom to modulate the agricultural policies, depending on the domestic needs, that the agriculture sector in these and other developed countries remained highly subsidized and protected against competition from imports.

Introducing a higher level of multilateral discipline in this sector had been under consideration in the GATT, but no concrete results could be achieved until the conclusion of the Uruguay Round (1986-1994). The Tokyo Round (1973-1979) became engaged, but no forward move could be made. Thereafter, there were regular informal consultations organized by the GATT secretariat for moving this process further, but no progress was made. Finally, it was taken up in the Uruguay Round as one of the important subjects for negotiation.

These negotiations proved to be quite tortuous, as important domestic interests in several major developed countries were involved. The main agricultural exporting countries joined a formal group, called the Cairns Group (named after the place where the group first met in Cairns, Australia)¹ and effectively coordinated their negotiating positions and strategies. The countries of the EU, which had been protecting their farm sector for a very long time, were the main targets of this group. There were internal problems in the EU, as the various countries did not have a similar perception of agricultural protection. The countries that had been protecting their farm sector, were hesitant to dismantle the protection, whereas the other countries, which had to bear the cost of this protection, were keen on having liberalization in this sector.

During the course of the Uruguay Round, the negotiations centred mostly on the talks between the Cairns Group and the European Commission (EC). At some point, the disagreement between these countries in the negotiations in this area threatened the conclusions of the entire round. Towards the end, the bilateral talks between the United States and the EC concluded the negotiations. The developing countries, which were not the Members of the Cairns Group, did intervene in the negotiations from time to time, but could not be effective in this process.

The importance of the agreement reached in the Uruguay Round in this sector is its initiation of the process of bringing agriculture into the folds of the normal multilateral trading rules. In several ways the disciplines are still softer than those applicable to the industrial goods; yet in some ways the disciplines are tougher, as will be explained later.

MAIN PROVISIONS

The main disciplines are contained in the Agreement on Agriculture. This Agreement has a special feature as it overrides the provisions of GATT 1994 and those of the other WTO Agreements (Article 21). If there is a conflict between the provisions of this Agreement and any provision of GATT 1994 or another WTO Agreement, the provisions of this Agreement will be applicable.

The Agreement covers the products in the Harmonized System of Classification, Chapters 1 to 24, except fish and fishery products and some small number of items in some other chapters. Thus fish and fishery products are covered by the disciplines contained in GATT 1994 and other WTO agreements, as applicable to the non-agricultural products.

The disciplines in the Agreement are broadly in three areas, viz., (i) market access; (ii) domestic support, i.e., the subsidy given for production; and (iii) export subsidy. In these areas, the commitments of Members are contained in their respective schedules which are an integral part of the WTO legal system.² Hence in order to know what the commitments of the Members are, one has to consult these schedules; merely reading the Agreement does not give this information.

MARKET ACCESS

Tariffication and reduction in tariffs

The restrictions on market access were earlier in the form of tariffs and certain non-tariff measures, like quantitative restrictions, variable import levies, minimum import prices, discretionary import licensing, State trading, voluntary export restraints and similar other border measures. Members were required to remove all these non-tariff measures and replace them by their tariff equivalents. These additional tariff levels were to be added to the ordinary tariffs resulting in the total tariffs, on different agricultural products. This is called the “tariffication” of the non-tariff measures.

The tariffs arrived at after tariffication for products to which non-tariff measures applied, and the tariffs applicable to other agricultural products, were to be reduced by certain specified percentages over the implementation period. These are to be the final levels of tariffs at the end of the implementation period. The base levels and the final levels of tariffs have been recorded by a Member in its schedule.

This reduction was required to take place uniformly over the implementation period. In this manner, the tariffs would be reduced successively from year to year during this period. The modalities required that a developed country would reduce the tariff by 36 per cent and a developing country by 24 per cent over their respective implementation periods, which in the former case is until the end of the year 2000 and in the latter case until the end of 2004. The least developed countries were, however, not required to make any reductions in their tariffs, even though they were required, as noted below, to bind them.

Import control measures taken in pursuance of some specific provisions of GATT were not required to be covered by the process of tariffication. For example, the measures taken by developing countries for balance-of-payment (BOP) reasons in accordance with Article XVIII B of GATT 1994, or the measures taken by Members in pursuance of general exceptions, as contained in Article XX of GATT 1994, were not required to be subjected to tariffication process. The implication is that once a Member of a developing country ceases to have the protection of the BOP provisions, it

cannot resort to such import control measures in agriculture, except through the procedure of safeguard action.

Binding of tariffs

All Members, including LDCs, were however required to bind their reduced rates of tariffs (including those resulting from tariffication) against further increases. Developing and least developed countries were however given flexibility to bind their tariffs at ceiling rates, which could be higher than their applied rates or those resulting from reduction agreed in the negotiations. Almost all LDCs have taken advantage of this flexibility and have given an undertaking not to raise their tariffs applicable to agricultural products over the bound ceiling rates; the applied rates in all these countries are significantly lower than the ceiling rates.

Access opportunity and tariff quota

It had been foreseen that for products for which rates were determined after "tariffication" the resulting tariff may be, even after reductions agreed in the negotiations, so high as to make market access in these products almost impossible. Hence the Members were required to provide certain levels of import opportunity through tariff quotas, i.e., by providing very low tariffs up to certain specified import quantities in different products.

There were three types of import opportunities provided by the Members in this manner, as given below.

- (1) Current market opportunity was to be provided by including in the tariff quota (i.e., by providing very low tariffs) the levels of import equal to the average annual import for the reference years 1986-1988. The quantities covered by the then existing bilateral or plurilateral agreements were to be continued.
- (2) There would be minimum market access opportunity by laying down certain quantity in the tariff quota for this purpose. The quantity against this provision in 1995, i.e., the first year of the implementation period, would not be less than 3 per cent of the average annual consumption in 1986-1988. It would be raised to 5 per cent by the end of the implementation period.
- (3) Special minimum market access opportunity was to be provided by Japan, Philippines and the Republic of Korea for rice, and Israel for

sheep meat and some dairy products. These Members did not resort to tariffication in respect of these products, and in lieu of that, the special minimum market access opportunity has been provided by them.

The tariff quotas in the WTO are generally to be available for use by the other Members on a non-discriminatory basis. Thus these tariff quotas in agriculture were to be laid down at the global level, except for the country-specific quotas in pursuance of the bilateral or plurilateral agreements. But in actual practice, several developed countries combined various elements of access opportunities and have provided for country-specific quotas in a large number of cases.

Special safeguard measures

Whereas it is possible to take general safeguard measures (explained in the Chapter 2, Safeguard Action) in agriculture, there are also provisions for special safeguard measure (SSM) in this area under certain conditions. Members that have taken to tariffication in respect of some products are authorized to use SSM on those products. The SSM can be in the form of additional duty on imports. Unlike the general safeguard, quantitative restriction cannot be imposed through this route of SSM. An important point of difference from the general safeguard action is that, in the case of the SSM, injury to the domestic production is not required to be proved, as is the case with the general safeguard action.

There are two alternative pre-conditions for taking SSM, viz.: (i) the import quantity rises above a trigger level; or (ii) the price level falls below a trigger level.

There is a limit to the additional duty, which can be imposed through the import quantity trigger. The additional duty cannot exceed one third of the ordinary customs duty on the product.

The price trigger is to be announced by a Member. It is generally the average price applied during 1986-1988. In this case too, there is a limit to the additional duty which can be imposed. Different limits have been prescribed based on the differential of the import price and the trigger price. No additional duty will be imposed if the differential is 10 per cent or less.

DOMESTIC SUPPORT

The modalities agreed during the negotiations provided for the quantification of the domestic support and its reduction over the implementation period. The quantification is done through aggregate measurement of support (AMS). The AMS for different products, and also products that are of a general nature and thus not related to any specific product, are added to get the total AMS. The level of the total AMS which forms the basis for reduction is called the base total AMS and is calculated on the basis of the figures for 1986-1988.

The modalities required that the base total AMS would be reduced by the developed countries by 20 per cent and by the developing countries by 13.3 per cent over the implementation period, which is the end of the year 2000 for the former and the end of 2004 for the latter. This total reduction is distributed over the successive years.

The reduced level for a particular year in the implementation period is called the annual bound commitment level of the total AMS for that year. In order to examine whether or not a Member has fulfilled its commitment of reduction of the domestic support, the annual bound commitment level is compared with the actual level of the support in that particular year, which is called the current total AMS for that year.

It is to be noted that the commitment is on the reduction of the total AMS; thus a Member has the flexibility to choose the type of the measures and the products which will be covered by the particular measures within the overall ceiling of the annual bound commitment level of the total AMS for that particular year. The Members have calculated their base levels and annual levels and included them in their schedules. The LDCs do not have to undertake any commitment for the reduction of their domestic support.

The support measures that are exempted from inclusion in the calculation of AMS and thus from reduction commitment are recorded at two places in the Agreement, viz., in Article 6 and in Annex 2. Box 1 lists these measures.

Box 1: Support measures exempted from the inclusion in the calculation of the aggregate measurement of support (AMS)

Article 6 covers: investment subsidies generally available to agriculture in developing countries, input subsidies generally available to low-income or resource-poor producers in developing countries, support to producers to encourage diversification from growing illicit narcotic crops in developing countries, product-specific domestic support which does not exceed 5 per cent of the total value of the production of that product in the year under consideration (this *de minimis* limit is 10 per cent for developing countries), non-specific domestic support which does not exceed 5 per cent of value of the total agricultural production in a country (this *de minimis* limit is 10 per cent for a developing country), and direct payments under production limiting programmes subject to certain maximum limits.

Annex 2 covers: general services, like research, pest and disease control, training, extension and advisory services, inspection services, marketing and promotional services and infrastructure services, public stockholding for food security purposes, provided the purchases are made at the current market prices and sales at no less than the current domestic market prices (developing countries have the flexibility to have the purchase and sale at administered prices, but the price subsidy in purchases is to be counted in the AMS, which means that some other subsidy in agriculture in that year will have to be reduced if there is a price subsidy in purchases for this purpose), domestic food aid, provided the purchases are made at current market prices (developing countries may provide food to the poor at reasonable prices, without this subsidy being counted in the AMS), certain types of direct payment to producers, like decoupled income support, financial participation in income insurance and income safety net programmes, payment for relief from natural disasters, structural adjustment assistance through producer retirement programmes, resource retirement programmes or investment aids, payment for environmental programmes and payment under regional assistance programmes.

EXPORT SUBSIDY

In respect of the export subsidy the discipline on reduction is on two parameters, viz., the annual budgetary outlay and the quantity of export covered by the export subsidy. The modalities prescribed that the base for the calculation of reduction in these cases would be the figures for 1986-1990. The requirement of reduction in the developed countries over the

period of implementation would be 36 per cent for the budgetary outlay and 21 per cent for the quantity of export covered by the export subsidy. The period of implementation is till the end of 2000. In case of the developing countries, these percentages would be respectively 24 and 14, and the period of implementation is till the end of 2004. The reduction in the levels of subsidy would be spread uniformly from year to year, during the implementation period. The Members have calculated their base levels and annual levels and included them in their schedules.

The export subsidies which are to be included in the base figures to be used for reductions are: subsidies contingent on export performance, sale or export of products by governments at prices lower than those of the like products in the domestic market, payments on the export of a product that are financed by virtue of governmental action, either through public account or through a levy on the product, subsidies to reduce the cost of marketing, including handling, upgrading, processing and international transport and freight, provision of internal transport and freight charges on terms more favourable than for domestic transport and subsidies contingent on the incorporation of the product into exported products.

About 24 countries (the European Union counting as one) have given commitments to reduce export subsidies. The number includes five developing countries. All these countries are under an obligation not to exceed the commitment levels shown in their schedules in respect of both budgetary outlays and volumes. Countries which have not given commitments are prohibited from using export subsidies on agricultural products. However, the provisions on special and differential treatment permit developing and least developed countries to use the two types of subsidies from those used in the above paragraphs. These are subsidies to reduce the cost of marketing exports of agricultural products (including handling, upgrading and processing), and internal transport and freight charges on export shipments on terms more favourable than domestic producers.

SPECIAL PROVISIONS FOR DEVELOPING COUNTRIES, INCLUDING LDCs

The special provisions for the developing countries, including the LDCs, have been mentioned earlier in various places, but it may be more convenient to place them in one section.

There is no obligation on the LDCs to reduce tariffs and domestic support. The LDCs were, however, required to bind tariffs applicable to agricultural products; in most cases, however, they have bound them at levels which are higher than the applied rates.

The implementation period for the reduction commitment for the developing countries is from 1995 to 2004, whereas for the developed countries it is 1995 to 2000. Thus the developing countries have a longer time to bring about the prescribed reduction, which means that the reduction per year during the implementation period is lower compared to that for the developed countries.

Further, a Ministerial Decision at Marrakech (April 1994) has mentioned the special problems of the LDCs and other net food-importing developing countries. The decision is to work towards more effective food aid. Also, the special difficulties faced by these countries in importing foodstuff have been recognized.

EXPERIENCE OF IMPLEMENTATION

High tariffs and subsidies in developed countries

The developed countries have kept their tariffs very high in respect of several agricultural products as they have determined very high tariff equivalents of their non-tariff import restraints. Some countries have kept their tariff levels between 300 and 400 per cent in respect of some products, e.g., in Japan, 352.7 per cent for wheat, 388.1 per cent for wheat products and 361 per cent for barley product, and in Canada 360 per cent for butter. Some countries have kept their tariffs between 200 and 300 per cent for some products, e.g., 244.4 per cent for sugar in the United States, 213 per cent for beef in the EU and in Canada 289 per cent for cheese and 236.3 per cent for eggs. These are clearly prohibitive tariffs, making any import almost impossible.

Net food-importing countries

As mentioned above, there is recognition of the problems of the LDCs and the net food-importing countries regarding additional burdens on them

caused by liberalization in agriculture. However, no specific action has been taken to provide relief to the countries that were adversely affected as a result of the increase in prices. Consequently, these countries have continued to remain without any solution to their problems.

Tariff quotas

It has been mentioned in the section on market access that the Members have provided special market access through tariff quotas, but in several cases these are country-specific quotas and not global quotas. The Members in general cannot take advantage of the tariff quotas which are made country specific.

Uncertainty of domestic support

A Member has the flexibility to choose the products as well as the types and rates of domestic support within the overall limits of the annual domestic support amounts. Thus exporting countries are not sure which products and which types and rates of support would be used by a particular Member in a particular year. This creates an uncertainty about their export prospects.

BUILT-IN AGENDA IN AGRICULTURE

The Agreement mentions that negotiations will commence at the beginning of 2000 for further reduction of protection and subsidies. Since general non-tariff measures have already been converted to tariffs, the negotiation on reduction of protection will be focused on reduction of tariffs. In addition, the reduction in the domestic support and export subsidies will also be covered by the negotiations.

As the tariffs on several products and domestic support, as well as export subsidies, are still very high in the developed countries, it is in the interest of developing countries, including the LDCs, to press for a high degree of reduction in these levels in the developed countries. Further, it will also be important for them to request some flexibility for themselves regarding the use of import control, domestic support and export subsidy in this area. The recommended action for developing countries, particularly the LDCs, is elaborated later in the form of suggestions for improvement.

IMPROVEMENTS NEEDED IN THIS AREA

Food production in developing countries

It is desirable for developing countries, particularly the LDCs, to produce food for domestic consumption even if such production is somewhat costly. It will be dangerous for them to depend entirely on imported food. They generally do not have a stable and comfortable foreign-exchange reserve and income; hence they do not have an assured capacity to import food. At the same time, provision of food to the country's population is an absolute necessity. Hence production of food in developing countries, particularly the LDCs, must be encouraged and any impediments to it must be removed.

It is therefore necessary for them to have the flexibility to use domestic support and import control as may be necessary for encouraging their food production for domestic consumption. At present they do not have the flexibility in domestic support beyond the *de minimis* level, nor do they have the flexibility to use direct import control measures. These should be allowed for the purpose of enhancing food production in these countries for domestic consumption.

Hence, food production for domestic consumption in the developing countries, particularly the LDCs, should be kept out of the current disciplines of the WTO.

Support for small farmers and household farmers

The underlying objective behind the disciplines in the Agreement on Agriculture is the working of the price mechanism and commercial practices. However, in a large number of developing countries, it is a common practice for farmers to take to farming, not as a commercial venture but simply as a family activity passed on for generations. Farmers cultivate their land as it has come to them as an inheritance and they have no other source of livelihood. This is in the nature of subsistence farming at the household level. Besides, many developing countries have a large number of small farmers who will not be able to withstand the competition in international trade.

Hence, if this sector is subjected fully to the disciplines on import control and domestic support as contained in the Agreement, a vast number of such small farmers and household farmers may lose their source of livelihood. Therefore it is necessary for the developing countries, particularly the LDCs, to have the flexibility regarding import restraint and domestic support for the protection of, and for providing support to, such farmers. This activity should remain outside the disciplines of the Agreement.

Large reductions of tariff in developed countries

As mentioned earlier, several developed countries are maintaining high tariffs in the agricultural sector, which in many cases are at prohibitive levels. All they have been required to do is to reduce the tariffs by 36 per cent from the beginning of 1995 to the end of 2000. Thus, even by the end of 2000, their tariff levels on a large number of items will remain very high. Their farmers have already benefited by protection for a very long time, earlier through direct import control measures and lately by prohibitive tariffs. Continuation of such a high level of protection in the developed countries is very unfair.

It is necessary for the developed countries to reduce significantly their tariffs in this area. Mere reduction by a certain percentage will not be sufficient. What is needed is to have a reasonable tariff level and remove all tariffs beyond that level within a short period.

Reduction of domestic support and export subsidy

As explained earlier, the developed countries are still continuing with very high levels of domestic support and export subsidy, as they were required to reduce them only by 36 to 21 per cent from the beginning of 1995 to the end of 2000. The farmers in these countries enjoyed government support for a long time in the past. They have much higher levels of resources and infrastructure. Their continuing to get such high levels of domestic support and export subsidy distorts the international trade significantly and grossly undermines the production and export prospects of the farmers of developing countries.

Therefore, the domestic support and export subsidy in developed countries should be totally eliminated over a short period of time. Mere reduction by certain percentages is not enough.

Domestic support and export subsidy in developing countries

Only a few of the developing countries were using domestic support and export subsidy during the base period, as defined in the modalities for commitment in the Uruguay Round. Hence a very large number of the developing countries have not recorded domestic support and export subsidy in their schedules. The result is that they are debarred from applying domestic supports measures in future beyond the *de minimis* levels and are prohibited from using export subsidies, except the two types of subsidies mentioned earlier. This is highly iniquitous, particularly as their farmers are in a much more disadvantageous position compared to those in the developed countries.

There is therefore a grave need for removing the prohibition on the developing countries, particularly the LDCs, on the use of domestic support and export subsidy.

Unpredictability about domestic support

As mentioned earlier, a country has the flexibility to choose the product, the type of subsidy and the rate of subsidy in a year within the overall discipline of not exceeding the amount of subsidy beyond the annual bound commitment level. The exporting countries thus remain in doubt about their export prospects as they do not know well in advance which products will be covered by the subsidy and to what extent.

It is desirable for the countries to announce well in advance, say, more than a year ahead, about the choice of the product, the type of subsidy and the rate of subsidy proposed to be applied in a particular year.

Relief to net food-importing developing countries and LDCs

As mentioned earlier, the current provision about the relief to the LDCs and net food-importing developing countries does not contain specific and concrete action. No relief has been provided so far. There is a need for

specific action for relieving the burden on these countries arising out of the increase in the cost of imports of food as a result of the liberalization in agriculture.

It would be useful to have a fund for this purpose, to which contributions could be made by the developed exporting countries. Specific criteria for the contribution to the fund should be worked out and should be made enforceable in the Agreement.

NOTES

- 1 The member countries of the Cairns Group are: Argentina, Australia, Brazil, Canada, Chile, Colombia, Fiji, Hungary, Indonesia, New Zealand, Philippines, Malaysia, Thailand, South Africa and Uruguay.
- 2 The commitments in these areas contained in these schedules have been worked out by the Members on the basis of the modalities set for this purpose during the negotiations in the Uruguay Round. The paper containing the modalities, however, is not a part of the Agreement; hence it is no more enforceable. What is enforceable is the commitment of a Member contained in its schedule which was presumably based on the modalities.

The modality paper gave the guidelines for the calculation of the base levels of import restraint, domestic support and export subsidy. It laid down the extent of required reductions in these levels (in terms of percentages) during the implementation period. The schedules prepared by a Member were supposed to be verified by other Members in the process of verification; but the time was too short for a thorough verification.

Chapter 13

Textiles and clothing

BACKGROUND

The sector of textiles has remained under special trade regime in derogation of general GATT disciplines for a long time. Now the WTO Agreement on Textiles and Clothing (ATC) has abolished the special regime; it provides for the gradual removal of restrictions applicable to imports of textile and clothing products by 1 January 2005.

In the past, the main reason for the developed countries to sponsor special restrictive regime in this sector was that their industry was not able to withstand the competition with the imports from the developing countries. The normal course for the developed countries in such a situation would have been to let the textiles industry in their countries phase out; but they did not want to do that. Another option was to protect the industry on a temporary basis by using the safeguard provision of the GATT; but it would have meant restricting the imports from other developed countries as well. They were not prepared to do that. They adopted an easy course of ignoring the normal GATT rules and evolving a special restrictive regime in which restrictions would be put on the imports from the developing countries. In this process, first there was the Short-term Arrangement Regarding International Trade in Cotton Textiles (STA) of 1961, and then the Long -Term Agreement (LTA) of 1962. Later, there was the Arrangement Regarding International Trade in Textiles in 1973, commonly known as the Multi-fibre Arrangement (MFA), since the restraints were to cover the products of several fibres and not limited to cotton, as was the case earlier.

Under the MFA, the bilateral agreements were negotiated between importing developed countries and exporting developing countries which contained provisions for limiting the export of specific products to specified levels in a particular year.

Successive negotiations for the extension of the MFA increased its product coverage and country coverage, and thus intensified its discrimina-

tory character. Over the years the implementation of the MFA diverged from its original aim and spirit, i.e., providing temporary relief to the industry in the developed countries, and it went on being extended for nearly two decades, when it was terminated by the ATC in the Uruguay Round of MTNs, as mentioned earlier.

MAIN PROVISIONS

Scope and coverage

The ATC provides for the progressive phasing out of all MFA restrictions and other restrictive measures, and the integration of this sector into GATT 1994 in four stages over a transition period of 10 years from 1 January 1995.

A transitional safeguard mechanism has been included in the ATC, which is almost of similar nature as in the MFA, though with comparatively stronger disciplines on the importing countries. Certain handloom products and historically traded textile products have been kept outside the transitional safeguard mechanism; hence no restrictions can be placed on their import, which is almost in line with similar stipulations in the MFA.

The ATC covers the MFA restrictions which were in place on 31 December 1994, other restrictions in this area, whether or not consistent with the GATT 1994; and actions taken under the transitional safeguard mechanism. No new restrictions on the products covered by the ATC will be introduced except under the provisions of the ATC or relevant GATT 1994 provisions.

The Textiles Monitoring Body (TMB) has been established for the supervision of the implementation of the ATC.

Integration programme

Products listed in the Annex to the Agreement, including those subject to MFA restrictions, will be integrated into GATT 1994 in four stages defined as follows:

- *Stage One* – On the date of entry into force of the WTO Agreement, i.e. on 1 January 1995, members shall integrate into GATT 1994 products

which account for not less than 16 per cent of the total volume of 1990 imports of the products in the Annex, in terms of HS lines or categories.

- *Stage Two* – On the first day of the 37th month that the WTO Agreement is in effect, i.e., 1 January 1998, members shall integrate into GATT 1994 products which account for not less than a further 17 per cent.
- *Stage Three* – On the first day of the 85th month that the WTO Agreement is in effect, i.e., 1 January 2002, member shall integrate products which account for not less than a further 18 per cent of the total volume of the member's 1990 imports of the products in the Annex.
- *Stage Four* – On the first day of the 121st month that the WTO Agreement is in effect, i.e., 1 January 2005, member shall integrate the textiles and clothing sector shall stand integrated into GATT 1994, all restrictions under this Agreement having been eliminated.

In each of the first three stages of the integration programme, the products to be integrated shall encompass products from the following four groups: Tops and yarns, fabrics, made-up textile products and clothing. The integration ratios mentioned above are the minimum. Nothing in the Agreement shall prevent members from completing the integration programme at an earlier date or integrating products into GATT 1994 at rates higher than those provided for in the above-mentioned programme.

GROWTH RATES AND FLEXIBILITIES

To provide improved and enlarged access for textile products that may continue to be restricted during the transitional period, the Agreement provides for increases in the growth of the quotas fixed for each category of textile products under bilateral agreements at escalated rates, as shown below:

- 16 per cent per year in the first three years;
- 25 per cent per year in the next four years; and
- 27 per cent in the next three years.

It should be noted that these percentages are for the increase in the growth rates. As the growth rates are small, the actual increase of quotas as a result of the increase in the growth rates is quite modest, as will be explained later.

The ATC also provides for flexibility provisions of the MFA, i.e., swing, carryover and carry forward. These flexibilities as applicable during 1994 will be continued till the end of the integration.

Integration of non-MFA measures

The Agreement also requires countries applying non-MFA restrictions to phase them out in a period of 10 years. The programme for the gradual phasing out of such restrictions is to be prepared by the importing country and presented to the Textiles Monitoring Body (TMB).

Transitional safeguard measures

Though the aim of the Agreement is to facilitate the removal of restrictions, it permits countries to impose new restrictions by way of safeguard actions during the transitional period. Such transitional safeguard actions can be taken only in respect of textile products that are not integrated into GATT, and if the importing country determines that:

- The product is being imported in such increased quantities as to cause serious damage or actual threat thereof to the domestic industry producing the like product; and
- There is a causal link between such serious damage to the domestic industry and sharp and substantial increase in imports from the exporting country or countries whose exports are to be restrained.

Such restrictions can ordinarily be imposed only after consultations and after reaching agreement with the exporting countries on the level of imports. However, the Agreement permits countries to impose restrictions even in the absence of an agreement provided the matter is refereed to the Textile Monitoring Body. The importing country is expected to abide by the TMB decision.

Special treatment for certain categories of members

The ATC provides special treatment for certain categories of members. Under the integration programme, those members whose exports subject to restrictions represent 1.2 per cent or less of the total volume of the restrictions applied by an importing member as of 31 December 1991, will be granted meaningful improvement in access for their exports during the duration of the Agreement, through advancement by one stage of the

growth rates or at least equivalent changes, as may be mutually agreed, with respect to a different mix of base levels, growth and flexibility provisions.

In the application of the transitional safeguard mechanism, the interests of the following exporting members will be taken into account:

- Least-development country members shall be accorded significantly more favourable treatment than that provided to the other members, preferably in all its elements but, at least, on overall terms;
- Small suppliers shall be accorded differential and more favourable treatment in terms of restraint level, growth and other flexibility provisions. Due account will also be taken of the possibilities for the development of their trade and the need to allow commercial quantities of imports from them;
- Wool-producing developing country members, in view of their dependence on the wool sector and the fact that their exports consist almost exclusively of wool products, shall be given consideration as regards their export needs when quota levels, growth rates and flexibility are being considered; and
- More favourable treatment shall be accorded to the outward processing trade.

Circumvention

For dealing with the problem of circumvention, by way of transshipment, re-routing, false declaration concerning country or place of origin, and falsification of official documents, the Agreement requires members to establish the necessary legal provisions and/or administrative procedures to address and take action against such circumvention, and to extend full co-operation in this regard consistent with their domestic laws and procedures. Members are also required to take action against the exporters or importers under their domestic laws for penal offences such as false declaration.

Other obligations

The Agreement requires the members to achieve improved market access for textiles and clothing products by tariff reductions and bindings, and through liberalisation of non-tariff measures; strengthen the rules and

disciplines with respect to anti-dumping practices, subsidies and countervailing measures, and protection of intellectual property rights; and avoid discrimination against textiles and clothing imports when taking measures for general trade policy reasons.

