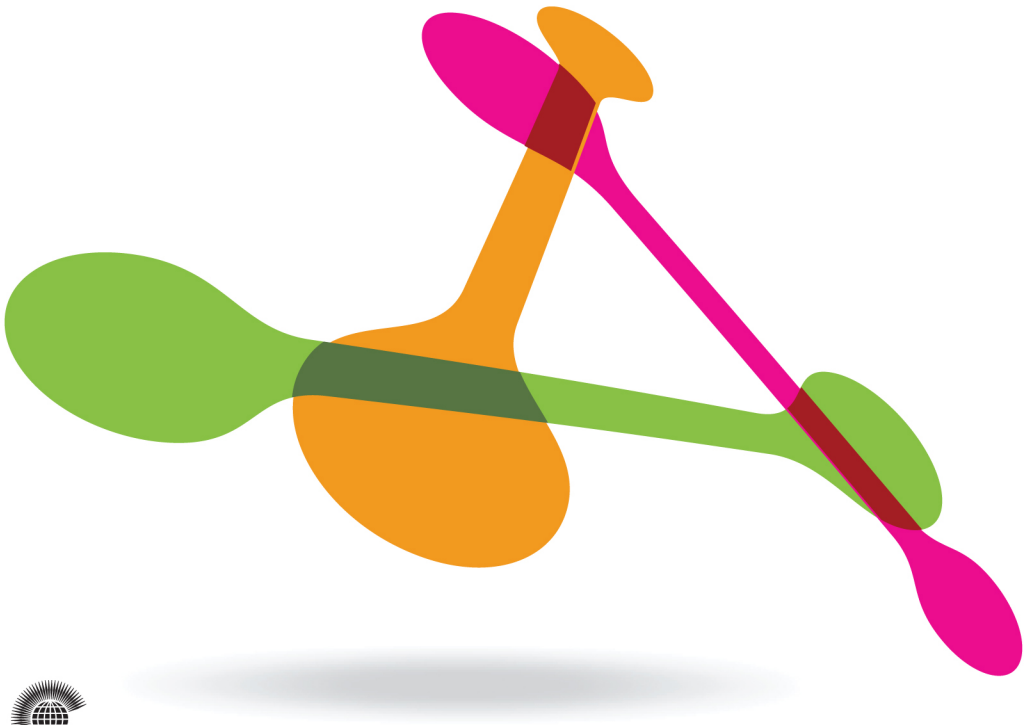
Lessons from the Commonwealth No.2

Negotiating at the World Trade Organization

Vinod Rege



Negotiating at the World Trade Organization

Lessons from the Commonwealth 2

Vinod Rege

COMMONWEALTH
SECRETARIAT

Vinod Rege, a former Director of GATT (now WTO), is an expert on trade and development economics and in trade law. He has specialised in study and analysis of the issues as they relate to the particular interests and concerns of developing countries, and written extensively on the topic in a career spanning almost 40 years.

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Preface

The establishment of the World Trade Organization (WTO) in 1995 led to a major transformation of the multilateral trading system. Until then, the system comprised only those rules that countries were expected to apply to trade in goods. With the WTO, these rules were extended to trade in services and to trade-related aspects of intellectual property rights. The widening of the rules, and their bewildering complexity, posed challenges to the delegations of developing countries in participating in the discussions.

A number of these countries had become members only a few years before or during the Uruguay Round of negotiations (1986–1994), which led to the establishment of the WTO. Many of them had not been able to establish effective national mechanisms to undertake the studies and analysis required for briefing delegations on the approaches they could adopt in the discussions. At the same time as the Geneva-based delegations of these countries struggled to improve their understanding of the complicated existing rules, the First WTO Ministerial Conference (Singapore, 9–13 December 1996) took decisions to include new subjects for study and analysis with a view to developing even more new rules.

This difficult situation prompted ambassadors from some of the Commonwealth developing countries to take action. They requested the Commonwealth Secretariat to employ the services of a Geneva-based senior adviser with expertise in WTO law and practice to help improve the knowledge and understanding of the WTO's rules-based system and to prepare for participation in the new round of negotiations that was expected to be launched. I was appointed to the post in August 1997. Immediately afterwards steps were taken to constitute the Geneva Group of Commonwealth Developing Countries as a forum for discussion and exchange of views on WTO negotiation issues. These exchanges were to be based on background papers prepared by me. The Group also adopted a constitution setting out broad principles governing how I should provide advice and assistance, and on the relationship between the Group, the Secretariat and myself.

In accordance with these principles, the Group evolved procedures to ensure the assistance provided was recipient driven, and that it did not clash with assistance provided by other Geneva-based organisations such as UNCTAD. I was encouraged to collaborate with officials from the missions in the preparation of the background papers. After being discussed in the Group, and reviewed and revised taking into account the comments these papers were attributed to the Group and made available to its members. To encourage wider discussions on the issues raised the papers were

made available to the Commonwealth Secretariat for publication after delegations had used them in the negotiating groups.

I was also required to provide, on request, advice and assistance to individual delegations. Where this support involved the preparation of papers in addition to discussions, such papers were made available only to the requesting delegation. These papers were circulated to all members of the Group if the requesting delegation agreed.

At the time of my appointment I was working on some of the trade-related subject areas on behalf of the Commonwealth Secretariat in a joint effort with the International Trade Centre (ITC). It was agreed that I should also devote some of my time to this work.

The purpose of this handbook is to provide an overview of the work done during the project's 11–year span. In deciding to publish it, the Commonwealth Secretariat and the members of the Group were influenced by two considerations. First, it could help in assessing the extent to which delegations of the member countries had been successful in adopting approaches in the negotiations that took into account their perceived trade and development interests both on liberalisation of trade and on rule-making. Second, increasing access to background papers previously available only to the Group would be useful to negotiators in the last phase of the negotiations and, after the termination of negotiations, to the officials from capitals and future negotiators. Academics, research scholars and others engaged in studying how the WTO negotiating process worked in the Doha Round of negotiations will also find it useful.

One of the achievements of the Doha Round during the time of the project was the recognition of the important role the 'Aid for Trade' initiative can play in enabling developing countries to participate actively in WTO negotiations and other work and take advantage of the benefits of the liberalisation measures agreed in the negotiations. This aspect of the project, as recorded in this handbook, will be useful to Aid administrators from international organisations and from the national donor agencies as well as officials from recipient countries. The project experiences will be particularly beneficial in deciding on the framework and procedures for providing assistance to developing countries participating in trade negotiations to enable them to pursue their perceived trade and development interests independent of the interests of the donor countries and other participating countries.

In compiling this book I have taken care to be objective and factual, mindful that historical accounts such as this are greatly influenced by the perceptions of the author.

Acknowledgements

I wish to acknowledge first and foremost the following ambassadors, who were elected as Chairpersons of the Group, for the support and confidence they placed in me, for their willingness to meet with me at short notice to review the project work, despite their heavy work schedules, and for their invaluable comments and feedback: Ambassador P Sinzinza (Zambia), Ambassador D Baichoo (Mauritius), Ambassador Ransford Smith (Jamaica), Ambassador Hanido Ali (Malaysia), Ambassador Nathan Irumba (Uganda), Ambassador K J Weeransinghe (Sri Lanka), Ambassador Trevor Clarke (Barbados), Ambassador Charles T Ntwaagae (Botswana), Ambassador Gomi T Senadhira (Sri Lanka), Ambassador Dennis Francis (Trinidad and Tobago) and Ambassador Arsene Balihuta (Uganda).

It was possible to ensure the high quality of the project publications and of the background papers only because of the remarkable level of interest and hard work of the project's research associates, Ms Caroline Lo Moro, Ms Isabella Kataric, Mr Yuvan Beejadhur and Mr Suddha Chakravartti.

I would particularly like to thank Mr Suddha Chakravartti for the help and support he provided in the preparation of this book.

One of the features of the work under the project was the remarkable level of co-operation that I received from officials from the Missions in the preparation of the background papers, as well as their strong interest in the work of the Group. The list of officials who co-operated on an individual basis in the preparation of the papers is indeed too long to be included here but I would like to mention a few of those who collaborated actively in the last few years: Mr Nelson Ndirangu and Ms Anne Kamau (Kenya), Mr Elly Kafeero (Uganda), Ms Simone Rudder (Barbados) and Mr Siva Palyanathan (Mauritius).

The keen interest and support provided by Mr Ransford Smith, Deputy Secretary General, Mr José Maurel, Director, Special Advisory Services Division (SASD) and Mr Nikhil Treebhoohun, Adviser and Head of the Trade Section in SASD, facilitated greatly the smooth functioning of the project during its last few years. I would like to thank Mr Treebhoohun in particular for carefully going through the draft of this handbook and for his constructive and valuable suggestions.

I would also like to pay tribute to those who were responsible for the management of the project in the earlier years: Mr Winston Cox, Deputy Secretary General; Mr R Gold, Director, SASD; Mr Rumman Faruqi, Director, and Mr Indrajit Coomaraswamy, Director, Economic Affairs Division; and Mr George Saibel, Director, Mr Anant Vijay,

Deputy Director, Mr Pierre Berthelot, Deputy Director, and Ms Angela Strachen, Chief Programme Officer, of SASD.

My thanks to Mr E Gannon and his colleagues, who worked so efficiently on the administrative and financial aspects of the project.

I would also like to thank Mr R Badrinath, Director, and Mr Shyam Gujadhur, Senior Adviser, from the International Trade Centre (ITC) for the co-operation they extended to me in the work that was done under the joint Commonwealth/ITC projects.

My sincere thanks go to Ambassador Marwa Kisiri, who heads the ACP Geneva Office, and Ms Esparanza Duran, Executive Director of the Agency for International Trade Information and Cooperation (AITIC), for their co-operation in arranging a number of joint seminars and workshops. I also acknowledge the co-operation extended by Mr Martin Khor, who was then Executive Director of the Third World Network, and the support of Mr Yash Tandon, Secretary General of the South Centre and other officials from the Centre for their keen interest in the work being done under the project and for their support.

Grateful thanks to Ms Moira Redecker and her colleagues from the conference division of the WTO Secretariat, who went out of their way to ensure that meeting rooms required by the Group were made available. I am grateful to my past colleagues from the WTO Secretariat, especially Mr Alberto Campean, Mr Eric Sorensen, Mr Patrick Low and Ms Janet Chacarian for their promptness in providing me with information and clarifications on technical and legal issues under discussions in WTO. I would also like to thank Ms Meena Mashayakhi, Mr Mohamed Arda and their colleagues at UNCTAD for the co-operation they extended to me.

Contents

Part Three: Assistance provided to individual delegations and in the pre-Doha period

Boxes

Tables

Abbreviations

ACP	African, Caribbean and Pacific
ADP	Anti-dumping Practices
AITIC	Agency for International Trade Information and Co-operation
AMS	Aggregate Measure of Support
AOS	Agreement on Safeguards
ASEAN	Association of Southeast Asian Nations
ATC	Agreement on Textiles and Clothing
CB	Certification Body
CFTC	Commonwealth Fund for Technical Co-operation
COMDC	Commonwealth Developing Countries
COMESA	Common Market for Eastern and Southern Africa
DRAs	Drug regulatory authorities
DSB	Dispute Settlement Body
ECOSOC	Economic and Social Council
ECOWAS	Economic Community of West African States
ESM	Emergency Safeguard Measures
EU	European Union
FAO	Food and Agriculture Organization
FESE	Foreign established service enterprise
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
GMP	Good manufacturing practices
GSP	Generalised System of Preferences
GSTP	Generalised System of Trade Preferences
IDA	International Development Association
IEC	International Electro-technical Commission
IMF	International Monetary Fund
IPRs	Intellectual property rights
ISO	International Organization for Standardization
IT	Information Technology

ITC	International Trade Centre
ITU	International Telecommunications Union
LDCs	Least-developed countries
MERCOSUR	Common Market of the South
MFN	Most favoured nation
NGO	Non-governmental organisation
NTMs	Non-tariff Measures
OECD	Organisation for Economic Co-operation and Development
OECS	Organisation of Eastern Caribbean States
OTDS	Overall Trade Distorting Subsidies
PSI	Agreement on Pre-shipment Inspection
PSS	Procurement Services System
SASD	Special Advisory Services Division
SCM	Subsidies and Countervailing Measures
SME	Small and medium enterprise
SPS	Sanitary and Phytosanitary Measures
SVEs	Small and vulnerable economies
TBT	Technical Barriers to Trade
TIAF	Trade and Investment Access Facility
TRIMs	Trade-Related Investment Measures
TRIPS	Trade-Related Aspects of Intellectual Property
UN/CEFACT	UN Centre for Trade Facilitation and Economic Business
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNHDI	United Nations Human Development Index
WAEMU	West African Economic and Monetary Union
WCO	World Customs Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

Summary and Author's Concluding Observations

Introduction

This Summary is organised as follows. It begins by describing the structure of the book. This is followed by a brief overview of the assistance provided in various subject areas under the Commonwealth project, and how it helped member countries in deciding on the approach they could adopt in the discussions and negotiations at the World Trade Organization (WTO). The concluding section is an assessment of the achievements of the project and the constraints faced. An Author's Addendum looks at the contribution of several special features of the project in facilitating positive results, despite the constraints.

Structure of the Book

This book is divided into three parts. Part One provides background information and consists of two chapters. Chapter 1 describes the main features of the rules-based system created by the World Trade Organization (WTO) and what it does. It also explains how the work done in the organisation is different to that done in other organisations, and why the delegations from developing countries need technical assistance to participate in the highly technical and legal discussions and negotiations held under its auspices. Chapter 2 looks at how the Commonwealth project for providing assistance and advice to the members of the Geneva Group of Commonwealth Developing Countries came to be established.

Part Two consists of seven chapters that present an overview of the assistance provided to the members of the Group in discussions leading to the launching of the Doha Development Round of Negotiations in November 2001, and later after the round was launched, for participating in the negotiations on subjects covered in the agenda. Chapter 3 describes the problems that were encountered and how these were resolved resulting in the launching of the Doha Round. This is followed by accounts of the assistance and advice provided to the members of the Group since the launching of the Round to enable their participation in the discussions and negotiations in the following subject areas:

- Liberalisation of trade in agricultural products (Chapter 4)

- Agricultural commodity issues (Chapter 5)
- Liberalisation of trade in non-agricultural products (Chapter 6)
- Liberalisation of trade in services (Chapter 7)
- Role of industrial policy in attaining the Doha objectives (Chapter 8)
- Agreement on TRIPS and public health (Chapter 9)
- Trade facilitation (Chapter 10)

Part Three is devoted to a more detailed description of the assistance provided to individual delegations (Chapter 11), as well as the assistance provided in the period prior to the launching of the Doha Round (1997–2001) and the work done under the joint Commonwealth/International Trade Centre project (Chapter 12).

The working papers and other papers prepared in pursuance of the work done under the project are available for reference from the Commonwealth Secretariat's library, Tel: +44 (0) 207 747 6164, Email: library@commonwealth.int

Overview of the Assistance Provided

The Group selected the subjects on which the assistance of the Adviser was required.

Modalities for negotiations on agricultural and non-agricultural products

In agriculture, the papers prepared suggested that the extent to which Commonwealth developing countries could reduce their tariffs should take into account that production in almost all these countries was undertaken by poor farmers at subsistence level and, as such, the sector was not expected to benefit from efficiency gains that accrue following the liberalisation of trade. They should further be entitled to exclude from tariff reductions those products for which the existing level of protection was considered necessary for the maintenance of the livelihood of poor farmers and for ensuring food security.

In the industrial sector the analysis showed that if new measures to liberalise trade were to result in new investment and industrialisation, and not in de-industrialisation and increased unemployment as had happened in the past in some of the African countries, it was necessary that tariffs be reduced gradually and by small percentages. In addition, those sectors of industry that needed the existing level of protection should be excluded from tariff reductions.

In both the agricultural and non-agricultural sectors the assistance provided helped member countries to press developed countries for maximum reductions in tariffs and for removal of other barriers affecting trade in products of interest to them (chapters 4 and 6).

Agricultural commodity issues

One of the other major achievements is that the assistance provided enabled member countries of the Group that are heavily dependent on export earnings of primary commodities, to get included in the agenda for negotiations measures that could be taken under the legal framework of WTO to address the problems stemming from the persistent decline of commodity prices. Subsequent negotiations resulted in the inclusion of separate procedures for negotiations on improvement of the rules in the General Agreement on Tariffs and Trade (GATT) relating to international commodity agreements, in the modalities for agricultural products. These procedures would, inter alia, recognise that commodity-producing countries could enter into arrangements for stabilisation of prices without inviting consuming countries to participate in such arrangements, as required under the GATT rules (Chapter 5).

Trade in services

The papers prepared identified sectors in which the member countries of the Group could make requests to developed countries for liberalisation of trade. In deciding the sectors they should liberalise the papers emphasised the need to ensure that at national level there were effective mechanisms in the sectors to regulate the activities of the service enterprises. Commitments to bind the liberalisation measures on a legal basis should be given only if a regulatory mechanism was in place, or was being developed, to take into account the changes in competition that would result from liberalisation. Alternatively the countries making requests for liberalisation should be persuaded to provide the assistance necessary for building up such a mechanism (Chapter 7).