Despite the existence and continuation of quota restrictions on textiles and clothing in the major developed countries, tariffs in this sector have not received the same attention in these countries as the other industrial sectors. The commitments made for tariff reductions by developed countries, especially those applying the MFA quotas, have been relatively modest. While the average tariff applicable to industrial products in these countries would have been lowered to less than 4 per cent after the full implementation of commitments made in the Uruguay Round, the average for textile and clothing will remain at 12 per cent. The tariffs on individual textile and clothing products in certain importing developed countries are very high. For example, those on synthetic and man-made fibre apparel products, the tariffs are some times higher than 30 per cent in the US.

Another peculiar feature of textile tariff reductions by major developed countries in the Uruguay Round is with respect to the length of time for effecting these modest reductions. While tariff reductions for industrial products are to be implemented in five years, and those for agricultural products over a period of six years, these countries' tariff reductions for textiles and clothing will be implemented over a period of ten years.

EXPERIENCE IN IMPLEMENTATION

Liberalisation

The progressive liberalisation in this area by major developed countries in the first two stages has been disappointing, as it has resulted in only insignificant removal of restraints. They have chosen to integrate in GATT mostly those products in the annex which have not been under restraint. Thus they seem to have fulfilled their obligations in strict technical sense, without actually liberalising the products under restraint, except to an insignificant extent. For instance, during the first two stages of liberalisation, the USA, EU and Canada integrated, respectively, only 1.30 per cent, 3.15 per cent and 2.32 per cent, by volume, of the restrained products.

Then considering the number of quotas, out of its total number of 750 quotas, United States eliminated only 13, 2 by way of integration in stages

1&2 and 11 by early elimination; Canada and EU, out of their respective total quotas of 295 and 219, eliminated only 29 and 14, respectively, by way of integration in these two stages. Further, the quota elimination on the restrained trade by EU and USA, during the period 1995 to 1997 averaged, respectively, merely 4.8 per cent and 6.09 per cent, by volume, per annum. Thus the liberalisation from the angle of removal of quotas has been quite dismal in these countries. One notable example is Norway, which has done away with virtually all of its quotas (51 out of 54) by way of early elimination.

Growth rates

The provision of the enhancement of the growth rate has not brought about any significant expansion of export opportunities for the exporting developing countries. The reason is that the growth rates were quite small; hence a raise by, say, 25 per cent would not result in noticeable expansion of opportunities. For example, the application of enhanced growth rates by Canada, USA, EU and Norway during stage1 resulted in increase in quotas by only 1.97 per cent, 1.92 per cent, 1.26 per cent and 0.84 per cent, respectively.

Safeguard action

One major developed country Members has taken recourse to a large number of transitional safeguard action, despite the stipulation in the ATC that such actions should be taken as sparingly as possible. During the period 1995 to 1998, United States applied 28 transitional safeguard actions, as many as 24 of which were in 1995. The value of trade affected due to these safeguard actions amounted to one billion dollar, approximately. On examination of several cases, the TMB concluded that the obligations laid down in the relevant Article of the ATC had not been observed while taking these safeguard actions. Two of these cases had also been reviewed through the dispute settlement process. In both cases, the Panels and the Appellate Body found that the application of these safeguard actions was inconsistent with the relevant provisions of the ATC.

Anti-dumping actions

The EU, a major importing developed entity, has taken extensive anti-dumping action against the imports of textile products from the developing

countries which were already under restraint. This has naturally affected the imports of these countries very severely. Some times, repeated anti-dumping action has been started against the same or similar product, leading to harassment of the exporters.

Rules of origin

For the administration of quota restriction, it is necessary to adopt rules of origin to determine in which country the imported textile products have originated. The United States changed in July 1996, its rules for determining origin of some of its textile products. The new rules could affect adversely exports of developing countries, which export products to which they apply. Some of these problems may be resolved, when as a result of the work being undertaken in WTO in cooperation with WCO under the Agreement on Rules of Origin, harmonized rules are adopted for the determination of origin. At present, there is no binding multilateral agreement specifying rules for the determination or origin.

In according favourable treatment to certain categories of exporters, as per Article 1.2 of the ATC, Members are required to use the provisions of paragraph 18 of Article 2 and paragraph 6(b) of Article 6 in such way as to permit meaningful increases in access possibilities for small suppliers. At the same time, the footnote to Article 1.2 urges the Members to treat the LDCs favourably. In accordance with these provisions, Canada and USA gave the benefit of additional access in certain cases to LDCs. In the case of Bangladesh, however, similar treatment has not been accorded either by Canada or by the USA. On the other hand, Bangladesh exports in Canada and the USA faced restraints in a number of items (5 in Canada and 7 in the USA) at the end of both 1997 and 1998.

SUGGESTIONS

- Restraining countries should remove restrictions applicable to imports of textile and clothing products from LDCs, while integrating these products into GATT 1994 in third stage, i.e. 1 January 2002.
- Imports of all textile and clothing products from LDCs should be allowed to be imported by developed countries on duty-free basis under the generalized system of preference. Alternatively, priority should be given to making deeper cuts in high MFN tariffs that are applicable to these products in most of the developed countries.

Chapter 14

Trade-Related Investment Measures (TRIMs)

INTRODUCTION

Background

When the Uruguay Round of negotiations was being launched, some of the developed countries, particularly the United States, had proposed inclusion of investment in the negotiations. In particular the suggestion was to consider the feasibility of applying to foreign direct investment the GATT principles of national treatment (which would give foreign investors the same right as domestic investors) and MFN treatment (which would prevent countries from discriminating amongst sources of investment).

While these proposals received some support from most of the developed countries, they were not looked on with favour by developing countries. Apart from holding that GATT's mandate did not permit it to negotiate on investment issues, these countries maintained that, if any such negotiations were to be held, they would have to include the problems posed to trade by transnational corporations resorting to transfer pricing, restrictive business methods and other practices. This reluctance of developing countries to allow discussions in GATT on investment issues ultimately resulted in negotiations taking place on a narrowly defined concept of "trade-related" investment measures. In particular, the Ministerial Declaration launching Uruguay Round of Trade Negotiations provided that:

"Following an examination of the GATT Articles related to the trade restrictive and distorting effects of investment measures, negotiations should elaborate, further provisions that may be necessary to avoid adverse effects on trade".

Finally the agreement which was reached in the Uruguay Round was limited to reiterating some existing disciplines in area of trade in goods, as will be explained in detail later. No additional obligation has been envisaged in the agreement in respect of investment.

Investment measures

Investment measures (trade-related and others) may be of two types, viz., investment incentives and performance requirements.

Investment incentives are economic advantages afforded to enterprises by governments, in order to encourage them to behave in a certain way, including taking the decision to invest in the host country rather than elsewhere. They can be broadly grouped into four categories: (i) financial incentives; (ii) fiscal incentives; (iii) subsidized services; and (iv) market privileges. Whereas incentives try to elicit desirable market behaviour by carrots, mandatory performance requirements are measures that mandate certain operational obligations. For example, the host government may put conditions on the investing firm regarding the use of technology (mandatory technology transfer); to source a certain percentage of inputs domestically (domestic content rules); to export a certain portion of exports (export performance requirements); or to balance the import with exports (trade-balancing requirements). Other such requirements may be: local equity participation, hiring of local managers, the conduct of a certain level or type of research and development, etc. (Box 1).

Approaches in the negotiation

Even though this subject, like almost all other subjects, was brought into the negotiations by the developed countries, there were some differences among them as to which of the measures should be covered in the negotiations. Some of them did not want any discipline on investment incentives, as they were themselves using them. Finally, they pushed for negotiations on the disciplines on performance requirements, which were being used largely by the developing countries. Naturally the developing countries thought they were being made targets for extracting concessions. Throughout the major phase of negotiations, therefore, there were heavy North-South overtones.

Box 1:
A non-exhaustive list of investment measures

Investment incentives*Financial*

- 1 Investment grants
- 2 Subsidized credits
- 3 Credit guarantees

Fiscal

- 1 Reductions in standard corporate income/profit tax rate
- 2 Tax holiday (often time-limited)
- 3 Reduction in social security contribution
- 4 Duty exemptions
- 5 Duty drawbacks
- 6 Export tax exemptions
- 7 Reduced taxes for expatriates

Subsidized services

- 1 Electricity, water, telecommunication, transportation, etc.
- 2 Designated infrastructure at less-than-commercial price, e.g., commercial buildings.

Market privileges

- 1 Preferential access to government contracts
- 2 Closing of the market for further entry, e.g., a cap on the number of licences issued in services industries and promises not to grant investment permission to competing foreign firms.
- 3 Protection from import competition, e.g., increased tariffs or a commitment of retained trade barriers for a specified number of years.

Performance requirements

- 1 Local content requirements
- 2 Trade-balancing requirements
- 3 Foreign exchange balancing requirements
- 4 Exchange restrictions
- 5 Domestic sales requirements
- 6 Manufacturing requirements
- 7 Export performance requirements
- 8 Product mandating requirements
- 9 Manufacturing limitations
- 10 Technology transfer requirements
- 11 Licensing requirements
- 12 Remittance restrictions
- 13 Local equity requirement

The developing countries were initially quite strong in their opposition to any disciplines on performance requirements, but they subsequently became somewhat soft on this issue. Part of the reason for the change in approach was that many of them had by then done away with domestic content and similar other requirements in order to encourage foreign investment, either as a result of the commitments given by them under the structural adjustment programmes or as a part of their own economic reform programme.

MAIN PROVISIONS

Prohibitions

The agreement prohibits measures which infringe Articles III and XI of the GATT 1994. The former basically lays down that the imported products must not be given treatment inferior to that accorded to a like domestic product. The latter prohibits restrictions on imports and exports.

In particular, the domestic content requirement and the trade balancing requirement have been prohibited. The agreement gives an illustrative list of the measures of these types.

More specifically the agreement lays down the examples as follows.

The performance requirements prohibited because of infringing the Article III of the GATT 1994 are those requiring an enterprise:

- to purchase or use the products of domestic origin or from any domestic source (commonly called the domestic content requirement);
- to restrict the purchase or use of imported products to an amount related to the volume or value of the local products it exports (commonly called the trade balancing requirement).

Performance requirements considered inconsistent with the provisions of Article XI of the GATT 1994 include those that:

- restrict imports to an amount related to the quantity or value of the product exported (i.e., trade-balancing requirements constituting restrictions on imports).

- restrict access to foreign exchange to an amount of foreign exchange attributable to the enterprise (i.e., exchange restrictions resulting in restrictions on imports).
- specify exports in terms of the volume or value of local production (i.e., domestic sales requirements involving restrictions on exports).

It is important to note that the prohibition on the use of performance requirements listed above applies to the measures which are: mandatory or enforceable under domestic law or administrative rulings or compliance with which it is necessary to obtain investment incentive or other advantage.

It is also important to note that the export performance requirements are not prohibited under the agreement.

Provision for LDCs and other developing countries

The Agreement required countries to notify to the WTO Secretariat, within three months of its coming into operation (i.e., by 30 March 1995) all performance requirements which they were applying that were not consistent with its provisions. In regard to such notified performance requirements, the developing countries are given transitional period of five years (i.e., up to 1 January 2000) to eliminate them. A longer period of seven years (i.e., up to 1 January 2002) is provided to least developed countries for this purpose.

It is possible for developing or least developed countries to request the Council for Trade in Goods for the extension of the transitional period, if they find difficulties in eliminating the notified performance requirements by the target date. In considering any such request, the Council is expected to take into account their individual development, financial and trade needs.

BUILT-IN AGENDA

The Agreement provides for review of the provisions of the Agreement on the basis of the experience of its operation in the first five years. In any such review, which is to commence in the year 2000, and is to be carried out by the General Council, it is open to Member countries to suggest to

the Ministerial Conference, adoption of amendments to the provisions of the Agreement. In addition, the Agreement calls on Council for Trade in Goods to consider in any such review, whether it should be complemented by provisions on investment policy and on competition policy.

The issues involved in including the investment policy and competition policy into the agreement will be discussed in detail while discussing these new issues under study at present in the WTO. Hence these are not being taken up here. Here we are taking the other points of the review.

The main points to consider is whether the developing countries, particularly the LDCs, should press for retention of the options for the domestic content requirement and the trade balancing requirement. There are varying views. The main argument against these options is that they cause distortion in trade and also that they reduce the competitiveness of the final products produced by the enterprises. The arguments in favour are that the domestic content requirement has several benefits, e.g., it saves the scarce foreign exchange, encourages domestic economic activities and establishes linkages between the investment with the domestic economy. And the trade balancing requirement ensures protection against pressures on the foreign exchange reserves as well as encourages the enterprises to go in for the production of tradeable goods.

These are very weighty reasons for the developing countries, particularly the LDCs, to try to retain the options of the domestic content requirement and trade balancing requirement.

In this context it is important to note that the adoption of performance requirements, like domestic content and export performance requirements, may be more necessary for least developed countries, as compared to other countries, as multinational enterprises are often reluctant to get inputs required for incorporation of the final product produced in these countries. One of the reasons for this is that as most of the workers are unskilled, the enterprises have to spend considerable amount of money on their training. The existence of performance requirements strengthens in the circumstances the hands of authorities in persuading the enterprises to undertake measures which are conducive to the development of local economy.

There is also a linkage between the domestic content requirement and the rules of origin often used by the developed countries in respect of the

preferential access of the goods of the developing countries under the GSP. It is particularly important for the LDCs, as the developed countries have undertaken to allow duty free entry of goods from these countries. Some developing countries have also introduced schemes for allowing imports from these countries on a preferential basis. As to whether export of a particular product would benefit from preferential access however depends on whether it meets the criteria relating to “substantial transformation” or “value added by processing” prescribed by the rules adopted under the systems for the determination of the origin of goods. If the least developed countries wish therefore to derive maximum benefits from the preferential access that is available to them under the GSP and other preferential systems, they may have to ensure that minimum level of processing required under the rules of origin takes place in their territories. The existence of domestic content requirements would go to ensure that such minimum levels of processing is undertaken by enterprises within the country.

SUGGESTIONS

- (1) The developing, particularly the LDCs, should press for continuing the option to use domestic content and other types of performance requirements which are prohibited by the agreement.
- (2) The restrictions applicable at present to adoption of performance requirements, other than those notified to WTO by 30 March 1995, should be eliminated.
- (3) Any new rules that may be adopted should not result in restraints being placed on the right available to these countries to use export performance and other performance requirements.
- (4) The developed countries use investment incentives in a large measure to attract investment. Such measures operate very much against the interest of the developing countries, particularly the LDCs, as in the absence of the incentives in the developed countries, a part of these investments would flow into the developing countries. Considering the level of development of the developed countries and the facilities and attraction already existing for the investors, it does not appear equitable to allow them to use these incentives. Hence the developing countries should press for the prohibition of investment incentives in the developed countries.

Part Two

SERVICES, INTELLECTUAL PROPERTY AND DISPUTES



Chapter 1

The General Agreement on Trade in Services (GATS)

INTRODUCTION

The General Agreement on Trade in Services (GATS) sets out general principles, obligations, commitments and exemptions governing international trade in services. Part I through Part IV contain the main provisions of the GATS, while annexes provide exemptions, sectoral specificities, modes of supply and modalities for negotiations. The GATS architecture uses the positive list approach for negotiations so that members are not obliged to grant access or national treatment other than what they have specified in their Schedules of Specific Commitments. This feature is particularly important for developing countries and LDCs as they can select the sectors in which they wish to permit foreign participation and achieve reciprocity in other services sectors (or goods) for doing so.

This agreement along with the Agreement on the Trade-related Intellectual Property Rights (TRIPS) are the two agreements in the WTO which expanded the traditional role of the GATT, which was in the area of trade in goods. The developed countries mostly have the supply capacity in the area of services, hence the binding commitments by various countries on liberalization in this area gives benefit primarily to the developed countries. Of course, the developing countries, including the LDCs, may benefit by importing services, as it may improve their own production process in the goods sectors and services sectors. But to have these benefits, all they have to do is to have their own autonomous policy of liberalization, without making a binding commitment in the multilateral framework of the WTO. This aspect is important to note, as at the time of making a concession in this sector in future, the developing countries, particularly the LDCs, should ask for at least some reciprocal concessions from the developed countries that seek those concessions. It is specially important as the negotiations for further liberalization in this area will be undertaken in 2000.

KEY PROVISIONS OF THE SERVICES AGREEMENT

Part I: Scope and definition

Services covered under the GATS include any service in any sector except services supplied in the exercise of government authority. The Agreement recognizes that trade in services takes place in four modes:

- (1) Cross-border movement of service products;
- (2) Movement of consumers to the country of importation: e.g., tourism;
- (3) The establishment of commercial presence (e.g., branch or subsidiary) in the country where the service is to be provided; and
- (4) Temporary movement of natural persons to another country, in order to provide service there.

Part II: General obligations and disciplines

Most-Favoured-Nation (MFN) Clause (Article II)

The most-favoured-nation (MFN) treatment means non-discrimination as between different Members of the WTO. In the context of the GATS, it means non-discrimination as between the services suppliers and services products from different Member countries. This obliges Members to give equal treatment to all other WTO member countries. MFN treatment specified in Article II is unconditional and is to be treated as a General Obligation, whether services are included in the Schedule of Commitments or not.

Article II:2 provides for certain exemptions from this obligation, governed by the criteria of the Annex on Article II Exemptions. Members are allowed to benefit from such exemptions for a period of not more than 10 years. The Article is subject to review after a period of five years — in 2000.

Transparency (Articles III, III bis)

Under this provision, the Members have the obligation to: promptly publish all relevant measures affecting trade in services including those taken by regional or local authorities; to notify changes to the Council for Trade in Services; and to create and maintain enquiry points enabling

foreign companies and governments to obtain pertinent information about regulations in any service sector. Under Article III bis, members are exempted from providing confidential information, the disclosure of which would undermine law enforcement or legitimate commercial interests.

Increasing participation of developing countries (Article IV):

This clause specifies measures that could be taken by Members to facilitate the increased participation of developing countries in international trade, with special priority to LDCs. One example of Article IV becoming operational is through the specific terms of Article XIX on Negotiation of Specific Commitments in Part IV.

Article XIX:2 provides that the process of liberalization should take place with due respect for national policy objectives and the level of development of individual countries, both overall and in individual sectors. Towards this end, appropriate flexibility should be granted to individual 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 service suppliers, attaching to it conditions aimed at achieving the objectives referred in Article IV.

Further, in order to ensure the increasing participation of developing countries in trade, the above Article requires developed Member countries to assist them to: (a) strengthen their domestic services capacity and efficiency and competitiveness, inter alia, through access to technology on a commercial basis; (b) improve access to distribution channels and information networks; and (c) liberalize market access in sectors and modes of supply of export interests to developing countries. In addition, developed countries are required to establish 'contact points' to give access to information on commercial and technical aspects of the supply of services, registration and other requirements, and facilitate the availability of service technology.

With respect to LDCs, the Preamble and paragraph 3 of Article IV provide that particular account shall be taken of their serious difficulties and that they will be required to undertake commitments and concessions only to the extent consistent with their individual development, financial trade needs or their administrative and institutional capabilities.

Economic Integration (Article V)

Article V allows Members to give each other preferential treatment in services when they are parties to an economic integration agreement. Requirements specified in this Article are similar to those of GATT Article XXIV, i.e., (a) substantial sectoral coverage; and (b) absence or elimination of substantially all discrimination between or among the parties in the sectors covered.

Domestic Regulation (Article VI)

The service sector is highly regulated in many countries for the purpose of consumer protection, security, morale protection and prudential measures. While the GATS recognizes the sovereign right of a country to regulate services for legitimate purposes, Article VI seeks to prevent the use of administrative decisions (i.e., laws, regulations, judicial decisions and administrative procedures) in disguise of protectionist measures. Members have to establish judicial, arbitral or administrative tribunals at the request of affected service suppliers for review and remedies for administrative decisions affecting trade in services.

Article VI further calls on Council for Trade in Services (CTS) to develop necessary disciplines to ensure that qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers with respect to professional services.

Monopolies and Exclusive Service Providers and Business (Article VIII and Article IX)

Article VIII contains strict provisions on the operations of monopolies. Members must ensure that monopoly suppliers do not act in a manner inconsistent with Article II (MFN principles) and specific commitments. These provisions apply to exclusive service suppliers as well. Article IX on business practices recognizes that certain business practices of service suppliers, other than those falling under Article VIII, may restrain competition and restrict trade in services.

Emergency Safeguard Measures (Article X)

It was not possible to reach a definitive agreement on safeguard measures during the Uruguay Round. As required by Article X, negotiations are being held in the Working Party on GATS Rules. The main concerns of the developing countries, including the LDCs, in these negotiations are discussed later.

Payments and Transfers (Article XI)

Article XI:2 provides that restrictions on capital movements do not frustrate concessions with respect to commercial presence. Article XI requires Members not to impose restrictions on any capital transactions inconsistently with its specific commitments, except under Article XII (restrictions to safeguard the Balance of Payments). Such restrictions, however, must be temporary and subject to review of the WTO and other limits and conditions.

Government Procurement (Article XIII)

Article XIII:1 states that Article II (MFN treatment), Article XVI (market access) and XVII (national treatment) shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial resale". The question of rules on government procurement is left to future negotiations and it is being examined in the Working Party on GATS Rules. The main concerns of the developing countries, including the LDCs, are discussed later.

General Exemptions (Article XIV)

Article XIV establishes general exceptions. It is closely based on Article XX of GATT. Article XIV (d) addresses the issue of ensuring equitable or effective imposition or collection of direct taxes (i.e., taxes on income and capital gains, on estates, inheritances and gifts, and on wages or salaries paid by enterprises), which is specific to the GATS.

Subsidies (Article XV)

Some developing countries sought for a standstill and rollback on subsidies of developed countries and flexibility in the use of subsidies by developing countries to achieve specific objectives. Article XV recognizes that subsidies may cause distorting effects in certain circumstances, but provide no remedy for the problem. It was agreed during the Uruguay Round to enter into negotiations with a view to developing necessary multilateral disciplines to avoid such effects. The issue is being discussed in the Working Party on GATS Rules, which aimed at recognizing the role of subsidies in relation to the development programmes of LDCs and take into account the needs of Members for flexibility. The main concerns of the developing countries, including the LDCs, are discussed later.

Part III: Specific commitments

Part III of GATS specifies general conditions governing three types of specific commitments: market access (Article XVI), national treatment (Article XVII) and additional commitments (Article XVIII).

Market Access

Article XVI:2 sets out a structure within which the market access commitments operate. A Member is committed to provide market access only to the extent it has agreed in its schedule of commitments, and it cannot impose any further restrictions unless such limitations are specified in its Schedule of Commitments. The Article further specifies the limitation which countries could impose while giving their commitments. These are: (a) the number of service suppliers; (b) the total value of service transactions or assets; (c) total number of service operations or the total quantity of service; (d) total number of natural persons that may be employed in a particular service sector; (e) types of legal entity or joint venture; and (f) participation of foreign capital.

The above list is exhaustive and it is not open to a country to impose any other restriction.

It is to be noted that a Member is not committed at all in respect of the market access in the service sectors which it has not included in its schedule of specific commitments. However, if it has included a particular service sector in its schedule of specific commitments, it is bound to allow total market access except for the conditions which it has mentioned in its schedule. Hence it is important that before entering a service sector in its schedule, a Member must finalize its restrictions in that sector and incorporate them in its schedule. Normally, the choice of the sector and the restrictions on the market access are finalized in bilateral and plurilateral negotiations which a Member undertakes at the time of negotiations for the liberalization in services sectors.

National treatment (Article XVII)

Unlike the GATT, the national treatment obligation of GATS is not a general obligation, but it depends on the commitments inscribed in the Members' schedules. This implies that foreign suppliers and service products should not be treated less favourably than domestic suppliers or

service products. It is, however, open to the countries to specify conditions under which they would be prepared to extend such treatment to foreign suppliers or their service products. Such conditions could be similar to those permitted to be used when giving market access commitments.

If a country enters a particular service sector in its schedule of specific commitment, there is a presumption of the commitment of national treatment in that sector, except if the country inscribes in its schedule the conditions or limitations that would be applicable.

Additional Commitments (Article XVIII)

Members may negotiate commitments with respect to measures affecting trade in services, in addition to those regarding market access and national treatment. Such commitments must be inscribed in a Member's schedule. Members use this approach accepting regulatory disciplines in the field of basic telecommunications services, but in general few such commitments have been made.

Part IV: Progressive liberalization

Similar to the GATT, the GATS in principle agrees to liberalize trade in services progressively in successive rounds. Part IV provides guidelines for future negotiations on trade in services, which contains three articles: (a) Article XIX (Negotiation of Specific Commitments); (b) Article XX (Schedules of Specific Commitments); and (c) Article XXI (Modification of Schedules).

Progressive Liberalization (Article XIX)

As noted earlier, the article specifies that the objective of further negotiation is to achieve higher levels of liberalization, and that the process should take place with a view to promoting the interests of all participants on a mutually advantageous basis. Para. 2 states that the negotiations should take place with due respect for national policy objectives and the level of development of individual Members, with appropriate flexibility for individual developing member countries for opening fewer sectors, liberalizing fewer types of transactions and progressively extending market access in line with their development.

Schedules of Specific Commitments (Article XX)

This specifies the scheduling commitments of a country. At the time of filing the schedule of commitments, a Member has the right to choose the services sector or type of transactions it intends to liberalize. This article sets out all the requirements to be fulfilled with regard to commitments by a Member: market access conditions, qualification on national treatment, time-frame of implementation, and the date of entry into force of commitments. Once the schedules are annexed, they become legally enforceable. The commitments agreed in the schedules are 'bound' in the sense that they can be modified or withdrawn only after negotiations with affected countries. The commitments can, therefore, be considered as 'guaranteed conditions' for foreign exporters and importers of services and investors.

Modification of schedules

Detailed procedures have been laid down for modification of a commitment of a Member. The withdrawal of a commitment can be done only after three years since the particular commitment became applicable. In seeking the modification of the commitment, a Member will have to give alternative equivalent concessions in the same sector or in other service sector.

Part V: Institutional provisions

This part contains five articles on institutional provisions. Article XXII and Article XXIII (Dispute Settlement and Enforcement) should be read in the context of the integrated dispute settlement system contained in the Understanding on Rules and Procedures Governing the Settlement of Disputes. Article XXII (Consultation) allows for any Member to request for consultation with any other Member with respect to any matter affecting the operation of this Agreement. If the disputed matter is not resolved through consultation, it may be referred to the Council for Trade in Services or to the Dispute Settlement Body (DSB) for settlement. The decision of the DSB is final and binding on the Members. Article XXIV (Council for Trade in Services) specifies that the CTS shall be represented by all Members and shall facilitate the operation and objectives of the GATS. Article XXV (Technical Cooperation) provides for technical assistance to developing countries at the multilateral level by the WTO Secretariat.

BUILT-IN AGENDA

Progressive liberalization

The GATS, Article XIX of Part IV, provides that WTO Members shall enter into “successive rounds of negotiations with a view to achieving a progressively higher level of liberalization” of trade in services starting no later than January 2000. As mentioned earlier, these negotiations will start in 2000.

The developing countries, including the LDCs, have to prepare themselves for the negotiations. First, they must identify the sectors of service in which they have supply capacity and the specific restrictions existing in these sectors in other countries. This will help them to put in their request on other countries for liberalization in those countries. At the same time, those services sectors where liberalization can be done should be identified in order to include them as offers from their own side. All this needs considerable collection and analysis of facts. Also it needs wide consultations with the suppliers and consumers of specific services in the country.

Negotiations in specific areas

The GATS prescribes further negotiations to define disciplines in the areas of emergency safeguard measures (Article X), government procurement (Article XIII) and subsidies (Article XV). The Working Party on GATS Rules has already conducted information exchange on these issues.

The specific concern for the developing countries, particularly the LDCs, in the area of safeguard is that they must have the flexibility to take safeguard measures in order to protect their services sectors. The need for such protection may be felt very often as these sectors are not well developed in these countries and they may be often in danger because of the import of these services.

Similarly, in the area of subsidy, the concern of the developing countries, particularly the LDCs, is that they must have the flexibility to subsidize their services. It may be useful here to have a general exemption for the developing countries in respect of subsidizing their services sector,

considering that these sectors may need a lot of government support before they become fully competitive.

In the area of government procurement, it will be desirable for the developing countries, particularly the LDCs, to retain their flexibility available to them as a result of non-application of the MFN treatment and national treatment. This will help them to choose the source of supply from specific foreign countries and also to give encouragement and incentive to their domestic services sectors.

Negotiations in specific sectors

Negotiations on financial services, maritime services, basic telecommunication services and movement of natural persons were extended after the completion of the Uruguay Round Negotiations. The agreement on financial services was concluded in December 1997. Negotiations on maritime services have been suspended and are to resume with the commencement of comprehensive negotiations on services under Article XIX. Negotiations on the movement of natural persons and basic telecommunications were concluded on July 5 1995 and February 1997, respectively. For professional services, it was decided to work on multilateral disciplines to ensure objectivity and transparency of domestic regulatory requirements.

Movement of natural persons

The negotiations in the area of movement of natural persons ended without any significant concessions in this important area for the developing countries. It is important for the developing countries, particularly the LDCs, to seek concessions from the developed countries in this area, as this is perhaps the only area where a large number of developing countries have the opportunity of supply. This negotiation needs to be opened up and specific suggestions need to be made for liberalization of the services that could be provided to other countries through movement of natural persons.

Financial services

The financial services have been classified into four groups: insurance and insurance-related services, banking and other financial services. It should be noted that the Annex on Financial Services provides that the

obligations assumed by countries under the provisions of GATS or commitments given would not prevent a member country from taking measures for prudential reasons, including for the protection of investors, depositors or policy holders or to ensure the integrity of the financial system.

In the negotiation in this sector, the liberalization commitments made by countries include: elimination or relaxation of current restrictions on, *inter alia*, commercial presence of foreign financial service suppliers; withdrawal of broad MFN exemptions based on reciprocity (e.g., by the United States, India and Thailand); allowing for more commercial presence of foreign financial service suppliers by eliminating or relaxing limitations on foreign ownership of local financial institutions, juridical form of commercial presence (branches, subsidiaries, agencies, representative officers, etc.) and expansion of existing operations; and “grandfathering” of existing branches and subsidiaries of foreign financial institutions.

Among the LDCs, nine countries have made commitments in this area; all nine in banking and four in insurance. They had either liberalized financial services as part of their own policy or had specific motivation, e.g., promoting offshore insurance and banking business.

Telecommunication services

The negotiations in this sector covered both the basic telecommunication services and value-added services. The latter are the services that use the basic telephone network to manipulate information in voice, video or data form. The guidelines for negotiations were provided by the provisions in the Annex in GATS on Telecommunications relating to transparency and access to public telecommunications.

The transparency provisions require members to ensure the availability of information on conditions affecting access to and use of public telecommunications transport networks and services (e.g., tariffs, specifications of technical interfaces, organizations responsible for preparation and adoption of standards; conditions on attachment of terminal and other equipment, notifications, registration and licensing requirements).

Access to and use of Public Transport Telecommunications Transport Networks and Services requires each member to ensure that all service suppliers seeking to take advantage of scheduled commitments are

accorded access to and use of public basic telecommunication networks and services on reasonable and non-discriminatory basis. The right to make use of telecommunication includes: rights to purchase or lease and attach terminal or other equipment which interfaces with the network; access to information in databases and in machine-readable form; to use operating protocols of the service suppliers' choice; and to transmit information within or across borders. There are provisions in the Annex permitting countries to impose conditions for access and use of public telecommunications transport networks, including restriction on resale or shared use of services, requirement to use specified technical interfaces, protocols, etc., restrictions to achieve goals of international telecommunication agencies, requirements to obtain approval to use certain terminal equipments and impose requirements pertaining to notification, registration and licensing.

The Annex contains specific provisions for developing countries. They may, consistent with their level of development, place reasonable conditions on access to and use of public telecommunications networks and services necessary to strengthen their domestic telecommunications infrastructure and service capacity. Such conditions should be specified in the Member's schedule.

Further, there are provisions regarding the technical cooperation. The agreement endorses and encourages the participation of developed and developing countries and other international organizations such as ITU, UNDP and the IBRD in providing efficient, advanced telecommunication infrastructure, particularly for developing countries. The agreement requires Members to make available to developing countries information on telecommunication services, information technology and their development to assist in strengthening the domestic capacity. The agreement also requires Members to give special consideration in providing opportunities for LDCs in the transfer of technology, training and other activities that support the telecommunication infrastructure.

The negotiations on telecommunications will continue to be of importance, and a few issues are likely to dominate the negotiations. Among them, further liberalizations, competition policy in the emerging market structure and regulatory framework are going to be crucial.

Among the LDCs, four countries have made commitments in telecommunication services.

REVIEW OF MFN EXCEPTIONS

The agreement provides for periodic review of MFN exceptions after 5 years (i.e., after 1 January 2000). The developing countries, particularly the LDCs, should try to retain their MFN exemptions. At the same time, it may be relevant to scrutinize very closely the exceptions maintained by the developed countries. They should try to remove the exceptions maintained by the developed countries.

SUGGESTIONS

- The developing countries, including the LDCs, should make thorough preparations for the forthcoming round of negotiations in the services sectors. As mentioned above, they should select the services in which they have supply capacity and ask for liberalization in other countries, particularly the developed countries.
- The developing countries, including the LDCs, may also examine the service sectors where they would like to introduce liberalization on the basis of binding commitment in the WTO. In the negotiations, there will naturally be demands from them. They should be ready with their response.
- It is important for the developing countries, particularly the LDCs, to ensure that the developed countries sincerely follow the mandatory guidelines in Article XIX that the developing countries will have the flexibility to liberalize fewer sectors and fewer transactions.
- The developed countries should provide for incentives to their entities which import services from the developing countries, particularly the LDCs.
- The developed countries should also facilitate structural adjustment of the services sectors in their countries, so that the prospects for the export of services from the developing countries, particularly the LDCs, are enhanced.

- The developing countries, particularly the LDCs, should press for substantial liberalization in the developed countries in the area of movement of persons. This is an area in which they have supply capacity.
- What, of course, is of utmost importance is that the developing countries, including the LDCs, should develop their services sector, particularly the critical sectors which will help their diversification and upgradation of industrialization.

Chapter 2

Trade-Related Aspects of Intellectual Property Rights (TRIPS)

INTRODUCTION

The subject of trade-related aspects of intellectual property rights (IPR) was included in the Punta del Este Ministerial Declaration (1986) as one of the “new issues” for negotiation in the Uruguay Round. The outcome of the negotiations is contained in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).

Intellectual property is given protection in order to provide incentive to the innovators, and, in this way, it contributes to the growth of knowledge and technology. But such exclusive rights result in a certain degree of monopoly on the intellectual property, which naturally has adverse implications for its consumers. The benefits to the IPR holders have to be balanced with protection of the interests of the consumers of the intellectual property. A country has to find an appropriate balance based on its development objectives. The TRIPS Agreement lays down some disciplines on governments in this regard. It ensures certain minimum levels of protection of intellectual property in the Member countries and also provides for effective enforcement of protection.

MAIN PROVISIONS

General framework

Coverage

The TRIPS Agreement covers: copyright and related rights, trademarks, geographical indications, industrial designs, patents, integrated circuits and undisclosed information.

Minimum standards

The Agreement provides for minimum standards of protection of IPRs. WTO Members cannot, in the specific areas and issues covered by the Agreement, confer a lower protection than established therein. At the same time, Members are protected against demands by other Members to confer a higher protection: no Member can be obliged to provide a “more extensive” protection than established in the Agreement (article 1.1.).

The Agreement sets forth substantive standards relating to the availability of rights, as well as procedural rules relating to the enforcement of such rights. This means that the TRIPS Agreement not only stipulates, for instance, the (minimum) exclusive rights that a patent or trademark owner must enjoy, but also specifies the administrative and judicial procedures that should be available to him/her in order to effectively use the conferred rights vis-à-vis third parties.

The incorporation of enforcement rules is a major difference with respect to previous conventions on the matter, which dealt, only or mainly, with substantive standards.

Relationship with other IPRs conventions

Several international conventions had been negotiated and adopted before the TRIPS Agreement on various categories of intellectual property rights. The negotiation of the TRIPS Agreement took into consideration and supplemented, with additional obligations, some of those conventions: the Paris Convention for the protection of Industrial Property (1967), the Berne Convention for the Protection of Literary and Artistic Works (1971), the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (the Rome Convention) (1961), and the Washington Treaty on Intellectual Property in respect of Integrated Circuits (1989).

The obligations set forth by these conventions become binding (with some exceptions) for all Members, even those that have not ratified them, except in the case of the Rome Convention which only continues to be binding on States that have joined it. Moreover, Members are bound by the provisions of the Washington Treaty, as amended by the Agreement, despite the fact that this treaty never came into force.

Implementation

The “method of implementing” the TRIPS Agreement’s provisions can be freely determined by its Members within its “own legal system and practice” (article 1.1). There are considerable differences between national legal systems, particularly between those based on Anglo-American law, and those that follow the approach of continental European law. These differences are noticeable, for instance, in the field of copyright and neighbouring rights, trademarks and trade secrets protection.

The Agreement does not constitute a uniform law. It leaves considerable freedom in many areas to legislate at the national level. Though the Agreement will contribute to harmonize, to a considerable extent, the substantive (and some procedural) rules on IPRs in accordance with standards essentially comparable to those prevailing in the most advanced countries, various degrees of legislative freedom remain at the national level to adapt IPRs laws to national conditions and objectives, as discussed below.

Objectives and principles

The main stated goal of the Agreement is “to reduce distortions and impediments to international trade, taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become a barrier to legitimate trade” (Preamble).

Though it is recognized that intellectual property rights are “private rights”, the underlying public policy objectives of national systems for the protection of intellectual property, including “developmental and technological objectives” are also recognized (Preamble). More specifically, articles 7 and 8 of the text provide a framework for the interpretation and implementation of the Agreement.

According to article 7, “the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to the balance of rights and obligations”.

The concepts of “mutual advantage”, “social and economic welfare” and “balance of rights and obligations” mean that the recognition and enforcement of intellectual property rights are subject to higher social values and, in particular, that a balance needs to be found between the exclusive rights conferred to innovators and the interest of society in the diffusion and further innovation of existing technology.

Article 8 is also an important provision for framing national legislation that respond to particular public interests and to prevent or remedy abuses of intellectual property rights.

Article 8.1 states that “members may, in formulating or amending their national laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement”.

In addition “appropriate measures”, provided that they are consistent with the provisions of the Agreement, may be applied “to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology” (article 8.2).

Developed countries have extensively applied antitrust laws in order to balance the public and private interests involved in the use of IPRs. The implementation of the TRIPS Agreement in LDCs may require the adoption or revision of competition law so as to ensure the control of anticompetitive practices relating to the use of IPRs.

National treatment

The TRIPS Agreement provides that each Member must accord to the nationals of other members treatment no less favourable than that it accords to its own nationals, subject to the exceptions already provided in the international conventions referred to above (Paris, Berne, Rome and Washington Treaty).

Most favored nation

If the protection conferred to the nationals of a Member were more favourable than those granted to the nationals of other Members, such

higher protection would have to be immediately and unconditionally extended to the nationals of the latter Members, by virtue of the “most-favoured-nation” (MFN) clause (article 4).

One of the permitted exceptions to the MFN clause relates to international agreements made before the entry into force of the WTO Agreement, and notified to the Council of TRIPs, provided that they “do not constitute an arbitrary or unjustifiable discrimination against nationals of other Members” (article 4.d). Any new regional or subregional agreement on IPRs would be subject to the MFN clause.

Exhaustion of rights

Article 6 of the Agreement permits any Member to admit parallel imports irrespective of the type of applicable IPRs. “Parallel imports” take place when a protected product is imported in a country without the authorization of the title holder after he has legitimately placed it in circulation. The concept behind this article is that the title-holder “exhausts” his/her rights after the sale of a protected product, whereby he/she obtained remuneration for the IPR content of the sold product.

The application of this principle may permit acquiring legitimate goods in a foreign country under prices lower than those charged domestically for the same goods, thus benefiting users and consumers.

Special and differential treatment

The TRIPS Agreement does not provide for special and differential treatment in favour of developing and least developed countries in respect of either the minimum standards for the rights or the procedure for enforcement. The special needs of the developing countries have only been taken into account in relation to technical assistance and transitional periods (article 65). In respect of the LDCs, there is an additional provision relating to the promotion of the transfer of technology (article 66.2).

Transitional arrangements

The developed country Members were allowed one year after the date of entry into force of the WTO Agreement (1 January 1995) to implement the obligations relating to intellectual property protection (article 65.1). Therefore they had to implement them by 1 January 1996. The developing countries, excluding the LDCs, and countries in transition were allowed an

additional period of four years. Thus they have to implement the obligations by 1 January 2000. However, the obligations concerning national and most-favoured-nation treatment, became applicable to them on 1 January 1996, i.e., one year after the coming into force of the WTO Agreement (Article 65.2).

The least developed countries are permitted, in view of their special needs and requirements, of “their economic, financial and administrative constraints and their need for flexibility to create a viable technological base” (article 66.1), up to 10 years from the general date of application (i.e., 1 January 1996). Thus they have to create such a base by 1 January 2006. This term may be extended “upon duly motivated request” by the Council for TRIPS.

In addition to the general transitional period referred to above, a further period of five years is allowed for developing countries which are bound to introduce product patent protection in areas of technology not so protected in their territory on the general date of application of the Agreement for that country (Article 65.4). This provision is of particular importance in the area of pharmaceutical products, which was excluded from patent protection in more than 50 countries at the beginning of the Uruguay Round.

The application of these transitional periods does not require any specific declaration or reservation by the concerned country: they are applicable automatically.

Transfer of technology to LDCs

According to Article 66.2, developed Member countries are obliged to provide incentives under their legislation to enterprises and institutions in their territories for the purpose of promoting and encouraging the transfer of technology to LDCs “in order to enable them to create a sound and viable technological base”.

At its meeting of September 1998, the Council for TRIPS agreed to put on the agenda the question of the review of the implementation of article 66. 2.

Technical assistance

The technical and financial cooperation for developing and least developed countries is mentioned in article 67 of the Agreement, but no specific obligations or operative mechanisms are provided for. The provision of the assistance is on request and subject to “mutually agreed terms and conditions”.

Such cooperation includes assistance in the preparation of laws and regulations on the protection of IPRs as well as on the prevention of their abuse and the establishment or reinforcement of domestic offices, including the training of personnel. The Council for TRIPS has on many occasions reviewed information on assistance provided to developing and least developed countries, including by intergovernmental organizations.

Dispute settlement

Unlike previous international conventions on intellectual property rights, under the TRIPS Agreement complaints about non-compliance with the obligations stipulated in the Agreement could be brought for settlement on a multilateral basis, in accordance with the procedures established by the Dispute Settlement Understanding (DSU). However, if a WTO member does not observe certain minimum standards, no other Member can unilaterally apply trade sanctions against the former. The adoption by another Member of unilateral trade sanctions would be incompatible with the multilateral rules.

Monitoring and review

In addition, the implementation of the TRIPS Agreement is subject to supervision within the WTO system. A specific body, the Council for TRIPS, is in charge of monitoring the compliance by Members with the Agreement’s obligations. This Council also offers Members the opportunity of consulting on matters related to the agreement and shall assist, upon request, in dispute settlement.

Restrictive business practices in contractual licences

Section 8 (Part I) establishes certain conditions for the control by Member States of anticompetitive practices in contractual licences relating to IPRs. Practices that may be prevented are those that “constitute an abuse of intellectual property rights having and adverse effect on competition in

the relevant market” (article 40.1). Practices are to be assessed case by case.

The application of these conditions will imply that restrictive business practices in such arrangements can only be condemned under a “competition test”, thereby excluding other criteria which could be included in the “development test” proposed during the unsuccessful negotiation of a Code of Conduct on Transfer of Technology in the 1980s.

Enforcement

The TRIPS Agreement includes detailed provisions in Part III on judicial and administrative procedures and other measures related to the enforcement of IPRs. They include, inter alia, provisions on evidence, injunctions, damages, provisional measures, and criminal penalties, as well as specific rules to combat counterfeit trademark or pirated copyright goods at the border. Detailed obligations relating to procedures aimed at suspending the circulation of infringing goods by customs authorities are established.

SPECIFIC OBLIGATIONS

Copyright and related rights

In the area of copyright and related rights, the TRIPS Agreement explicitly stipulates the protection of software as a literary creation and provides - for the first time in an international agreement - rental rights for phonograms, films and computer programs. It also obliges to protect data compilations under copyright. The Agreement provides for a minimum term of protection for works (other than works of applied art or photographic works) not belonging to natural persons: 50 years from publication or from creation (if publication was not made within 50 years from the making of the work).

In the area of “related rights”¹ the Agreement did not include significant new standards, except for the extension of the term of protection for performers and producers of phonograms to 50 years (20 years were granted under the Rome Convention).

Box 1: Main provisions on copyright and related rights

- Protection of works covered by the Berne Convention, excluding moral rights (only the expression is to be protected and not the ideas, procedures, methods of operation or mathematical concepts as such);
- Protection of computer programs as literary works and of compilations of data;
- Recognition of rental rights, at least for phonograms, computer programs, and for cinematographic works;
- Exceptions to exclusive rights must be limited to special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder;
- Recognition of 50 years minimum term for works (other than photographic or applied art works) owned by juridical persons, and for performers and phonogram producers;
- Recognition of rights of performers, producers of phonograms and broadcasting organizations (article 14).

Enforcement rules are also to be considerably strengthened in the copyright field, particularly due to the obligation to establish criminal procedures and penalties against copyright piracy on a commercial scale (article 61).

Trademarks

For the protection of trademarks, a comprehensive definition of signs that can constitute trademarks has been given. Also there is a specification of a minimum permissible period of non-use, which can be justified by “valid reasons based on the existence of obstacles” (article 19). Goods and services trademarks are put on the same footing.

The TRIPS Agreement supplements the Paris Convention with regard to “well-known” trademarks, which must be given protection even if they became known on the basis of publicity and not of an effective use in a country.

Box 2: Main provisions on trademarks

- Definition of protectable signs, which should be capable of distinguishing the goods or services of one undertaking from those of other undertakings. Service marks shall receive a protection equivalent to marks for goods.
- Registrability, but not filing of an application, can be dependent on use.
- Definition of exclusive rights conferred with respect to identical or similar goods and services.
- Protection of well-known trademarks for goods and services, including if knowledge thereon is acquired through their promotion.
- Exceptions to exclusive rights must be limited and take into account the legitimate interest of the trademark owner and of third parties.
- The minimum term of protection is seven years, renewable without limitation.
- Requirements of use are to be limited both in terms of the minimum period of non-use and the admissibility of reasons for non-use.
- Special requirements for use are limited, as well as conditions on licensing and assignment of trademarks. A trademark can be assigned without the transfer of the business to which it belongs.
- Measures to combat trade in counterfeiting products should be available at the border.

Geographical indications

Geographical indications that meet certain conditions are considered by the Agreement as a particular kind of IPR. The Agreement obliges Member countries to protect those indications that identify a good as originating in a certain territory, “where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin” (article 22.1).²

A special, higher protection is recognized for geographical indications related to wines and spirits. However, indications which have become a term “customary in the common language” (article 24.6) in a Member can be excluded from protection. Members can also permit the use of indications of another Member if they were continuously used at least 10 years preceding 15 April 1994 or in good faith preceding that date.

Box 3: Main provisions on geographical indications

- Geographical indications are indications which identify a good as originating in the territory of a member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the goods is essentially attributable to its geographical origin.
- Legal means shall be provided to prevent use of an indication in a manner that mislead the public or when it constitutes unfair competition, and to invalidate a trademark if the public is misled as to the true place of origin.
- Additional protection is conferred to geographical indications for wines and spirits, including ways of protecting homonymous indications.
- Negotiations shall be undertaken to establish a multilateral system of notification and registration, and aiming at increasing the protection of indications for wines and spirits.
- Exceptions to the required protection may be based on prior and continuous use of an indication, prior application or registration in good faith of a trademark, or on the customary use of the indication
- Obligations only relate to geographical indications that are protected in their country of origin.

Industrial designs

Industrial designs which are independently created are to be protected for at least 10 years under the TRIPS Agreement, whenever they are “new or original” (article 25). Notwithstanding that this is one of the IPRs areas where differences among national laws is highest, the Agreement includes very few elements of harmonization.

Designs essentially dictated by technical or functional considerations need not to be protected under the Agreement. Member countries may, at their discretion, develop legislation on functional designs, such as “utility models”.

Patents

An important chapter of the Agreement relates to patents. It includes, inter alia, standards relating to patentability and its exceptions, compulsory licences and the duration of protection (at least 20 years).

Box 4: Main provisions on industrial designs

- Protection should be conferred to designs which are new or original.
- Requirements for protection of textile designs should not impair the opportunity to seek and obtain such protection.
- Exclusive rights can be exercised against acts for commercial purposes, including importation.
- Ten years is the minimum term of protection.

Patents are to be granted and the conferred rights to be exercised without discrimination as to the place of invention, the field of technology or on the basis of whether the protected product is locally produced or imported. For biotechnological inventions and as a reflection of the complexity and still unresolved differences on the issue³, article 27.3.b) (which should be reviewed in 1999) allows for a possible exception to the patentability of plants and animals, but plant varieties must be protected by patents or an “effective sui generis regime” or a combination of both.

The TRIPS Agreement specifies the contents of the exclusive rights to be conferred under a patent, including the protection of a product directly made with a patented process, and to produce, sell and import the protected product. As mentioned above, article 6 allows Member countries to legislate on the international exhaustion of rights and, therefore, to admit parallel imports.

The reversal of burden of proof is stipulated for civil procedures relating to process patents in order to strengthen a patentee’s position in cases of infringement, leaving each Member the option to apply this principle to all existing or only with respect to “new” products.

Additionally, a detailed provision (article 31) recognized the Members’ rights to permit “other use without authorization of the right holder”, i.e., to grant compulsory licences under the specified conditions. Compulsory licences would be non-exclusive and terminate when the circumstances that motivated their granting ceased to exist.

No specification is made on the grounds under which such licences can be granted, though particular reference is made to the cases of national emergency or extreme urgency, dependency of patents, licences for

Box 5: Main provisions on patents

- Patents shall be granted for any inventions, whether products and processes, provided they are new, involve an inventive step and are capable of industrial application;
- Patents shall be granted in all fields of technology. No discrimination is allowed with respect to the place of the invention, or based on whether the products are locally produced or imported;
- Member countries can exclude from patentability diagnostic, therapeutic and surgical methods for treatment of humans or animals, as well as plants and animals and essentially biological processes for the production thereof;
- Exclusive rights conferred in the case of product and process patents are defined, subject in the case of imports to the principle of exhaustion (article 6);
- Inventions shall be disclosed in a manner which is sufficiently clear and complete for a skilled person in the art to carry out the invention. The indication of the best mode of carrying out the invention, as well as information concerning corresponding patent applications and grants, may be required;
- Limited exceptions to the exclusive rights can be defined by national laws (article 30);
- Conditions for granting other uses without the authorization of the patent holder (compulsory licences) are set forth; Member countries can determine the grounds to allow such uses;
- Revocation/forfeiture is subject to judicial review;
- The term of protection shall be at least 20 years from the date of application;
- Reversal of the burden of proof in civil proceedings relating to infringement of process patents is to be established in certain cases.

governmental non-commercial use, and licences to remedy anticompetitive practices. National laws can, however, provide for the granting of such licences for other reasons, such as public health or public interests at large. The text of the Agreement is also open with respect to the rights that can be exercised by the licensee, including production or importation.

Integrated circuits

The layout designs (topographies) of integrated circuits shall be protected according to the provisions of the Washington Treaty of 1989. The TRIPS Agreement, however, excludes some of the provisions of the Treaty (notably with respect to compulsory licences), and supplements it with respect to *bona fide* acts involving infringing integrated circuits or industrial articles containing them. The minimum term of protection is 10 years.

Undisclosed information

The TRIPS Agreement is the first multilateral agreement on “trade secrets”. Negotiations in this area reflected substantial differences between the Anglo-American and the continental European law traditions. The Agreement followed the latter’s approach: trade secrets are deemed protectable under the discipline of unfair competition, as established in article 6bis of the Paris Convention. No exclusive rights are conferred on the possessor.

In order to be protectable, the information shall be secret, possess a commercial value and be subject to reasonable steps by the possessor to keep it secret.

In addition, obligations are provided for in the Agreement in relation to test results and other data submitted to governments in order to obtain approval of pharmaceutical or agrochemical products. Protection of these

Box 6: Layout designs of integrated circuits

- The layout designs (topographies) of integrated circuits shall be protected according to the provisions of the Washington Treaty of 1989, except those specifically excluded by the Agreement (e.g., provisions on compulsory licences);
- Protection shall extend to layout designs as such and to the industrial articles that incorporate them;
- *Bona fide* purchases of products involving infringing layout designs shall be liable to pay a compensation to the rights holder after notification;
- The terms of protection shall be a minimum of ten years.

Box 7: Main provisions on undisclosed information

- Undisclosed information is to be protected against unfair commercial practices, if the information is secret, has commercial value and is subject to steps to keep it secret.
- Secret data submitted for the approval of new chemical entities as pharmaceutical and agrochemical products should be protected against unfair commercial use and disclosure by governments.

data applies when they are the result of a significant effort, and only against unfair commercial use by third parties, and against disclosure, except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use.

IMPLEMENTATION OF TRIPS AGREEMENT

Problems in implementation

The TRIPS Agreement brought about a “signal change” in the protection of intellectual property rights. As a result of its broad coverage and the nature of its provisions, the implementation of the TRIPS Agreement requires dealing with a significant body of national legislation, both in terms of substantive as well as of procedural rules. In many developing and least developed countries, such an implementation has called for massive changes in pre-existing laws. Moreover, there are areas in which no previous legislation existed at all in many countries, such as in the case of undisclosed information, integrated circuits and plant varieties.

Since the Agreement provides a framework for legislation and not operative provisions that may be directly incorporated into national laws, its implementation necessitates considerable elaboration at the national level. Developing new legislation on IPR requires legal expertise in a number of fields, which is often lacking in developing countries, including the LDCs.

The process of drafting legislation to implement the TRIPS Agreement is not only a complex technical problem. But, it also raises a number public policy issues that need to be properly addressed. The TRIPS Agreement

aims at balancing the interests of producers and users of technology (article 7). Developing the appropriate mechanisms to do so is a quite difficult task, for which adequate consultation processes, reliable data and profound knowledge of each particular area are required. Drafting legislation needs an active involvement and cooperation of different State organizations (ministries of industry and trade, agriculture, health, etc.) and an interaction with the private sector, particularly those sectors of the economy that may be most affected by the new standards, as well as with consumers and other groups (e.g., local communities).

As mentioned, the TRIPS Agreement includes enforcement rules, and not just substantive provisions. The compliance with the Agreement requires the revision of national laws in respect of civil and criminal judicial procedures, administrative procedures, as well as redefining the role of police and custom authorities. The costs of developing the institutional infrastructure to implement the Agreement's standards may be substantial.

One important feature of the TRIPS Agreement is the exclusion of unilateral retaliatory actions. A basic obligation of all WTO Members is to channel any controversy relating to IPRs through the multilateral procedure under the Dispute Settlement Understanding. While several complaints have been filed under the TRIPS Agreement, involving alleged infractions by developing and developed countries, only one case has been decided in a case of United States against India relating to the implementation of article 70.8 of the Agreement. The European Union has also filed a complaint against Canada with regard to the so called "Bolar exception", that is, the permission given to any third party to request approval for commercialization of a pharmaceutical product before the expiration of the patent.⁴

However, developing countries have continued to be under unilateral demands by some developed countries in the area of IPRs, in some cases aiming at ensuring protection of such rights beyond the minimum standards set forth by the Agreement.

As a result of the previous factors, and despite the transitional periods referred to above, many developing countries have not been able yet to adapt their legislation to the Agreement's standards, and are unlikely to do so before the end of the general transitional period on 31 December 1999. Even some developing countries that have made significant steps to

implement the Agreement have not been able to cover all areas (particularly those in which they had no previous legislation), or have not been able yet to reform enforcement-related rules.