Adoption of a national industrial policy to support liberalisation measures

The paper prepared explained that there was a growing view amongst economists and policy-makers that liberalisation of trade does not automatically lead to economic development. In most cases, it becomes necessary to adopt appropriate 'industrial policy' under which governments provide incentives for investment in new industries through such measures as the establishment of industrial estates. Governments must also ensure they were able to rescue agricultural producers or industries that were being hurt by dumped or subsidised imports by imposing anti-dumping or countervailing measures. In certain situations, it may also be necessary for governments to provide increased protection by using the flexibility provided to developing countries

under the GATT rules to increase protection for the development of new industries. The analysis in the papers has enabled countries belonging to the African, Caribbean and Pacific (ACP) Group of States to table legal-based texts for improving the rules of the Agreement on Anti-dumping Practices (ADP) and the Agreement on Subsidies and Countervailing Measures (ASCM) to facilitate the developing countries to apply such measures in appropriate cases. They have also tabled a text seeking clarifications of the rules of GATT Article XVIII for improving the procedures for the WTO to examine the measures taken by developing countries for providing increased temporary protection for the development of new industries or for the development of recently established industries (Chapter 8).

TRIPS and public health

The Agreement on Trade Related Aspects of Intellectual Property (TRIPS) was added to the body of multilateral rules in 1995 when the WTO was established. It provides inter alia that all countries must protect the exclusive rights of patent holders to market the products for which they hold patents at prices to be determined by them for a minimum period of 20 years.

Prior to the adoption of the Agreement, a large number of developing countries provided protection to patents for pharmaceutical products for a period of only five to seven years. This had enabled the pharmaceutical industries in these countries to produce generic versions of products for which patents had expired in the country and to sell them in the domestic market and in other countries where the patent was either not registered or had expired at prices that were substantially lower than those charged by patent-holding company. The developing countries were apprehensive and had therefore argued that the adoption of the rule requiring all countries to provide protection for a minimum period of 20 years would, by preventing them from producing generic versions, have a serious impact on prices and on the ability of their governments to make drugs available to the people needing them at prices they could afford. Their apprehensions proved to be justified soon after the adoption of the TRIPS Agreement. Prices of pharmaceutical products became a controversial subject of public debate as a result of high prices charged by the pharmaceutical companies for new drugs that were needed in developing countries for treatment of diseases such as HIV and AIDS.

Against this background, the main focus of the work done under the project was to assist delegations in examining how the rules of the TRIPS Agreement could be improved and clarified to ensure that people in developing countries could have access to drugs at prices they could afford. The TRIPS Agreement leaves it open to countries to compel a patent holder to grant a licence to a domestic producer to produce a generic version of the patented product, particularly in cases where he or she is charging unreasonably high prices. However the rules provided that such compulsory licences

should be granted 'predominantly' for sales in the domestic market. The rules thus prevent companies that produce generic versions under compulsory licences from exporting. Further, the provisions permitting countries to grant a compulsory licence to a pharmaceutical company in the country to produce a generic version were of advantage only to those countries with a well-established manufacturing industry. A large number of developing countries, particularly the least-developed countries or those at a lesser stage of development, did not have national industries producing pharmaceutical products and so were in no position to take advantage of the provisions.

The working paper on the subject prepared under the project therefore proposed that the rules on compulsory licences in the Agreement should be modified to permit the governments of countries with a well-established pharmaceutical industry to also grant compulsory licences for the production of generic versions for export to least-developed and other low-income countries that did not have a manufacturing industry. The paper also suggested procedures that would have to be adopted to ensure supplies of these generic versions were not diverted to other countries.

The members of the Group who were actively participating in the negotiations in this area, generally agreed that the approach suggested in the paper provided a basis for the 2003 Decision taken on 'Access to Medicines at Affordable Prices by Countries with no Manufacturing Capacities' and the amendment to the relevant rules in the TRIPS Agreement that were subsequently adopted (Chapter 9).

Trade facilitation

A handbook on trade facilitation (Rege and Kataric 2007) published by the project proved useful not only to trade officials in national capitals and negotiators in Geneva but also to chambers of commerce, and research and other organisations interested in work in this area. The handbook topped sales at the WTO bookstore for over a year, and a number of delegations have time and again emphasised its usefulness in terms of the detailed points and suggestions it makes (Chapter 10).

Assistance to individual delegations

One of the key innovative aspects of the project was a hotline to make provision for assistance on request to individual delegations. This included, inter alia, providing clarifications on the legal issues raised in the discussions, giving opinions on compatibility with WTO law and practice of the laws, rules and regulations that countries proposed to adopt, and preparing papers on issues of special interest to the requesting delegations in the discussions (Chapter 11).

Assistance provided pre-Doha

From 1997, when it was established, to mid-2001 the main thrust of the project was on the preparation of papers that would explain in simple language the main features

of the various agreements and their rules. Papers were also prepared on the new subjects – trade and investment, trade and competition policy and transparency in government procurement – included in the WTO work programme adopted at the 1996 Singapore Ministerial Meeting for study and analysis. These enabled the member countries of the Group to examine whether these subjects should be taken up for negotiations on rule making if a new round were to be launched. All the papers were compiled in a manual on the world trading system (Rege 1999), which has been used widely not only by the delegations from developing countries and officials from their national capitals as a useful reference material on WTO law and practice but also by academic institutions, the business community and the general public. Its usefulness for all those who have an interest in WTO work is evident from the fact that it has been translated into nine languages – Arabic, Cambodian, Chinese, French, Romanian, Russian, Spanish, Ukrainian, and Vietnamese.

The assistance provided during the period also aimed at preparing delegations for participation in meetings on how the development dimension could be included in the agenda, if a new round of negotiations was launched. Considerable emphasis was placed on helping members of the Group in preparing formal submissions to appropriate WTO committees. The submissions identified in more specific ways the problems they were encountering in applying the rules of the various WTO Agreements at national level.

When the Commonwealth project started the Adviser was working on a joint Commonwealth/International Trade Centre project on some of the WTO related issues, and a decision was taken that he should continue to do this work. One of the major achievements of the work done under the joint project is the publication of a book on the challenges encountered by exporters in developing countries in meeting international trade standards (Rege and Gujadhur 2004). In analysing the difficulties the book emphasises that one of the important reasons is their inability to participate effectively in the technical-level discussions that take place in international standardisation organisations when the standards are being formulated and makes recommendations on the technical assistance that may be required to improve their capacities for participation in international standardisation activities. The publication has been well received particularly by persons who are involved in standardisation activities, and by trade officials and WTO officials associated with the work on technical regulations and sanitary and phytosanitary measures (Chapter 12).

Assessment of the Project's Achievements and Constraints

From what is stated above, it is evident that the work done under the project has been able to make a useful contribution. However, in evaluating how far this work has improved the participation of member countries of the Group in WTO activities, particularly in the negotiations held under its auspices, it is necessary to bear in mind

that assistance for this purpose is also being provided by a number of other international organisations. In fact the project was conceived and implemented to provide more focused attention on the needs of the member countries by complementing the analytical work on trade and development problems of developing countries that was being done by the UN Conference on Trade and Development (UNCTAD) on issues under discussions and negotiations in WTO. A number of other intergovernmental organisations like the Agency for International Trade Cooperation (AITIC) and non-governmental organisations such as South Centre and Third World Network are also active in providing assistance in this area. In addition, the Economic Affairs Division of the Commonwealth Secretariat provides assistance from London on certain subject areas under discussions in WTO. Member countries therefore had wide choices in deciding which agency they would like to rely for assistance and advice in a particular area.

It would appear that in deciding on a broad approach that could be adopted in the negotiations on liberalisation of trade in agricultural and non-agricultural products, the members of the Group relied greatly on the working papers prepared by the Adviser under the project. Further, it would appear that the member countries have relied heavily on the advice and assistance provided by the Adviser in most of the rule subject areas (such as trade facilitation, anti-dumping and other trade remedy measures and special and differential treatment to developing countries) where his insights into the trade and development problems of developing countries, and knowledge and understanding of WTO law and practice were important factors in securing clarification of the existing rules or adoption of new rules in the negotiations.

Findings in the evaluation reports

The pivotal role that the project played in providing assistance was reflected in the periodic reviews undertaken by the Group and in the reports of independent experts. For instance, in the major review of the first two years of the project, the Group unanimously agreed that the assistance programme had made 'a positive contribution in assisting delegations in improving their understanding of the technical and highly complex issues under discussions in WTO'. The assistance provided on request to individual delegations on specific matters of interest or concern to them, was found to be 'most valuable, particularly as such assistance was not available from UNCTAD or other agencies ... providing technical assistance on WTO related matters'. In subsequent reviews most of the members reaffirmed that the high quality of the papers had helped them in deciding on approaches that could be adopted in the discussions.

Independent experts commissioned by the Commonwealth Secretariat to conduct external evaluations echoed this positive assessment by members of the Group. In 2000, Mr Percy Mistry from the UK-based Oxford International Associates, after reviewing a number of background papers, stated that they were 'commendable' in respect to

their quality, substantive content and style with the pertinent arguments presented in a direct, non-technical way. 'They are neither condensing (as papers prepared by experts often are) nor abstruse containing mainly expositions and factual analysis that are objective, impartial and understandable. They simplify complex technical issues and terminology and can be understood by officials without specialised knowledge of trade economics or of procedural technicalities. They report on, and analyse the implications of, positions being taken by different countries on different issues without being partisan.'

In 2001 independent consultant Professor Mike Faber identified as an 'exceptionally valuable quality' the way in which the papers analysed a proposal or an obligation so that 'different governments or organisations can see exactly how the measure under scrutiny will affect them, and can make up their own minds on how they can respond to it'.

Mr Peter Tulloch, former Director of the WTO, evaluated the work done under the project in 2003. After interviewing ambassadors from the Commonwealth developing countries and officials from Geneva-based international organisations engaged in providing assistance, Mr Tulloch reaffirmed in his report that the majority of the members of the Group 'attached great value to the Adviser's work, which they see as filling a unique niche, providing information and advice which is genuinely driven by their demands, is timely, responds to their priorities and is available at short notice...' (Chapter 2).

Constraints faced

This assessment of the achievements of the project would not however be complete without reference to the difficult period the project went through from about the middle of 2002 to nearly the beginning of 2004. Some of the donor countries that were financing the project considered the papers prepared under the project often suggested negotiating approaches that in their view were not always consistent with the liberal and open trade policies developing countries should follow in the fast globalising economy. These donor countries therefore insisted that the papers should be made available to them for scrutiny and comments at the same time as they were submitted to the Group for discussions and review. The Group strongly resisted this proposal. A compromise solution was found in early 2004 when the donor countries agreed to give up their demand to see the papers before they were finalised, and, in return, the developing countries agreed to change the composition of the then existing Advisory Committee to include representatives of donor countries. The new Advisory Committee that was established consisted of three representatives of recipient countries and two from donor countries, and its main function would be to deal with the project's administrative aspects on the basis of quarterly reports to be submitted by the Adviser. The work of the Group went smoothly after this mechanism was adopted (Chapter 2).

Author's Addendum: Concluding Observations

In my view the project had six special features that contributed to the positive results, despite the constraints mentioned above.

First, the members of the Group were all Commonwealth developing countries and as such shared common historical ties and more or less the same systems for administration of laws and regulations. This enabled me to focus on their common trade and development interests in the background analytical papers and to make for their consideration, suggestions on the approaches they could adopt in the discussions and negotiations in WTO.

The practice of encouraging the active participation of the officials from the Missions in the preparation of the papers also enhanced the effectiveness of the assistance provided. The process began with discussions with officials from member countries who had requested the paper and reaching agreement with them on an outline of the issues to be covered. After the draft paper was ready, it was discussed in meetings held at expert level, in which officials from the Missions of all member countries took part. The purpose of these meetings was twofold; to brief the officials on the main points and to get their views on the suggestions made in regard to the approach members could adopt in the discussions and negotiations in WTO. The draft, which was revised taking into account the comments and views expressed in the expert-level meetings, was finalised only after its consideration at policy level in Ambassador-level meetings.

The expert-level meetings were generally arranged during lunch breaks, over sandwich lunches, in order to facilitate attendance by officials in between the morning and afternoon WTO meetings, which are held on almost every workday of the week.

The active involvement of the officials from the Missions in the preparation of the papers created a feeling of 'ownership' on their part, and encouraged them to take an active interest in the work of the Group. In addition, the detailed briefings on the issues covered by the papers, provided by the Adviser during the expert-level meetings, strengthened their capacity to participate effectively in the discussions and negotiations on the subjects in WTO.

Second, efforts were also made, wherever possible, to get the views of officials from capitals on the issues on which work was being done. The officials attending the expert-level meetings were requested to send the draft papers to capitals to get instructions on whether or not the approach suggested in the paper should be followed, before they were considered at the Ambassador-level meetings. Further, in order to ensure greater involvement of capital-based officials in the work of the Group, wherever possible, they were invited to attend seminars or workshops that were arranged to finalise the papers.

Third, the acceptance by those overseeing the project at the Commonwealth Secretariat that since I was working for the Group they did not need to be shown the papers I prepared in draft form for prior approval, contributed greatly both to the smooth operation of the project and efficiency in delivery of the assistance. The practice developed for sending the papers to the Secretariat after they were finalised in the expert-level meetings. If the Secretariat had any comments the Director of the Special Advisory Services Division or his representative made these known in the Ambassador-level meetings. The general approach of the Secretariat was that since these were papers of the Group and not of the Secretariat, it was for the members of the Group to ensure that they generally supported the views expressed in them. In adopting this approach the Secretariat was trying to ensure that the project was in practice member-driven.

Fourth, the flexibility available to me for providing assistance on request to individual delegations on a personal and confidential basis, in addition to that provided in pursuance of the work programme adopted by the Group, enhanced the usefulness of the assistance provided overall. As such assistance was not being provided by any of the Geneva-based organisations the delegations found it most useful, particularly as I was able to provide it almost immediately on request because of my long experience of working on WTO-related issues.

Fifth, it was recognised right from the beginning that even though as developing countries members of the Group had commonality of interest, given their widely differing levels of development it would not be possible for the Group as a whole to take joint positions in the discussions and negotiations in WTO. Thus members started out using the mechanism of the Group for discussions and exchange of views on the basis of papers prepared under the project, and no time was spent on lobbying for or building up joint positions. It was generally left to each delegation to decide on the position it would like to adopt in the discussions and negotiations in WTO, taking into account the points made in the papers. The Group therefore acted as a 'think tank' on issues on which papers were prepared. However, members of the Group belonging to the African and Caribbean regions who considered they may be able to take joint positions because their countries are at the same stage of development, were able to use the mechanism of the ACP or African Groups for building up joint positions based on the papers prepared under the project.

Finally, one of the most important factors that contributed to the positive results of the project was the personal interest shown by the Ambassadors who were elected as Chairpersons in the work of the Group. They demonstrated great confidence in my efforts, and despite their heavy work schedules all of them showed a willingness to meet with me at short notice for informal reviews of the work being done and to exchange views on further work that could be organised.

Part One

The WTO rules-based system and the Commonwealth Project

1

What is the WTO and What Does It Do?

Introduction

The World Trade Organization is an international body that has developed rules its member countries are expected to follow in their trade relations with one another. The basic objective of these rules is to encourage countries to follow open and liberal trade policies. The assumption is that the pursuit of such open policies by all member countries would result in the most efficient use of available world resources thereby increasing employment and the standard of living.

One of the main functions of the WTO is to keep a close watch on all member countries to ensure they comply with its rules in keeping with the legal obligations imposed on them. The organisation provides a forum for consultations when a member country finds that another member is not following the rules. If such consultations fail the matter is brought before the Dispute Settlement Body (DSB), which is comprised of representatives of all member states. The decisions handed down by the DSB are binding on the parties to the dispute.

The WTO also provides a forum for negotiations on further liberalisation of trade in goods and services, to review and make improvements to the existing rules and for developing rules covering new trade-related subject areas. In most cases, these negotiations are held in periodic rounds of negotiations. Decisions to launch such negotiations are taken at ministerial meetings, generally after preparatory work lasting over a few years. The 1994 Marrakesh Agreement establishing the WTO imposes an obligation to hold meetings at ministerial level every two years.

Main Features

The rules-based multilateral trading system that emerged with the establishment of the WTO has evolved over a period of nearly 60 years. In 1947, some 23 countries took the first step towards the adoption of rules applicable to international trade in goods by adopting the General Agreement on Tariffs and Trade (GATT). The establishment of WTO in 1995 resulted in two new main agreements – the General Agreement on Trade in Services (GATS), which lays down rules governing trade in services, and the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS).

With the establishment of the WTO, GATT ceased to be a separate entity. Thus, the multilateral trading system now consists of three main agreements: GATT, GATS and TRIPS. In addition, there are a number of agreements, decisions and understandings that elaborate on the main rules contained in GATT (Box 1).

Box 1: The main legal instruments negotiated in the Uruguay Round along with the Marrakesh Agreement establishing the World Trade Organization

Multilateral Agreements (obligations apply to all WTO members)

A. Trade in goods

- General Agreement on Tariffs and Trade (GATT 1994)

  Associate Agreements

  Agreement on Implementation of Article VII of GATT 1994 (Customs Valuation)

  Agreement on Preshipment Inspection (PSI)

  Agreement on Technical Barriers to Trade (TBT)

  Agreement on the Application of Sanitary and Phytosanitary Measures (SPS)

  Agreement on Customs Valuation

  Agreement on Import Licensing Procedures

  Agreement on Safeguards

  Agreement on Subsidies and Countervailing Measures (SCM)

  Agreement on Anti-dumping Practices (ADP)

  Agreement on Trade-Related Investment Measures (TRIMs)

  Agreement on Textiles and Clothing (ATC)

  Agreement on Agriculture

  Agreement on Rules of Origin

  Understandings and Decisions

  Understanding on Rules and Procedures Governing the Settlement of Disputes

  Understanding on the Interpretation of Article II:1(b) of GATT 1994 (Binding of tariff concessions)

  Decision on Trade and Environment

  Trade Policy Review Mechanism

B. Trade in services

- General Agreement on Trade in Services (GATS)

C. Intellectual property rights (IPRs)

- Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

D. Settlement of dispute

- Understanding on rules and procedures governing settlement of disputes

E. Plurilateral Agreement (obligations only apply to countries that become its members)

- Agreement on Government Procurement
- Information Technology Agreement

Rules of the GATT

Four basic principles

Even though the detailed rules prescribed by the GATT and its associate agreements may appear to be complex and their legal terminology is often bewildering, the entire framework of this agreement is actually based on just four basic principles. These are:

Protection of domestic industry through tariffs

The GATT rules recognise that member countries may have to protect domestic production against foreign competition. However, it requires countries to provide such protection through tariffs. The use of quantitative restrictions is prohibited except in a limited number of closely defined situations.

Reductions and binding of tariffs

Countries are further urged to reduce, and where possible eliminate, protection to domestic production by reducing tariffs and removing other barriers to trade. Tariffs so reduced are restricted from further increases by being listed in a country's national schedule. Countries may set rates at levels higher than those resulting from reductions made in the negotiations, and rates so set are listed in the schedule of concessions. Each country has a separate schedule and is under an obligation to ensure that tariff rates applied to imported products do not exceed the bound rates shown in its schedule.

Most-favoured-nation (MFN) treatment

This important rule of GATT lays down the principle of non-discrimination. The rule requires that tariffs and other regulations should be applied to imported or exported goods without discrimination among countries. In other words a country should not levy customs duties on imports from one country at a rate higher than it applies to imports from other countries.

There are, however, some exceptions to the rule. Trade among members of regional economic groups, which is permitted on preferential or duty-free rates, is one such exception. The Generalised System of Preferences (GSP) provides another. Under this system, developed countries apply preferential or duty-free rates to imports from developing countries, but apply MFN rates to imports from other countries. These systems are non-reciprocal; the developing countries benefiting from such access are not expected to provide preferred access to imports from the preference-giving developed countries.

The systems also provide for more favourable treatment to all least-developed countries by allowing a substantial proportion of their goods to be imported on a duty free basis. In recent years, some of the developing countries that are at higher stages of development, such as India and Brazil, have adopted systems allowing imports of some of the products from all least-developed countries on a non-reciprocal basis.

National treatment rule

While the MFN rule prohibits countries from discriminating among goods originating in different countries, the national treatment rule prohibits discrimination between imported products and similar domestically generated products. This rule applies to the levy of internal taxes and in the application of internal regulations. Thus, after a product has entered its market on payment of customs duties a country cannot then levy an internal tax (e.g. sales tax or value-added tax) at rates higher than those payable on a product of national or domestic origin. Nor can it apply a mandatory standard to an imported product that is different or more stringent than that applicable to a similar domestic product.

Rules of general application

The four basic principles described above are complemented by rules of general application governing goods entering the customs territory of an importing country. These include rules that countries must follow in determining the dutiable value of imported goods where customs duties are collected on an ad valorem basis (i.e. in proportion to the estimated value of the goods concerned); in applying mandatory product standards (technical regulations), and sanitary and phytosanitary measures to imported products; and in issuing licences for imports. The detailed rules applicable in these and other areas are contained in the relevant associate Agreements. The main features of these rules are described in Box 2.

Box 2: Summary of GATT rules applicable at the border

Determination of dutiable customs values

The Agreement on Customs Valuation protects the interests of importers by stipulating that value for customs purposes should be determined on the basis of the price paid or payable by the importer for the items being cleared by customs. However, the customs agency can reject the declared value where there is reasonable doubt about the truth or accuracy of the declaration. In all such cases, customs must give importers an opportunity to justify their declared value. Where customs is not satisfied with the justification, the Agreement sets out a hierarchy of five alternative yardsticks that may be applied.

Application of mandatory standards

Countries often require imported products to conform to the mandatory standards they have adopted to protect the health and safety of their people. The Agreement on Technical Barriers to Trade provides that such product standards should not be formulated and applied in a way as to cause unnecessary barriers to trade. Towards this end it calls on countries to use international standards as a basis for their technical regulations.

Application of sanitary and phytosanitary measures

Such regulations are applied by countries to protect their plant, animal and human life from the spread of pests or diseases that may be brought into the country by contaminated fruits, vegetables, meat and other food products. The Agreement on the Application of Sanitary and Phytosanitary Measures requires countries to base such regulations on international standards and guidelines in order to ensure that they do not cause barriers to trade. It further requires that where countries specify standards in their sanitary and phytosanitary measures that are higher or different from those laid down by international standards, they should base them on scientific principles.

Import licensing procedures

The Agreement on Import Licensing Procedures sets out guidelines for licensing authorities to follow in issuing import licences with a view to ensuring that the procedures do not have additional trade-restricting effects.

Other rules

In addition to the rules of general application described above, the GATT multilateral system has rules governing the following areas:

The use of subsidies

Governments grant subsidies for the attainment of a variety of policy objectives. Such subsidies could, in practice, distort conditions of competition in international trade. The basic aim of the GATT rules is to prohibit or restrict the use of subsidies that have trade-distorting effects.

The rules governing the use of subsidies are contained in the Agreement on Subsidies and Countervailing Measures (SCM) and apply to both industrial and agricultural

products. The Agreement on Agriculture contains some additional and more specific rules that apply to agricultural products. The SCM Agreement divides subsidies into two broad categories: prohibited and permissible.

Prohibited subsidies include export subsidies and subsidies that encourage the use of domestic rather than imported goods. The Agreement prohibits countries from granting export subsidies on industrial products. The prohibition on the use of such subsidies does not apply to developing countries with per capita income of less than US$1,000.

All subsidies, other than export subsidies are treated as permissible. These are divided into two categories: non-actionable and actionable.

Subsidies are treated as non-actionable by other countries when they do not benefit 'a specific firm, industry or group of industries' and when they are granted on the basis of criteria that are natural, non-discriminatory and horizontal. Such subsidies include inter alia aid for the development of small and medium industries or disadvantaged regions, and subsidies to facilitate the adoption of plants to new environmental regulations.

All subsidies that are specific to a firm or industry are actionable if they create 'adverse effects' on the trade of a member country. Adverse effects could occur where imports of subsidised products cause injury to the domestic industry or cause serious prejudice to the importing country's interest. In cases where subsidised imports cause serious injury to the domestic industry, the importing country may impose countervailing duties (see below). Serous prejudice is defined as existing if the total volume of ad valorem subsidisation of a product exceeds 5 per cent of the cost of the product. The country that suffers such serious prejudice has the right to call for consultations and bring the matter to the WTO for settlement if the subsidy has resulted in the reduction of its exports, significant price undercutting or an increase in the market share of the product in the subsidising country.

These rules relating to the use of subsidies are complemented by additional rules in the Agreement on Agriculture, details of which appear in Chapter 4 on liberalisation of trade in agricultural products.

Contingency protection measures

The GATT rules further recognise that the ability of the member countries to maintain open and liberal trade policies would be enhanced if their industries were assured that the governments could come to their rescue by taking protective measures for a temporary period where they are being hurt or injured by increased imports. These could take the form of safeguard measures and anti-dumping and countervailing measures.

The Agreement on Safeguards (AOS) permits importing countries to restrict imports of a product for a temporary period by either increasing tariffs over bound rates or imposing quantitative restrictions. Governments can resort to such safeguard actions only when it has been established through properly conducted investigations that a sudden increase in imports (both absolute and relative to domestic production) has caused or threatened to cause serious injury to the domestic industry. Safeguard actions cannot be taken if only one or two producers are affected. They are permitted only where it is established that increased imports are causing serious injury to producers of the majority of total domestic production of a product similar to the imported product.

The primary purpose of providing such temporary increased protection is to give the affected industry time to adjust to the increased competition presented by foreign producers, even though it is fair and the foreign suppliers are not engaging in any unfair practices. The Agreement ensures that such restrictions are applied only for temporary periods by stipulating a maximum period of eight years for the imposition of a safeguard measure on a particular product. Even though governments can take the initiative to commence with investigations, in most countries the practice is to initiate such investigations only on the basis of a petition from the affected industry.

Governments may also levy additional duties on imported products where it is alleged that foreign suppliers are resorting to unfair trade practices. The rules deal with two types of unfair practices that can distort conditions of competition in international trade. The first is dumping of goods in foreign markets. The Agreement on Anti-dumping Practices (ADP) lays down strict criteria for the determination of dumping. It stipulates that a product should be treated as being dumped where its export price is less than normal value, i.e. the price at which it is offered for sale in the domestic market of the exporting country. The second type of unfair competition occurs where a foreign supplier is able to charge low export prices as it has received a subsidy from the government.

The ADP authorises importing countries to levy anti-dumping duties on products that are being dumped. Likewise, the Agreement on Subsidies and Countervailing Measures permits importing countries to levy countervailing duties on imported products that have benefited from subsidies.

The levy of such duties is, however, subject to two important conditions. First, the duties cannot be levied simply on the grounds that the product is being dumped or subsidised. It is essential for the importing country to establish, through investigations carried out at national level, that increased imports are causing material injury to the domestic industry. Second, governments can initiate such investigations if a petition is submitted by or on behalf of the domestic industry claiming that dumped or subsidised imports are causing material injury to producers accounting for at least 25 per cent of total domestic production.

It should be noted that the standard for determining injury to industry in safeguard actions is much higher than that required for determining injury for the levy of countervailing duties. For safeguard actions it must be established that the injury to the industry is serious, while for anti-dumping and countervailing measures a lower standard of proof of material injury is adequate. The difference is due to the fact that in the case of the former, the problems of the domestic industry in the importing country are caused by fair foreign competition; in the case of the latter the problems arise from the unfair trade practices of foreign suppliers.

Further, in the case of safeguard measures, the importing country applying such measures is required to make compensatory concessions in the form of reducing tariffs on equivalent trade. The rules do not impose any such obligation in cases of anti-dumping or countervailing duties. The main reason for the difference is that in the case of safeguard measures, the right of exporters to access the market of the importing country is being denied on the basis that the domestic industry is not able to meet the competition, which is fair. In the case of anti-dumping and countervailing duties, the exporters are penalised because they are engaging in unfair trade practices.

GATT and developing countries

The GATT rules recognise that developing countries, particularly those that are least developed, may not be able to derive full benefits from the rules-based system unless positive efforts are taken 'to secure' for them a share in growth in international trade that is commensurate with the needs of their economic development. To assist developing counties to derive full benefits from the system in promoting economic development, a number of special provisions have been included in the GATT and GATS.

These provisions can be broadly grouped into the following three categories:

- Granting of preferential access to imports from developing countries by developed countries;
- Special rules included in the Agreements to provide flexibility to developing countries to take measures for promoting economic development;
- Extension of special and differential treatment to developing countries in the application of the rules.

A brief overview of these provisions is provided in Box 3.

Box 3: Special GATT provisions relating to developing countries

Preferential tariff access to imports

In 1979, following the agreements reached in UNCTAD on the Generalised System of Preferences, GATT member countries adopted a Decision permitting developed countries to deviate from the most-favoured-nation rule. This allowed them to apply preferential tariff rates on a 'non-reciprocal and non-discriminatory basis' and, where possible, duty free access to imports of products originating in developing countries. This decision has come to be known as the General Enabling Clause. It permits countries granting such preferential access to extend more favourable preferential treatment to imports from least-developed countries than that extended to developing countries.

In pursuance of these decisions, almost all developed countries have been granting preferential access to imports from developing countries by adopting systems falling under the GSP. The granting of preferential access is, however, unilateral in character, and most of the systems provide for denial of preferential access to imports of products from developing countries that have become competitive on the basis of the criteria specified in the system.

Flexibility for promoting economic development

The GATT rules prohibit countries from increasing tariffs that have been bound in order to provide increased protection to agricultural producers or to domestic industries. However, they recognise that developing countries may have to rely on trade measures to restrict imports in cases where no 'new industries are being established or those which have been established are not able to develop further'.

The special provisions permitting developing countries to extend such protection are contained in Article XVIII on Governmental Assistance to Developing Countries. It provides that developing countries may grant more protection for the development of 'particular industries' by increasing bound rates of tariffs or by imposing quantitative restrictions on imports or by using both measures together. The term 'particular industries' covers development of a new industry or modifications or extension of the existing production with a view to achieving fuller and more efficient use of resources in accordance with the priorities of economic development.

However, Article XVIII also requires the country taking such measures to reach agreement with exporting countries that consider their trade would be adversely affected, with a view to providing them with compensatory concessions for the loss of their trade. Further, in cases where the increased protection from foreign competition is granted through imposition of quantitative restrictions, the rules require WTO member countries to approve the measures taken.

Extension of special and differential treatment in applying the rules

Provisions for extension of special and differential treatment to developing countries are contained in most of the associate agreements. These provisions allow for, inter alia:

- Granting them transitional periods, varying from five to 10 years, to prepare for acceptance of the obligations they impose;
- Longer periods for acceptance of some of the obligations;
- Longer periods for acceptance of the obligations by the least-developed countries than for the acceptance by developing countries; and,
- Extension of technical assistance to developing countries from developed countries, the WTO Secretariat and, where appropriate, other international organisations to assist in building up technical capacities for the application of the rules of the agreements and to abide by their obligations.

Rules of the General Agreement on Trade in Services (GATS)

Main sectors

The term 'services' covers a wide range of economic activities. The WTO has identified the following 12 major categories of services: Business, Communications, Construction and relational engineering, Distribution, Educational, Environmental, Financial, Health and social, Tourism and travel, Recreational, Cultural and sporting, and Transport. (Other services that do not fit into these categories are listed separately.) These 12 sectors are further divided into 155 sub-sectors.

Four modes

One of the main characteristics of services is that they are intangible and invisible; goods, by contrast, are tangible and visible. These differences also influence the modes in which international trade transactions take place. While international trade in goods involves the physical movement of products from one country to another, only relatively few service transactions involve cross-border movements. For most service transactions, proximity between the service provider and the consumer is necessary. Such proximity can be obtained either by establishing a commercial presence in the importing country (e.g. opening a branch) or establishing a subsidiary through the movement of natural persons for a temporary period (e.g. a lawyer or architect moving to another country). In the case of a few service activities, consumers may have to travel to the country of importation to obtain a service (e.g. tourism).

The General Agreement on Trade in Services, which was negotiated in the Uruguay Round, has created a framework for bringing this trade under international discipline. GATS provisions apply to all the modes in which international trade in services takes place. These are as follows:

- Cross-border movement of service products (Mode 1);
- The movement of consumers to the country of export or consumption abroad (Mode 2);
- The establishment of a commercial presence in the country where the service is provided (Mode 3); and
- Temporary movement of natural persons to another country to provide a service there (Mode 4).

Main provisions

The GATS consists of a framework text specifying the general principles that apply to measures affecting trade in services, and specific liberalisation commitments that apply to the service industries and sub-industries listed in each country's schedule.

MFN and national treatment

These two basic principles of trade in goods now also apply to trade in services. However, they have been modified to take into account the special characteristics of trade in services. Thus the Agreement requires countries to apply MFN treatment by not discriminating between service products and service providers of different countries.

The national treatment principle envisages that countries should not treat non-national service products and service providers less favourably than their own service products and service providers. The Agreement, however, does not impose this as an obligation to be applied across the board in all service sectors as in the case of trade in goods. Rather, it requires countries to indicate in their schedules of concessions the sectors in which and the conditions subject to which such treatment would be extended. Box 4 explains the reasons for the differences in the approaches adopted in the application of the national treatment principle to trade in goods and to trade in services.

Box 4: Why the national treatment principle is not applied across the board in GATS

The GATT national treatment rule that applies to trade in goods prohibits countries from applying higher internal taxes or more rigorous domestic regulations to imported products than those that are applied to similar domestic products. The rule is intended to ensure that, in practice, the domestically produced product does not obtain more protection than that resulting from the levy of tariffs and other charges payable at the border.

Since services are invisible protection to the domestic service industry is provided not through tariffs but through national regulations. These regulations include the conditions under which the foreign suppliers could export their services products and provide services to, or establish branches in, other countries. If the national treatment rule was to be applied to trade in services countries would have to apply the same regulations to domestic and foreign services industries, resulting in the total elimination of protection in the service sector. The GATS rules, therefore, provide that countries should be free to indicate in the negotiations the sectors or sub-sectors and the terms on which they would be willing to extend such treatment to service products and suppliers from overseas.