In implementing the TRIPs Agreement, LDCs will be confronted with severe financial and administrative constraints. In the case of Bangladesh, for instance, it has been estimated that the implementation will involve an initial investment of US\$ 550,000 and annual expenditures exceeding half a million US dollars. In view of their persistent financial constraints and the lack of IPR-related technical expertise, most LDCs would have to depend on external support for implementing the TRIPS Agreement provisions.

National administrative offices in charge of registration of IPRs will require large and better qualified staff, as well as access to information and availability of computer resources. The establishment of the necessary infrastructure, particularly for patents, may pose a considerable burden on LDCs. Several alternatives to building up a local capacity of examination may be considered, including the possible membership to the Patent Cooperation Treaty (PCT).

The implementation of the new international standards is likely to entail increased costs in terms of the enforcement of IPRs. Likewise, judicial and custom authorities may be faced with an increased number of cases for which expertise and other resources are lacking.

The application of the transitional periods established by the TRIPs Agreement may provide the necessary time - but not the resources⁵ - to introduce changes in legislation, develop the infrastructure for administration of IPRs, and introduce other measures required to reduce any possible economic disadvantages derived from the new framework.

Options in implementation

The TRIPS Agreement is likely to bring about a considerable degree of harmonization of national laws on IPRs. However, differences in legislation and practice will remain in many aspects. As mentioned, the Agreement does not amount to a "uniform law" and preserves, in many areas, room for different national solutions.

The room for manoeuvre left can be used by LDC Member countries to design their IPRs systems - within the limits permitted by the Agreement - in accordance with their own needs and objectives. For instance, the implementation of the Agreement may, while protecting the legitimate interests of IPRs title holders, seek to encourage competition, technology transfer and the diffusion of existing technologies.

The main areas in which the TRIPS Agreement leaves room for manoeuvre to adopt different national rules include the following:

(1) International exhaustion of rights

LDCs may admit parallel imports so as to ensure access to goods at the lowest possible prices internationally available, and to encourage foreign title holders to establish themselves locally in order to monitor the market and adjust business strategies to changing conditions.

(2) Compulsory licensing

LDCs may implement different types of compulsory licences, for instance, to remedy anticompetitive practices, for the use of improvement patents or to satisfy other public interests. Those licences may also apply in the case the patent holder refuses to grant a voluntary licence on reasonable commercial terms.

(3) Definition of invention

National legislation may exclude the patent protection of plants and animals and of essentially biological processes for their production. It may also exclude materials which already exist in nature, as well as computer programs. In addition, the “doctrine of equivalents” may be applied in a narrow manner in order to stimulate inventing around existing patents.

(4) Protection of plant varieties

Plant varieties may be protected by patents, a sui generis regime or a combination of both (article 27.3.b). Most LDCs currently lack specific protection in this area. They may develop a sui generis regime suited to their seed supply systems, which are generally characterized by the importance of the seeds produced by the farmers (“landraces”) and by informal modes of exchange thereof. LDCs may also consider the implementation of “Farmer’s Rights” as defined in the context of the FAO

International Undertaking on Plant Genetic Resource (FAO Resolution 5/89).

(5) Protection of industrial designs and utility models

National legislation can determine the basic conditions for protection of industrial designs (for instance, for handicrafts) subject only to the standards set forth by the Agreement. Utility models -which generally cover "minor" innovations, such as improvements in working tools and machinery- are not covered by the TRIPS Agreement. LDCs can therefore legislate on this modality according to their own needs.

(6) Limitations to exclusive rights

Limitations to exclusive rights are permitted, under certain conditions, with respect to all IPRs covered by the TRIPS Agreement. In the field of copyright, for instance, they may include the "fair use exception", in order to foster educational and general cultural purposes. In the patent field, exceptions may include the use of an invention for experimental purposes and for approval of a medicine or agrochemical before the expiration of a patent, for research and education, and for bona fide use prior to the granting of a patent.

(7) Evaluation

The evaluation of copyrighted works (such as computer programs) to develop competitive products is not prevented by the TRIPs Agreement. A clear distinction between the protection of the expression and of the "ideas, procedures, methods of operation or mathematical concepts as such" (article 9.2) is made. Reverse engineering is also permissible in the case of trade secrets, since protection is only conferred against acquisition "in a manner contrary to honest commercial practices" (article 39.2).

(8) Other areas

Though Part III of the TRIPs Agreement contains considerably detailed provisions on enforcement of IPRs, a large number of aspects are left to national legislation, such as examination procedures, opposition by third parties to registration of a patent, registration fees (where applicable), among others. For example, LDCs may establish differential fees for small companies and individual inventors, so as to facilitate acquisition of IPRs by them.

BUILT-IN AGENDA

(i) Article 27.3.b relating to the protection of plants and animals:

As mentioned earlier, this provision of the agreement is to be reviewed in 1999. In all likelihood the review will continue for some time. The exact purpose and scope of the review have not been specified. This review provides the opportunity to examine and improve on some provisions of this article, in particular, to establish the relationship between this provision of the TRIPs Agreement and the Convention on Biological Diversity (CBD) and the FAO International Undertaking on Plant Genetic Resources.

The plant resources from developing countries are often taken by big firms and, with some modifications, are patented as plant varieties. Also, sometimes the old established uses of these plants or their parts are patented without giving any benefit to the countries of origin or the indigenous communities which have nurtured them over centuries. It is important to correct these deficiencies. Further, there are certain features of this article which need clarification and improvement. For example, this article says that plants and animals need not be patented (which means that a country may or may not provide for the patents for these objects), but it goes on to prescribe that the provision of patenting must be made for microbiological organisms. The same provision is made for non-biological and microbiological processes. It is not clear why this distinction has been made in the agreement between the animals and microbiological organisms or between biological processes for production of plants and animals and microbiological processes. Besides, the difference between a microbiological organism and a microbiological process is not clear.

It will be desirable to take up these issues in the negotiations during the review process. Some specific suggestions are given later.

(ii) Protection of geographical indications

Negotiations will be undertaken to enhance the protection of individual geographical indications of wines and spirits. In this connection, it may be relevant and important for the developing countries, particularly the LDCs, to improve the protection of the geographical indications of their products, e.g., handicrafts, etc.

(iii) Dispute settlement

The conditions in which disputes can be raised on the matters relating to the TRIPS Agreement are somewhat limited in comparison to those related to other areas. Disputes can be raised in this area if a Member has a grievance because of another Member not carrying out its obligations. The general provision of dispute settlement is that disputes can be raised under certain conditions about the application of a measure by another Member, whether or not the measure conflicts with a particular agreement. Disputes can also be raised because of the existence of other conditions. These last two situations for raising a dispute do not apply to this area. There will be a review of this subject.

As the developing countries, including the LDCs, are likely to be the targets of disputes in this area rather than being the complainants, the current restrictions on the conditions for raising a dispute in this area suits them very well. Any expansion of the scope of the conditions for raising a dispute in this area may not be in their favour.

SUGGESTIONS

In the context of the issues and problems discussed above, the following suggestions appear relevant.

- (1) In course of the review of Article 27.3.b, the following elements may be taken up:
 - to exclude plants and animals and their parts from patentability;
 - to clarify that natural occurring substances, including genes, shall remain outside any IPRs protection;
 - to determine the novelty requirement in a manner that excludes the patentability of any subject matter which was made available to the public by means of a written description, by use or in any other way in any country before the date of filing, including use by local and indigenous communities, or by deposit of a material in a germplasm bank or other deposit institution where said material is publicly available;
 - to establish commitments by governments not to grant, or to cancel ex officio or upon request, IPRs on biological materials obtained (a)

from collections held in international germplasm banks and other deposit institutions where such materials are publicly available; (b) without the prior consent, where applicable, of the country of origin.

- to ensure, as appropriate, compliance with the obligation to share benefits with the country of origin of a patented biological material.
 - to specifically allow for an experimentation exception (including breeding of new plant varieties)
- (2) As explained above, it will be appropriate to seek the protection of geographical indications in case of the relevant objects of the LDCs, e.g., handicraft products.
 - (3) In respect of the review of the provision for the dispute settlement, it will be proper to let the present provision of limited pre-conditions for initiating a dispute continue. It will not be proper to expand the scope of the preconditions to include other elements as explained above.
 - (4) In formulating the legislation for implementing the TRIPS Agreement, the LDCs may take advantage of the options in various important provisions as elaborated above.
 - (5) In order to facilitate the transfer of technology and to ensure domestic availability of the products, the LDCs may establish different types of compulsory licences. As mentioned earlier, no specification is made in the Agreement on the grounds under which such licences can be granted.
 - (6) LDCs may also provide for the control of anticompetitive practices in contractual licences relating to IPRs. Rules on licensing agreements may be developed to specify the most common restrictive business practices.
 - (7) In future negotiations on TRIPS, LDCs may try to develop Article 7 of the Agreement so as to make operational the objective of fostering the transfer and dissemination of technology.
 - (8) The procedural provisions in Article 31 for the compulsory licence should be made flexible, as the current provisions make compulsory licensing extremely difficult.
 - (9) LDCs may also try to develop rules for the protection of the works of folklore, as recommended by the UNESCO Model Law of 1989.
 - (10) It is also important to make it clear that a Member has the right to recognize and protect the traditional knowledge of the country.

- (11) It would be necessary to operationalize the provisions of Article 66.2 which, inter alia, provide that developed countries should provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to the least developed countries.

NOTES

- 1 This expression corresponds to “neighbouring rights”, as defined under European law.
- 2 With this definition, the TRIPS Agreement only requires protection of “qualified” geographical indications, such as “appellations of origin” where, as stated, a relationship between certain characteristics of the products and the place of their origin can be established.
- 3 Unlike the United States and Japan, in Europe and many developing countries patents for plant varieties and animal races are not admitted.
- 4 In Canada this exception includes the production and stockpiling of the product for six months before the date of expiration.
- 5 Developed country Members committed themselves to providing technical and financial cooperation to developing and least developed country Members “to facilitate the implementation” of the TRIPs Agreement (Article 67). The text is too general and is subject, in any case, to “mutually agreed terms”.

Chapter 3

Dispute settlement

BACKGROUND

The dispute settlement process is an important part of the WTO as it provides for the enforcement of the rights and obligations contained in the WTO agreements. If a Member has a grievance against another Member in respect of its obligations under the WTO agreements, the former can take recourse to the dispute settlement process for getting relief.

The dispute settlement process has been an integral part of the GATT, and now it has been very much strengthened in the WTO. Taking important decisions in the dispute settlement process has been made automatic; hence no Member can now block or delay the decision on the establishment of a panel, as it was often seen earlier. Besides, specific and clear time frames have been established for various stages of the dispute settlement process. All this has brought about higher efficiency and dependability in the process. However, there are some severe limitations in the process for weaker trading partners, specially the developing countries, and in particular, the LDCs, as will be explained later.

The controversial point has been how far the role of the independent body like a panel in the dispute settlement process should be strengthened, and correspondingly to what extent the discretion of governments should be curtailed. Some major developed countries did not favour the curbing the discretion of governments. This approach would make the dispute settlement process very much dependent on the wishes of the governments, mainly the contesting parties; and to that extent it would be that much ineffective and uncertain in its capacity to give relief. On the other hand, if the role of the independent bodies like the panel is strengthened and the power of governments to challenge them restricted, the governments would lose significant power in respect of the interpretation of rules, which gets almost invariably involved in deciding a dispute. This approach would result in substantially transferring the role on interpretation of agreements from the Members to the panel/Appellate

Body, which may not be quite proper, as the substantive interpretation of the agreements is not a technical matter but one involving balance of rights and obligations.

In the Uruguay Round, the final decision was to restrict the discretion of governments and give strengthened role to the panels which resulted in near certain acceptability of the recommendations of the panel/Appellate Body. The only area which has been excluded from this principle is the anti-dumping, where the role of the panels has been very much constrained. Whereas the panel is normally required to give its opinion as to whether or not an action or inaction in question is in conformity with any provision of the relevant agreement, it is prohibited from making such a pronouncement in the disputes related to anti-dumping. In this area all it can examine is whether the domestic authorities have established the facts properly and objectively and whether the evaluation of the facts has been objective and unbiased. Further, if the relevant provision of the agreement admits of more than one permissible interpretation, the panel has to declare an action correct if it is based on one of these, even though the panel itself may not be considering the action right.

It is important to note that the disputes can be raised in the WTO only by the Members, i.e., by the governments. The entities engaging in the economic activities affected by the subject of the dispute, are not allowed to raise a dispute directly in the WTO. If they have a grievance in respect of the WTO rules, they can seek relief only through their governments.

The mode of enforcement of disciplines in a multilateral system is at the very core; because even the best of disciplines can be totally useless in absence of an effective enforcement mechanism. The dispute settlement process provides such a mechanism in respect of the WTO agreements.

MAIN PROVISIONS

The rules on the dispute settlement process are contained in the Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding or DSU), which forms a part of the WTO agreements. Earlier, the basic frame of the dispute settlement was provided by Articles XXII and XXIII of GATT 1994. These still continue to be applicable and, in addition, the DSU further provides elaboration of

these provisions and methods of application. Some agreements contain some additional clauses on the dispute settlement and some of them apply the provisions with some modifications. Hence, in order to understand fully the DSU as applicable to an area, one must read the DSU and the particular WTO agreement applicable to that area.

Cause of action

The cause of action for a Member to resort to the dispute settlement process is contained in Article XXIII of GATT 1994. It says that the process may be initiated by a Member if it considers that any benefit accruing to it under GATT 1994 is being nullified or impaired as a result of the following:

- (1) The failure of another Member to carry out the obligations under GATT 1994; or
- (2) The application by another Member of any measure, whether or not it conflicts with the provisions of GATT 1994; or
- (3) The existence of any other situation.

Action may also be initiated by a Member if it considers that the attainment of any objective of GATT 1994 is being impeded as a result of any of the situations mentioned above.

These provisions generally apply to the agreements in the goods sector with some qualifications and modifications in some areas. The services sector and the TRIPS also follow these provisions with some modifications.

Main procedural steps

The dispute settlement process starts with consultation between the complainant party and the respondent party. If consultation does not succeed, a panel is formed to consider the points raised by the contesting Members. The panel gives its recommendation on the issues involved. The Member dissatisfied with the recommendation of the panel may decide to go for appeal; otherwise the recommendation of the panel will be accepted. In the event of a contesting Member deciding to go for appeal, the Appellate Body considers the report of the panels on matters of law and gives its own recommendation, which is accepted. Final action has to be taken in accordance with the recommendation of the panel/Appellate Body. If the respondent Member fails to abide by the recommendation of

the panel/Appellate Body, the complainant Member is authorized to take retaliatory measures against it. These steps are described below.

Consultation

The initial step in the dispute settlement process is for the complaining Member to give notice to the responding Member for consultation. The objective of the consultation is to allow the Members to explain to each other their points of view, their arguments and opinions. The consultation is aimed at resolving the dispute amicably between the contesting Members. The request for consultation contains the description of the complaint, in particular, the description of the specific measures which are in issue and the points of law involved. At the time of giving the notice for consultation to the respondent Member, a notification has also to be given to the Dispute Settlement Body of the WTO, the Council and the Committee concerned with the subject of the dispute. This enables other Members to be aware of the dispute and to decide whether their own interests are involved. If a Member feels that its own substantial interests are involved in the dispute, it may request to be allowed to join the consultation. In case its request is not allowed, it can enter into separate consultation with the relevant party.

The Member to whom the notice for consultation has been given must respond within 10 days and must enter into consultation within 30 days.

The consultation takes place without prejudice to the rights of the Members with respect to the further proceedings. It means that in case a Member has shown some flexibility and makes some concessions and yet the consultation has failed to resolve the dispute, that Member is not bound by the offers made during the course of consultation.

If the dispute has not been settled in 60 days, the aggrieved party may ask for the formation of a panel.

Panel Process

Formation of the panel

The request for formation of a panel is considered by the Dispute Settlement Body (DSB) of the WTO of which all the Members of the WTO

are members. The process of the decision making in this case is such that the panel has to be formed by the DSB.

The provision of the DSU is that the DSB will establish a panel unless it decides by consensus not to do so. Now “consensus” has a well-defined meaning in the WTO Agreement. It is laid down that “consensus” will be reached if none of the Members present at the meeting where the decision is being taken formally objects to it. The Member requesting for a panel will naturally always object to a decision not to form a panel. Hence it is practically impossible for the DSB to have this negative consensus, i.e., to take a decision by consensus not to form a panel. Hence the formation of a panel is almost automatic.

Terms of reference and membership

Usually the DSB prescribes the standard terms of reference which calls for an examination of the issue raised by the complainant and asks for giving findings to assist the DSB in making recommendations or in giving the rulings provided for in the relevant agreement. If the contesting parties so decide and if the DSB agrees, special terms of reference can also be prescribed.

The panel normally has three members; but the parties to the dispute may give the option for a five-member panel. Initially the WTO Secretariat proposes the nomination for the membership of the panel. The parties to the dispute generally accept it, except for compelling reasons. If the difference on the nomination continues for 20 days, the Director General of the WTO decides on the nomination in consultation with the Chairman of the DSB and the Chairman of the relevant Council/Committee. The parties to the dispute are also consulted in this process.

Usually the members of the panel are chosen from a list maintained for this purpose by the WTO Secretariat. Three types of persons are on this list, viz., (i) those having direct experience of the GATT/WTO, or (ii) those having served as senior trade policy officials in various governments, or (iii) those having taught or published on international trade law or policy. The Members of the panel are thus experts in the field of international trade/WTO. They work on the panel in their individual capacity, and thus even if they are officials of some governments, they work on the panel quite independent of the positions or opinions of their governments.

Panel's work

The panel receives detailed written statements of the parties to the dispute. The representatives of the complainant and the respondent make their presentations orally too. Rebuttals of written and oral presentations are also given.

The role of the panel is to: (i) make an objective assessment of the facts of the case, (ii) make an examination of the applicability of the relevant agreement and (iii) make an evaluation as to whether the measures under consideration are in conformity with the agreements. It may also make other findings which may help the DSB in its consideration of the issue. As it has been explained in chapter on anti-dumping, the role of the panel in the area of anti-dumping, however, is very much limited.

After considering the presentations and other matters, the panel prepares a provisional descriptive part of the report. It is given to the parties to the dispute for their comments. After considering their comments, the panel prepares an interim report including the findings and conclusions. It is given to the parties. The parties may request for a review of specific parts of the report. After considering these suggestions, the panel prepares the final report. It is then circulated to the Members of the DSB.

Normally the panel is expected to complete its work in six months. In cases of urgency, e.g., the case involving perishable goods, the time limit is three months.

Consideration of Panel's Report in the DSB

The Members have 20 days time to study the report before it is considered by the DSB. At this stage there are two alternative tracks. Either one of the parties to the dispute gives notice to go for an appeal in which case, the DSB will not consider the panel report, or the DSB considers the report in absence of a notice for appeal. In the latter case, the DSB has to adopt the report within 60 days of the sending of the report to the Members, unless it decides by consensus not to adopt the report. In view of the process of consensus described above, such negative consensus is a near impossibility, as the Member gaining by the adoption of the report, will almost certainly object to the consensus of not adopting the report. Hence there is near certainty that the report will be adopted by the DSB.

Appeal Process, Consideration of Appellate Body's Report in the DSB

If a notice for appeal is given by a party to the dispute as in the first alternative mentioned above, the report of the panel is considered by the Appellate Body. The Appellate Body is a standing body of seven members, three of whom normally consider a particular appeal. The parties make written and oral presentation to the Appellate Body.

It is only the parties to the dispute which can give the option for going in appeal; the third parties that have indicated their interest in the dispute and had made presentations do not have this right. But once the appeal process has started, the third party Members may make written or oral submission to the Appellate Body.

The appeal is limited to issues of law covered in the panel report and to legal interpretations given by the panel. The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel report.

Generally the appeal process must not take more than 60 days, and in no case more than 90 days, from the date the notice for appeal was given.

The report of the Appellate Body is considered by the DSB, and it has to be adopted by the DSB within 30 days of its circulation to the Members, unless the DSB decides by consensus not to adopt it. As explained earlier, such a negative consensus is a near impossibility.

Implementation of Recommendation

The Member which has to implement the recommendation is expected to do so promptly. Specific time limits have been prescribed for deciding on the time frame for implementation. Within 30 days of the adoption of the panel/Appellate Body report, the Member that has to implement the recommendation has to give to the DSB a timetable for implementation. If the DSB approves, i.e., if the complaining Member is satisfied along with the others, the timetable will be acted upon. If there is no agreement, the parties have a further period of 45 days to discuss and come to an agreement on the timetable. If still there is no agreement, the timetable will be finalised by arbitration within 90 days of the adoption of the report. The guideline to the arbitrator is that normally it should not take more than 15 months from the adoption of the report to complete the implementation.

The implementation is monitored by the DSB. Six months after the finalization of the timetable, the subject comes up on the agenda of the DSB, and it remains there till the implementation is completed.

Compensation and Suspension of Concession

If the recommendation is not implemented within the prescribed time frame, the complaining Member may seek compensation from the offending Member. An agreement on compensation should be reached within 20 days. In case of failure, the complaining Member may seek authorisation from the DSB for suspension or withdrawal of concessions against the offending Member. Such suspension or withdrawal should be equivalent to the adverse effect caused by the offending Member. The DSB will almost invariably approve the request of the complaining Member for suspension or withdrawal of concessions, as any contrary decision will need consensus in the DSB which will be almost impossible, since at least the complainant Member will oppose it.

Cross Sector and Cross Agreement Retaliation

Under certain conditions, DSU provides for retaliation, i.e., the suspension or withdrawal of concessions, in other sectors and in other areas than that under dispute. It has important implications for the developing countries, particularly the LDCs.

If the complainant Member considers that it is not practical or effective to apply suspension or withdrawal of concession in the same sector, it may seek approval to apply such retaliation in another sector covered by the same agreement. If, however, it considers that even such counter action will not be practical or effective and circumstances are serious enough, it may seek approval to apply retaliatory measures in areas covered by another agreement.

The term "sector" for goods means all goods. For services, it means specific sectors based on the activities, for example, business services, communication services, etc., will be considered different sectors. For the intellectual property rights, it means different categories of the intellectual property rights, e.g., patent, copyright, etc., or provisions relating to the enforcement of intellectual property rights or provisions relating to procedures for acquisition and maintenance of intellectual property rights.

The term “agreement” for goods means the multilateral agreements on goods and also plurilateral agreements if these are applicable to the parties to a dispute. For services, it means the General Agreement on Trade in Services, and for the intellectual property rights, it means the Agreement on TRIPS.

The potential significance of this cross-retaliation for the developing countries lies in the fact that for a perceived violation of obligations in the areas of services or intellectual property rights, they can confront retaliation on their export of goods. It will be quite easy for a country to plead that a retaliation in the services area or intellectual property area may not be effective in case of developing countries, since these countries do not have much prospects in these areas; and therefore a case can be made out for retaliation in the goods sector in their case. However, to date, there is no precedent of cross-retaliation.

LDCs

When an LDC Member is involved in a dispute, it may resort to the special provision for good offices, conciliation or mediation. If a satisfactory solution to the problem has not been reached during the consultation, an LDC Member which is a party to the dispute may request for the good offices, conciliation or mediation by the Director General of the WTO or the Chairman of the DSB. It is obligatory on the Director General or the Chairman thereafter to undertake the process. It means that they will have discussions with the parties separately or jointly to resolve the dispute between the parties.

Further, there are some other provisions regarding the LDCs in the DSU, which are not of mandatory nature; these are in the nature of strong guidelines. In the dispute settlement process, particular consideration has to be given to the special situation of the LDCs at all stages of the dispute involving them. Due restraint must be exercised in raising matters involving an LDC Member and in asking for compensation or seeking authorization for retaliation against an LDC Member.

Besides, there are some provisions relating to the developing countries, which are naturally applicable to the LDCs too. When a dispute is between a developing country and developed country, the panel must include at least one member from a developing country, if the developing country which is a party to the dispute so requests.

BUILT-IN AGENDA

The Ministerial decision of Marrakesh (April 1994) lays down a full review of dispute settlement rules and procedures by the end of 1998 and invites the Ministerial Meeting to be held immediately thereafter to take a decision whether to continue, modify or terminate the dispute settlement rules and procedures.

The review process started in 1998 and it has not been completed by the agreed deadline of 31 July 1999.

EXPERIENCE OF IMPLEMENTATION

The Members have taken recourse to the dispute settlement process in a big way after coming into force of the DSU (1 January 1995), and a large number of disputes have been brought to WTO for settlement. Both developed and developing countries have been the complainants in these disputes. This is indicative of the expectation of the Members that they will get relief through this process. So far any LDC has not been directly involved in the dispute in the WTO.

The mechanism of automatic adoption of the reports of the panel/Appellate Body has normally worked well and there has been no blocking of the process. The Members expected to implement the recommendations of the panel/Appellate Body have also generally followed the process satisfactorily with very few exceptions when the complainant Member had to resort to retaliation, for example in the banana dispute between the United States and the EC. EC's implementation was not found satisfactory by the United States and it decided to retaliate by raising tariffs on the imports from EU. In this case an arbitration was also held which gave its verdict on the level of retaliation.

Though the process has generally worked well, there are certain problems faced by the developing countries. Some of them are explained below.

- (1) The process is very costly, and thus there is a big financial burden on the developing countries in either initiating a dispute or in defending themselves. The panel and the appeal process have become intensely

technical and legal. The developing countries do not have adequate expertise for this purpose; hence they generally have to depend on the legal firms of major developed countries that are very costly. Besides, the collection of materials for the preparation and presentation of the case involve major effort for which the developing countries do not have adequate resources. The situation is more serious in case of the LDCs.

This creates a serious imbalance in the capacities of the developed and developing countries with regard to the enforcement of rights and obligations. A developing country has to think very hard before initiating a dispute even if it is convinced that its rights have been violated, as it has to weigh the financial burden against the relief through the dispute settlement. Such a dilemma would not be faced by a developed country for which the financial cost of a dispute may not appear so much of a burden.

- (2) Even though it is expected that the Member that has been found to have violated the rules will immediately implement the recommendations of the panel/Appellate Body and thereby give relief to the complainant Member, the ultimate relief for the complainant Member is to resort to retaliation against the other Member if it does not implement the recommendations. In really difficult cases, this may be the reality. And in such a situation, a developing country as a complainant will find itself in a very handicapped position, as retaliation, particularly against a major developed country, may not be a practical alternative. This creates further imbalance of the capacity to enforce the rights and obligations as between strong countries and weak countries, in particular the developing countries, specially the LDCs.
- (3) The panels/Appellate Body has often undertaken the exercise of substantial interpretation of the provisions of the agreements resulting in significant shift in the rights and obligations of Members. In a number of cases in the recent past, the options of the developing countries have got constrained and those of developed countries expanded. For example in the Indonesian car panel case, the panel has held that subsidy for the use of domestic product which is permissible for developing countries under the Agreement on Subsidies cannot be used, as according to the panel, it violates the Agreement on TRIMs. In the shrimp-turtle case, where the victims of trade restrictive measures were the developing countries, the Appellate Body has widened the

scope of taking trade restrictive action. Further, in the gasoline case, the Appellate Body's recommendations have relaxed the disciplines on taking trade restrictive actions for protection of exhaustible resources. In all these cases, the adverse effects are likely to be on the developing countries.

Hence there is a need for developing countries to be vigilant about the working of the DSU and to strive for bringing about improvement in the process.

SUGGESTIONS FOR IMPROVEMENT

There is a need for improvement in the rules and also in the working of the rules. As the Ministerial Meeting is expected to decide on these rules, it is quite timely for the developing countries, including the LDCs to make specific proposals for improvement. Some suggestions are given below.