Liberalisation commitments

Each country assumes specific liberalisation commitments, as contained in its schedule of concessions. These commitments indicate, on a sector-by-sector basis and for each of the four modes in which trade in services takes place, the conditions subject to which countries have agreed to improve market access treatment by eliminating or reducing discriminatory treatment extended to foreign suppliers.

The Agreement further imposes on countries the obligation to refrain from applying restrictions on international transfers and payments in sectors where they have made specific liberalisation commitments (except when they are in balance-of-payments difficulties).

Special and differential treatment to developing countries

The rules provide that in negotiations in the area of trade in services, as in the case of trade in goods, contributions that developing countries could make should be determined taking into account the level of development of the participating countries. Towards this end, the developing countries participating in the negotiations should be given flexibility to open fewer sectors and to liberalise fewer transactions.

Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

What is intellectual property?

The Agreement on TRIPS together with the multilateral agreements on trade in goods and trade in services, form the tripod of the WTO legal system. The objects of intellectual property are the creations of the human mind. The rights of creators of innovative or artistic work are known as intellectual property rights (IPRs). They include copyright (which protects the rights of authors of books and other artistic creations), patents (which protect the rights of inventors) and industrial designs (which protect rights to ornamental designs). They also cover trademarks and other signs that traders use to distinguish their products from those of others in order to build consumer loyalty and goodwill for their logos or brand names.

Main provisions of the TRIPS Agreement

The Agreement on TRIPS complements agreements on the protection of intellectual property rights developed by the World Intellectual Property Organization (WIPO). In particular, TRIPS prescribes minimum standards and periods for which protection should be granted to different intellectual property rights. In doing so it takes on board the standards laid down in the WIPO conventions and adds some more, particularly in the area of patents. Countries are further required not to discriminate among foreign nationals and between foreign and their own nationals in the acquisition, scope and maintenance of IPRs (extension of MFN and national treatment). An important feature of the TRIPS Agreement is that the mandatory standards of protection established in the WIPO conventions have been made legally enforceable.

Rules governing negotiations

In addition to providing a legal framework for the conduct of international trade, the multilateral trading system urges its member countries to hold periodic rounds of negotiations. The primary objective behind holding these rounds is to promote further liberalisation of trade by securing more reductions in tariffs and the removal of non-tariff measures. They also present an opportunity for securing improvements in the existing rules as well as for developing rules covering new subject areas.

The decision to launch negotiations is generally taken at a Ministerial Conference. Any such decision is usually preceded by two to three years of preparatory work during which countries decide on the subject areas that could be taken up for negotiations.

Ten rounds of multilateral trade negotiations have been held in the period between the establishment of the GATT in 1947 and the founding of the WTO in 1995 (Table 1). The first four rounds dealt almost exclusively with tariffs. Starting with the Kennedy Round (1964–67) attention began to shift towards addressing non-tariff measures, which, with gradual reductions in tariffs, were considered to be increasingly providing more serious barriers than tariffs for the development of trade.

Table 1: The GATT Trade Rounds

Year	Place/Name	Subjects Covered	Number of Countries
1947	Geneva	Tariffs	23
1949	Annecy	Tariffs	13
1951	Torquay	Tariffs	38
1956	Geneva	Tariffs	26
1960–1961	Geneva (Dillon Round)	Tariffs	26
1964–1967	Geneva (Kennedy Round)	Tariffs and anti-dumping measures	62
1973–1979	Geneva (Tokyo round)	Tariffs, non-tariff measures, and adoption of decision on General Enabling Clause	102
1989–1994	Geneva (Uruguay Round)	Tariffs, non-tariff measures, rules, services, intellectual property, dispute settlement, textiles, agriculture, creation of WTO	123

Most of these barriers arise as a result of differences in applying the basic rules of GATT to imported products. In order to ensure uniformity in the practices followed, the Kennedy Round adopted agreements that stipulated the broad principles and rules countries should follow in determining the value of imported goods for levy of customs duties and in applying anti-dumping measures. These agreements were reviewed in the Tokyo Round and new ones adopted in such areas as subsidies and countervailing measures, technical barriers to trade, government procurement and import licensing procedures. The round also adopted commodity agreements covering meat and dairy products.

In the Uruguay Round all these agreements (except the commodity agreements) were reviewed and modified taking into account the experience of their application since they were adopted. In addition, a new agreement on safeguard measures elaborating on the provisions in the GATT for dealing with emergency safeguard measures was adopted.

The Uruguay Round brought about one far-reaching change in relation to these agreements. Prior to the round membership of these agreements was voluntary. This had resulted in a large number of developing countries choosing not to become members on the basis that they would be unable to accept the additional procedural and other obligations imposed. The Marrakesh Agreement establishing the WTO changed this situation as it provided that all except four of the remaining agreements were multilateral and as such all countries that were members of GATT, automatically became their members and were bound by their obligations.

What Does the WTO Do?

Main functions

The WTO's numerous functions are related to the legal framework of rights and obligations created by the multilateral trading system, as described above. Briefly, it is responsible for overseeing the operations of the multilateral trade agreements, administration of the dispute settlement mechanism, surveillance of the trade policies of member countries, and the launch and conduct of negotiations.

How the work is organised

The main responsibility for overseeing the work lies with the Ministerial Conference. The Marrakesh Agreement establishing the WTO provides that member countries must meet at the ministerial level at least every second year to review the work undertaken during the previous two years and to adopt a programme of work for the next two. Between meetings of the Ministerial Conference, the General Council is responsible for carrying out the functions of the WTO. The Dispute Settlement Body considers disputes and the Trade Policy Review Body reviews the trade policies of different countries. Three subsidiary councils for trade in goods, trade-related aspects of intellectual property and trade in services operate under the guidance of the General Council. There are also a number of permanent committees like those on trade and development, agriculture and market access that report directly to the General Council. The committees that monitor the implementation of agreements – such as those on customs valuation, technical barriers of trade, sanitary and phytosanitary measures and anti-dumping practices – report to the Council of Trade in Goods, which, in turn, reports to the General Council.

In addition, working groups are often established for study and analysis in specific subject areas like trade and finance or trade and investment. Some 40 councils, committees, sub-committees and working groups function under the auspices of the WTO. The membership of these bodies is open ended and as such all WTO members can attend meetings.

Ambassadors generally attend the meetings of the General Council and of the other councils and most of the main committees, like the Committee on Trade and Development. Elections are held each year to select the ambassadors who will chair these bodies. The meetings of the committees that are established under the various agreements to ensure that actions taken by member countries are in full compliance with their rules tend to be highly technical. Officials from the missions who have developed expertise in the field take part in these meetings. Some countries, particularly the developed countries and some of the developing countries that are at a higher stage of development, often bring in their experts from capitals to attend these meetings. Senior officials from the missions, with expertise in the relevant fields, generally chair these meetings.

Framework for periodic negotiations

Since the GATT years it has been the practice to establish a separate institutional framework to oversee the work on negotiations, whenever a decision is taken to launch a new round. The declarations launching the negotiations generally provide for the establishment of the Trade Negotiations Committee, which guides and supervises progress. The WTO Director General has chaired this leading body since the Uruguay Round. Separate negotiating groups are constituted for negotiations in subject areas included in the agenda for negotiations. In the Doha Round (ongoing at time of writing), separate negotiating groups have been established for negotiations on agricultural products, non-agricultural products and trade facilitation, and in rules-based areas. Ambassadors, who are chosen on the basis of their knowledge and expertise of the issues under negotiations, chair these negotiating groups.

Decisions by consensus

All decisions in the WTO are taken by consensus – from the level of the committees and working groups to that of the councils and General Council, and at the Ministerial Conference. Consensus does not mean that unanimity is required for decisions to be taken. In fact, consensus is reached when there appears to be broad support among members for a decision and those who are not in favour agree not to express their opposition when it is being adopted. To arrive at consensus, consultations and negotiations are held, first on a bilateral and plurilateral basis and later on a multilateral basis. Such consultations are not only for taking decisions on major issues, such as the launching of a new round of negotiations or including a new subject for rule making in the agenda for negotiations. They also relate to discussions in the various councils and committees seeking solutions to the practical problems that member countries encounter in implementing the various legal instruments at national level. Thus, the WTO is a forum where, on most of its working days, negotiations are taking place on one issue or the other with a view to developing a consensus.

Consultations in 'green room' meetings

The procedures adopted for arriving at consensus acknowledge that it would be almost impossible to reach consensus if consultations are arranged in formal meetings of the councils and committees, which, as a rule, extend membership to all WTO member countries (153 as of 23 July 2008). From the early days of the GATT it was recognised that in order to prepare for arriving at consensus, meetings might have to be arranged among key delegations with differing views on the subject under discussion. These meetings were initially held in the conference room of the director general, which has green wallpaper. They therefore came to be called 'green room' meetings, a term that has stuck even though they are not always held there and are convened not only by the director general but also by the chairman of the particular council or committee seeking consensus, or outside Geneva during a ministerial conference.

The procedures followed to develop consensus through consultations on a limited country basis, have been a matter of criticism and controversy in recent years, as membership of the WTO has expanded. A large number of developing counties considered that in most cases only the developed countries and a few developing countries at higher stages of development, like Argentina, Brazil and India, were being invited to these meetings. They also considered that decisions taken in such meetings were brought to councils or committees for approval and endorsement by the whole membership, without allowing any serious discussions to take place. The matter came to a head at the Seattle Ministerial meeting, which was held in November 1999 to launch a new round of negotiations. The ministers from a number of developing countries in Africa, Asia and Latin America found they had to wait outside the conference room or stay in their hotels for most of the conference days as they were not invited to the so-called green room meetings even though the consultations were on whether or not the new subjects (trade and investment, trade and competition policy, transparency in government procurement and trade facilitation), to which they were opposed, should be included in the agenda for the proposed new round. The resentment this created led to the failure of the entire Ministerial meeting.

Considerable efforts have been made since then to improve the procedures that are adopted for arranging such meetings. It is now agreed that in order to ensure attendance is representative of developing countries belonging to different regions, at least 30 to 40 countries must be invited to these meetings. Further, in order to ensure fair and equitable representation of developing countries, the chairpersons of the regional groups of developing countries which have come into existence in Geneva (like the ACP, African countries and least-developed countries) should be invited to nominate two or three of their members, who have expertise in the subjects and issues to be discussed, to take part in the meeting.

Advantages and disadvantages of the consensus rule

It is important to note that the Marrakesh Agreement establishing the WTO, which contains rules on how decisions should be taken, provides that a majority vote can be taken in cases where it appears that decisions cannot be reached by consensus. In such cases each member country has one vole. Resorting to voting procedures is obligatory for certain types of decisions where the rules require a majority of two-thirds or three-quarters. For instance, a majority of three-quarters is required for interpretation of the provisions of WTO and for waivers from WTO disciplines while amendments that do not alter the rights and obligations of countries could be adopted by a two-thirds majority.

WTO members have consistently refused to resort to voting and have relied on consensus rule in taking major decisions. Even in the cases mentioned above, where more than a simple majority is required, efforts are made to develop a consensus and the votes are taken after such consensus is developed in order to comply with the legal requirements.

The consensus rule often leads to delays in decisions being taken. For instance, it was possible to develop consensus to launch the Uruguay Round of negotiations in 1989 only after difficult and tortuous negotiations lasting nearly five years, while the ongoing Doha Round of negotiations was launched in 2001 after prolonged discussions and negotiations lasting nearly four years.

Whatever may be the limitations of the system, the consensus rule is seen as protecting the interests of countries that are at a lower stage of development and as such have no political or economic strengths to influence decisions. They can refuse to join in the consensus where they consider that the proposed decision does not take into account their trade and development interests or the issue on which a decision is to be taken is not ripe for further rule making. However, those who criticise the system hold the view that it gives a few countries the right to almost veto a decision, even when the decision is acceptable to the majority.

The Secretariat

The WTO Secretariat is headed by the director general, who is elected for a term of four years by the member countries. The director general selects four deputy director generals from different regions on the basis of their experience, knowledge and expertise of WTO law and practice. The Secretariat is divided into divisions headed by directors.

The role of the Secretariat is limited, however, as compared to that of other international organisations like the International Monetary Fund (IMF) and World Bank. Its primary role is to provide members with technical and logistical support. This includes organising meetings of governing bodies, and preparing background papers

that are requested by the committees and councils and reports on the discussions in the meetings. It has very little formal authority to take initiatives. For instance, it cannot prepare research papers providing broad policy advice without the specific authorisation of member countries. Secretariat officials generally refrain from expressing opinions on the issues under discussion and in negotiation and if requested to do so they provide only factual information on the differing views expressed by the participants. Neither they nor the director general have any authority to suggest a new subject be taken up for discussions, or that a particular case be brought before the WTO Dispute Settlement Body for examination even where, in their view, a country is in blatant breach of the rules. Unlike the World Bank and the IMF, where heads and senior staff members have the right to take initiatives, the WTO director general and his senior staff have no such right. All such decisions have to be taken by the member countries. Because of this WTO is considered to be a member-driven organisation while the World Bank and the IMF are considered to be more secretariat-driven organisations.

Participation in WTO v. Other International Organisations

Discussions on trade and development at international level take place in addition to WTO in a number of other international and regional organisations. Important among these are the UNCTAD, World Bank and IMF. Like WTO, both the World Bank and the IMF emphasise the need for countries to follow open and liberal trade policies and to avoid protectionism. UNCTAD's role is somewhat different. It was established to address the trade and development problems of developing countries and today plays an important role in providing these countries with policy guidance through research and analytical work.

There are important differences between these organisations and the WTO in the way policy discussions take place and in relation to decisions taken. The discussions in UNCTAD, the World Bank and IMF take place at conceptual levels and often result in the adoption of resolutions containing recommendations that the governments are 'urged' to follow. However, these recommendations have no binding force. In WTO, on the other hand, most of the work is directed towards negotiations for liberalisation of trade on a legally binding basis.

Participation in WTO discussions and negotiations requires wider co-operation and interaction with other ministries, and involves more intensive research and analytical work than that required for participation in the World Bank and the IMF. The highly legal and technical nature of WTO work has led developed countries to ensure that they are represented at both ambassadorial and official levels by 'technocrats' – that is, experts in the field of WTO law and practice with working experience at national level of dealing with WTO related issues. Some of the developing countries that are at a higher stage of development have now, like developed countries, adopted well-

functioning institutional frameworks for preparatory work for participation in WTO activities. These countries are also ensuring that their official representatives, at all levels, are persons with experience working on WTO matters.

A large number of developing countries at the middle and lower stages of development, or that fall under the category of least-developed countries or small and vulnerable economies, have not been able to establish effective mechanisms at national level for undertaking preparatory work. Some countries find that even though they have established a framework for preparatory work, they often do not have officials with the necessary expertise in the subjects under discussions and negotiations. The result is that representatives of these countries often find themselves without a briefing from the governments on the policy approach to adopt. The problems are compounded when, more often than not, ambassadors and other officials do not possess past experience of work on WTO matters, and often have only a passing knowledge of the rules of the system and of the issues under discussions and negotiations. Thus, many of these developing countries turn to the international organisations for technical assistance to prepare for effective participation.

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2

The Project and the Modalities Adopted

Introduction

The previous chapter described the main features of the WTO multilateral trading system and the legal nature and extreme complexity of the issues underlying the need of developing countries for technical assistance to participate in the discussions and negotiations. This chapter focuses on the assistance that was being provided to developing country members by various organisations at the time when WTO came into existence. It explains why some of the ambassadors of Commonwealth developing countries requested technical assistance from the Commonwealth Secretariat to enable them to participate fully and more effectively in the discussions and negotiations, and how this action led to the establishment of the Geneva Group of Commonwealth Developing Countries.

Technical Assistance from GATT to WTO

At the time of its establishment the WTO along with other international organisations like UNCTAD were providing technical assistance to developing countries to enable them to participate more effectively in discussions and negotiations. The two forms of assistance provided were training of government officials in WTO law and practice and the arrangement of seminars and workshops on issues under discussions and negotiations in WTO.

Training of officials

Soon after the establishment of GATT, the member countries recognised that developing countries were at a serious disadvantage in participating in the discussions and negotiations due to their lack of technical expertise. To help developing countries to build a cadre of officials with such expertise, the GATT Secretariat began arranging training programmes for officials from developing countries. Three courses, each lasting for about three months, were arranged separately for officials from English, French and Spanish-speaking countries. These courses focused on explaining the main objective of the multilateral trading system, the framework of rights and obligations created by the various agreements, and the work that was being done.

Since the establishment of the WTO the scope and content of these training programmes has been widened. In addition to Geneva, training programmes are being offered at regional centres in Asia, Africa and the Caribbean in co-operation with universities and research institutions. A new entity, the Institute for Training and Technical Cooperation, has been established within the WTO Secretariat with responsibility for arranging such training programmes and for providing other trade-related technical assistance.

Seminars and workshops

In 1973 the GATT Secretariat started arranging seminars and workshops at country and regional levels to brief government officials on the work that was being done, particularly on the issues on which it was expected new rules would be developed. UNCTAD arranged similar workshops and seminars in the period when the preparatory work for launching of the Uruguay Round of negotiations was underway in GATT. After the new round was launched the focus shifted to briefing officials from developing countries on the issues under negotiations.

There was, however, a significant difference in the approaches adopted by the two organisations. Secretariat officials in the seminars and workshops arranged by the GATT, given the need to maintain strict neutrality as officials of a negotiating body, confined themselves to explaining facts and different views that were expressed by delegations from developed and developing countries. In contrast, the officials in seminars arranged by UNCTAD often shared with the participants the views of UNCTAD or their own personal views on the approaches developing countries could take on the issues under discussion or negotiation in the WTO.

Despite these steps to build the capacities of developing countries to participate in WTO activities, the Geneva-based delegations of most of these countries found that they lacked the knowledge and expertise to do so effectively. Three factors were responsible for this. First, the establishment of WTO had broadened the scope of negotiations from trade in goods to include trade in services and trade-related aspects of intellectual properly. Second, as previously noted, countries that had not become members of the GATT's associate agreements (e.g. on technical barriers to trade, anti-dumping and countervailing measures) in the earlier period, found that as a result of the decision taken while establishing the WTO they had automatically become members and were bound by the obligations. A third factor compounded their problems; as a result of pressures mainly from some of the major developed countries, four new subjects – trade and investment, trade and competition policy, transparency in government procurement, and trade facilitation – were included in the WTO's work programme at the first Ministerial Meeting held in Singapore, in December 1996. A number of the ambassadors and the officials posted in the missions found they did not have the required expertise in most of these areas, and they were not getting detailed briefs from their governments on the approach they could adopt in the discussions. In some cases the briefs received were cursory and

lacked in-depth analysis as the officials responsible at national level for their preparation did not have the required expertise. The result was that many of them found they were taking positions under a 'veil of uncertainty' as to whether their national interests were being effectively protected (Rege 1999).

Establishment of the Commonwealth Project

These difficulties prompted some of the ambassadors from Commonwealth developing countries to take action. They held consultations on the desirability of requesting the Commonwealth Secretariat to provide the services of a Geneva-based trade expert to advise and assist them in the negotiations. There was a precedent for the request: during the Uruguay Round, the Commonwealth Secretariat had established an office in Geneva and posted one of the Secretariat officials to work as an adviser.

The informal consultations resulted in the preparation of a non-paper identifying the areas in which assistance would be required and broad indications of the modalities that could be adopted by the adviser in providing such assistance. It was agreed with the Commonwealth Secretariat that the programme of work of the adviser would have to be carefully drawn to ensure it complemented that being done by UNCTAD and WTO and did not lead to unnecessary duplication. It was also recognised that in order to ensure the advice and assistance provided contributed to the effective participation of the recipient delegations, it was necessary that the adviser appointed was a senior person who could liaise directly with Ambassadors. Further qualifications included expertise in WTO law and practice as well as in-depth knowledge and understanding of the trade and development problems of developing countries.

At a meeting held in February 1997, the Secretariat confirmed that it was in principle agreeable to the proposal. It was agreed with the ambassadors of all Commonwealth developing countries that the adviser should be initially appointed on a pilot basis, after which time the project would be evaluated.

The Geneva Group and its Constitution

The Commonwealth Secretariat completed the selection procedures in July 1997 and appointed Mr Vinod Rege, a Geneva-based consultant who, besides being a former Director of WTO, is also an economist specialising in the trade and development problems of developing countries. Following confirmation of the appointment, a meeting was arranged to formally establish the Geneva Group of Commonwealth Developing Countries and agree the modalities that should be followed by the Adviser in providing assistance. The invitees to the meeting included the ambassadors of all missions of Commonwealth developing countries in Geneva. The meeting took decisions regarding the composition of the Group and the logistical arrangements that would be made for the work of the Adviser (Box 5).

Box 5: Institutional framework of the Group and terms of reference for the Adviser

Following is a summary of the decisions taken at the meeting of Geneva-based ambassadors of the Group of Commonwealth Developing Countries held in Geneva, 7 July 1997, which established the Group and adopted its constitution.

Composition of the Group

- The Group shall consist of all developing country members of the Commonwealth that have missions in Geneva. It shall meet periodically for discussion and exchange of views on subjects of interest to them in WTO work.
- The Group shall elect one of its members as Chairman. The Consultant appointed by the Commonwealth Secretariat to provide technical assistance and advice to those countries for their improved participation in WTO activities, shall act as its secretary.

Bureau and Advisory Committee

- There shall be a Bureau consisting of the Chairman of the Group and the Advisory Committee of Ambassadors.
- The Advisory Committee shall consist of seven members. Of these, three shall be elected from among the African developing countries and two each from the Asian and Caribbean countries belonging to the Commonwealth.
- Senior officials nominated by the Commonwealth Secretariat shall be ex-officio members of the Advisory Committee. The Adviser shall also be an ex-officio member of the Advisory Committee.

Modalities for assistance and advice provided by the Consultant

- In providing assistance and advice the Adviser should, where possible, lay emphasis on arranging informal meetings of interested delegations to brief them on the issues under discussions in WTO. He may invite experts from the WTO, UNCTAD, International Trade Centre and other international organisations to participate in such meetings where he considers it appropriate and desirable.

Background papers

- The papers prepared by the Adviser to provide a basis for discussions in such meetings, should be brief and practical in orientation. They should explain, in simple language, the WTO law applicable in the subject areas and analyse the possible implications of further liberalisation of trade and of the proposals for the development of rules covering new subject areas for trade and economic development in the Commonwealth developing countries.
- In addition, he should bring to the attention of interested delegations analytical papers and articles published by academic and research institutions on subjects that are under discussion in the WTO, and where possible circulate these.

Response to individual confidential requests

- In cases where a delegation requests the Adviser to prepare a paper on a subject of particular interest or for a legal opinion on a specific point of concern, he should make the paper available only to the requesting delegation. It would be for the requesting delegation to decide whether the paper should be made available to others.
- In his periodic reports to the Commonwealth Secretariat the Adviser may indicate broadly the subject areas on which such papers were prepared, in order to provide transparency. He should also try to ensure that there is a reasonable balance between the time devoted for the preparation of such papers and the other work he is expected to do in accordance with the work priorities determined by the bureau.

Techniques used for the provision of assistance

Taking into account the provisions in the Group's constitution three techniques were used for providing practical assistance, as follows:

Participation of officials in preparing background papers

The first step in drafting a paper involved the preparation of an outline by the Adviser in co-operation with the officials from delegations who had shown an active interest. For this purpose, the Adviser spent considerable time in briefing them on the implications of the issues to be covered. When the draft paper was ready it was discussed at so-called 'expert level meetings' of officials from missions and revised taking into account the comments made and views expressed. The papers, revised and approved at the expert level meetings, were later discussed in 'ambassador level meetings' to exchange views on the suggested policy approaches that could be adopted by the member countries of the Group in the discussions and negotiations. Senior officials from the Commonwealth Secretariat were invited to attend these meetings and to contribute their views.

Right from the beginning it was recognised that it would not be possible for the Group as a whole to build common positions on issues under negotiations because of the different stages of development of the countries. The delegations therefore used the papers for improving their understanding of the issues under discussions and to raise the points, when appropriate, in the WTO meetings. However, as the work proceeded members of the Group belonging to the African and Caribbean regions considered that in some cases they might be able to use the points made in the papers to develop joint submissions to the negotiating groups. These members subsequently developed the practice of discussing the background papers and legal-based texts more broadly in the ACP and African groups to gain the support of non-Commonwealth countries in the regions. This broader support made it possible to submit them either as African or ACP proposals.

Training in subject areas

From time to time, seminars and workshops were arranged for officials from the missions as well as officials from the capitals dealing with the subjects at national level. These seminars and workshops involved training in subject areas required for application of the rules of the WTO agreements (e.g. pre-shipment inspections and customs valuation). They also covered subject areas that required further work at the national level to decide on whether the subjects suggested by other delegations should be included in the agenda for negotiations (e.g. transparency in government procurement and trade facilitation).

The background papers prepared by the Adviser and some other experts provided a basis for discussions at the seminars and workshops. Officials from the capitals who were invited to attend were required to submit papers on the practices and policies pursued by their governments in the subject areas. They were also required to give their views on the difficulties encountered in the application of existing rules, and, where the subject matter related to new areas, on whether the subject could be included in the agenda for negotiations.

Briefing and training programmes

Meetings to brief ambassadors and new officials in Geneva on the WTO rules and the work being done in the organisations were held from time to time almost every year. Such briefing meetings were often arranged at the request of delegations on one or two specific subjects on which they considered they needed in-depth preparation.

In 2001 and 2002, more intensive training was arranged for officials from Commonwealth Developing Countries attending the trade policy courses for English-speaking countries organised by the WTO's Institute of Training and Technical Co-operation. Under the programme, the Adviser assisted each of the officials attending the two-week programme in preparing a paper on a subject discussed in the WTO, which in their view was of crucial importance to their specific country. Even though the programme was found to be useful and to be making a positive contribution, it was discontinued in the latter part of 2003 after undergoing a difficult period, as explained later in this Chapter.

Assistance to individual delegations

The mandate for the work of the Adviser stipulated the provision of assistance to individual delegations. Roughly 20 per cent of the Adviser's working time was spent on providing assistance over the phone or in face-to-face meetings in the form of discussions and exchange of views on a particular issue, and in some cases, preparation of detailed background papers. The advice sought varied from securing clarification on legal issues and on how to respond to the points raised by other delegations in the WTO meetings, to the approaches that could be adopted on whether subjects like 'labour rights and WTO rules' should be taken up for discussions in the negotiations.

The Appointment of the Adviser

The Adviser started working from 1 August 1997. The initial appointment was for a period of six months. In the beginning the funds required for the project were provided from the Commonwealth Fund for Technical Co-operation (CFTC). Later on the project was brought under the umbrella of the Trade and Investment Access Facility (TIAF), a special fund made available to the Commonwealth Secretariat by

four donor countries: Australia, Canada, New Zealand and the UK. After the first evaluation, which was undertaken by the Advisory Committee in co-operation with the Commonwealth Secretariat, it was decided to extend the project.

Reviews and Evaluations

From the project's inception, the Group in co-operation with the Secretariat developed the practice of periodic review and evaluation of the work done by the Adviser to ensure that the assistance provided was effective in meeting the identified needs of the member countries. In a major internal review of the work done prior to the expiry of the first two-year period, the Group unanimously agreed that it had been positive.

Members described the assistance programme as 'most useful' and considered that it had made a 'positive contribution in assisting delegations in improving their understanding of the technical and highly complex issues under discussions in WTO'. The assistance provided on request to individual delegations 'was found most valuable, particularly as such assistance was not available from UNCTAD or other agencies providing technical assistance on WTO related matters'.

In addition to the internal evaluation, independent experts also assessed the work done under the project. One such evaluation conducted in 2000 by the UK-based Oxford International Associates observed:

> 'A review of a number of background papers prepared by the Adviser recently indicates that their quality, substantive content and style are commendable. They have been written to inform policy-makers of key issues and present the pertinent arguments in a direct, non-technical way. They are neither condescending (as papers prepared by experts often are) nor abstruse containing mainly expositions and factual analysis that are objective, impartial and understandable. They simplify complex technical issues and terminology and can be understood by officials without specialised knowledge of trade economics or of procedural technicalities. They report on, and analyse the implications of positions being taken by different countries on different issues without being partisan' (Mistry and Saplegivi 2000).

In a subsequent evaluation, independent consultant, Professor Mike Faber, also attested to the usefulness of the advice and assistance provided by the Adviser in improving the participation of Group members in the WTO discussions and negotiations. Professor Faber reaffirmed that the papers prepared by the Adviser were objective and enabled the countries to analyse the different proposals and make their own decisions on the approaches to adopt. In particular, his report observed:

> 'They (the papers prepared by the Adviser) are well formed, up to date and clearly written. They have another, exceptionally valuable quality. They analyse a proposal or an obligation in such a way that different governments or organisations can see exactly how the measure under scrutiny will affect them, and can make up their own minds on how they can respond to it…' (Faber 2001).

To evaluate the role and further requirements of the Adviser, the Secretariat appointed an independent consultant to undertake a cost-benefit analysis of the proposal for providing office facilities and research support. After interviewing the relevant parties, the consultant reported that the majority of the members of the Group...

> '...attach great value to the Adviser's work, which they see as filling a unique niche, providing information and advice which is genuinely driven by their demands, is timely, responds to their priorities and is available at short notice ... They emphasised the usefulness for small delegations in Geneva to have a readily on hand source of expertise in the rapid and complex areas of WTO negotiations, appreciate the Adviser's long standing knowledge of the GATT and WTO system and the rapid response and flexibility of having an individual present (in Geneva)...' (Tulloch 2002).

However, the project met with some initial criticism. For example in August 2003, *The Guardian* newspaper in the UK published an article stating that donor countries were unhappy with some aspects of the project relating to the new issues of trade and investment, trade and competition policy, transparency in government procurement and trade facilitation. According to the article there was a feeling among some donors that the background papers did not support the negotiating approach of the donor countries to get these subjects included in the agenda for the negotiations for rule making.

Compromise solution

Ultimately, at meetings held in Geneva, the shared values of the Commonwealth family prevailed and enabled a compromise solution to be found. The donor countries agreed to give up their demand to see the background papers before they were finalised. In return the developing countries agreed to change the composition of the Advisory Committee to include representatives of donor countries. The Advisory Committee that was established consisted of three representatives of Asia, Africa and Caribbean recipient countries and two representatives of donor countries. It would meet every four months to review the work done by the Adviser on the basis of reports submitted by him. The reports should provide an overview of the work done under each of the items included in the work programme for the year and the number of days devoted to such work.

It was recognised that the basic objective of the review was to ensure greater transparency of the work done by the Adviser and not to review or scrutinise the papers prepared by him. However, the Group was encouraged to make available to the donor members of the Advisory Committee those papers that had already been discussed in the Group and could therefore be circulated more widely.

Following the establishment of the Advisory Committee and the re-appointment of the Adviser the uncertainty about the future of the project came to an end. As envisaged in the compromise solution, the Advisory Committee met regularly every fourth month and the Group started the practice of making available to the donor members

some of the background papers after members had used them in deciding on the approach they could adopt in the discussions or negotiations in WTO.

The first two meetings of the Advisory Committee were held in Geneva after which agreement was reached to meet virtually, with face-to-face meetings taking place only if requested by a member. The arrangement worked to the satisfaction of all parties. However, by 2008 the funds made available under TIAF had been exhausted and the project was reorganised in consultations with the members of the Group, taking into account the funding constraints and the progress made in the negotiations. It was agreed that the Geneva-based Adviser should be responsible for providing assistance in selected rules-based areas in which a large number of member countries had been unable to participate actively in the negotiations.

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Part Two

Assistance provided on subjects in the agenda of the Doha Round

3
The Doha Round of Negotiations

Developing Countries Reluctant to Engage

With the establishment of WTO at the conclusion of the Uruguay Round, the developing countries found that they would have to adopt the legislative and administrative framework necessary for national level implementation not only of the provisions of GATT and its associate agreement but also of GATS and the Agreement on TRIPS. They also found that they would require time to adjust to the new situation created by their further integration into the multilateral trading system. However, at the first ministerial meeting in Singapore (December 1996), some of the developed countries proposed that a fresh round of negotiations covering new subject areas should be held in the near future. The US proposed the launch of negotiations on transparency on government procurement, while the EU pushed for the inclusion of trade facilitation. The EU also wanted trade and investment and trade and competition policy included in the agenda for negotiations, although the US voiced concern on both these issues. A large number of developing countries mounted strong resistance to the demands. In the end, WTO members agreed to set up working groups to examine whether these subjects could be taken up for negotiations. These four subject areas have come to be known as the 'Singapore issues'.

Developing countries offered more resistance to the proposals at the next ministerial meeting, which was held in Geneva in May 1998 to celebrate the 50th anniversary of the multilateral trading system. Most voiced serious concern about the inclusion of the Singapore issues in the agenda for negotiations. Led by India, several developing countries insisted that they were unable even to meet the obligations imposed by the WTO agreements. It was therefore necessary to examine the problems they were encountering in implementing the agreements and whether any improvements were needed in the provisions for special and differential treatment, before any decision was taken for launching of the negotiations. The serious differences that existed among participating countries, particularly the opposition of developing countries to the Singapore issues, also resulted in no agreements being reached on the agenda for negotiations at the Seattle ministerial meeting in 1999.

Even though no decision could be taken for launching the new round, the WTO member countries decided to commence negotiations for liberalisation of trade in agricultural products and of trade in services early in 2001. This decision was taken because the Agreement on Agriculture and GATS imposed an obligation on WTO

members to start negotiations for further liberalisation of trade within five years of their coming into operation (i.e. before 1 January 2001).