- (1) In view of what has been said above regarding the financial burden on the developing countries, there is grave need for the General Council to deliberate on the means to reduce the cost of developing countries in the dispute settlement, both as initiators of disputes and as respondents. It should come out with specific decisions in this regard.
- (2) It is advisable to have an institutional arrangement for having a legal cell, preferably outside the frame of the WTO Secretariat, for providing legal assistance to the developing countries, particularly the LDCs, in handling disputes. This cell could also help in developing legal expertise on the WTO rules in the developing countries, particularly the LDCs.
- (3) There is a need for reimbursement of the cost to the developing country if its stand has been found to be correct in the dispute settlement process. When a developing country and a developed country are two opposing parties and the finding is in favour of the developing country, the developed country should pay adequate financial compensation to the developing country towards the cost incurred by it in the dispute.
- (4) As mentioned above, the developing countries would find the ultimate relief through retaliation quite impractical. Hence some alternative means of enforcing the recommendation in such difficult cases is necessary. One way may be to provide for collective action by the

Members in cases where a developing country has been a complainant and a developed country a respondent and the recommendations are not implemented by the developed country.

- (5) Even if the respondent developed country implements the recommendation of the panel/Appellate Body, the relief to the developing country complainant is very limited in the sense that the latter takes corrective action only from a prospective date. But the developing country would have suffered loss in the past too, because of the offending measure having been in existence; but there is no consideration in the system of relief provided by the DSU at present for compensating it for this loss. In cases where a developed country has been found to cause nullification or impairment of benefits to a developing country, the developed country, in addition to taking corrective action promptly, should also give compensation for the period from the start of the dispute to the time of the complete implementation of the recommendations.
- (6) It has been explained above that the substantive interpretation by the panel/Appellate Body has enhanced the obligation and constrained the rights of developing countries in the recent past. Such serious interpretations change the balance of rights and obligations contained in the WTO agreements, which have been accepted by Members as a single undertaking. There is a need for guidance by the General Council to the panels/Appellate Body that it should not engage in any substantial interpretation of the rights and obligations. In cases where it has to go beyond simple interpretations, it should refer the matter to the General Council for guidance.
- (7) As mentioned above, the provision of cross-retaliation is likely to work particularly against the developing countries. This provision should be removed.
- (8) The suggestions given above are in respect of the rules and their operation. What is equally important is that the developing countries, including the LDCs, should try to develop adequate domestic expertise on the WTO agreements and the dispute settlement process. These countries may find it difficult to have these facilities individually; hence they may also make some joint efforts, for example by a few countries together, to share the responsibility for building up this expertise.

Part Three

NEW SUBJECT AREAS INCLUDED IN WTO
WORK PROGRAMME FOR STUDY AND ANALYSIS



Chapter 1

Trade and environment

INTRODUCTION

The consideration of the relationship between trade and environment has assumed an important place in the WTO for some time. A Ministerial Declaration at the Marrakesh meeting established the Committee on Trade and Environment (CTE) with a broad mandate to examine the relationship between trade and environment in the multilateral trading system. The CTE has the twofold responsibility of: (1) identifying the relationship between trade measures and environmental measures to promote sustainable development; and (2) making recommendations on whether any modifications need to be made to the provisions of the multilateral trading system to meet environmental objectives.

The CTE's agenda includes ten items (Box 1). The CTE's work on these agenda items should be given careful consideration, and at the same time, the developing countries, including the LDCs, may identify additional environmental issues of interest to them.

Many developing countries, including the LDCs, have expressed legitimate apprehension about a comprehensive environmental negotiation in the WTO. This position reflects the fact that the existing trade and environment agenda is unbalanced and that developing country issues such as market access, technology transfer and trade in domestically prohibited goods have received inadequate attention. Unless conducted with the interests of LDCs in mind, further inclusion of environmental considerations may encourage the use of trade-restrictive, rather than "enabling measures" such as technology transfer, financial assistance, improved market access, and foreign aid to achieve environmental goals.

Box 1:
The Agenda of the Committee on Trade and Environment

The CTE has been given the mandate to address the following matters:

- (1) The relationship between trade provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements (MEAs);
- (2) The relationship between environmental policies, that are relevant to trade and environmental measures and that have significant trade effects, and the provisions of the multilateral trading system;
- (3) The relationship between the provisions of the multilateral trading system and (a) charges and taxes for environmental purposes; and (b) requirements for environmental purposes relating to products, including standards and technical regulations, packaging, labeling and recycling;
- (4) Transparency of trade measures used for environmental purposes and requirements that have significant trade effects;
- (5) The relationship between the dispute settlement mechanisms in the multilateral trading system and those found in MEAs;
- (6) The effect of environmental measures on market access, especially in relation to developing countries, in particular to the least developed among them, and the environmental benefits of removing trade restrictions and distortions;
- (7) The issue of the exportation of domestically prohibited goods (DPGs);
- (8) The relevant provisions of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS);
- (9) The work programme envisaged in the Decision in Trade in Services and the Environment; and
- (10) Appropriate arrangements for relations with intergovernmental and nongovernmental organizations.

ENVIRONMENT IN THE EXISTING WTO AGREEMENTS

Many aspects of the CTE's work programme touch on the existing environmental provisions in WTO Agreements. These provisions are important to the developing countries, including the LDCs, as in many cases they affect both environmental policy and market access. The

position of the LDCs should reflect their experience with these WTO obligations and with the environmental policies they regulate.

Article XX of GATT 1994

Article XX of the GATT 1994 allows the Members to impose measures that would otherwise contravene their WTO obligations where, among other things, they are “necessary for the protection of human, animal or plant life or health” (XX.b) or “relating to the conservation of exhaustible natural resources”(XX.g). Article XX, in its chapeau, provides the overall guideline that these measures must not, however, be applied in manner that causes “arbitrary or unjustifiable discrimination between countries where the same conditions prevail” or “disguised restrictions on international trade.”

The terms under parentheses mentioned above have been the subjects of repeated consideration, interpretation, controversy and concern. No definite criteria have evolved as to what would determine the “necessity” for applying the measures; however, it is clear that the “necessity test” is required for Article XX.b measures, both in respect of the very application of the measure and in respect of the intensity of the measure. For Article XX.g measures, however, one Appellate Body report of the WTO (Venezuela gasoline dispute) has said that the necessity test is not required; only the nexus between the trade measure and the conservation of the exhaustible natural resource is to be established. But both these types of measures have to satisfy the conditions of the chapeau that there should not be arbitrary or unjustifiable discrimination between countries having similar conditions and the measures should not be disguised restrictions on trade. Hence, a valid argument may be made that even in respect of XX.g measures, though the necessity test is not required, the test for non-existence of disguised trade restriction would involve a substantial examination of the motives and compulsions behind applying the measures.

Agreement on technical barriers to trade (TBT)

The Agreement on TBT provides for formulation and enforcement of technical regulation for goods for the protection, *inter alia*, of human health or safety, animal or plant life or the environment. The Agreement, however, aims at minimizing the impact of national technical regulations,

standards and conformity assessment procedures on international trade. It states that technical regulations – including packaging, marketing and labeling requirements – must not be more trade restrictive than necessary to achieve legitimate government objectives, taking into account the risks that non-fulfillment would create. In assessing such risks, available scientific and technical information, related processing technology and the intended end use of the product should be considered. As well as applying to central governments, provisions of the TBT Agreement apply to technical regulation that are adopted by local government, non-government and regional bodies.

As discussed below, the environmental requirements, most of which are covered by the TBT Agreement, may present difficulties to LDCs seeking to penetrate foreign markets.

- *technical regulations and standards* – such as the requirement that textiles be free of certain environmentally unfriendly dyes – may affect LDC access to developed country markets by setting strict environmental requirements or obliging LDCs to submit their products to complex testing and certification procedures;
- *packaging requirements* may affect LDC exports where packaging is considered environmentally unfriendly, or cannot be recycled in the importing country;
- *eco-labeling schemes*, both voluntary and compulsory, can affect LDC exports to developed country markets. While labeling has also been used effectively by some LDCs as a marketing tool to improve trading opportunities, complex labeling requirements may affect market access,
- *process and production method (PPM) requirements* may affect LDC market access. Here, the main controversy has been about the coverage of the PPMs by the disciplines. The Agreement on TBT provides that the “related” PPMs will be covered, which has been generally considered so far as meaning that only those PPMs will be covered which have an impact on the content and the characteristics of the products. But environmental lobbies are aiming at extending the coverage to the PPMs which, even though not affecting the contents and characteristics of the product, adversely affect the environment at the place of manufacture in the production process.

- *buyers' requirements* in developed countries may impose environmental requirements on LDC exports. Requirements relating to environment, child labour and human rights have in the past affected LDC trading opportunities.

The TBT Agreement provides for the technical assistance to the LDCs in preparing technical regulations, establishing and participating in standardizing bodies, establishing regulatory bodies to assess conformity with technical regulations, and seeking conformity assessment within the territory of other WTO Members. In addition, it offers LDCs special and differential treatment, including more time to comply with their TBT obligations.

Agreement on sanitary and phytosanitary measures (SPS)

The SPS Agreement covers measures to protect human and animal life or health. Among other matters, it provides for protection from risks arising from additives, contaminants, toxins or disease-causing organisms in food, beverages and foodstuffs, as well as for prevention of the establishment or spread of pests. The SPS Agreement aims to ensure that the national health and safety regulations (SPS measures) do not unduly restrict international trade.

It requires the SPS measures that exceed international standards to be based on a risk assessment and scientific evidence. It also states that the measures must not be more trade restrictive than required to achieve the Member's chosen level of sanitary protection. Under the SPS Agreement, Members are also required to notify the WTO of sanitary measures with trade implications, and to set up national inquiry points to respond to information requests.

The SPS Agreement provides for technical assistance to the LDCs to enable them to implement the agreement. Like the TBT Agreement, it also includes provisions of special and differential treatment for developing countries.

Trade-related Aspects of Intellectual Property Rights (TRIPS)

The TRIPS Agreement has environmental implications because it may affect the development of biotechnology, the conservation and use of

biodiversity, the protection of traditional rights and knowledge and the transfer of environmentally friendly technology.

The Agreement on TRIPS provides that a country may or may not patent the plants and animals, but it must provide for patents of microorganisms and non-biological as well as microbiological processes for production of plants and animals. It also makes it obligatory on a country to provide for the protection of plant varieties either by patents or by an effective sui generis system or by a combination of both.

These provisions have important implications for the environment. The conservation and expansion of biodiversity is crucial to the preservation of healthy environment for the life on the earth. And it will depend a good deal on how these provisions are interpreted and implemented.

Further, this agreement provides for patenting of the products of technology and thus gives exclusive rights to the technology holders for the use and production of the patented products. Thus whether the technology for the production of the products relevant to the protection of environment will be easily available to the developing countries will crucially depend on the ability of the countries to put conditions on the patent holders regarding its wide use and dissemination.

Agreement on Subsidies and Countervailing Measures (SCM)

The Agreement on SCM makes the subsidies given to the entities for adaptation to new environmental standards non-actionable within certain limits. Thus it encourages and supports the industry to adopt environment-friendly standards. Of course, such subsidies are mostly prevalent in the developed countries, as the developing countries hardly have the financial resources to widely give such subsidies.

Potential impacts of new trade and environment obligations on LDCs

The WTO environmental obligations discussed above provide an important starting point when developing a positive agenda for LDCs on trade and environment. The following section considers these, and adds to them some additional issues that have not featured prominently in WTO trade and environment deliberations.

Multilateral Environmental Agreements

Considerable attention has been given to the WTO consistency of certain measures in the Multilateral Environmental Agreements (MEAs). MEAs are multilateral measures to address environmental problems that have global consequences, including biodiversity loss, ozone depletion, climate change and hazardous waste transportation. Trade measures are used in MEAs to regulate trade in environmentally harmful products, to create an incentive for broad participation, and to enforce in the event of non-compliance.

It has been questioned whether certain trade measures in MEAs are WTO compatible. In response, a number of countries have suggested that WTO rules could accommodate MEA trade measures by developing criteria for dispute settlement panels, adopting an interpretation or understanding of WTO rules, waiving WTO application to existing MEAs, or amending Article XX to provide an “environmental window” for current and future MEAs that satisfy certain principles.

Two important and basic issues are involved here, viz., (i) whether the trade measures required by the MEAs should be allowed to be imposed without the scrutiny and examination of the conditions prescribed by Article XX of GATT 1994 and other WTO agreements, as discussed above; and (ii) MEAs could be arrived at by only a very few countries coming together to have those particular agreements, and as such, whether it would be proper to have automatic application of their trade measures to countries which are not parties to such agreements.

The disciplines provided in the GATT/WTO Agreements, particularly Article XX, are preventives against protectionist pressures which have been very much prevalent in the developed countries in specific sectors where the developing countries have the advantage of competitiveness in international trade. It will be dangerous to reduce the rigours of these disciplines as it may encourage neoprotectionism which is widely emerging in the developed countries.

Market access and enhanced trading opportunities for environmentally friendly goods and services

Open and predictable market access provides many LDCs with the trading opportunities that allow them to generate income, to reduce

poverty and to obtain resources to implement and enforce effective environmental policy. LDCs should carefully examine the impact of environmental proposals on their market access, as well as options to strengthen preferential market access, particularly for environmentally friendly goods and services.

Enhanced trading opportunities for environmentally friendly products may simultaneously benefit the environment in LDCs, and promote market access. Markets for environmentally friendly products are proliferating. The small initial size of these niche markets, the limited use of harmful chemicals in many LDCs, and the importance of donor support to developing the capacity to produce environmentally friendly products may all operate in favor of LDCs.

Similarly, environmentally friendly services, such as ecotourism, carbon sequestration and, biodiversity protection also hold promise for LDCs. To take advantage of these markets, careful market assessments, additional infrastructure and capacity building will be required.

Besides, some other aspects of market access are relevant to environment: e.g. (i) identification of areas where the removal of trade distortions such as high tariffs, tariff escalation, subsidies and other non-tariff barriers in the developed countries can yield “win-win” results, i.e., additional market access for LDCs as well as environmental benefits; (ii) examination as to whether differential treatment for small and medium-sized enterprises can be accommodated within the WTO system; (iii) promotion of ecolabeling criteria to minimize adverse effects on LDC exports by promoting transparency, avoiding unnecessary obstacles to trade, and ensuring LDCs participate as fully as possible in standard setting bodies.

Domestically prohibited goods

Products that are banned as unsafe in the country of export are referred to as domestically prohibited goods. These products have been exported to developing countries without full information about their environmental and health risks and without the consent of the developing country. In many cases, developing countries lack the information and infrastructure to adequately monitor, and where appropriate, regulate trade in these products.

Precautionary principle

There have been calls for WTO rules to be revised to further implement the precautionary principle. The precautionary principle provides that, where there are threats of serious or irreversible harm, the absence of full scientific certainty shall not be used as a reason to postpone cost-effective measures to prevent environmental damage. It embodies the logic that prevention is often better than cure, and acknowledges that scientific certainty often arrives too late to allow policy makers to formulate policy to avert serious environmental damage. In the trade context, the precautionary principle suggests greater deference by the trade rules, in certain defined circumstances, to national environmental measures.

LDCs should approach the precautionary principle with care, as it may be used to foreclose market access. At the same time LDCs could, for example, consider whether the precautionary principle can be used to develop prior informed consent procedures and, where appropriate, proof by the exporter of a minimum level of safety for trade in inherently risky products, such as domestically prohibited goods, hazardous waste and genetically modified organisms. Finally, LDCs may wish to consider how to balance the relationship between the precautionary principle and sound science to ensure they can both regulate risky products and enhance their market access.

Environmental review of trade agreements

In response to concern about the environmental implications of further trade liberalization, calls have been made for the environmental impact assessment of both past and proposed future trade agreements. The assessment of the effects of trade liberalization provides an important national policy tool to help integrate trade, environment and development policies. It will be relevant to have the environmental assessment focus on issues of concern to LDCs, including subsidies, the dissemination of environmentally friendly technology under the TRIPs Agreement, and trade in products such as domestically prohibited goods and genetically modified organisms. It has also to be ensured that LDCs have additional financial and technical assistance to assess the scale, income and technology effects of further trade liberalization. However, pressures to multilateralize environmental reviews of trade agreements, including through Trade Policy Reviews at the WTO may pose a risk to LDCs.

Domestic financial and technological capacity to address environmental concerns

Sound resource management and environmental policies at the national level should accompany trade liberalization to maximize its contribution to sustainable development. While significant attention has been paid to the use or non-use of trade measures to achieve environmental objectives, less attention has been paid to the use of enabling measures such as financial and technical assistance. A lack of infrastructure, weak institutional capacity and limited resources constrain LDCs from dealing effectively with trade and environment issues. It also limits their ability to meet environmental norms in importing countries, with implications for market access.

Any future agreements on trade and environment should provide resources and advice to enhance policy coherence in LDCs. The strengthening of LDCs' capacity for policy analysis and better coordination between trade and environment policies could reduce some of the obstacles to the achievement of sustainable development. Capacity building in the field of trade and environment, including UNCTAD's technical cooperation programme for LDCs, has an important role to play here. It should be examined as to how far the countries have honoured their Agenda 21 commitments to provide finance, access to technology and capacity building. Such supportive measures, conceivably improve the prospect that trade liberalization will contribute to LDC efforts to achieve sustainable development.

SUGGESTIONS

- LDCs should be careful to ensure that any clarification of Article XX does not encourage unilateral measures, especially those which are applied extra-territorially and based on non-product related PPMs.
- LDCs should examine the scope of the existing TBT disciplines, and consider proposing additional technical assistance and improved domestic capacity to help them comply with importing country environmental requirements.
- LDCs should examine both the role of sanitary measures in protecting national health, and the impact of these measures on their exports to foreign markets. Building the infrastructure to inspect, test and control the quality of exports will often involve significant spending by LDCs.

Unless carefully crafted, foreign SPS measures may have significant impacts on the export by LDCs of meat, fruit and fishery products. Products that do not meet foreign sanitary standards may face special conditions governing imports, or bans.

- The impact of intellectual property rights on LDCs should be carefully examined on the basis of empirical analysis both as part of the TRIPS review and any future negotiations. A positive agenda should consider the effect of the TRIPS Agreement on the transfer of environmentally friendly technology, the development of biotechnology, the protection of traditional rights and knowledge, and the conservation and use of biodiversity. The transfer of technology should be encouraged on “fair and most favourable terms” by ensuring developed countries honour their obligations to provide technical and financial cooperation (Article 67), and incentives to private entities to promote technology transfer to LDCs (Article 66.2).
- The development of biotechnology should be examined to ensure that all patent applications indicate the country of origin of germplasm and whether prior informed consent was obtained to facilitate benefit-sharing arrangements. In addition, LDCs could study the application of Article 27.2, which allows environmentally harmful technologies to be excluded from patentability.
- The protection of biodiversity and traditional knowledge should be encouraged by maintaining the exception in Article 27.3(b), developing sui generis systems to protect traditional medicine and the land races from which germplasm is derived, and resisting moves to harmonize sui generis systems to UPOV 1991.
- LDCs may explore how the non-actionable nature of the subsidy for environmental adaptation can be utilized by them for the benefit of their enterprises, particularly the small and medium-sized enterprises.
- LDCs should ensure that the Members clearly define which domestically prohibited goods should be considered at the WTO, implement concrete mechanisms such as a DPG notification system to increase transparency, and develop enforceable obligations for additional technical assistance to monitor trade in domestically prohibited goods. In addition, the adequacy of other international agreements and their relationship with WTO processes should be examined to ensure full coverage of domestically prohibited goods.

- LDCs could consider promoting strengthened policy coordination at the national and multilateral levels to reduce potential conflicts between MEAs and WTO rules, and encourage developed countries to fulfil their Agenda 21 promise to provide additional financial and technical resources.
- LDCs should strongly resist any proposal that would risk transferring the burden of additional environmental improvement to LDCs, or that would encourage the use of unilateral action, rather than capacity building, financial and technical assistance, and other positive measures.
- In conclusion, three other issues merit the attention of LDCs as part of a positive agenda on trade and environment:

First, LDCs should approach the concept of “mainstreaming” environment into WTO deliberations with caution. While in theory, mainstreaming allows WTO Members to consider environmental issues in each relevant element of the WTO’s work programme, it may overburden LDCs by adding complexity to existing deliberations, disturbing the carefully balanced CTE agenda, and reducing the prospects for trade-offs between different environmental issues.

Second, biotechnology promises to play a prominent role in future trade negotiations. LDCs should carefully track developments on biotechnology in a range of committees and meetings – including those forums where the TRIPS, Agriculture, TBT and SPS Agreements are discussed – to ensure they are coordinated and reflect LDC interests. LDCs should also pay close attention to developments in other international forums such as the Codex Alimentarius Commission and Biosafety Protocol, which may influence how they can regulate imports of genetically modified organisms.

Third, LDCs should consider the relationship between WTO rules and new mechanisms evolving under the UN Climate Change Convention to trade carbon sequestration services. In particular, LDCs may examine how these services can be made tradable under new mechanism such as the “Clean Development Mechanism”.

Chapter 2

Trade and investment

INTRODUCTION

Attempts have been made repeatedly by the major developed countries to bring the subject of investment into the GATT/WTO, as many of them consider it desirable to ensure free operation of their investors, particularly in the developing countries, which have been adopting measures to ensure that foreign investments serve their developmental objectives. The Uruguay Round of Multilateral Trade Negotiations (MTN) included the trade related investment measures as a subject of negotiation.

The major developed countries sought a comprehensive code on investment, based on the principle of free access to foreign markets. The developing countries, however, disagreed with that approach and strongly resisted the moves to subject investment per se to multilateral rules. They argued it was outside the remit of GATT and advocated instead a trade-based approach, whereby investment issues would be subject to multilateral regulation only if they had a direct and significant negative effect on international trade. A number of factors seemed to motivate these countries. From a trade policy perspective, there was a lack of conviction in the merits of applying a free market approach and to treating investment like trade in goods. Whilst from a strategic point of view there was considerable skepticism about the underlying motives of the major developed countries in pursuing this proposal, the developing countries considered it necessary to retain their freedom to use investment policies as a tool for achieving national development objectives and also as a counter-balance to the anticompetitive practices of transnational corporations.

Finally, the resulting agreement, viz., the Agreement on TRIMs, as mentioned in the chapter on TRIMs, was limited to a substantive reiteration of the obligations contained in Articles III and XI of the GATT 1994. It did not add to the obligations already contained in these articles; however it clarified these obligations by specifically mentioning some illustrations of the prohibited measures, i.e., the domestic content requirement and

foreign exchange balancing requirement. It left the issue of considering the investment policy open. The agreement states that in five years, i.e., in 2000, there would be a review to examine whether the agreement should be extended to investment policy and competition policy.

Simultaneously, the General Agreement on Trade in Services (GATS) provided for free movement of capital in so far as it was needed for the supply of services covered by the specific commitment of market access by a country in that specific service sector.

The subject of investment was further pursued by the major developed countries while preparations were going on for the Singapore WTO Ministerial Conference (December 1996). The developing countries again opposed the move. An agreement was reached in Singapore to establish a Working Group to examine the relationship between trade and investment. A similar Working Group was created to examine the interaction between trade and competition policy. These Working Groups were created *“on the understanding that the work undertaken shall not prejudice whether negotiations shall be initiated in the future”*. Further, it was made clear that *“future negotiations, if any, regarding multilateral disciplines in these areas, will take place only after an explicit consensus decision is taken among WTO Members regarding such negotiations”*.

ONGOING WORK IN THE WTO

The Working Group on the Relationship Between Trade and Investment has held discussions on four sets of items, viz.: (1) implications of the relationship between trade and investment for development and economic growth; (2) 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 the discussions in the Working Group the developed countries have often sought to broaden the discussion by beginning to address the possible content of a multilateral investment code. Developing countries have repeatedly drawn attention to the basic question as to whether the very notion of a multilateral framework on investment is compatible with

the need to preserve the ability of governments to pursue development strategies suited to their specific circumstances. Such statements are often followed by a debate on the extent to which an ‘investment friendly’ regime would necessarily be ‘development friendly’.

There have been differences on what types of investments should be covered, i.e., in respect of the definition of investment. The conventional threefold classification distinguishes: (1) foreign direct investment – commonly defined as foreign ownership, alternatively control, of a business or part of a business that is located in another country; (2) portfolio investment – which refers to the purchase by a foreign investor of securities in a domestic enterprise solely to earn a financial return and without any intent to own, control or manage it; and (3) other tradeable property rights – which concern the foreign ownership, alternatively control, of any other asset in another country, such as intellectual property or mining permits. Now some Members (typically developing countries) consider that if there is to be an agreement,¹ then it should cover only the first category, whilst others (most prominently the United States and Japan) wish to have all three brought within a uniform multilateral framework.

The matters presently under consideration fall into two broad categories. One set are technical issues, concerning the effects of international investment, the distribution of its benefits between investor and host, and the efficacy of different forms of regulation. Some of the important issues are the following:

- (1) Whether foreign direct investment is beneficial in terms of the commercial opportunities and profits it provided to the enterprise, and what is its role in the economic development of the host country, and the revenue that the originating country derives from it?
- (2) Whether the regulatory control to liberalize foreign direct investment is necessary to maximize the net gains and how the various, at times competing, interests are to be balanced in any regulation? For instance, what flexibility should be given to the host country to control the activities of investors and to discriminate amongst them in the interests of development? (The issue of balance is elaborated later.)
- (3) Whether multilateral control is likely to deliver any added advantages to the current use of bilateral agreements and voluntary guidelines, or any improvements that may be made to the use of those options?

The other set of issues are more narrowly concerned with the legal implications of an agreement, its scope, whether it should be prohibitive or permissive, how any new arrangement might be reconciled with agreements presently in place and how the agreement should be enforced. Some of the issues are mentioned below.

- (1) What types of measures should be covered and what kind of acts should be prohibited?
- (2) Whether the obligations should be structured like those in the MAI and NAFTA, with a negative list showing all derogations from a commonly accepted set of obligations or like the GATS, with a positive list providing a schedule of concrete commitments that Members are prepared to make?
- (3) How the interests of parties to existing bilateral and regional agreements should be reconciled with the rights that would accrue under a multilateral agreement?
- (4) How the agreement should be enforced and in particular, whether trade sanctions should be permitted to punish non-compliance?

As the content of these two lists would illustrate, the consideration of the investment policy issues is still at a very early stage. With so much technical work still outstanding and with so many serious differences still existing in the perceptions among the countries, it is clearly much too early to begin discussion on whether there should be a multilateral investment regime, let alone starting to detail its form and content.

The heart of the difficulty, particularly for the developing countries, including the LDCs, centres on the 'development issue'. Many of them view foreign investment as a significant part of their national development strategies. They are concerned with not just the direct effects of investment in terms of employment and revenue income, but also the indirect effects that stimulate the growth of local supply networks, improve skills and transfer technology.

Often the objectives of the investor and the host country may not coincide. The investor aims at having quick, high and assured profit; and he will invest in sectors and areas which bring such profits. The host country, on the other hand, wants investments which will produce exportable goods and services or which help in improving its capacity to produce such goods and services. It is interested in channeling the investment for the

development of infrastructure and for technological upgradation. Often it wants investment to flow into specific geographical areas for ensuring regional development. All these complex objectives may not very often harmonize with the interests of the investor. The best situation is when the objectives of the investor and the host country are similar. However, when these are dissimilar, there is a need for the host country to put conditions on the investors. It will be dangerous for the developing countries, particularly the LDCs, if there is erosion of the discretion of the host country in this regard.

It has to be realized that the foreign direct investment involves payment of profits and dividends in foreign exchange. The inflow of the investment in the first two or three years in a project may be balanced by the outflow of profits and dividends in a few years thereafter; and then the outflow on this account may result in net outflow from the country. If the investment has created enough potentiality in the country for exportable production, this continuing future outflow may not be seen to be a burden; however if such benefits have not resulted from the investment, the country will be saddled with the burden of payment, which it may not be able to bear. Besides, it is also desirable for the host country to ensure that the foreign investment helps the development of domestic economic activities and upgradation of the domestic skill.

All this requires that the host countries not give up their role to channel the investment in the ways which are conducive to their development objectives. These considerations must be fully reflected in the ongoing process of examination of the subject in the WTO.

In any case, as mentioned above, a stage has not been reached yet in the study process to start considering whether there should be a multilateral framework for investment. The turn of events in the OECD in this area also gives ground for extreme caution.