A new round of negotiations, covering a range of subjects, was ultimately launched at the ministerial meeting held in Doha in November 2001. Developed countries, seeking to win over the opposition, promised to put in place all possible measures in the round to facilitate promotion of economic development of developing countries. It was therefore decided to call the round a 'development round'. The agenda for the round lays down specific guidelines on how the development dimensions should be taken into account in further liberalisation of trade in goods and services and in the adoption of new rules. In particular it provides that developed countries should give priority to reductions in tariffs and other barriers affecting the trade of developing countries. It further stipulates that special and differential treatment should be extended to developing countries by requiring them to reduce tariffs and other barriers to trade applied by them, based on the principle of making a contribution that is 'less them full reciprocity' (WTO 2001).

The agenda included the four Singapore issues, despite the opposition by developing countries. However, these issues were included for study and analysis and the decision on whether they should be taken up for negotiations in the round was left to be determined at the next Ministerial meeting in Cancun in 2003. But that meeting failed too as the developing countries continued to resist negotiations being held on the issues. However, as a result of consultations held in Geneva, agreement was reached in July 2004 to drop three of the four Singapore issues from the negotiations – namely, trade and investment, trade and competition policy, and transparency in government procurement – and to take up in the round only the subject of trade facilitation. It was included in the agenda for negotiations on the basis of a firm commitment by developed countries to provide technical assistance to developing countries for building up their capacities to apply the rules that may be adopted in this area. This relates particularly to the application of new methods for clearance of goods through customs and for the implementation of the other obligations they would impose.

The compromise solution enabled WTO member countries to agree on a 'broad framework' governing the modalities that could be applied in the negotiations for liberalisation of trade in agricultural and non-agricultural products and in the various subject areas taken up for negotiations at the Hong Kong Ministerial meeting held in 2005. Box 6 lists the main subject areas of negotiations being held at time of writing, taking into account the decisions reached at the Hong Kong Ministerial meeting (WTO 2005).

Box 6: Main subject areas included in the Doha Agenda

Agriculture

Continuation of the negotiations commenced in early 2000, in accordance with the aims of the provision of Agreement on Agriculture for:

- Securing substantial improvement in market access;
- Phasing out of all types of export subsidies; and
- Substantial reduction in trade distorting support.

Market access for non-agricultural products

Commencement of the negotiations for:

- Reduction and, where appropriate, elimination of tariffs including tariff peaks and high tariff, and tariff escalation; and
- Removal of non-tariff measures.

Services

- Continuation of the negotiations launched in January 2001 in accordance with the provisions of GATS.

Trade-related aspects of intellectual property

Negotiations shall aim to:

- Find solutions to the problems faced by countries with insufficient or no manufacturing capacities in making effective use of compulsory licensing under the TRIPS Agreement;
- Complete negotiations for the establishment of a multilateral system for notification and registration of geographical indications for wines and spirits; and
- Examine the relationship between the TRIPS Agreement and the Convention on Biological Diversity and issues relating to the protection of traditional knowledge and folklore.

Trade and environment

- Negotiations on improving the relationship between WTO rules and specific trade obligations set out in the multilateral environmental agreements;
- Continuation of the work on the effect of environmental measures on market access; and
- Examination of the relevant provisions of the TRIPS Agreement and labelling requirements for environmental purpose.

WTO rules

- Clarification of the rules of the Agreement on Anti-dumping Practices and of the Agreement on Subsidies and Countervailing Measures.

Trade facilitation

The aim of the negotiations shall be to clarify and improve relevant aspects of:

- Article V relating to transit trade;
- Article VIII on fees and on formalities in connection with importation and exportation; and

- Article X, which provides for the publication and administration of regulations with a view to expediting the movement, release, and clearance of goods in transit.
- Regarding development gaps between member states and application of the rules:
- Developing and least-developed countries shall not be required to make commitments for application of the rules for which they do not have the technical capacities to implement;
- Developed countries shall provide technical assistance to improve the technical capacities of developing countries for the application of such rules; and
- Developing countries shall be under an obligation to apply such rules only after the required capacity has been developed.

Source: Hong Kong Ministerial Declaration (WTO 2005)

Developments Since the Hong Kong Ministerial Meeting

After the Hong Kong Ministerial meeting, serious negotiations were re-started on the modalities (or rules or procedures) that should be adopted in negotiations for further liberalisation of trade in agricultural and non-agricultural products – i.e. trade in services, trade facilitation, and improvements in the rules relating to the application of the Agreement on Anti-dumping Practices and on other rules-based subjects included in the agenda for the Doha Round.

But the negotiations proceeded at a very slow pace and there were periods when they had to be formally suspended or were subject to long pauses because of the differences and deadlocks. In early 2006, ministers from the Group of Six (G6) member countries (Australia, Brazil, EU, India, Japan and USA) began meeting in an attempt to advance the negotiations, particularly on modalities for negotiations on agricultural and non-agricultural products. But these meetings contributed little to resolving the issues on which differences existed and by July 2006 Mr Pascal Lamy, Director General of WTO, who chaired these meetings, decided to suspend the negotiations. The following year another attempt to take the negotiations forward (this time by a smaller group of four ministers from Brazil, EU, India and USA) collapsed in June. Expressing frustration at the lack of progress in these efforts to find solutions to the problems, the Director General decided to end the meetings of small groups of Ministers and to commence the negotiations in Geneva on a multilateral basis at the level of Ambassadors. By mid June 2008 it appeared that this multilateral process had resulted in a broad consensus on the modalities for negotiations on agricultural and non-agricultural products. Mr Lamy therefore decided to call for a 'mini' Ministerial meeting in Geneva from 21 to 29 July 2008, in which Ministers from some 39 countries were invited to participate. The US Presidential election, which was due to be held in November 2008, was another factor that influenced the decision to hold the Ministerial meeting. Some delegations were apprehensive that unless the package

containing agreements on modalities were accepted before that date, the new administration might re-open negotiations on some of the issues. But even though there appeared to be a broad consensus on most of the issues, the meeting collapsed on the last day because of serious differences on a few technical issues mainly in the area of modalities for negotiations on agricultural products. The failure of the meeting signalled that revival of the negotiations would be possible only after the new US administration took over in January 2009 and elections in some of the other countries, notably India, were complete. However, these hopes were shattered when the world economy went into recession as a result of the global financial crisis.

The attention of the world leaders shifted from completing the Doha Round to finding solutions to the serious situations created by the crisis. In order to help agricultural producers and manufacturing industries affected by the decline in economic activity, countries started taking trade protectionist measures. The WTO director general, heads of the World Bank and the IMF and a number of leading economists emphasised that one of the ways to deal with the economic downturn was to curb protectionism by completing the round of trade negotiations as early as possible. World leaders agreed in principle. The need to revive the trade negotiations was emphasised at every important meeting attended by heads of state or trade ministers to consider measures to deal with the financial crisis. But it was clear that most countries lacked the political will to take measures that would commit them to further liberalise their trade and open up their economies to foreign competition until there were clear signs of an economic revival.

Some willingness to conclude the Round by the middle of 2010 was reflected in a summit meeting of leaders from the G20 countries held in London in April 2009. But these expectations received a serious setback in a meeting held on 25 June on the margins of an OECD Ministerial meeting in Paris. At that meeting Mr R Kirk, the US Trade Representative, stated that US business groups considered the reductions in tariffs on agricultural and non-agricultural products that would result from the modalities on which tentative agreements had been reached were far from adequate for increasing their trade, particularly with emerging economies like Brazil, China, India and South Africa. To meet these concerns of the business community, Mr Kirk said the US proposed to hold bilateral consultations with each of these countries, and others, on the flexibilities provided under the modalities for excluding tariff lines from tariff cuts, or for making less than formula cuts, with a view to securing further improved access commitments. This proposal to engage in bilateral negotiations on how flexibilities agreed in multilateral negotiations should be implemented is being strongly resisted by the emerging economies and other developing countries as adding entirely new element in the procedures for negotiations. These countries have argued that both in the area of agricultural and non-agricultural products, they have agreed to cut tariffs by higher margins than they were expected to make. The modalities further

recognise that it would be left to each country to decide on how the flexibilities for excluding a tariff line or making less than formula cuts should be implemented.

At the time of finalising this book (September 2010), there was no clear indication that the major players from developed countries (EU and USA) and developing countries (Brazil, China and India) are willing to engage in serious negotiations for reaching final agreements on modalities for negotiations in agricultural and non-agricultural products, and for completion of the negotiations in the area of trade in services. As it would take six to eight months to finalise the technical negotiations on the schedules of tariff and other concessions after the completion of negotiations on modalities, expectations that the Doha Round of negotiations could be concluded by the middle of 2011 are fast receding.

With this broad overview providing background to the launching of negotiations and the present state of play, we shall now describe the assistance that was provided in the subject areas covered by the agenda and of the progress achieved in these areas in the negotiations (Chapters 4–10).

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4

Liberalisation of Trade in Agricultural Products

Introduction

Securing further liberalisation of trade in goods and trade in services is one of the most important objectives of the negotiations in the Doha Round. This chapter describes the assistance provided to the members of the Geneva Group of Commonwealth Developing Countries on the approach they could adopt in the negotiations on agricultural products.

The WTO's definition of 'agricultural products' differs slightly from that of the World Customs Organization (WCO), the only intergovernmental organisation exclusively focused on customs matters. Under the WCO Harmonized System Classification, products falling under chapters 1 to 24 are treated as agricultural products and those falling under chapters 25 to 99 are treated as industrial products. This definition is used in a slightly modified way in WTO work. For instance, in WTO work fish and fish products are treated as non-agricultural or industrial products but in the WCO classification they are treated as agricultural products under chapters 1 to 24. Further, products such as essential oils, hides and skins, raw fur skins, and silk and silk waste fall under chapters 25 to 99 in the WCO clarification and are therefore treated as industrial products while they are treated as agricultural products in WTO work.

Pre-Uruguay Round: Legal Situation Regarding Application of GATT Rules

Prior to the conclusion of the Uruguay Round and the establishment of WTO in 1995, the rules of GATT applicable to agricultural products were much weaker than those applicable to industrial products. For instance, the rule prohibiting countries from using export subsidies was applied broadly to non-agricultural products and not to agricultural products. In practice also, most countries did not abide by the rule against the use of quantitative restrictions and other similar measures in the agricultural sector. The US was able to apply quantitative restrictions to imports of agricultural products because it had obtained a waiver from its GATT obligations but the application of such restrictions by other countries constituted a breach of their obligations. Some of these countries, most notably those belonging to the EU,

adopted systems such as variable levies. Under this system the rate of tariff payable on imported agricultural products was determined on a transaction-by-transaction basis, taking into account the differences between the higher guaranteed price payable to domestic farmers and the lower price of the imported products. These variable customs tariffs (or 'levies' as they were called) insulated the domestic market from foreign competition and as such had in practice the same (or even more) restrictive effect on trade as quantitative restrictions. In addition, in order to ensure reasonable level of income to the farming community and parity between the income levels of farmers and industrial workers, a number of developed countries had adopted domestic support systems involving heavy use of subsidies. These subsidies often encouraged farmers to increase production even though the cost of production was much higher than in countries that were efficient producers of agricultural products. The result was that products in excess of domestic requirements could be sold in international markets only by granting export subsidies.

Reform programme

The Agreement on Agriculture negotiated in the Uruguay Round, took the first major step towards ensuring that countries applied the basic principles of GATT to agricultural products. The agreement adopted a reform programme covering the measures applied by countries at their borders (e.g. tariffs and quantitative restrictions) and in regard to the use of subsidies (both export and domestic).

The programme recognised that the reform process would have to be gradual. The new and strengthened rules and the measures taken for further liberalisation of trade would have to take into account the special features of trade in agriculture as well as non-trade concerns, including those relating to food security and environmental protection. It further provided that the programme should be reviewed and negotiations for further liberalisation of trade and improvements in the rules should commence within a five-year period (i.e. before 2001).

Tariffication

One of the main achievements of the reform programme adopted under the Agreement on Agriculture was that countries were required to eliminate any quantitative restrictions or such systems as variable levies that they had applied in the agricultural sector. In order to guard against a sudden reduction in the level of protection enjoyed by domestic producers, the rules provided that the 'tariff equivalent' of such restrictive measures should be calculated and added to the tariff applicable to the concerned products. This process has come to be known as tariffication.

Products on which duties were tariffied included mainly temperate zone products, such as cereals and flour, meat and dairy products and such products as fresh fruits and vegetables, and vegetable oils. The countries were required to reduce their tariffs,

including the new tariffed rates, on all agricultural products. The developed countries reduced their tariffs at an average rate of 36 per cent while developing countries reduced them by 24 per cent.

The other feature of the reform programme was that all countries, including developing and least-developed countries were required to bind all of their tariffs against further increases. However, they were given the flexibility to give bindings at ceiling rates, which could be higher than their applied rates or those resulting from reductions agreed in the negotiations.

Special agricultural safeguards

Countries, mainly the developed ones that were eliminating quantitative restrictions and systems of variable levies, were apprehensive that in certain sectors the resulting increase in imports may adversely affect domestic production (despite being permitted to apply higher rates of tariffs through the tariffication process). In order to meet these concerns the agreement provided for a special agricultural safeguard mechanism. This mechanism allowed additional duties to be levied on products to which tariffed rates applied, if the volume of imports increased over and above a specified percentage or prices declined below the average level of prices in the preceding three-year period.

Export and domestic support subsidies

In addition to improving the discipline applicable to the measures countries apply at the border, the reform programme took steps to improve the discipline applicable to the use of subsidies in the agricultural sector.

Export subsidies (i.e. subsidies that are linked to exports) are considered to be most distorting from the point of view of trade. It was for this reason that in 1960 a Decision was adopted to prohibit the use of export subsidies on industrial products. These rules, however, did not apply to agricultural products. The Agreement on Agriculture aimed at extending these rules to agricultural products but it recognised that farmers in some of the major developed countries were heavily dependent on such subsidies for sale of their agricultural products in international markets. Therefore, it would not be possible for governments of these countries to agree that the use of export subsidies on agricultural products should be prohibited. The approach adopted required the countries that were granting such subsidies to reduce them by giving reduction commitments and listing these in their schedules of commitments.

All subsidies other than export subsidies are treated under the agreement as domestic subsidies. Such subsidies are further divided into two categories, those that are trade distorting and those that are not. The Agreement categorises the various subsidies by the colours green, blue and amber.

Non-trade distorting subsidies are either categorised as green or blue box subsidies. All those that have 'no or most minimal, trade distorting effects on production' and do not have the effect of providing price support to production are known as green box subsidies and are exempt from reduction commitments. Such subsidies include among others, those granted for research, pest control, marketing and promotion services, governmental participation in income insurance and income safety programmes, structural adjustment programmes, regional assistance programmes, environmental programmes and payments for natural disasters.

During the last phase of the negotiations, it was also agreed that 'direct payments' to farmers who participate in 'production limiting or reduction programmes' should also be treated as non-trade distorting and exempted from reduction commitments. These subsidies, which were granted at that time primarily by the EU and the US, have come to be known as blue box subsidies.

All subsidies other than those categorised as green and blue are treated as trade distorting subsidies and called amber subsidies. The agreement required countries to calculate the total amount of such subsidies granted by them in the base period from 1985 to 1986. The legal term used to designate the total amount of such subsidies paid by a country is 'aggregate measure of support (AMS)'. In arriving at AMS on this basis, countries were permitted to treat product specific subsidies that were less than 5 per cent of the value of that product as de minimus and exclude them from calculation. Likewise, non-product specific domestic subsidies could be excluded from the calculation, if they did not exceed 5 per cent of the value of production. For developing countries, the de minimus levels for both product and non-product subsidies were fixed at 10 per cent. The agreement imposed an obligation on developed countries to list the amount of AMS in their GATT schedules and to reduce it by specified percentages.

The developed countries were required to reduce their AMS calculated on the above basis by 20 per cent over a period of six years from 1 January 1995. The developing countries were required to reduce their AMS at a lower rate that was two-thirds of the percentage at which developed countries were required to reduce over a period of 10 years. The time provided for reducing subsidies has now expired and the countries that have reduced the AMS are under an obligation to ensure they do not allow their trade distorting subsidies to exceed the resulting reduced level.

Operation of the Reform Programme

What has been the experience in implementing the reform programme?

Tariffs of developed countries

Even after the reductions made in the Uruguay Round, the rates of tariffs applicable to agricultural products in developed countries remained substantially high as

compared to those they applied to industrial products. This was largely due to two factors. First, in the rounds of negotiations held prior to the Uruguay Round a number of these countries had excluded agricultural products from tariff reductions. Second, in the Uruguay Round while adding the tariff equivalence of the protection provided by the quantitative restrictions that were being removed to the rate of tariffs, countries had deliberately inflated the equivalence. Since almost all developed countries had resorted to this practice, there was a 'gentleman's agreement' among them not to challenge the calculation of tariff equivalence made by the others. As a result of this process of 'dirty clarification,' for a number of products the base rate used for reduction remained high.

The result was that apart from a few tropical products like tea, coffee and cocoa (products predominantly produced in developing countries on which duties were removed), peak tariffs in excess of 12 per cent continue to be applied on a large number of products such as cereals and flour, fresh fruits and vegetables, vegetable oils, meat, fish and dairy products. Many of these products are also of export interest to developing countries. UNCTAD (1997) estimates that over 10 per cent of 4,000 or so tariff lines in the schedules of each of the developed countries (Canada, EU members, Japan and US) continue to face such tariffs. Further, 15 per cent of the peak tariffs in Canada, 20 per cent of those in the US, 20 per cent of those in the EU and 30 per cent of those in Japan were above the level of 30 per cent. In addition, excessively high rates exceeding 70 per cent were applicable to products on which duties had been tariffed (UNCTAD 1997, p. 134).

Increasing use of subsidies

The Agreement on Agriculture had envisaged that putting a ceiling on the use of domestic trade distorting subsidies and export subsidies, and requiring countries to reduce them by agreed percentages, would curtail the use of subsides in the agricultural sector. But four years after the implementation of the Uruguay Round commitments relating to subsides, while most of the countries had reduced their trade distorting subsidies according to their stated commitments, they were compensating farmers for the reduction by increasing permissible subsidies listed in the green and blue boxes. Thus, the overall level of domestic support had increased instead of declining.

Export subsidies also increased over the commitment levels as some of the countries, while making reductions according to commitments, were replacing them with export credit guarantee schemes or market promotion programmes. The discipline of the agreement did not apply to such measures; it only emphasised the need to develop international discipline in this area. The rise in the use of both domestic and export subsidies by major developed countries had frustrated one of the basic objectives of the Agreement on Agriculture, that of bringing under control the use of trade distorting subsidies, both domestic and export.

The Negotiating Approach

Taking into account the main features of the reform programme embodied in the Agreement on Agriculture and the experience of its operation, as described above, the Adviser put forth suggestions on the general approach that could be adopted in the negotiations on the liberalisation of trade and improvement of rules governing trade in agriculture. The suggestions were set out in background papers, particularly the Working Paper on Agricultural Products, prepared by the Adviser for consideration by the members of the Group. Following are the suggestions made in regard to the main elements (Rege 2001).

Tariffs

Reductions by developed countries

The aim of the negotiations in this area should be to secure from developed countries further significant reductions in tariffs, particularly of peak tariffs. Further reductions in tariffs on final processed products and on raw materials used in further processing should be made in such a way as to eliminate tariff escalations and where this is not possible, to reduce them. Towards this end the modalities for negotiations should provide that they could reduce their tariffs either on the basis of an across-the-board cut in tariffs using a formula, or by 'request' and other procedures.

With respect to making reductions on the basis of a formula, the Swiss formula (adopted in the Tokyo Round) that resulted in deeper cuts being made in higher duties, should be given consideration. The ground rules for negotiations should also provide for developing countries to make requests to developed countries for deeper cuts than those resulting from the application of the tariff cutting formula, on products of specific interest to them. It should also be open to countries that enjoy preferential access to the markets of developed countries to request that a limited number of products for which 'the preferential margins provide meaningful advantage' should be exempted from tariff reductions. Alternatively, cuts in most-favoured-nation tariffs on such products should be made at a rate that is 'lesser' than that resulting from the formula. The other alternative would be to provide for a longer time (say 15 years) for phased reductions of duties applicable to such products.

Reductions by developing countries

In deciding on the approach that could be adopted on the extent to which developing countries should reduce their tariffs, the working paper emphasised that it would be essential to take into account the differences in the way countries undertake production in the agriculture sector. Production in most of the countries that are efficient exporters of agricultural products (Australia, Canada, New Zealand and the US among developed countries and Argentina, Brazil and Uruguay among developing

countries) is undertaken on large farms consisting of thousands of acres, and in many cases owned by big corporations. The huge size of the farms enables the use of the most modern mechanised and scientific methods of production. The resulting low cost of production enables them to market their products at relatively low prices in foreign markets. On the other hand in most of the developing countries, particularly in the Commonwealth countries belonging to Africa, Asia and the Caribbean regions, production of food crops and of animal and dairy products is undertaken on small farms mostly for consumption in the domestic markets and only a small proportion is exported. A high proportion of production in these countries originates from 'subsistence farming'. As such the bulk of food and animal products produced are consumed by the poor farmers for their sustenance and the remaining small proportion is sold in the neighbouring domestic market to obtain in return the requirements of clothing and other essential articles. As a result of the small size of farms and the inability of poor farmers to use new technologies and the inputs like fertiliser and insecticide required for efficient production, costs tend to be high.

The past experience of these countries with regard to the liberalisation measures imposed on them under the IMF's structural adjustment programmes has shown that increased imports at low prices gradually displaces domestic production causing many poor small farmers to lose their main source of income. In other words, reductions in tariffs and the removal of other restrictions on food, fresh fruits and vegetables, poultry and dairy products, pose serious problems for small farmers in these countries, particularly the least developed and those with small economies. These problems are further compounded by the fact that a large proportion of the population of these countries (in some cases as high as 60 per cent) is dependent on agriculture as even after liberalisation of trade and relaxation of restrictions on investment, no new industries are being created so the farmers and agricultural workers affected by increased imports are not able to find alternative employment.

In the light of this experience, more and more questions are being raised about an economic rationale for trade policy with such an emphasis on the pursuit of open and liberal trade policies. Academics and policy-makers are increasingly challenging the thesis that the pursuit of such policies automatically leads to economic growth, both on methodological and theoretical grounds. Many now recognise that, at least in the field of agriculture, exposure of producers to unbridled foreign competition could only lead to displacement of domestic production by imports, resulting in high economic and social costs to the local population. This was well brought out by the recent experience of some of the developing countries, particularly in Africa, where the increased imports of cheap food products appeared to be increasingly displacing domestic production.

Given this situation, the working paper suggested that the extent to which developing countries should reduce tariffs and the coverage of products would have to be determined by them, taking into account their stage of development. As provided

in the Doha Declaration, in trade negotiations these countries are required to make contributions on reducing tariffs that are based on the principle of 'less than fall reciprocity' and, further, are not inconsistent with their trade, financial and development needs. For the achievements of these negotiating objectives, the modalities that may be adopted for negotiations would have to provide for two basic positions. First, irrespective of whether developing countries are required to reduce tariffs on the basis of a formula or on request and other procedures, they should be required to make reductions at rates that are lower than the rates at which reduction on a percentage basis would be made by developed countries. Second, these countries should have a right to exclude from reductions, or make less than average percentage reductions on, products on which they consider existing protection must be maintained in order to ensure food security and livelihood to poor farmers living at subsistence level, and to promote rural development by establishing agro-based industries.

Special safeguard measures

The working paper further pointed out that some of the developing countries that had undertaken measures for liberalisation of trade, either on a unilateral basis or under structural adjustment programmes sponsored by the IMF or the World Bank, were finding that the existing levels of protection for some of their products were inadequate. Because of this, producers in these countries were finding it difficult to compete with low cost imports originating in countries where costs of production tended to be lower. The worst affected sectors included vegetable oils, poultry, and milk and dairy products. In light of this situation, it would be necessary to include in the WTO legal framework provisions permitting developing countries to apply special safeguards to restrict imports for a temporary period. Any such provisions would be different from the 'special agricultural safeguards' clause included in the Agreement on Agriculture in two respects. First, it would stipulate that the measures could be applied to all products not merely those on which rates were determined in the Uruguay Round through the tariffication process. Second the right to use such safeguards would be available only to developing countries and should be based on the following principles:

- Developing countries could apply such measures to imports of agricultural products where a product is being imported in increased quantities by (x) percentage of the average level of imports reached in the previous three years, or where the price at which the product is entering the customs territory has fallen below the 'trigger price' calculated on the basis of average prices of imports for the previous three years.
- In all cases where the measures taken conform to the above-mentioned criteria, it shall be assumed that increases in the level of imports were causing or threatening injury to domestic production.

- Special safeguard measures can take the form of additional duty or quantitative restrictions on imports, but quantitative restrictions should only be applied only in exceptional cases, where it was considered that the application of increased tariffs might not result in significant reductions in imports.
- Any country taking the decision to apply special safeguard measures shall notify the WTO Secretariat, immediately after the decision is taken.

Domestic support and export subsidies

Taking into account the problems and issues arising in the implementation of the Agreement on Agriculture rules on the use of domestic and export subsidies, the working paper prepared by the Adviser made the following suggestions on the approach that members of the Group could consider adopting in further negotiations:

Green and blue box subsidies

It has been possible for developed countries to circumvent their commitments under the Agreement to reduce trade-distorting subsidies by substituting them with subsidies permitted under green and blue boxes. In the case of permissible green box subsidies, it would be desirable to examine and adopt a suitable discipline to prevent their use as a substitution for trade distorting subsidies. As regards blue box subsidies, since they were used mainly by the EU and the US and in practice are not necessarily trade neutral, it would be desirable for developing countries to support proposals for their abolition as a separate category and for their inclusion in the aggregate measures of support.

Aggregate measures of support

In the Uruguay Round countries using such subsidies had agreed to a ceiling on their use and to further reduce them by 20 per cent over a period of eight years, that is, by 2003. Against this background, the negotiating approach could be to secure deeper cuts in the reduced permissible levels reached by 2003, with a view to securing elimination of the use of such trade distorting subsidies by all countries by a fixed target date.

Export subsidies

Since export subsidies distort conditions of competition and of trade, it would be in the interest of developing countries to negotiate for all countries to prohibit the use of them. Simultaneously, efforts should be made to develop a discipline that should apply to export credit, export credit guarantee and insurance programmes.

Tentative Agreements on the Modalities

The background information on the implementation of the reform programme adopted under the Agreement on Agriculture and the suggested negotiating approach set out in the working and other papers, provided members of the Group with a sound and informed basis for deciding on the strategy to adopt in the negotiations. A brief overview of the 'tentative' agreements reached in mid–2010 on the modalities that could be adopted for negotiations in the area of agriculture is provided below. It should be emphasised that the numbers indicated for percentage reduction in tariffs and subsidies or for the application of increased duties under special safeguard measures are only tentative; they indicate an assessment by the Chairman of the Negotiating Group on the basis of which agreement may be reached when final negotiations take place during the concluding phase of the negotiations (WTO 2008a, 2008b).

Tariffs

Developed countries should reduce tariffs on the basis of the 'tiered formula' (Table 2), which provides for greater percentage reductions being made in higher rates of tariffs.

Table 2: The tiered formula

Tariff range	Percentage cut
0 to 20	50%
20 to 50	57%
50 to 75	64%
75 and above	70%

The tariff ranges listed above have been slightly modified to take into account the tariff structure of the developing countries but broadly speaking these countries are expected to make two thirds of the cut that would be made by the developed countries, in each tariff range.

The maximum average cut developed countries are expected to make by using the tiered formula shall be 54 per cent while the maximum average level of cuts that developing countries must achieve is 36 per cent. In cases where the application of the formula results in an overall average tariff cut of more than 36 per cent the developing country concerned shall have the flexibility to decrease reductions across the bands, to keep within the average level.

Developed countries would reduce their tariffs over a period of six years, developing countries over a period of ten years.

Least-developed countries, small vulnerable economies

In the initial phase of the negotiations the developed countries had taken the position that apart from the least-developed countries all developing countries, whatever may be the stage of development reached by them, must make tariff reductions on the basis of the tiered formula. But as the negotiations proceeded they started showing a willingness to consider sympathetically the pleas from countries with small and vulnerable economies or at the middle level of development, that they should not be required to make tariff cuts on the basis of the formula. This change in position by the developed countries could be attributed to two factors.

First, these small and vulnerable countries – using arguments based on the analysis contained in the working paper prepared under the project and similar papers prepared by UNCTAD as well as in some of the empirical studies undertaken by academic institutions – were able to make a case for more favourable treatment in reduction of tariffs than that extended to other developing countries. Gradually, some of the developed country negotiators started realising that it would not be appropriate to insist that the principle of 'one size fits all' should apply to the liberalisation measures to be taken by developing countries. These negotiators were further influenced by pressures from non-governmental organisations in their countries, and in some cases from the members of their own parliaments. The NGOs and MPs considered that it would not be in the trade and development interests of small and vulnerable countries, or those in the middle stage of development, to liberalise their trade on the same basis as emerging countries that were rapidly developing and had already reached a relatively high stage of development.

Second, in tactical terms the negotiators from some of the developed countries considered that by conceding to the demands of small and vulnerable economies and of countries at the middle stage of development, they would be able to isolate the emerging economies, which in their view provided the main potential markets for their exports. They could thus confine the discussions on levels of percentage cuts and on the exclusions of products from tariffs reductions (so called special products) to be settled in negotiations with the emerging countries.

The result was that criteria for identifying the small and vulnerable economies was elaborated in such a way that it could cover a large number of countries which are at lower or middle stage of development. For the purpose of negotiations on agricultural products, the criteria adopted provides that the term 'small and vulnerable economies' would apply to countries with the following average shares in world trade in the period from 1999 to 2004: merchandise of no more than 0.16 per cent; non-agricultural products of no more than 0.1 per cent; and agricultural products of no more than 0.4 per cent.

On the basis of the above criteria 45 countries have been identified as small and vulnerable economies for the purpose of negotiations on agricultural products (Box 7).

Box 7: Countries identified as small and vulnerable economies for the purpose of negotiations on agricultural products

Albania	Antigua and Barbuda	Armenia	Barbados
Belize	Bolivia	Botswana	Brunei Darussalam
Cameroon	Cuba	Dominica	Dominican Republic
Ecuador	El Salvador	Fiji	FYR Macedonia
Gabon	Georgia	Ghana	Grenada
Guatemala	Guyana	Honduras	Jamaica
Jordan	Kenya	Kyrgyzstan	Macao, China
Mauritius	Moldova	Mongolia	Namibia
Nicaragua	Panama	Papua New Guinea	Paraguay
St Kitts and Nevis	St Lucia	St Vincent and the Grenadines	Sri Lanka
Suriname	Swaziland	Trinidad and Tobago	Uruguay
Zimbabwe			

Source: WTO Document TN/AG/W/4/Rev.3

They include small-island states of the Caribbean and Pacific regions, but also countries belonging to the African and South American regions as well as some countries that are transitional economies.

It is important to note that this categorisation of small and vulnerable economies is only intended for use in the modalities for negotiations on agricultural products during the present round and does 'not constitute the creation of a new category of WTO members'.

The countries identified as small and vulnerable economies have been given two options. They can either apply the tiered formula, or they can simply make an overall average cut of 24 per cent and designate as many products as they wish as special products (provided the overall average percentage cut is reached). The least-developed countries are not required to make any reductions in tariffs on agricultural products during this round.

Product exclusion: sensitive products

At broad policy level, developed countries as a group were lending support to the proposals for deeper cuts being made in tariffs applicable in the agricultural sector, across the board and without any exception. However, as the negotiations proceeded some of them began demanding that they should be also entitled to exclude certain products from tariff reductions, particularly those that were import sensitive or where a

continued level of production was considered necessary for environmental and other reasons. As a result of the pressure exerted by them it is now tentatively agreed that developed countries may deviate from tariff reduction resulting from the formula and make small reductions by designating 4 per cent of their tariff lines as sensitive products. Developing countries have a right to designate up to one-third more of tariff lines as sensitive products.

Special and differential treatment to developing countries

Special products

The right to exclude sensitive products would be available to both developed and developing countries. The latter countries would have a further right to 'self designate' 12 per cent of tariff lines as special products by using the indicators that have been elaborated. No cuts may be made on 5 per cent of such tariff lines. They would however have to ensure the average cut on tariff lines that are treated as special products shall be no less than 10 to 14 per cent.

Special safeguard measures

Developing countries would have a further right to apply special safeguard measures where the volume of imports exceeds average imports by a specified percentage in the preceding three years, or if the import price of the shipment falls below a trigger price equal to 85 per cent of average monthly MFN-sourced price for that product in the most recent three-year period. In cases where safeguard measures are applied on the basis of a volume trigger, the rate of additional duty that could be imposed is determined on the basis shown in Table 3.

Table 3: Rules governing imposition of duties on the basis of volume trigger

Increase in the volume of imports	Additional duty that can be levied
110%	25% of the current bound rate or 25 percentage points, whichever is higher.
115%	40% of the current bound tariff or 40 percentage points, whichever is higher.
135%	50% of the current bound tariff or 50 percentage points, whichever is higher.

Domestic subsidies

Cuts in overall trade distorting subsidies

The proposed modalities provide that in addition to amber subsidies, blue box subsidies, which are not at present treated as trade distorting, should also be subjected

to cuts. Countries would also be required to reduce the present levels of de minimus subsidies, which they are at present allowed to exclude from the calculation of the agreed measures of support. For this purpose a new concept of 'overall trade distorting subsidies' (OTDS) has been adopted. To arrive at the OTDS the permissible amount of AMS specified in the schedule is added to the higher average level of blue box subsidies granted by the country during the period 1995 to 2000. The developed countries are expected to include a further 10 per cent of the average total value of agricultural production in the period from 1995 to 2000. This amount reflects 5 per cent of the average total value of production that countries are allowed to exclude from AMS for product specific subsidies. In the case of developing countries, 10 per cent of the average production is to be added to the OTS, as the de minimus subsidies that could be excluded in calculating AMS are 10 per cent each for product and non-product specific subsidies.