OECD PROCESS ON INVESTMENT AGREEMENT

The exercise for having a multilateral agreement on investment had gone on in the OECD for some time in a serious way. A negotiating text of a multilateral agreement emerged in the OECD. It met with a lot of difficulties in the OECD countries. Significant concerns emerged about

sovereignty in several respects, e.g., social and environmental policy and about cultural autonomy. A further concern was that multilateral investment rules might give foreign investors rights not available to domestic investors, for example, the right to subject disputes with the state to arbitration. Ultimately in December 1998, the negotiations in the OECD collapsed.

This experience provides an objective lesson for the developing countries, particularly the LDCs. If the developed countries perceived major adverse implications of an agreement in this area, the situation is likely to be much more adverse for the developing countries, particularly the LDCs.

SUGGESTIONS

- To a large extent the LDCs may be guided by the current conclusions of the Working Group in the WTO. Although considerable work has been carried out (and the OECD, IMF, UNCTAD and the World Bank have all contributed studies), there is nonetheless a lot more still to be done. Whilst of course some work was envisaged and proposed at the outset, other information needs have become more clearly identified as the discussions have progressed and Members have identified additional matters to be investigated. On the basis of its own recommendation, the Working Group obviously does not feel it has made sufficient headway with its mandate 'to examine whether the TRIMs Agreement should be complemented with provisions on investment policy' to make any substantive recommendations. Accordingly, the least developed country Members should simply support the recommendation and refuse, as highly premature, any debate on the actual issues concerned - on the basis that there is little point in establishing a working group only to start debating matters before it has completed its task.
- They should be seeking to have sufficient research work carried out to investigate claims made by the developed countries about the positive impact of a multilateral agreement on flows of foreign direct investment and, therefore, its impact on development. In this connection it will be important to ensure that the scope of the work should be strictly limited in order to avoid prejudice to the positions of Members before the further studies are completed.

- It will be rational and important to oppose strictly any move to upgrade the current examination of the subject into preparation for any form of negotiation.
- The LDCs should also urge that the reasons for the collapse of the OECD negotiations for an agreement in this area should be fully analysed to examine the implications of such an agreement for the LDCs.

NOTE

1. Of course many of them do not consider that a multilateral agreement that moves further than the current TRIMs agreement should be concluded at all and are unhappy about engaging in, what for them, are discussions on hypothetical issues, lest their position be thereby compromised.

Chapter 3

Trade and competition policy

INTRODUCTION

Globalization and trade liberalization has enhanced the role of foreign direct investment (FDI) and the business sector in countries' economies. As the process of globalization intensifies and countries rely more on market forces, the question of ensuring competition and keeping markets functioning efficiently assumes increasing importance. In this environment, the role of appropriate competition policy, which would be conducive to promoting development, has assumed special importance for the developing countries, particularly the LDCs.

Competition policy is intended to combat business practices which have harmful effects on competition and efficient functioning of markets. In general, a well-designed competition policy should encompass policies relating to globalization, liberalization and deregulation, insofar as they have an impact on competition; and particularly in the developing countries, it should be fully in consonance with the development needs and development strategy of the country.

Only few among the LDCs, such as Malawi, the United Republic of Tanzania and Zambia have competition laws and competition authorities. Others, such as, Benin, the Central African Republic and Mali have institutions that are more focused on price regulation rather than on the implementation of competition law and policy. The drafting and enactment of those countries' competition legislations was prompted by the United Nations Conference on Trade and Development (UNCTAD) Set of Principles and Rules for the Control of Restrictive Business Practices (RBPs). The enactment of competition legislation in these countries was facilitated by UNCTAD's work on model laws on Restrictive Business Practices.

In light of the importance of the competition policy as mentioned above, it is relevant to examine the costs and benefits of competition policy in LDCs, as well as the relationship between competition policy and economic growth and development.

The subject of competition policy has lately assumed special significance and urgency for the developing countries, as the major developed countries have been trying to initiate negotiations in the WTO in this area. In this context, it is relevant to outline the discussions going on in the WTO on this subject and to consider the options for the developing countries, particularly the LDCs in this exercise.

The competition policy should be discussed both in respect of its role in the domestic sphere and also its implications regarding cross-border transactions. Often the latter is given less prominence, but it is becoming much more important with the march of globalization, as mentioned above.

COMPETITION POLICY: BENEFITS AND CONSTRAINTS FOR LDCs

Benefits from competition policy

LDC economies are generally characterized by imperfect markets. They usually have a high degree of State involvement in economic production. Many goods are produced and distributed under monopolistic or oligopolistic conditions with a high level of State intervention in terms of price fixing etc.

Given their particular circumstances, and given the fact that competition policy, by complementing trade and regulatory policies, can ensure that economic liberalization results in economic efficiency and enhanced consumer welfare, one appreciates the positive role of appropriate competition policy. With the establishment of competitive prices in its domestic economy, a country will be able to eliminate inefficient structures of production and approach optimal allocation. As a consequence, entrepreneurial activity and investment will be stimulated. Greater domestic competition will lower production costs, stimulate enterprises to undertake research and development in order to improve production methods and develop new products, and thus enhance their international competitiveness. Consumers will also benefit from protection against anticompetitive behaviour that results in higher prices and scarce consumer goods.

Many LDCs have privatized or are in the process of privatizing State-owned enterprises. Competition policy can also play an important role in helping governments ensure that privatization does not result in a mere transformation of state-run monopolies into private monopolies.

Constraints from competition policy

Enhanced competition is, however, not without its problems. LDCs are concerned about attending economic and social upheavals, such as unemployment or threats to the survival of small firms. That sufficient supply capability must first be present in an economy before the benefits of competition could be realized is of serious and fundamental concern for the developing countries, particularly the LDCs. While deregulation should in principle increase opportunities for competition, this may not necessarily happen automatically, because of a number of market imperfections or obstacles to market entry in the developing countries. These include small markets and limited consumer purchasing power, a shortage of entrepreneurs and of production inputs (including physical and human capital), old technology, poor information flows and inadequate distribution and communications infrastructure.

One reason why developing countries have hesitated to adopt competition laws, or have been unable to implement them effectively, is the belief that there is still a role to be played by efficient monopolies in the development process. Particularly in the case of countries with small markets, large national firms are considered appropriate given the need to make the best use of scarce resources, achieve economies of scale in production and operations and thus move towards international competitiveness. Hence, allowing one or a few large firms to hold large market shares may sometimes be desirable or inevitable in some LDCs.

Apart from these considerations for intradomestic firm competition, there is also the important implication regarding the competition as between the foreign firms and the domestic firms of the developing countries. The issues get more pronounced in case of the domestic firms of the LDCs. There is vast difference between the resources, strength and experience of the foreign firms and those of the domestic firms. Hence, the latter will find it extremely difficult to survive if exposed to full competition with the former. And the survival and growth of the domestic firms are essential for the development of these countries. This aspect of the issues

has to be kept very much in mind while engaging in the examination of this subject, particularly in the WTO.

All this may require the formulation of a mix of policies that stimulate competitive behaviour, while at the same time affording appropriate and necessary protection to local enterprises. Successful experience of Japan, the Republic of Korea and Taiwan Province of China provide ample justification for protection in order to encourage investment, the acquisition of technology and export growth.

Anticompetitive practices

The scope for enterprises to engage in anticompetitive practices has widened with the advent of globalization and the structural adjustment reforms adopted by developing countries and most of the LDCs. Structural adjustment has resulted in wide-ranging deregulation (such as reduction or elimination of subsidies, tariff reforms, removal of price controls, exclusivity arrangements or barriers to market exit, and friendlier policies towards FDI, etc.) and greater flexibility for firms to pursue their own interests. There is a risk, therefore, that firms may take advantage of deregulation to engage in restrictive business practices (RBP) in order to entrench their market positions and block market entry - behaviour that had previously been prevented by direct government intervention. In light of the above, this section consists of a review of the main types of anticompetitive practices and the various forms of abuse of market power that competition law and policy is intended to guard against and redress. These practices may be broadly divided into two categories, viz., horizontal and vertical practices.

Horizontal restraints

Horizontal restrictive agreements commonly known as 'cartels', are those concluded between rival or potentially rival enterprises engaged in broadly the same activities. Such agreements usually have the following restrictive objectives or effects: price fixing, market or customer allocation and, reduced production or sales. Price fixing, along with the practices that support it, is one of the most common forms of restrictive business practices and is widely viewed as being fundamentally incompatible with the viability of competition.

Some of the horizontal agreements have an ambiguous effect on competition and welfare. They may, at the same time as reducing the

degree of competition in the market, reduce production costs and increase product and process innovation as well as other positive welfare effects. Such beneficial effects can, in turn, be passed on, partly or fully to consumers, depending on the residual level of competition prevailing in the market.

Examples of horizontal agreements that have positive impacts are: technology and research-sharing arrangements among firms which would otherwise be unable to undertake such research and development due to the high costs involved.

Vertical restraints

Vertical practices encompass collusion amongst enterprises operating at different stages of the vertical production-distribution chain (suppliers and distributors, etc.). They include: resale price maintenance, refusal to deal, exclusive dealing, reciprocal exclusivity, tied selling, predatory pricing, quantity fixing, territorial exclusivity, etc. The most widely practiced restraints are described below.

- (1) *Resale price maintenance* is the act by a manufacturer to fix the price at which he obliges the distributor to sell. This type of restraint is extremely harmful to competition, and can lead to the elimination of price competition among downstream firms.
- (2) *Exclusive dealing* is the undertaking by the manufacturer to give exclusive supply rights to a particular dealer in a given market thus granting the dealer a monopoly in that market. Exclusive dealing is anticompetitive when it results in foreclosing markets for competing firms that are thus deprived access to essential inputs or distribution outlets. However, it can have positive effects such as when it facilitates the development of distribution networks and thereby creates adequate incentive for retailers to invest in promotional efforts.
- (3) *Territorial dealing* occurs when a portion of the retail market is assigned to a specific retailer. In this way intrabrand competition is reduced or eliminated because no other competing distributor is allowed to supply customers in the same territory.
- (4) *Quantity fixing* refers to a vertical contractual arrangement that establishes the quantity of goods retailers are required to buy from the manufacturer. When the demand facing the retailer is known and is directly linked to the final price, quantity fixing is similar to resale price maintenance.

Other vertical practices would normally be evaluated on a case-by-case basis to determine whether they are harmful, neutral, or even beneficial for competition, taking into account any pro-competitive, or efficiency benefits. The likelihood that these vertical restraints will be anticompetitive will depend, in large part, upon market structure, the market shares of firms concerned, the existence of a dominant position of market power, and the portion of market covered by the restraint and entry barriers.

Dominant position of market power refers to the degree of actual or potential control of the market by an enterprise or enterprises acting together or forming an economic entity. Market dominance can be measured on the basis of market shares, total annual turnover, size of assets, number of employees, etc. It should also focus on the ability to manipulate prices above or below their competitive level for a significant period of time. Specific criteria defining market dominance is, however, difficult to delimit.

Occupying a position of market dominance does not in itself, constitute an anticompetitive action. Market dominance must normally be coupled with a specific abuse, involving anticompetitive conduct which could not have occurred otherwise. Such abuse may take the form of exclusionary behaviour aimed at hindering entry or forcing exit of actual or potential competitors through various kinds of monopolistic conduct (e.g., predatory pricing or acquisition of key customers or suppliers). It may also involve exploitative behaviour such as excessive pricing or profits.

COMPETITION POLICY AND THE WTO

Earlier consideration

Competition policy has not been taken up seriously in the GATT/WTO, except during the Singapore Ministerial Meeting in December 1996. Earlier, the question of restrictive business practices had been considered and a Decision had been adopted in November 1960 in the GATT, providing for consultations on restrictive business practices.

This Decision recognized that business practices which restrict competition could hamper the expansion of world trade and economic development in individual countries and thereby frustrate the benefits of

tariff reduction and the removal of quantitative restrictions or could otherwise interfere with the objectives of international cooperation. It also recognized that harmful restrictive practices in international trade could only be dealt with effectively through international cooperation. However, in arriving at this Decision, contracting parties considered that in the prevailing circumstances of that time, it would not be practicable for them to undertake any form of control of such practices nor provide for investigations. Consequently, the Decision recommends that at the request of any contracting party, consultations on harmful restrictive practices should take place on a bilateral or multilateral basis as appropriate.

Later, the subject of the restrictive business practices started being considered in the UNCTAD.

Singapore Ministerial Meeting

The subject was sponsored very strongly in the WTO during the preparation for the WTO Ministerial conference which was to be held in Singapore in December 1996. The major developed countries wanted negotiations to start in the WTO in the area of competition policy. The Agreement on TRIMs, as mentioned before, has the stipulation that there would be a review to examine whether the agreement should be expanded to cover the areas of competition and investment policy. The developing countries took the line that a review was in any case scheduled to commence in 1999, hence, according to them it was premature to consider starting a negotiating in this area. Finally the Singapore Ministerial Meeting of December 1996 decided to set up a working group to study the interaction between trade and competition policy.

Ongoing work

At present, the countries are free to adopt their own competition policy. It is a subject of intensive debate within the Working Group in the WTO as to whether it would be useful for developing countries in general, and LDCs in particular, to be bound by international obligations to adopt and implement competition law effectively. There remains the fundamental question of whether and to what extent it would be useful to include provisions relating to the content or application of competition laws in any binding international agreement in this area. The view that competition has a role to play in economic development has received broad support in the

WTO Working Group. However, it has also been pointed out that a comprehensive competition law might not be strictly necessary to ensure a desired degree of competition.

This concern results from several underlying considerations. First, the argument is made that, at least in the case of small economies characterized by a minimum degree of government intervention in markets, an open trade and investment policy could serve as a substitute for competition policy. In such economies, competition from foreign enterprises could serve as an effective substitute for rivalry among domestic producers in disciplining the exercise of market power. Second, it is argued that, before the benefits of competition could be realized, sufficient supply capability has to be present in an economy and the application of competition policy could make this objective more difficult to achieve. Third, questions and concerns are raised regarding social and economic dislocation that could result from the reliance on competition policy as a tool of economic development. In particular, it is suggested that the application of competition policy could create unemployment and could affect the survival of firms and industries, including small and medium-sized enterprises, and that these effects could not be ignored, particularly in LDCs. Moreover, it is argued that competition policy actually comprises the full range of government measures that have an impact on market structure and conduct, including trade liberalization and sectoral measures; consequently, it is conceivable that a commitment to competition policy need not entail the adoption of a traditional competition law.

It is a matter of serious concern for LDCs that developed countries appear to be focusing mostly on domestic competition policy matters in order to ensure that their firms are not faced with impediments in other countries. Towards this end, their immediate objective is to examine the difficulties arising from domestic competition laws and the effectiveness of enforcement. This implies a subsequent objective to have a framework by which countries will commit themselves to certain minimum standards for domestic competition laws and enforcement procedures.

This can have serious implications for the emergence, survival and growth of domestic firms in the developing countries, particularly the LDCs. A free entry of the foreign firms with enormous resources and full freedom to operate in these countries would have a vastly stifling impact on the domestic firms. A developing country has to take this important factor into

consideration in shaping its competition policy. And it is the role of the developing countries that may be sought to be curtailed through a negotiation in this area in the WTO.

Besides, the major developed countries which are sponsoring this subject in the WTO are reticent about the role of a possible multilateral framework in curbing the anticompetitive practices in international transactions or in monitoring and discouraging the emergence of monopolies or oligopolies in the world through the mergers of firms which are already very big.

In view of the ongoing process of globalization/liberalization with the multinational firms expanding their activities in LDCs, it is increasingly important to seek ways to curb trans-border anticompetitive practices often adopted by these firms. Some of these practices have been discussed in detail earlier. These include: transfer pricing, predatory pricing, collusive tendering, private sharing of markets, formation of export and import cartels, as well as other strategic alliances among firms, which may not appear to be directly anticompetitive, but may indirectly constrain competition.

Liberalization may be counter productive if it is implemented before LDCs have established the institutions and control mechanisms necessary to prevent local or foreign firms from abusing their newly gained freedom. New and effective multilateral action with an efficient enforcement mechanism could be relevant and vital. LDC efforts to eliminate or curb such anticompetitive practices through domestic regulation and procedures may not be adequate. Hence if there is to be any multilateral framework for competition policy, it must enable and aid the developing countries, specially the LDCs, in controlling and checking such anticompetitive actions of the multinational entities.

Further, in several sectors, mergers and takeovers are taking place in the world. Already there is limited competition in several areas in the world economic activities; these waves of mergers and takeovers reduce the competition in international arena still more. Hence any possible multilateral framework on competition has to have an effective role in this regard.

All these vital considerations should fully inform the discussions going on in the Working Group in the WTO.

SUGGESTIONS

- LDCs should take into account their own developmental needs, circumstances and institutional endowments when formulating and implementing competition policy. It will naturally be a dynamic process. A fundamental question is whether competition is applicable in all cases and whether it should always be advocated. While it is true that competition policy fosters economic efficiency, economic growth and international competitiveness, it is also a fact that the conditions of market failure in LDCs may render competition law and policies ineffective or difficult to enforce. Peculiar market conditions may also render competition policies inappropriate in LDC, at least in the short term. The competition policy should have development as a core dimension. In formulating their competition policies, the LDCs should try to strike a balance between two objectives, viz., the interests of the consumers and the imperatives of creating proper environment for the growth of economic entities.
- In the context of trade liberalization and globalization and increased foreign direct investment, anticompetitive practices are becoming not only more prevalent but also increasingly international in scope. A rigorous national competition policy may therefore be necessary to respond appropriately to these concerns and to ensure that the benefits of trade liberalization and globalization are not being lost due to the anticompetitive practices of the multinational firms operating in the country.
- Effective differential treatment to the domestic firms as compared to the foreign firms in the competition policy in developing countries, including the LDCs, will be appropriate and necessary, considering the handicaps of the domestic firms in standing in competition with the foreign firms.
- From the LDCs' perspective, a major concern with opting for a 'level playing field' embodied in a multilateral standards for competition law and policy, is the exposure of their relatively weaker firms to compete with strong foreign firms. It may result in further marginalization of their economies. Full flexibility would have to be afforded to the developing countries, particularly the LDCs, any possible multilateral framework to cater to this concern, especially with regard to small and medium enterprises, which will be the most adversely affected by competition from foreign firms.

- Considerations in the Working Group and evolution of any possible future multilateral framework should also include the following essential elements:
 - Adequate disciplines should be enforced on the multilateral entities to eliminate or curb any anticompetitive practices. Thus there should be appropriate and enforceable obligations on them.
 - The home countries of these firms should also have enforceable obligations in respect of eliminating or curbing their anticompetitive practices.
 - There should be proper monitoring role and some type of supervisory role of a possible multilateral framework over the big mergers and takeovers in the world which may have direct effect on competition in the particular area.
- Technical cooperation from developed countries will likely be an important factor in facilitating LDC competition authorities to take action against anticompetitive behaviour in domestic markets.
- The developing countries, including the LDCs, should have the concerns mentioned above effectively reflected in the ongoing consideration of the subject in the WTO Working Group. Also, these elements should be the basic starting points in the evolution of any possible future multilateral framework in this area.

Chapter 4

Transparency in Government Procurement

INTRODUCTION

In almost all countries, governments and their agencies are significant buyers of goods and services. Depending on the economic system of a country, central government purchases of goods and services typically account for some 10 to 15 per cent of gross domestic product (GDP). The figure is often higher if account is taken of the purchases of public enterprises, regulated utilities, regional governments and municipalities. Despite the present trend in most of the countries towards lesser government intervention and privatization of public utilities (like those producing water and electricity) and of the other public enterprises producing goods and services, it is expected that the purchases by government will continue to constitute a significant proportion of the GDP.

RULES OF GATT

When GATT was being negotiated, a number of countries required their government departments and agencies to accord price preferences to domestic producers and to buy foreign goods only if domestic prices were higher beyond a certain limit (say, 10 per cent) than the prices of imported products. In addition, where goods were imported, purchasing agencies were often obliged to buy from suppliers in countries with which their governments had close trade relations or political ties. These practices were inconsistent with the national treatment and MFN rules of GATT.

Since most of the governments participating in the negotiations were unwilling at that time to change their practices relating to purchases by governments, it was agreed that GATT rules should specifically exclude "procurement by government agencies of goods for their own use and not intended for commercial sale", from the application of the MFN and

national treatment rules. In relation to the MFN principle, however, it was provided that while countries were not expected to abide fully by this principle, they would, in making their purchases in outside countries, extend to suppliers from different countries, “treatment that is fair and equitable”.

AGREEMENT ON GOVERNMENT PROCUREMENT (GPA)

Efforts to bring purchases by governments under the discipline of GATT, were however renewed soon after the GATT came into existence. The major step towards this was taken in the seventies when in the Tokyo Round, Agreement on Government Procurement, was adopted. It has been extensively revised in the Uruguay Round. The Agreement on Government Procurement negotiated in the Uruguay Round (hereinafter referred to as GPA) is a plurilateral Agreement. In other words, unlike the other WTO agreements, whose provisions are binding on all member countries, the obligation which the Agreement imposes are binding only on those countries that are signatories.

The provisions of the GPA apply both to trade in goods and services. However, its coverage is limited only to the procurement made by the purchasing agencies procuring goods and services specified in each country’s Annex.

The obligations which the GPA imposes can be broadly divided into two categories: substantive and procedural.

Important among the substantive obligations are the provisions which require purchasing agencies to apply MFN and national treatment to goods and to service contracts awarded that are above a specified threshold.

The procedural obligations cover rules aiming at ensuring that:

- (1) Tendering procedures remain open and transparent and provide an opportunity to all interested foreign suppliers to participate;
- (2) Transparency of post-award decisions; and
- (3) Challenge procedures providing remedies to both domestic and foreign suppliers as well as to the governments of foreign suppliers which consider that the contract has been awarded in violation of the rules of the Agreement.

Detailed description of the rules of the Agreement is contained in Annex.

At present, while all developed countries have become signatories to GPA, only three developing countries, which are at higher stage of development (viz. Singapore, Republic of Korea and Hong Kong-China) have become its members. The large majority of developing countries and countries in transition are, therefore, not bound by substantive and procedural obligations which the GPA imposes. They are only required to abide by the more flexible rules contained in GATT described above.

REASONS FOR THE RELUCTANCE OF DEVELOPING COUNTRIES TO ACCEDE TO GPA

The main reasons for the reluctance of developing countries to accede to the Agreement are the following:

- The gains for exports that would flow from membership of the GPA are likely to be marginal for most of the developing countries because of the nature of products generally purchased by procurement agencies in these countries and the difficulties in participation. On the other hand, the major beneficiaries of the improved access to their markets that would result from the membership of the Agreement, are likely to be the manufacturing and service industries in the developed countries;
- There may be potential for development of trade of developing countries in the procurement sector on a regional basis. But for this membership of the GPA it is not necessary.
- The efficiency gains for the majority of developing countries from the application of the Agreement's rules by procurement agencies may not be significant as :

the practice of purchasing goods by issuing tenders is widely prevalent; in the case of low income and least developed countries, where the high proportion of governmental expenditure is financed through financial assistance received from international financial institutions and donor countries, purchases are made by applying World Bank guidelines, whose provisions are similar in many respects, to those of the GPA. Further, the GPA rules cannot be applied to purchases made

against aid which is tied to purchases being made from the aid giving country. Proportion of such aid, in total bilateral assistance is quite high, particularly in the case of least developed countries.

Thus, while membership of GPA would not necessarily result in higher exports or efficiency gains, the developing countries would have to do away with their practices which require purchasing agencies to give price preferences to domestic suppliers, if they become signatories to the GPA. The policies requiring purchasing agencies to show preference to domestic producers are adopted by these countries, inter alia, to encourage development of small-scale industries and of backward regions.

GENESIS OF THE PROPOSAL FOR AGREEMENT ON TRANSPARENCY IN GOVERNMENT PROCUREMENT

In order to prepare developing and other countries which are not as yet members of the GPA, it was decided at the Singapore Ministerial meeting, as a result of the initiative taken by some of the developed countries (viz. United States and the EU) to establish in WTO a working group to conduct a study on transparency in Government procurement in order to develop interim agreement on transparency in government procurement. Membership of the agreement would be obligatory for all WTO member countries. The main advantages which, according to the proponents of the proposal, are expected to accrue countries are:

- efficiency gains from purchases being obtained at best value;
- improvement in capacity to deal effectively with “corruption” which is considered widely prevalent in many developing countries in relation to goods and services procured by governments.

PROGRESS IN THE WORK OF THE WORKING GROUP

The Working Group has been able to identify broadly, as a result of the work done so far, the main elements that may be included in an agreement on transparency in government procurement. In doing this, the Group has taken into account, the relevant provisions not only in GPA, but also those in World Bank Guidelines on Government Procurement, UNCITRAL

Model Law on Procurement of goods, Construction and services and national laws.

The elements that have been identified as of being important in ensuring transparency in government procurement can be broadly divided into two categories:

- those applicable before the contract is awarded; and
- those applicable after the contract is awarded.

The elements which would be considered for inclusion under the first category include:

- requirement that purchases above agreed threshold level should be made only by issuing tenders;
- rules and conditions governing the tendering (open, selective and limited or negotiated tenders);
- publication of notices inviting tenders and of procedures for submission and opening of tenders.

The main elements that would be considered for inclusion under the second category (i.e., after the contract is awarded) aim at providing information to the public and at providing for remedies to suppliers who consider that the contract has been awarded in violation of the rules. These are:

- publication of a notice after the contract is awarded for giving information to the general public on the type of procedures used in inviting tenders (open, selective or negotiated); the name and address of the winning tenderer and the price of the contract; the highest and lowest prices of tenders received;
- obligation on government of the procuring government to provide, if required, similar information to the government of the unsuccessful tenderer;
- establishment of an impartial review body to hear “challenges” from unsuccessful domestic and foreign suppliers of alleged breaches of the provisions of the agreement or of allegations that contract has been awarded for corrupt reasons.

- obligation on purchasing entities to provide an unsuccessful tenderer reasons why his tender was not accepted;
- right to the governments to bring the matter to the Dispute Settlement Body, in case the unsuccessful tenderer from its country consider that the contract has been awarded in breach of the rules of the Agreement.

SUGGESTIONS

From the discussions in the Working Group, it appears that the aim of the developed countries is to include in the proposed agreement on transparency almost all of the provisions of the GPA except those relating to the application by the purchasing agencies of the MFN and national treatment principles. The obligations of the GPA applies not only to central government purchasing agencies but also in the case of federal governments to state government authorities and to municipalities. Many of these agencies have a degree of autonomy and in practice the only authority which the governments have in ensuring compliance is that of persuasion. The experience of the operation of the GPA has shown that even developed countries are finding it difficult to ensure compliance by their purchasing agencies of a number of procedural obligations which it imposes. Such problems in ensuring implementation are likely to be more in the case of developing countries particularly those, which are least developed, whose governments would have the difficult task of ensuring detailed procedural rules which the proposed Agreement on Transparency lays down are followed by hundreds of purchasing agencies in their countries.

Taking into account practical problems which are likely to be encountered in implementing the Agreement, it would be desirable to see that the rules of the Agreement in the first instance apply to purchases made by central government bodies and only of products (goods) “purchased for governmental purposes and not with a view to commercial sale or with a view to use in production of goods for commercial sale, above agreed threshold level”. The coverage of the Agreement should not extend to the purchases made by central government agencies of services.

- The Agreement adopted should impose obligations on governments to make their best endeavours to require purchasing agencies, to abide by the rules and not to impose binding obligations.

- Compliance of the rules should be secured through establishment of appropriate mechanisms for consultations in the Committee that maybe established under the provisions of the Agreement and not through invocation of dispute settlement procedures.
- The rules on transparency should not require countries to change their existing practices to give preferences to their domestic suppliers, for the attainment developmental, industrial, social and environmental policy objectives.

ANNEX

Main features of the GPA

The GPA establishes an agreed framework of rights and obligations among its parties with respect to their national laws, regulations, procedures and practices in the area of government procurement. It applies to both goods and services.¹ The cornerstone of the agreement is the principle of non-discrimination, as between the sources of supply and as between the foreign supplies and domestic supplies. The agreement puts the obligation on governments to accord the products, services and the suppliers of the goods and services no less favourable treatment, than that accorded to domestic products, services and suppliers (national treatment), and that accorded to products, services and suppliers of any other party to the GPA (MFN among the participating countries). Further, governments must not discriminate between locally established suppliers on the basis of the country of production of the goods or services being supplied (Articles III.1 and III.2).

The use of offset-measures such as domestic content requirements, compulsory licensing of technology, investment requirements, counter-trade or similar measures designed to encourage local development or improve balance of payments, are explicitly prohibited by the agreement. However, at the time of their accession, the developing countries may negotiate conditions for the use of offset-measures, provided that these are used only for the qualification to participate in the procurement process and not as criteria for awarding contracts (Article XVI).

Special provisions for developing countries

Special and differential treatment is accorded by the agreement to developing countries, including the LDCs, in recognition of their specific developmental, financial and trade needs (Article V.1). Article V.3-7 makes allowances for developmental objectives of developing countries to be taken into account in the negotiation of coverage of procurement by entities in developed and developing countries. Article V also contains provisions that oblige developed countries to: provide technical assistance to developing countries (article V.8-11); establish information centres for procurement practices and procedures in order to better respond to

requests for information by parties from developing countries, including providing, upon request, assistance to potential tenderers in LDCs in submitting their tenders (Article V11, V12, V13).

Developing countries may negotiate mutually acceptable exclusions from the rules on national treatment with respect to certain entities, products or services (Article V.4). Such negotiations may even be initiated after the signing of the agreement (Article V.5). Theoretically, the scope for maintaining discriminatory procurement policies exists for the developing countries, but in actual practice it may not be really useful and is very burdensome, as it must be negotiated on a case-by-case, item-by-item basis, and is therefore inherently limited in its advantage by the relatively weak negotiating power of the country seeking accession. The scheme of the obligation is such that all areas of government procurement are open to the suppliers from all participating countries, except for those areas which have been negotiated as exceptions.

Enforcement

Challenge procedures

Article XX of the GPA sets out mandatory requirements for the establishment of a domestic bid challenge mechanism. Thus, bidders that believe that a tender has been handled inconsistently with the requirements of the GPA may seek the correction of a breach of the agreement or compensation for damages. Compensation, however, is limited to costs for tender preparation or protest. Pending the outcome of the challenge, the tribunal must be able to effect rapid interim measures, including the suspension of the procurement process, in order to correct breaches of the agreement and to preserve commercial opportunities. The domestic challenge mechanism is complemented by the WTO's multilateral dispute settlement process.

WTO dispute settlement

Disputes between GPA parties are subject to WTO rules and procedures that govern the settlement of disputes (Article XXII.1). Because of the plurilateral nature of the Agreement, Article XXII contains a number of special rules or procedures (Article XXII.3 - 6). Of particular interest is the provision disallowing 'cross-retaliation' - the suspension of concessions or other obligations under the WTO Agreements as a result of disputes arising

under the GPA, or vice versa (Article XXII.7). Moreover, the WTO dispute settlement body (DSB), has the power to authorize consultations among disputing parties regarding remedies when the withdrawal of violating measures is not possible (Article XXII:3).

NOTE

1. The obligations of the Agreement however apply to the purchases of goods and services made by procurement entities listed by each member country in the Annex. The Annex is an integral part of the Agreement.

Annexes

- I. Note on Labour Standards
- II. Integrating Least Developed Countries into the Global Economy: Proposals for a Comprehensive New Plan of Action in the Context of the Third WTO Ministerial Conference



Annex I

Note on labour standards

DEVELOPMENT OF INTERNATIONAL LABOUR STANDARDS

The development of international labour standards has a long but not particularly distinguished history, which predates the establishment of the ILO in 1919. It has been and remains a highly controversial area between certain developed countries, principally the United States, and developing countries. Many developed countries contend that there is a link between labour regulation and international competitiveness, which merits the inclusion of a 'social clause' in the WTO agreements with the ability to impose trade sanctions in the event of non-compliance. These arguments are fortified by moral concerns over the welfare of children and others working in exploitative conditions. By and large the developing countries reject any attempt to include such a clause, seeing it as a means of masking a protectionist attempt to erode their competitive advantage in lower employment costs by the strategic use of trade sanctions. They claim that issues relating to international labour standards are properly within the province of the ILO and, more significantly for the matters at issue here, lie outside the ambit of the WTO.

There are over 176 ILO drafted Conventions on labour standards currently in force. The number and pattern of ratifications varies considerably across countries. Ratification by a country implies that the particular Convention will be incorporated into law. In any event, it subjects the country to regular supervision by the ILO.¹ The ILO approach is essentially 'non-enforceable compliance'. It works with countries and organizations, conducting research and providing guidance and technical advice to achieve a mutually satisfactory solution.

However, achieving agreement on which labour standards should be considered 'core' has proved to be far from straightforward. This is largely because some countries believed that core labour standards should be those that relate to fundamental human rights, such as the 'prohibition on

forced or compulsory labour'. Whilst others, notably the United States, have sought multilateral agreement on a number of labour standards, which also included economic rights relating to working conditions such as 'rest periods'. The distinction between the two is not always easy to make as standards at the workplace, which many regard as economic rights, can shade into fundamental human rights where matters such as the 'elimination of employment discrimination' are concerned. The ILO recognizes the validity of the distinction between the 'fundamental human rights' of workers, which it considers needs no economic rationale at all but rest on moral arguments² and 'technical standards', which relate to matters such as occupational health and safety, minimum wages and social protection' and can be regarded as 'development-dependent'.³ Having said that, the ILO considers that the absence of discrimination at the workplace, although often classified as a matter of conditions at the workplace, is nonetheless a fundamental human right.

Notwithstanding United States concerns with standards on workplace conditions, the following labour standards are considered by some developed countries as trade-related⁴: (1) freedom of association;⁵ (2) right to collective bargaining;⁶ (3) prohibition of forced labour;⁷ (4) equality of treatment and non-discrimination in employment;⁸ and (5) minimum age.⁹ Nevertheless, there has been far from universal ratification of the ILO Conventions that embody those standards. In particular, and despite its concern with establishing international labour standards, the United States has yet to ratify the Conventions whilst many European countries had done so by 1995.¹⁰ Now, to some extent this may be attributable to inflexibility in the wording of the Conventions and therefore difficulties in incorporating the Conventions into domestic legislation. However, it does indicate that the task of achieving the detail of an agreed set of standards to be adhered to by the international community is likely to be far from easy.

In the absence of an international agreement the advocates of a 'social clause' have taken both regional and unilateral measures. At a regional level NAFTA includes a side agreement on labour, the North American Agreement on Labour Cooperation. Although the agreement recognizes the right of each country to make its own laws, it does permit trade sanctions and penalty to be used to enforce them where violations of child labour, minimum employment, and occupational health and safety standards are concerned. The EU revised its Social Charter in 1990 and incorporated the Maastricht Protocol on Social Policy and a number of

labour directives have been established, for example on health and safety at work and parental leave. As to unilateral measures, the United States has possibly been the most active. For example, the Caribbean Basin Initiative of 1983 permitted preferential access to the United States market to be withheld for failure to adhere to labour standards and between 1987 and 1993 Nicaragua's GSP privileges were withdrawn for violations of workers' rights and 22 others had their privileges temporarily suspended.¹¹

Furthermore, since the late 1980s there has been a proliferation of codes of conduct by transnational corporations, often formulated with the participation of enterprise associations, workers organizations and NGOs.¹² The vast majority of these codes relate to 'business ethics', however a significant and growing number of them concern labour practices. Enterprises, consumers and investors have also developed their own means of applying pressure on countries to adopt appropriate labour standards, such as the 'social labeling' of products and 'socially responsible investment'.¹³

The extent and variety of activity in respect of labour standards has fueled the argument for the development of a harmonized set of enforceable core labour standards.

WTO INVOLVEMENT UP TO THE SINGAPORE CONFERENCE

At almost every opportunity the United States and other developed countries, particularly France and Belgium, have attempted to have labour standards included in the multilateral trade agreements. The failed Havana Charter of 1947 for the establishment of the International Trade Organisation referred to 'fair labour standards' and the 'maintenance of unfair conditions in production for export giving rise to difficulties in international trade'. Article 7 of the Charter permitted Members to take 'appropriate action to eradicate such unfair conditions'. However, subsequent efforts to include such provisions in multilateral trade agreements have been resolutely resisted.

The only reference in the original GATT to labour standards is to be found in article XX on general exceptions, which includes a provision at sub-paragraph (e) that entitles Members to adopt measures "relating to the products of prison labour".¹⁴ In 1953 the US sought to have included in

GATT a provision that 'unfair labour standards, especially in export production, create difficulties in international trade which nullify or impair benefits under the Agreement'. Significantly, labour standards were to be considered unfair 'if they were maintained at levels below those which the productivity of the industry and the economy at large would justify'. The proposal was rejected, although the United States maintained that trade difficulties associated with labour standards were nonetheless actionable under article XXIII on nullification or impairment.

A further attempt was made during the Uruguay Round negotiations. Although no provisions on labour standards were included, the US and France managed to secure a commitment made in the closing remarks of the Chairman at the Marrakesh Ministerial Meeting in April 1994, that there would be further deliberation on the issue. That kept the door open, although it did not have the effect of placing the subject on the WTO's built-in agenda of work.

Predictably enough, the issue arose again during the First WTO Ministerial Conference at Singapore in December 1996, even though it was not an agenda item. This was partly because developed countries felt that it was 'unfinished business' but also because of the pressure exerted on governments due to high unemployment levels at home. There was also a growing perception, albeit not always a well-informed view, that increased trade liberalization had exposed the products of developed countries to 'unfair competition' from low-wage developing countries, where lower labour standards were an important element in the 'unfairness'. Such factors kept the pressure on developed countries to demand enforceable labour standards of developing countries.

During the many negotiations and discussions that took place during the Conference, the developing countries showed equal determination to retain any competitive advantage they might have and resist all allegations of 'unfair competition'. They were not convinced that any lack of adherence to core labour standards had been an important source of advantage to them. They were also concerned with a 'thin edge of the wedge' type situation, namely that once core, human rights-type, standards were included other standards concerned with conditions in the work place would be introduced, which would significantly increase the opportunities for retaliatory trade sanctions. There was also a deep skepticism about the real motives of the United States. Many developing

countries were convinced that if a social clause were included it would be abused and used to protect the products of developed countries.

Given the deep divisions on this issue between the two groups of Members, it is hardly surprising that the United States was unable to gain agreement to set up even a 'modest work programme' in the WTO in collaboration with the ILO to address the relationship between trade and labour standards.

The concerns of those countries and the difficulties experienced in the negotiations are evident in the carefully crafted paragraph on core standards in the final Declaration: *"We renew our commitment to the observance of internationally recognised core labour standards. The International Labour Organisation (ILO) is the competent body to set and deal with those standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalisation contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put in question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration."*¹⁵

There were prolonged negotiations on whether to include any reference to core labour standards in the final text at all. Eventually it was agreed to do so in order to give the statements the force of the 'official view of the WTO'. Even so, some developing countries were concerned that the wording of the final sentence, referring to 'WTO and ILO Secretariats continuing their existing collaboration', might have left open the door for a social clause to be introduced later on, which was not their intention. The Chairman of the Ministerial Conference¹⁶ specifically addressed that concern in his concluding speech: "... with regard to paragraph 4 – Core Labour Standards – we have agreed on a text which sets out a balanced framework for how this matter is to be dealt with. The text embodies the following important elements: ... it does not inscribe the relationship between trade and core labour standards on the WTO agenda ... there is no authorisation in the text for any new work on this issue ... we note that the WTO and the ILO Secretariats will continue their existing collaboration, as with many intergovernmental organisations. The collaboration respects fully the respective and separate mandates of the two Organisations. Some

delegates had expressed the concern that this text may lead the WTO to acquire a competence to undertake further work in the relationship between trade and core labour standards. I want to assure these delegations that this text will not permit such a development.”

WTO WORK PROGRAMME

The Ministerial Declaration at the Singapore Conference would seem therefore to have confirmed that issues concerned with core labour standards - whether the development of such standards, the inclusion of a social clause or any related work - are not at present on the WTO work programme. Accordingly, and for obvious reasons there are no WTO committees or working groups established to deal with trade-related labour standards issues.

Further, although the United States and developing country Members seem to disagree on the significance of the ‘Singapore Declaration’, there is general recognition that international agreement on the use of trade sanctions to ensure compliance with core labour standards is unlikely to be achieved at present.

KEY ISSUES

Although there is no WTO work programme, the WTO Secretariat has nonetheless participated in meetings with the ILO and engaged in informal exchanges in furtherance of the terms of the ‘Singapore Declaration’¹⁷. The results of the work of the ILO and the other bodies and organizations have been discussed extensively in the ILO Working Party on the Social Dimensions of the Liberalisation of International Trade at which the WTO Secretariat has observer status.

In addition to the meetings of the ILO Working Party, there have also been meetings of the ILO, OECD and groups of developing countries, at which labour standards and trade policy have been discussed. The ILO and the other multilateral organisations have also carried out research on matters concerned with the impact of labour standards on trade. The existence of such an economic link of course underpins the argument for

the inclusion of a social clause in the WTO Agreements with trade sanctions to enforce it.

The opposition of developing countries to a social clause in the WTO Agreements backed up by trade sanctions, appears to have hardened since the Singapore Conference. Both outside of the ILO and within its working parties their comments have been trenchant. For example the final Communiqué of the 7th Summit of the Heads of Government of the Group of 15,¹⁸ the first meeting after the Singapore Conference, the Communiqué states: “Low wages in developing countries are not responsible for the loss of jobs in the developed countries. This has been acknowledged by the G-7 as they have attributed unemployment and economic insecurity in the developed countries to rapid technological and demographic changes rather than to competition from developing countries ... We are committed to promoting core labour standards but reject their use for protectionist purposes.” Whilst the conviction of the United States and other developed countries appears to have been undiminished albeit their argument has been made more difficult by the results of research carried out by the OECD,¹⁹ ILO,²⁰ IMF²¹ and the World Bank.²²

Then at the 86th Session of the International Labour Conference in Geneva on 18 June 1998, the ILO ‘Declaration on Fundamental Principles and Rights at Work’ and its ‘Follow-up’ were adopted. One of its recitals acknowledges: “Whereas the ILO is the constitutionally mandated international organisation and the competent body to set and deal with international labour standards ...”. The Declaration urges all Members to ratify the ILO Conventions on the 4 core labour standards and work to implement them.²³ However, the developing countries were again successful in inserting a clause stressing that: (1) labour standards should not be used for protectionist purposes; (2) the Declaration should not be used to legitimise such action; and (3) the Declaration should not call into question the comparative advantage of any Member.

At the meeting of the Working Party on 3 March 1999 further, targeted, research on the social impact of globalization was called for as an essential part of the process of achieving broad acceptance of core labour standards. The ILO Task Force, which has been conducting a series of country studies,²⁴ has a mandate to address the issue of the relationship between core labour standards and economic development and, if appropriate, to

formulate an analytical framework as the first step in implementing such standards.

The issues discussed above have been distilled from the very different views of the United States and other developed countries and those of the least developed and developing countries, as well as the available research. There are basically 4 categories of issues: (1) technical; (2) legal; and (3) political; and (4) institutional.

The technical issues concern the fundamental questions of whether the lack of adherence to core labour standards does indeed tend to distort trade and is likely to produce a 'race to the bottom' in standards, as well as whether sanctions would constitute an effective response. The legal issues concern definition and whether as a matter of international law such 'harmonised standards' should be made enforceable by trade action. The political and institutional issues concern the questions of protectionist use and the appropriate forum. In the case of the ILO, which many developed and developing countries alike regard as the natural forum for labour-related issues, it has a different ethos than the WTO. It proceeds far more by way of voluntary action, consensus building and persuasion. As some developed countries are of the view that its method of operation is inappropriate to the task of securing compliance, there is an issue as to whether and if so how, its procedures should be modified or strengthened.

As regards the technical issues, recent studies by the World Bank and IMF have come out against trade sanctions to force compliance with core labour standards. The research for the World Bank concludes that 'there is little economic basis for a social clause based on labour standards in the WTO'. Whilst on the question of linkages between core labour standards and international trade policy, it concludes that 'deficient provision of core labour standards, rather than improving export competitiveness, generally diminishes it because of the distortionary effects of such deficiencies and, therefore, widely expressed concerns about the negative impacts of limited standards in developing countries on employment, wages and labour standards in developed countries are largely misplaced'.²⁵

The results of the IMF research also concludes that the developed countries' concerns are misplaced and rejects the suggestion that there might be a 'race to the bottom' as countries compete to attract capital. It concludes further that there is a 'danger that workers in developing

countries are likely to be harmed rather than helped by international harmonization of standards relating to conditions of work, especially if they are enforced through trade sanctions'. Rather increased economic growth is advocated, facilitated by increased international trade.²⁶

PROPOSALS FOR A POSITIVE AGENDA

Although consideration of the inclusion of core labour standards, the social clause, into WTO Agreements is not presently on the WTO work programme, experience suggests that the issue is likely to re-emerge. So notwithstanding the absence of the subject from the work programme and the fact that it is therefore not part of any study process, the following proposal is made:

Proposal 1: Least developed country Members should continue in their opposition to the inclusion of core labour standards in the work of the WTO, including resistance to any consideration/discussion of a social clause with trade sanctions imposed through the WTO. Their previous position should be maintained, namely that the correct forum for the discussion of labour standards is the ILO.

Aside from the WTO, least developed country Members should be vigilant in other forums and monitor developments at the ILO in particular. There is a critical and well-accepted distinction to be made between standards related to fundamental human rights and those related to employment conditions that are largely development dependent. Least developed countries should ensure that the distinction is maintained, so as to prevent the moral arguments over the former being to be used to bolster the otherwise less compelling arguments on the latter.

The least developed countries should also take every opportunity to remind the proponents of a set of core standards enforceable by trade sanctions, that independent research conducted by the multilateral organizations does not support a link between lower labour standards in developing countries and a competitive trade advantage. Nor does it suggest a link between such standards and unemployment and the trends towards outsourcing and relocation to developing countries. Furthermore, such research does not suggest that there would be any merit in using trade sanctions to ensure compliance.

The other fault line in the arguments of the developed countries and one which needs to be exploited, is their dual objective of improving the lot of the workers in developing countries and helping their own people by removing 'unfair competition'. The least developed countries should remind those developed countries at every opportunity that not only does the research fail to support the second limb of the argument, it suggests that it might actually be harmful to the first. They should advocate a strategy of targeted assistance to help increase living standards as more appropriate to the aim of getting core labour standards not just accepted by developing countries but also getting them to implement and enforce such standards.

Finally, least developed countries should monitor the position on the increased use of codes of conduct by enterprises and organizations operating in developing countries to ensure that their practices do not amount to unjustified non-tariff barriers.

NOTES

- 1 Exceptionally, in the case of 'freedom of association', the ILO is entitled to supervise irrespective of whether the relevant Conventions have been ratified.
- 2 The link between labour standards and economic impact on trade, is of course important for the proponents of the 'social clause', for that 'legitimises' the attempts to bring labour standards within the WTO and render non-compliance subject to trade sanctions.
- 3 Proceedings of the Working Party on the Social Dimensions of the Liberalisation of International Trade, 270th Session, Geneva, November 1997 – agenda item 1(d) GB.270/WP/SDL/1/4.
- 4 Stephen Golub, April 1997, International Labour Standards and International Trade, IMF Working Paper, 1997 WP/97/37.
- 5 ILO Convention No. 87, Freedom of Association and Protection of the Right to Organise, 1973.
- 6 ILO Convention No. 98, Right to Organise and Collective Bargaining, 1949.
- 7 ILO Convention No. 29, Forced Labour, 1930 and ILO Convention No. 105, Abolition of Forced Labour, 1957.
- 8 ILO Convention No. 100, Equal Remuneration, 1959 and ILO Convention No. 111, Discrimination (Employment and Occupation), 1958.
- 9 ILO Convention No. 138, Minimum Age, 1973.
- 10 Keith Maskus (1997), Should Core Labour Standards be Imposed Through International Trade Policy, (Washington, D.C., World Bank), Table 2 "Ratification of Fundamental ILO Conventions by Selected Major Countries, (November, 1995)".

- 11 Mita Aggarwal (1995), *International Trade, Labour Standards and Labour Market Conditions: An Evaluation of the Linkages*, United States International Trade Commission, Office of Economics, Working Paper No. 95-06-C (June), p.33.
- 12 However, the ILO Tripartite Declaration concerning Multilateral Enterprises and Social Policy adopted in 1977 is the only international public-private consensus on voluntary measures to be taken by enterprises. It is intended as a guide to transnational corporations and other employers, workers, employers' organisations and governments.
- 13 The WTO's Code of Good Practice of the Technical Barriers to Trade, Annex 3 to the Agreement on Technical Barriers to Trade, provides guidelines on how voluntary standards can be developed and implemented in ways that do not constitute unjustifiable non-tariff barriers.
- 14 This article does not of course prohibit the use of forced/prison labour per se, as a labour standard seeks to do, it simply entitles Members to refuse to import such products – in keeping with the GATT's focus on trade and trade-related issues.
- 15 WTO, 1996, Singapore Ministerial Declaration, adopted on 13 December 1996, Geneva, para. 4 WT/MIN(96)/DEC.
- 16 H.E. Mr. Yeo Cheow Tong, Minister for Trade and Industry of Singapore.
- 17 WTO General Council, 16 July 1997 in Geneva – Implementation of para. 4 of the Singapore Ministerial Declaration on Labour Standards and Relations with the ILO – report of the DG of the Secretariat.
- 18 7th Summit of the Heads of Governments of the Group of 15 3-5 November 1997 in Kuala Lumpur para 20 of the Communiqué (5 November 1997).
- 19 OECD, July 1997, *Employment Outlook 1997* and OECD, 1996, *Trade, Employment and Labour Standards*, (Paris: OECD).
- 20 ILO, 1996, *World Employment 1996/97: National Policies in a Global Context*, (Geneva: ILO) and ILO Task Force (1998-1999) – individual country studies on the social dimensions of globalisation.
- 21 Stephen Golub (April 1997), *International Labour Standards and International Trade*, Working Paper of the IMF WP/97/37.
- 22 Keith Maskus (1997), *Should Core Labour Standards be Imposed through International Trade Policy*, World Bank.
- 23 The Declaration has already been incorporated as a reference point in the Basic Code of the UK-based Ethical Trading Initiative.
- 24 Proceedings of the Working Party on the Social Dimensions of the Liberalisation of International Trade, 274th Session, Geneva, March 1999 – Progress report on the country studies on the social impact of globalisation GB.274/WP/SDL/2.
- 25 The only exception is the use of child labour, which it was considered could expand exports in highly labour intensive industries. However, it was concluded nonetheless that the possible application of international trade sanction might prove counter-productive in so far as it would harm those individuals it was supposed to help whilst not achieving the desired objectives.
- 26 Golub (1997).

Annex II

THE CHALLENGE OF INTEGRATING LDCs INTO THE MULTILATERAL
TRADING SYSTEM: COORDINATING WORKSHOP FOR SENIOR ADVISORS
TO MINISTERS OF TRADE IN LDCs IN PREPARATION FOR THE THIRD
WTO MINISTERIAL CONFERENCE
(Sun City, South Africa: 21-25 June 1999)

INTEGRATING LEAST DEVELOPED COUNTRIES
INTO THE GLOBAL ECONOMY:
PROPOSALS FOR A COMPREHENSIVE NEW PLAN OF
ACTION IN THE CONTEXT OF THE THIRD WTO
MINISTERIAL CONFERENCE*

* As adopted at the Coordinating Workshop's final plenary on 25 June 1999 (LDC/
CW/SA/6, 13 July 1999).

A. COMMUNIQUÉ

1. The Senior Advisers to the Ministers of Trade in the Least Developed Countries (LDCs) met in a Coordinating Workshop, jointly sponsored by the Government of South Africa, UNCTAD and UNDP, in Sun City, South Africa from 21 to 25 June 1999.

2. The meeting reviewed the experiences and problems of LDCs in implementing the Uruguay Round Agreements and assessed the impact of the implementation of these Agreements on their trade and development prospects. The meeting examined the question of enhancing LDCs' capacities to participate actively in the process of global trade rule-making and in identifying issues of interest to them in order to safeguard and promote potential benefits and to protect against possible risks and losses. The meeting also provided an opportunity to formulate proposals for a Comprehensive New Plan of Action for Integrating LDCs into the Global Economy.

3. The meeting expressed concern at the continuing marginalization of LDCs from the mainstream of a rapidly globalizing world economy, as reflected in their low and declining share in world trade, investment and output. In the globalizing and liberalizing world economy, LDCs face much greater challenges in overcoming their marginalization and require comprehensive and well coordinated support measures from the international community.

4. The meeting noted with deep concern the precarious socio-economic situation and the structural weaknesses inherent in the economies of the LDCs which relegate these countries to a weak competitive position in the current global economic setting. The majority of the population of LDCs, notably women, remain trapped in abject poverty and social exclusion. The challenges facing the LDCs in this context can be summed up in the following categories: (i) reversing the decline in economic and social conditions in these countries; (ii) reactivating and promoting economic growth, recovery and development; (iii) enhancing the process of structural transformation in these economies and reversing their continued marginalization in world trade; and (iv) ensuring their full and successful integration into international trade and the global economy on an equal footing. In this context, the strengthening of democracy, broad-based popular participation with a gender balance and

good governance were emphasized as prerequisites and critical inputs in the creation of an enabling environment for sustainable human development in LDCs.

5. The meeting was encouraged by the continued and concerted efforts made during the 1990s by the LDCs themselves and many of their development partners in order to improve the prevailing bleak socio-economic conditions in these countries. At national level, strong commitment to the implementation of economic reforms by Governments of the LDCs has brought about significant economic improvements. However, many of the constraints facing these countries are structural, and the reform gains attained in the last two decades have proven insufficient to redress the precarious socio-economic conditions in LDCs. As a result, these economies remain fragile and susceptible to internal and external shocks - political, social, financial or otherwise.

6. The meeting also noted initiatives in favour of LDCs undertaken on the international front, including the convening of two UN Conferences on LDCs, which adopted the Substantial New Programme of Action and the Paris Programme of Action in the 1980s and the 1990s respectively, the Marrakech Declaration and Ministerial Decision in favour of LDCs, the convening of the High-Level Meeting on Integrated Initiatives for LDCs' Trade Development by the World Trade Organization, and the adoption of the Integrated Framework for Trade-Related Technical Assistance being implemented by IMF, ITC, UNCTAD, UNDP, the World Bank and WTO. These initiatives are a clear manifestation of an increasing awareness and concern on the part of the international community on the declining socio-economic conditions in the LDCs and on the need to take corrective action.

7. The meeting, however, noted with grave concern that the numerous declarations, promises and commitments emanating from the above events in favour of LDCs have to a large extent failed to materialize. As a result, the benefits from national policy reform and adjustment programmes adopted by the LDCs themselves were not fully realized and in some cases have had a negative impact. In this context, the meeting called upon the international community to honour its commitments to its weakest members and provide concrete support commensurate with the development needs of the LDCs.

8. The meeting noted with great concern the shrinking aid effort of the major donor group, particularly the member countries of the Development Assistance Committee (DAC) of the OECD and the continued decline in ODA. The meeting welcomed recent initiatives to alleviate the debt burden on the LDCs and underlined the need for concrete, faster and substantial action. Similar concern was raised over lack of market access, the decline in commodity prices, the overdependence of LDCs on one or two commodities for their foreign exchange earnings, and the lack of financial flows, which continues to constrain further LDCs' growth and development prospects. Collectively, these problems have undermined efforts made by the LDCs to breakout of their inherited dualistic economic structures.

9. The meeting stressed the need for the globalization process to be tamed and managed by the international community in a way that facilitates the integration of LDCs into the world economy and at the same time offers a more equal sharing in its benefits.

10. In this regard, the meeting emphasized that meaningful and beneficial integration of LDCs into the global economy and multilateral trading system requires concrete actions by the LDCs and their development partners to strengthen LDCs' supply capacities, inter alia through the development of physical and institutional infrastructure and human resources development, unencumbered and improved market access, and retained flexibility in the use of appropriate policy instruments to strengthen competitiveness of sectors of strategic importance for the development of their trade. The initiative for duty-free treatment for all products of export interest to LDCs should be implemented immediately.

11. The meeting took the view that the scope of the multilateral trade agenda, the structure of negotiations and the timeframe will have great bearing on the ability of LDCs to participate actively in the light of their limited human and financial resources. The meeting also emphasized that special and differential treatment measures are of great interest to LDCs and should be made an integral part of the rules and disciplines governing the multilateral trading system. Fast-track accession to WTO by those LDCs which are not yet members should also be an important part of the efforts by the international community to integrate LDCs into the world economy.

12. The meeting decided that the outcome of the deliberations be presented as formal proposals by LDCs to the preparatory process for the Third WTO Ministerial Conference, during the Conference itself and in

other relevant forthcoming major trade and development forums such as UNCTAD X and the substantive preparations for the Third UN Conference on LDCs. The meeting endorsed the strategy of collective bargaining in furthering the interest of LDCs in a rule-based multilateral trading system and further resolved to establish a working group to be entrusted with the task of following up on the proposals and issues related to LDCs within the WTO work programme.

13. The meeting underlined the importance of the provision of technical assistance to LDCs by both bilateral and multilateral development partners to enhance the LDCs' efforts to contribute to the formulation of a positive agenda and to build up the negotiating capacity in these countries. In this regard, UNCTAD through the Office of the Special Coordinator for LDCs, and in cooperation with the UNDP, WTO, ITC, and other relevant organizations, was requested to continue assisting LDCs in the pursuit of negotiations to achieve the above stated objectives.

B. CONCLUSIONS

1. After consideration of concerns expressed about the risk of the marginalization of LDCs posed by globalization, the Meeting concluded that a collective strategy for the LDCs should be formulated for the forthcoming Seattle Ministerial Conference.

2. Following discussions on the benefits of membership of WTO, the Meeting concluded that there are nonetheless gains to be attained from rule-based system in terms of transparency, non-discrimination and improving competitiveness in LDCs.

3. With regard to concerns about the inability of LDCs to take full advantage of the opportunities provided by the WTO Agreements, the Meeting identified a variety of constraints, including: (1) shortage of skilled personnel; (2) complexity of WTO rules and working structures; (3) lack of awareness and full information on the rules; (4) inability to upgrade domestic regulations; (5) weak institutional infrastructure; and (6) high cost of maintaining missions in Geneva.

4. The Meeting concluded that the constraints on the LDCs' ability to benefit fully from the WTO are further compounded by the abuse by the

developed countries of their position in their exploitation of technical loopholes that resulted in them avoiding full liberalization and an opening up of their markets to LDC products.

5. Following a full discussion on how to redress the asymmetries in the LDCs' and the developed countries' use of the WTO Agreements, the Meeting resolved that the forthcoming negotiations should be used to improve the implementation of the existing Agreements on the one hand and should include a 'positive agenda' for LDCs to bring enhanced benefits on the other.

6. The Meeting stressed the need to ensure that the negotiations are centered on development issues, whilst recognizing that it would be crucial for LDCs to receive targeted assistance.

7. The Meeting acknowledged the availability of assistance under the Integrated Framework for Trade-related Technical Assistance to LDCs that seeks to increase LDCs' benefits from the assistance provided by the six core agencies, but was critical of the way it has operated so far and called for its evaluation and for more practical assistance.

8. Following a discussion on the lack of momentum and slow progress made in the organization of national round tables with donors envisaged in the context of the Integrated Framework for Trade-Related Technical Assistance, the Meeting expressed its disappointment and acknowledged that the pace of progress has severely constrained the overall implementation of the Integrated Framework adopted by the High-Level Meeting.

9. Following further discussion on the technical assistance available to LDCs, the Meeting identified the specific circumstances where the provision of well directed technical assistance would be of particular importance, as follows: (1) implementation of the existing WTO Agreements; (2) support for the forthcoming negotiations, and (3) the accession of LDCs to the Agreements.

10. After having considered the particular challenges for LDCs in the accession process, the Meeting agreed that, in future multilateral trade negotiations, the development needs of LDCs must be taken into account, and it endorsed the suggestion that the next round of negotiations should be a 'development round'.

11. The Meeting concluded that, while LDCs should have the primary responsibility for formulating their own policies and setting priorities to accelerate their economic growth, they should be assisted by the international community not only in designing policies and programmes but also in mobilizing the requisite finance to them.

12. Following calls for improved market access, the Meeting noted that even greater difficulties arise in connection with supply-side constraints and that due attention must be given to this issue.

13. The Meeting agreed that, in order to ameliorate supply-side constraints, which constitute fundamental bottlenecks in the integration of LDCs into the world economy, the international community should adopt innovative, concrete and result-oriented measures to enhance their competitiveness through, *inter alia*, infrastructure and human resources development, export diversification and institution-building.

14. The Meeting recognized the need for coherence amongst and between international organizations, and it was observed, that as a condition for structural adjustment loans, a number of LDCs have been pressurized into undertaking liberalization measures beyond requirements stipulated in WTO Agreements.

15. After considering the forthcoming WTO negotiations themselves, in particular their modalities, scope, duration and structure, the Meeting concluded that the LDCs should have a common negotiating position and, as a means of improving their bargaining position, coalitions should be built with other developing countries.

16. The Meeting considered issues relating to aspects of the WTO Agreement where the LDCs should benefit from and exploit the flexibility built into the implementation of the Agreements, and it agreed that there is a need for the reaffirmation and expeditious implementation of the Marrakesh Declaration and Ministerial Decision on Measures in Favour of the Least Developed Countries.

17. The Meeting heard instances of pressure being applied to LDCs not to make full use of the transitional periods and concluded that LDCs could benefit from close monitoring of the implementation of the provisions that are of particular importance to them, particularly 'special and differential treatment' and 'market access'.

18. The Meeting achieved full consensus on the fact that agricultural liberalization has socio-economic effects in developing countries, especially in LDCs, where the majority of the working population is employed in the agricultural sector, which consists mostly of small-scale or subsistence farmers.

19. The Meeting acknowledged that the agricultural sector makes a substantial contribution to GDP in LDCs, providing food for growing populations and raw materials for domestic industries, and further acknowledged that in an agrarian economy, a decline in agricultural production can lead to problems of food security, a large negative income effect on farmers, and structural socio-economic problems.

20. The Meeting agreed that the scope of the new negotiations on agriculture should take into account the special needs of LDCs, which would experience adverse effects from further agricultural liberalization, and further agreed that LDCs should be given flexibility regarding provision of domestic support for their agricultural sector.

21. The need for harmonization of international standards and the importance of full participation of LDCs in developing such standards was underscored by the Meeting, and it was agreed that national sanitary and phytosanitary (SPS) standards should not be set at levels higher than the corresponding standards set by relevant international bodies (i.e. codex alimentaris) and emphasized that technical barriers to trade (TBT) and SPS measures should not be applied for protectionist purposes.

22. The Meeting acknowledged that unilateralism in setting health standards and worse still changing such standards frequently and without warning undermines the efforts of LDCs in developing competitive exports and capacity-building.

23. The Meeting further agreed that countries resorting to protectionist measures against LDCs in respect of TBT and SPS should pay compensation for loss of income when proved wrong.

24. It was recognized by the Meeting that, in the context of liberalization of trade in services, the scope of the next trade negotiations in services is likely to be built up on the basis of unfinished business, and it was emphasized that, during these sectoral market access negotiations, the issue of movement of natural persons should be pursued.

25. It was further emphasized by the Meeting that, in the negotiations for GATS 2000, particular attention should be given to Article IV of GATT (increasing participation of developing countries) with a view to making this provision more operational and binding, and the Meeting further emphasized that there is a need to identify the potential for trade in services in LDCs through a critical assessment of individual national capacities.

26. The Meeting noted that article 66.2 of the TRIPS Agreement requires developed country Members to provide incentives to their enterprises and institutions so as to promote and encourage the transfer of technology to LDCs to enable them to create a sound and viable technological base.

27. The Meeting also noted that, in order to realize the full potential of intellectual property for the economic development of LDCs, it is necessary for UNCTAD, WTO and WIPO, within their respective mandates and with financial assistance from donors, to enhance the provision of technical assistance to LDCs in this area.

28. The Meeting further noted the necessity for the LDCs to simultaneously build domestic capacity in key sectors in order to realize the full potential of intellectual property for the development of their economies.

29. The Meeting acknowledged that acceding LDCs are being required to make more stringent commitments than those previously applied to LDCs, they have to negotiate every aspect of membership, including special and differential treatment, and that the whole process is protracted and burdensome.

30. The Meeting concluded that a clear and simplified procedure should be established for acceding countries so as to get their membership accepted within a year, and consensus was reached on the fact that LDCs seeking accession should automatically have their status recognized and not be subject to commitments that go beyond those of LDC Members of the WTO.

31. The Meeting recognized the importance of providing LDCs that are not members of the WTO with an opportunity to participate in sessions of WTO main organs, including the Ministerial Conferences, in order to increase their knowledge of the multilateral trading system.

C. PROPOSALS TO BE SUBMITTED TO THE PREPARATORY PROCESS FOR THE THIRD WTO MINISTERIAL CONFERENCE AND TO THE CONFERENCE ITSELF

Section A: GATT (1994) Agreements

I. Agriculture

LDCs' exports are still subject to high tariffs, tariff peaks and tariff escalation and suffer from the administration of the tariff rate quota system. This is because developed countries have been slow to implement those provisions of the Agreement on Agriculture that exhort them to implement the Agreement, taking cognizance of the particular needs and conditions of developing countries by providing for a greater improvement of market access opportunities for agricultural products of particular interest to LDCs.

A basic objective of agricultural policies in developing countries, especially in LDCs, is to ensure food security, in particular because most LDCs have structural food deficits and are net food-importing countries – a situation aggravated by their acute balance-of-payments problems. The reduction commitment on domestic support should thus recognize fully the multifunctionality of agriculture in LDCs, including the challenge to sustain economic growth and development and the need for food security.

Proposals

- Grant of duty- and quota-free access to all agricultural products, including those in processed forms, exported by LDCs in the resumed negotiations on agriculture.
- Exemption of all LDCs, including those acceding to the WTO, from undertaking commitments on domestic support and export subsidies.
- Provision of technical assistance to LDCs, as envisaged in the Marrakech Ministerial Decision on Measures Concerning Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries, should be enhanced, and made concrete, operational and contractual.
- Urgent contribution by developed countries and international financial institutions towards a revolving fund to help LDCs (and other net food-importing developing countries) to cope with rising food requirements

and associated high food import bills and to assist them to increase local food production and capacity, inter alia, in terms of marketing, storage and distribution.

Export subsidies in some developed countries have had a disproportionately negative effect on trade in agricultural products of export interest to LDCs.

Proposal

- Elimination of export subsidies by developed countries, within an agreed time period, particularly for agricultural products of strategic interest to LDCs.

II. Agreements on SPS and TBT

Article 2.3 ensures that SPS measures shall not be applied in a manner which constitutes disguised restriction on international trade. In reality, however, SPS measures have constituted major barriers to agricultural exports from developing countries, in particular LDCs.

Proposals

- Members should adhere to international standards, guidelines and recommendations when adopting SPS measures and avoid taking unilateral action.
- The provision in Article 10.1 of the SPS Agreement should be made more concrete by committing developed countries to providing adequate technical assistance to LDCs as stipulated under Article 9.1.

Many LDCs have reported severe problems in their attempts to comply with TBT measures that are related to process and production methods (PPMs). This scenario is complicated by the inadequate capacity of LDCs to participate effectively in the international standard-making process and by the disappointingly low level of technology transfer which is necessary for LDCs to improve product quality and standard in order to comply with the TBT requirements in major export markets.

Proposal

- Interests of LDCs have to be taken into account by international and regional standardizing bodies in preparing standards, guidelines and recommendations.

III. Industrial subsidies

Subsidies could play an important role in the economic development programmes of LDCs. However, while subsidies commonly used by developed countries have been categorized as non-actionable, those generally used by LDCs for the development of their industrial base and exports fall into the “actionable” category.

Proposals

- Non-actionable categories of subsidies should be expanded to include those subsidies for development, diversification and upgrading of industries which are needed and are commonly used by LDCs. Financial resources should be made available to meet the special needs of LDCs, particularly with respect to the subsidies covered by Article 8.2.c (green subsidies).
- Export subsidies applied by LDCs should be exempted from export competitiveness thresholds.

IV. Industrial tariffs

There is an imbalance in the current level of market access where special and differential treatment is not reflected in the actual level of market access. This is particularly so, considering the fact that tariff peaks and tariff escalation remain in developed countries for many products of export interests to LDCs. There is the need to ensure that duty-free and quota-free market access granted to LDCs is stable, predictable and commercially meaningful.

Proposal

- Unconditional, non-reciprocal, duty-free, quota-free and bound access for all industrial exports from LDCs. Applicable rules of origin should be those defined in Article 1 of the Agreement on Rules of Origin.

V. Rules of origin

Little progress has been attained in rationalizing the rules of origin under universal preferential tariff schemes such as GSP and the Lomé Convention because of the technical complexities involved in harmonizing rules of origin. The implementation of the Agreement on rules of origin will require substantial technical assistance and realistic transitional periods.

Proposals

- Rules of origin for products of export interest to LDCs should be tailored to promote the LDCs' participation in global production chains and the marketing of their products.
- Rules of origin in autonomous and unilateral trade regimes (unilateral preferential trading arrangements) in favour of LDCs should be simplified and harmonized.

VI. Customs valuation and pre-shipment inspection (PSI)

In view of the dependence of LDCs on custom duties as a source of government revenue, they have expressed the concern that the implementation of new custom valuation methods may imply a significant loss of custom revenue. While acknowledging that the Agreement has in some cases addressed specific problems in their customs administration, LDCs have generally found the notification requirements of the Agreement on PSI burdensome.

Proposals

- Extension of the transitional period contained in Article 20 of the Agreement on Customs Valuation to provide a more realistic time frame for LDCs.
- Provision of concrete and substantial technical assistance on customs valuation and pre-shipment inspection and adequate financing to specialized organizations such as the World Customs Organization.

VII. Agreement on Textiles and Clothing (ATC)

Unhindered market access for LDCs' textile and clothing exports is crucial considering the role of the textile and clothing sector in industrialization and employment generation in LDCs. This is particularly so because of the inadequate implementation to date of the provisions in Article 1.2 of the ATC in favour of small suppliers, such as LDCs.

Proposals

- LDCs' exports should be exempt from anti-dumping duties and safeguard actions.
- Undertaking specific measures such as early implementation of the phasing-out of remaining quotas for LDCs, extension of product coverage,

and duty-free access for all LDCs' textiles and clothing exports under preferential trading arrangements.

VIII. Safeguards

The rationale behind safeguards is that the burden of adjustment should be shared by all exporters of the product to the country whose industry is under threat of injury from increased imports. That being the case, it is difficult to justify the claim that an LDC should share the burden of adjustment in more advanced countries. On the other hand, with increased liberalization of their import regimes, LDCs may find themselves more frequently in situations where they may need to use safeguard provisions themselves.

Proposals

- LDCs exports should be exempted from all safeguard actions.
- LDCs that are implementing safeguard action should be exempted from undertaking compensatory measures.

IX. Anti-dumping

LDCs are at a great disadvantage in initiating anti-dumping measures, considering the technical complexities involved in adopting such measures. Competitive pricing is about the only legitimate means left to LDCs to expand their exports within a context of severe market access restrictions.

Proposals

- LDCs' exports should be exempted from anti-dumping action.
- Procedures for the initiation of anti-dumping action should be much simplified for LDCs.

Section B: Services (GATS and Annexes)

I. GATS framework

Guidelines and procedures for the next multilateral negotiations on services have yet to be finalized and are currently the subject of consultations. As part of the built-in agenda, services will be the subject of the upcoming negotiations. Accordingly, LDCs will need to deepen their understanding of the issues in the negotiations in order to advance their strategic interests.

The services sectors in LDCs are in general limited in their competitiveness and efficiency, and their regulatory infrastructure is not well developed. At the same time, many services have strategic importance in economic development and trade expansion in the LDCs. However, the efforts of LDCs to modernize their services and to establish appropriate regulatory infrastructure are being constrained by their difficult situation.

Proposals

- Retain the special and differential treatment measures accorded to LDCs, in particular the right to regulate services sectors to meet their national development policy objectives.
- Evaluate the adequacy of their domestic regulatory regimes in services and identify areas that require strengthening.

It is most likely that the current ongoing work in WTO to establish rules on specific issues under the GATS will be carried over to the forthcoming trade negotiations. Such issues would have serious implications for LDCs' development policies.

Proposal

- Incorporate special and differential treatment measures for LDCs in the development of new rules relating to subsidies, emergency safeguard measures and government procurement.

Many services are labour-intensive and can be exported through movement of natural persons. As the GATS covers all categories of services and service suppliers, there are services in which LDCs have actual or potential comparative advantage. At the same time, in order to exploit such comparative advantage, LDCs need financial assistance and technologies from more advanced countries.

Proposals

- Identify restrictions incorporated in the Schedules of Commitments of other Members that operate as actual or potential barriers to export.
- Strategically liberalize those services geared towards LDCs' national development policy objectives, including through the mechanism of scheduling commitments under the GATS.

II. Sectoral annexes

(i) Air transport and maritime services

The transport service sector, in particular air transport and maritime services, includes a wide range of highly labour-intensive services where LDCs' suppliers have a potential comparative advantage. However, in order to fully exploit it, modernization of facilities and equipment, as well as upgrading of skills and information technology, would be required.

Proposals

- Identify specific subsectors where comparative advantages exist and develop them.
- Conduct systematic studies to identify emerging opportunities.
- Negotiate specific commitments in strategic sectors in accordance with the provisions in GATS Article IV.

(ii) Financial services

A number of MFN exemptions were maintained when the preceding round of negotiations was concluded in mid-1995. The liberalizing element of GATS is conditional on the extent and nature of sector-specific commitments assumed by individual members. Core provisions relate to: market access (Article XVI), national treatment (Article XVII), and additional commitments (Article XVIII).

The state of the economy and the specificities of the financial sector in each LDC will determine not only which sectors are included for liberalization in the country's schedule, but also what sort of limitations the country inscribes in its schedule under these three core provisions. The developmental implications of commitments made must be carefully examined by LDC Governments within the context of possible costs and benefits of financial sector liberalization, with special attention to the concerns of small and medium-size enterprises, as well as of the rural population.

Proposals

- Coordinate financial sector liberalization with other macroeconomic policies.

- Submit country schedules that incorporate limitations designed to ensure a smooth transition in the process of financial sector liberalization.

(iii) Telecommunications services

Telecommunications services are critical in enhancing efficiency in LDCs' traditional exports sectors. They also facilitate the provisions of new tradeable services such as electronic commerce and data processing.

Proposals

- Inscribe in WTO Agreements as a contractual undertaking the provision of technical assistance in the area of personnel training, telecommunications infrastructure, and the drafting of legislation for WTO compatibility.
- Progressive liberalization in this sector should be undertaken so as to support the development objectives of LDCs, particularly those of small island LDCs. It should also aim at domestic regulatory reform and at fulfilling the principle of 'universal service'.

(iv) Movement of natural persons

Symmetry should be provided in the treatment of internationally mobile factors of production: capital and labour.

Proposals

- Identify the particular categories of services in which LDCs have a comparative advantage under this mode of supply of services.
- Identify all those areas where Members have failed to comply with the terms of Article IV.3, which stipulates that they should take into account "the serious difficulty of the least developed countries in accepting negotiated specific commitments in view of their special economic situation and their development, trade and financial needs".
- Collate concrete cases of non-transparent and discretionary measures applied to this mode of service supply.
- Incorporate specific provisions in the GATS to correct the imbalance in the mobility of labour in relation to capital in liberalizing trade in services.

- Improve transparency and predictability in the administration of visa regimes, work permits, licenses, the recognition of professional qualifications and other entry requirements.

Section C: TRIPS And TRIMs

I. TRIPS

Implementation

LDCs are in the process of taking the necessary steps to prepare for compliance with the provisions of the TRIPs Agreement. Given the need for complex changes in domestic legislation and the requirements for new legislation and institutional and administrative strengthening, compounded by the serious shortage of the relevant expertise, these tasks cannot be accomplished without significant increases in technical assistance and extension of the transitional period.

Proposals

- Under Article 67, developed countries should provide specific and practical modalities for the fulfillment of their obligation with respect to providing technical assistance.
- Request the operationalization of Article 66.2 through specific measures by developed countries.

Built-in agenda

Proposals

- Under the review of Article 27.3, there should be a formal clarification that naturally occurring plants, animals, and the parts of plants and animals, including the gene sequence and essentially biological processes for the production of plants, animals and their parts, must not be granted patents.

A provision should be incorporated to the effect that patents must not be granted without the prior consent of the country of origin of products referred to in the paragraph above. Also patents inconsistent with Article 15 of the Convention on Bio-Diversity must not be granted.

Members should retain the flexibility to develop “sui generis” protection regimes suited to the seed supply systems of each country.

- In the context of Article 41, there should be a provision authorizing Members to use automatic compulsory licensing for essential drugs in the interest of their supply at reasonable prices in their countries.
- With regard to the dispute settlement system, the transitional period applicable to non-violation complaints should be extended.
- Current work in the relevant international organizations in the area of folklore should lead to its protection for LDCs within a multilateral framework.

II. TRIMs

Due to institutional weaknesses and administrative and human resource capacity constraints, very few LDCs have been able to meet the notification requirements. TRIMs continue to be an important policy tool for strengthening the production and export supply base necessary to take full advantage of the market access concessions and preferential schemes made available to them by their trading partners. In this regard, local content requirements are particularly important.

Proposal

- An open-ended extension of the transitional period should be granted to provide those countries that have not yet fulfilled their notification requirements with another opportunity to notify existing TRIMs and to continue to apply them as long as they remain in the category of LDCs.

Section D: New Issues

I. Trade and Investment

The built-in agenda includes the obligation to consider whether the TRIMs Agreement should be complemented by provisions on investment policy. A Working Group was established at the Singapore Ministerial Conference to examine the relationship between trade and investment. That group has yet to complete its work and was granted further time by the General Council.

Proposal

- Consider carefully the expected recommendations of the Working Group to the General Council.

II. Trade and environment

The interests of developed countries have dominated the issues dealt with so far in the WTO Committee on Trade and Environment (CTE). It is important that the needs of developing and least developed countries are taken into account in the deliberations of the CTE in order to ensure that recommendations do not disproportionately disadvantage these countries.

Proposals

- In environmental protection and “mainstreaming sustainability”, positive measures should be considered first before accommodation is sought for the use of trade-restrictive measures in the implementation of multilateral environmental agreements. These positive measures include, inter alia, capacity building and, financial and technical assistance.
- WTO Members should clearly define which domestically prohibited goods (DPG) should be considered at the WTO, establish and implement concrete mechanisms such as a DPG notification system to increase transparency, and develop enforceable obligations for additional technical assistance to monitor trade in DPG by LDCs.

III. Trade and Competition Policy

The impact of competition policy can be unpredictable. Its benefits are more likely to be realized in the context of sufficient supply capacity. Prevalence of market imperfections in LDCs, in particular with reference to market entry and exit, and supply-side constraints would make it difficult for LDCs to enjoy the benefits of competition policy and ensure that it plays a positive role in their development. The Working Group established by the Singapore Ministerial Conference has initiated an educational process on competition policy. That Group has yet to complete its work.

Proposal

- Consider carefully the expected recommendations of the Working Group to the General Council.

IV. Labour standards

The Singapore Ministerial Declaration confirmed that ILO is the competent body to set and deal with all issues relating to labour standards. Serious concerns still remain regarding direct or indirect attempts to place that issue on the agenda of WTO.

Proposal

- Reiterate the position agreed by consensus in paragraph 4 of the Singapore Ministerial Declaration.

Section E: Dispute settlement

While recognizing that the Uruguay Round has significantly improved the efficacy of the dispute settlement mechanism, so far LDCs have been unable to utilize it because of their lack of financial resources and paucity of legal expertise.

Proposals

- Panels should be representative, including panelists from developed, developing and least developed countries.
- The proposed Legal Advisory Centre should be established without further delay in order to meet the needs of LDCs in terms of securing their rights through the use of the Dispute Settlement Mechanism.

SECTION F: Additional Agreements

Transparency in government procurement

Transformation of the plurilateral agreement on government procurement into a multilateral agreement would entail an onerous burden for LDCs. The issue of transparency in government procurement was deliberated on during the Singapore Ministerial Conference, and work is under way in WTO.

Proposal

- Pursue the work mandated in paragraph 21 of the Singapore Ministerial Declaration.

Section G: Accession to WTO

Of the 48 LDCs, 29 are WTO members and nine are observers, of which six are in the process of accession (Cambodia, Lao Peoples' Democratic Republic, Nepal, Sudan, Samoa, and Vanuatu). Thus, for as many as 13 LDCs, the question of becoming WTO members and beginning the accession process will have to be addressed sooner or later. The first step in integrating LDCs into the global economy and the international trading system is their institutional integration in this system. This should be among the first actions to be undertaken to stem and reverse the marginalization of the LDCs.

Proposals

- Least developed country status should be automatically granted at the first Working Party meeting and should be specifically referred to in the report of the Working Party.
- The forthcoming new round of multilateral trade negotiations should not divert attention from the need for a streamlined and accelerated accession process.
- The specific situation of LDCs calls for the establishment of a fast track approach for accession, lasting no more than one year from the date of the submission of the trade memoranda, with a maximum of two Working Party meetings, whichever is earlier, for the completion of the accession process for the LDCs.
- In the process of accession, LDCs should not be called upon to assume obligations or commitments that go beyond what is applicable to WTO LDC members.
- Special and differential treatment provisions should be automatically granted to acceding LDCs for the same transitional period as stipulated in the respective agreement for LDCs, counting from the date of accession.
- No commitments and obligations should be sought from acceding LDCs on issues which are not covered by the MTAs or go beyond them both in the context of WTO accession and in bilateral trade negotiations between an acceding LDC and a WTO member.
- No commitments and obligations should be sought from an acceding LDC as a condition for its accession on membership in the Plurilateral

Trade Agreements and acceptance of optional sectoral market access initiatives or other optional legal instruments of the GATT 1994.

- Market access negotiations for acceding LDCs should be simplified by agreeing on specific minimal targets for them in industrial tariffs, agricultural tariffs and services sectors. These should broadly correspond to the actual commitments by WTO LDC members.
- The least developed countries seeking accession to WTO require technical assistance to strengthen their negotiating capacity and to enhance their efforts to implement domestic legislative and economic policies compatible with WTO Agreements. They also need support to enable them to have periodical consultations and exchange experiences on the accession process. A “special window” should be established in the Trust Fund for LDCs, administered by UNCTAD, for this purpose. LDCs’ development partners, both bilateral and multilateral, are invited to make generous contributions to the Trust Fund for the above purpose.

Section H: Miscellaneous

I. Technical assistance

LDCs acknowledge enhanced WTO Agreement-related technical assistance (TA) from various international organizations but note that such TA has often fallen short of their needs and in several cases took too long to materialize.

Proposal

- Technical assistance should be regarded as a right for LDCs and an important precondition for meeting their obligations under the WTO agreements. To this end, adequate resources should be provided for technical assistance to LDCs under the regular budgets of key agencies charged with this responsibility according to their respective mandates.

II. Special and differential treatment

The response of developed countries to special and differential treatment measures has not been encouraging, mainly because the measures lack contractual status.

Proposals

- Special and differential provisions in favour of LDCs should continue to be an integral part of the new multilateral trade negotiations and should be provided in a manner which responds to their specific needs, taking into account their level of economic development.
- The transitional periods for the implementation of the Uruguay Round commitments should be extended to provide realistic time frames for LDCs.

III. Notification obligations

LDCs noted that despite the response by WTO (e.g. Handbook on Notification) to their difficulties in fulfilling their notification obligations, many of them have still not been able to discharge their notification obligations in full.

Proposal

- Notification requirements for LDCs should be simplified to facilitate compliance, taking into account their limited administrative capacity and resources.