Countries would be required to cut the OTDS calculated on the above basis using a formula that would provide for greater cuts being made by countries with the highest OTDS. At time of writing the EU has the highest level of OTDS so if this formula were accepted the EU would make 80 per cent cuts. By the same token, the US and Japan would cut their OTDS by 70 per cent and other countries by 55 per cent. Developed countries would be required to make these cuts over a period of five years and developing countries over 10 years.

Cuts in the AMS

Within the overall cuts provision has been made for reductions in the aggregate measures of support (AMS) as follows:

- Where the final bound total AMS is greater than US$40 billion the reduction shall be 70 per cent (EU);
- Where the final bound total AMS is greater than US$15 billion and less than US$40 billion the reduction shall be 60 per cent (USA and Japan);
- Where the final bound total AMS is less than US$15 billion the rate of reduction shall be 45 per cent (other countries).

Cuts in de minimus levels

Developed countries would reduce the de minimus level of both product and non-product subsidies that can be excluded from the escalation of AMS (to be used for calculation based on the above) from 5 per cent to 2.5 per cent. Developing countries, which are allowed to treat 10 per cent of such subsidies as de minimus, would be required to cut them by two thirds of the rate at which the developed countries would be reducing their de minimus levels. In this case, since the de minimus level for product and non-product subsidies is 10 per cent, the de minimus level after reduction

would be 6.7 per cent. However, the developing countries would not be required to make any cuts in the de minimus in subsidies that are granted mainly to poor farmers living at subsistence level.

Cuts in cotton subsidies

In order to help developing countries that are heavily dependent on the production and export of cotton, and that are losing their share of the international market as a result of subsidies granted by developed countries, modalities provide that these countries should make reductions in such subsidies on the basis of a formula that would result in cuts at rates higher than those on which subsidies would be reduced on other agricultural products.

Cuts in blue box subsidies

The definition of 'blue box' subsidies would be broadened to cover programmes that do not require farmers to cut production, in addition to programmes that require them to limit production. The use of these broadened subsidies by developed countries would be limited to 2.5 per cent of the value of the total average level of production in the period 1995 to 2000 and in the case of developing countries this limit would be 5 per cent. There would also be caps on the use of such subsidies per product.

Export subsidies

There is a general consensus that the countries granting such subsidies should eliminate them by the end of 2013, with at least half of them eliminated by 2010. Revised rules have been adopted to bring export credits, and export credit guarantee and insurance programmes under greater discipline.

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5
Agricultural Commodity Issues

Introduction

The mandate for the Doha Round did not include specifically the problems encountered by developing countries that are heavily dependent on three or four primary commodities for their export earnings, as a result of the persistent decline in prices and their volatility. How could these problems be addressed in the negotiations? This question was the subject of frank and open discussions in two high-level special meetings in Geneva in the first half of 2002. The meetings were organised by the delegations of Kenya, Tanzania and Uganda with Ambassador Amina Mohamed of Kenya in the role of co-ordinator.

The discussion in the first meeting was based on a keynote paper prepared by the Adviser. For the second meeting an independent commodity expert, Mr Peter Robbins was invited to participate and present his views. In addition, representatives of UNCTAD, the UN Food and Agriculture Organization (FAO), International Coffee Council and Common Fund for Commodities made contributions on the work that was being done by their organisations and on possible action that could be taken in the round, particularly on stabilisation of prices.

There was a general consensus at the meetings that further examination was required in the WTO of the problems faced by the 50 or so commodity-dependent exporting countries, 37 of which had been categorised as 'heavily indebted poor countries' by the IMF and World Bank. In particular, it was felt that some clarification of the legal issues relating to the negotiations and adoption of international commodity agreements could complement the work being done in the field of trade in commodities by UNCTAD, FAO and the various commodity councils, among others. The view was that the Group should raise the issues in one of the WTO's permanent bodies – like the Committee on Trade and Development, which provides a permanent forum for research, analysis and discussions on trade problems of developing countries – before taking them into the negotiations.

A Non-Paper Calls for Urgent Action

In pursuance of these recommendations, the delegations of Kenya, Tanzania and Uganda took action again with a submission to the Committee on Trade and Development on 19 May 2003. The submission was the 'Non-Paper on the Need

for Urgent Action in WTO to Deal With the Crisis Situation Created by the Long-term Trend Towards Decline in Prices of Primary Commodities to the Trade and Development of Developing Countries Which Are Heavily Dependent on Their Exports' (WTO 2003). The preamble to the non-paper highlighted the serious impact of the decline in prices on the economies of the developing countries. In particular it stated:

> 'The sharp decline in prices of these commodities has created a crisis situation in most of the commodity exporting countries, as there is close relationship between world market prices and poverty levels. In most of these countries farmers living at subsistence levels and who are in most cases also heavily indebted undertake production of crops like coffee, cocoa and sugarcane on small farms. The decline in prices has further reduced the meagre income of these farmers, pushing more and more of them below poverty levels.'

The section that followed the Preamble described the main reasons for the decline in prices.

> 'The main factor responsible for the decline in prices for almost all agricultural commodities is the imbalance between supply and demand. In the case of coffee and cocoa and some other commodities the oversupply is "structural" in nature as production and supply is consistently far in excess of world demand. There are three reasons for this. First, poor farmers try to produce more when prices are falling in order to maintain the same level of income, as they have no other source of income. Increased production, however, results in depressing prices further. Second, in relation to some of the commodities, the policy measures adopted by a few of the major producing countries have resulted in increased production, thus augmenting the oversupply. Third, in recent years new countries that are low-cost producers have started growing some of these crops. The irony is that the World Bank and the IMF advised these countries to diversify production to these commodities, apparently without taking into account the fact that resulting increased production could depress world prices unless there was a corresponding increase in world demand. Donor countries have also often encouraged and assisted developing countries to undertake cultivation of new agricultural export crops without adequate study of whether in the long term the world market would be able to absorb the increased production, without depressing prices.
>
> Structural oversupply on world markets has generally resulted in a large accumulation of stocks, and this movement of stocks is mirrored and magnified in the movement of prices. The ratio of global stocks to annual consumption had reached exceptionally high levels in recent years. For commodities in the situation of chronic oversupply (e.g. coffee and cocoa) the revival of prices is unlikely unless producing countries take steps to control production and reduce stocks. Past efforts by international commodity organisations to secure equilibrium between supply and demand, at stable and remunerative prices, have not always met with success. The economic clauses in the international coffee, cocoa and sugar agreements, which allowed these organisations to intervene in the market for the above purposes, have been abandoned. However, even if they were to be revived, it is doubtful whether buffer stocks alone could be effective in stabilising prices at levels that are remunerative to producers. Buffer stock operations are based on the assumption that the imbalance between supply and demand is

of a temporary nature, and that it would be possible to dispose of the stocks in order to defend the floor price when prices firm up as a result of reductions in production or increases in demand. But with stocks amounting to nearly one-third of the estimated consumption now available in producing and consuming countries, if a buffer stock agency were to enter into the market, it would be saddled with stocks that it could only attract heavy losses on the world market.

IMF and World Bank structural adjustment programmes have further exacerbated the problems encountered by countries exporting primary commodities as a result of low world market prices. Developing countries receiving assistance under such programmes were required to liberalise their internal markets by, among other actions, abolishing marketing boards. It is no doubt true that governments used these boards to raise revenue in a non-transparent manner, often resulting in high levels of taxation for agricultural producers. But they provided valuable services to the farmers, including guaranteed minimum prices (reflecting the strategy followed by the EU and US among other industrialised countries); making credit available at affordable rates; maintaining quality control and meeting quality standards; providing extension services (inputs, fertilizers, insecticides, etc.); and making it possible to sell forward, thus avoiding intra year seasonality.'

The last section of the non-paper set forth the possible solutions to these problems that could be found under the rules-based system.

'With the abolition of marketing boards, the international financial institutions were encouraging developing countries to develop the use of market-based instruments to protect the commodity producers and traders from the risks arising from fluctuating prices. These efforts have met with extremely limited results mainly because small farmers lack access to the know-how and foreign exchange required for dealing with future trading. In this situation there was a growing view that the long-term solution to the problem posed by "declining prices" could be found only if "producing countries" entering into arrangements for the management of supplies...

...The GATT rules call on its member countries to take "joint action" for negotiations on international agreements for stabilising commodity prices at equitable and remunerative levels (Art. XXXVIII). However, the GATT rules relating to negotiations of international commodity agreements are ambiguous and are generally interpreted to imply that such agreements must have as members not only producing countries but also consuming countries. These provisions may have to be reviewed to clarify that it was open to producing countries to enter into arrangements for management and control of suppliers without inviting consuming countries to become members.'

A paper prepared subsequently (Rege 2008) explained that any such clarification would not involve any amendment of the existing rules but it would make them more explicit, as demonstrated in Box 8.

Box 8: GATT flexibility for producer countries entering into commodity agreements

The **main provisions** relating to international commodity agreements are contained in Article XX covering general exceptions to its rules.

Sub para (h) states that the exceptions provided shall also 'extend to any measures', such as 'restrictions on exports', undertaken in pursuance of the obligations under any international agreement that conforms to criteria submitted to the Contracting Parties (now WTO Ministerial Conference) and not disapproved by them or which is so submitted and not disapproved by them.

An interpretative note to the provisions states that the above exceptions apply to international commodity agreements that conform 'to the principles approved by the Economic and Social Council in its resolution 30 (iv) of 28 March 1947'. The resolution inter alia states that commodity agreements must provide for participation of both countries that are producers or exporters of the commodities concerned and countries that are substantially interested in imports and consumption.

The drafting history of the Article shows that in the 1995 Review Session of GATT member countries there was considerable support for the proposal that in cases of short supply or burdensome surplus countries that considered themselves as substantially interested in production can separately enter into such agreements. In order to provide flexibility to countries to enter into commodity agreements the drafters used a formula that permitted countries to enter into agreements that did not conform to the principles laid down in the ECOSOC Resolution, if WTO did not disapprove them after their submission.

Since WTO decisions are taken by consensus, it could be difficult for countries that may have reservations to build the negative consensus necessary for disapproving such agreements particularly as the notifying countries can always block the decisions disapproving its adoption.

Favourable reactions

In the discussions in the Committee on Trade and Development, the initial reaction of some of the developed countries to the points made in the non-paper was one of scepticism. This was particularly so with respect to the proposal that commodity producing countries should be permitted to enter into agreements among producing countries for stabilisation of prices. The developed countries felt it would be appropriate for these countries to rely on market-based instruments and, if necessary, the technical assistance provided by UNCTAD, the World Bank and other agencies to establish an institutional framework for the application of such instruments, could be further strengthened. Gradually, however, they were persuaded to support the proposal when, in the course of the debate, the submitting countries gave the assurance that they fully recognised the importance of using market-based instruments for stabilisation of prices, and they would only resort to the adoption of arrangements among producing countries for stabilisation of prices in cases of structural oversupply and where it was considered appropriate to use measures such as requiring farmers

to reduce production or destruction of accumulated stocks. The WTO Secretariat's decision to invite representatives of the international councils for coffee and cocoa, the Common Fund for Commodities and delegations from some of the commodity exporting countries to make presentations on the problems faced in taking action at national and international levels for stabilisation of prices, further deepened understanding of the issues that could be addressed in the negotiations.

Proposal to Change GATT Rules

Nearly two years after the submission of the non-paper to the Committee on Trade and Development, some of the countries that were playing an active role in the debate decided that the discussions in the Committee had created an adequate basis for taking up the proposals in the negotiations. In June 2005, six countries – Côte d'Ivoire, Kenya, Rwanda, Tanzania, Uganda and Zimbabwe – tabled a proposal in the Special Committee on Agriculture spelling out specific areas in which action could be taken in the Round, including possible modifications to the GATT rules (WTO 2005).

Broad support

The tabling of the proposal and exchange of views that followed in the Special Committee resulted in the addition of specific provisions in the work programme adopted at the Hong Kong Ministerial meeting held in December 2005. The provisions recognised 'the need to address the particular trade concerns of developing and least-developed countries arising from the long-term decline in commodity prices'.

After securing inclusion of the 'commodity issues' in the agenda for negotiations, the six most active delegations in the discussions and negotiations decided it was time to raise the matter at the political level in the meetings of senior African trade officials and ministers.

The Ministerial Declaration on the Arusha Plan of Action on African Commodities, which was adopted on 23 November 2005, emphasised the importance of the involvement of African countries in finding solutions to the commodity issues in the ongoing negotiations. The Executive Committee of the African Union endorsed the proposals contained in the Declaration in January 2006 and the African Union in April 2006.

In Geneva, on 7 June 2006, the 31 member countries of the African Group tabled a paper expressing their full support for the proposal and emphasising the importance they attached to finding a solution to the problems faced by commodity-exporting countries in the Round (WTO 2006).

As the news spread about the tabling of the proposal, and the contents and thrust of it became widely known, a number of non-governmental organisations with offices

in Geneva, such as Oxfam and the Institute for Agriculture and Trade Policy, as well as others, requested briefings from some of the delegations and the Adviser. These organisations indicated their general support for the proposal and some of them were invited to the informal meetings arranged periodically to review developments in the negotiations.

These and other non-governmental organisations as well as some of the independent commodity experts publicised the proposal widely.[1] This prompted action from over 50 national farmers' associations and organisations from developed and developing countries and international non-governmental networks and federations working on trade and development and poverty alleviation. They signed and circulated an open letter, 'Call to Action on the Basis of Agricultural Commodities', on 7 July 2006, emphasising their support for the African Group proposal. The letter also stated that the signatories would work through all relevant channels to get wider support for the 'policies reflected in the proposal'.[2]

Negotiating modalities tentatively agreed

The wide public support for the proposal and the energetic and effective pursuit of the proposal in the negotiations by a number of African countries led by Kenya resulted in agreement being reached on the inclusion of separate modalities for negotiations on commodity issues in the text on modalities for negotiations on agricultural products (Box 9).

Box 9: Proposed modalities for negotiations on the rules relating to international commodity agreements

- Provision shall be made to ensure the possibility that Members may take joint action through adoption of suitable measures, including through adoption of intergovernmental commodity agreements, for stabilisation of prices for exports of agricultural commodities at levels that are stable, equitable and remunerative. The provisions of Article XXXVIII in the chapter on Trade and Development of GATT 1994, Part IV, which inter alia stipulates that the WTO Members could take 'joint action' through 'international arrangements' for ensuring 'stable equitable and remunerative prices' for exports of primary agricultural commodities should be reviewed, clarified and improved so that...an understanding will be reflected in the Agreement on Agriculture that the term 'arrangements' covers both commodity agreements of which all interested producing and consuming countries are parties, and agreements of which only commodity-dependent producing countries are parties.
- Action for negotiations and adoption of intergovernmental commodity agreements in pursuance of the provisions of the paragraph above may be taken either jointly by producing and consuming countries or by commodity-dependent producing countries only.
- Such intergovernmental commodity agreements may be negotiated and adopted by the countries themselves, or adopted after negotiations undertaken under the auspices of the WTO, UNCTAD or international commodity organisations.
- Intergovernmental commodity agreements may be negotiated and adopted on an international or regional basis.
- Such agreements may provide for the participation of associations of producers.
- The general exceptions provisions of Article XX (h) of GATT 1994 shall also apply to intergovernmental commodity agreements of which only producing countries of the concerned commodities are Members.
- Technical assistance shall be provided for, inter alia, the improvement of world markets for commodities and adoption and implementation of intergovernmental commodity agreements.
- Financial resources required by the international trade and other organisations for providing technical assistance in accordance with the provisions of paragraphs 100 and 101 above shall be monitored through the mechanism established in WTO for administering Aid for Trade.

It is expected that negotiations for securing clarification of rules on the basis of the above modalities would be held immediately after the modalities package is accepted and completed. Some of the commodity-dependent exporting countries have proposed that the most appropriate legal form that could be adopted for the clarification of rules relating to international commodity agreements would be to include a separate Article in the Agreement on Agriculture. For participation in these negotiations, legal based text for inclusion of a new Article in the Agreement would be prepared at an appropriate time in the negotiations, in co-operation with the interested delegations.

Reductions in tariff escalations

The non-paper had emphasised the need to ensure that 'tariff escalations' are reduced. They are to be found in the tariff structures of many countries and adversely affect the development of industries for further processing of commodities in developing countries that are producers. The modalities that would be adopted for reduction of tariff escalations are listed in Box 10.

Box 10: Modalities for negotiations for reduction in tariff escalations

In the event that adverse effects of tariff escalation for commodities were not to be eliminated via the tiered formula for reductions in bound duties and such specific measures on tariff escalation as are provided for, Members shall engage with commodity-dependent producing country Members to ensure satisfactory solutions. Consistent with this, the following approach shall be applicable:

(a) Commodity-dependent developing country Members, individually or as a group, shall identify and present products of interest to them for purposes of addressing tariff escalations to be adopted as part of the modalities. In doing so, they will indicate the match of products on which tariff escalation should be addressed;

(b) Developed countries and those developing country Members declaring themselves to be in a position to do so shall undertake tariff escalation reductions in the identified products;

(c) At the end of the implementation period, the difference between the identified primary and processed products shall not exceed an agreed defined percentage spread in the event that the combined effect of reductions through the tiered formula, through liberalisation of tropical and diversification products and through the tariff escalation is not deemed to have been sufficient.

Source: WTO Document TN/AG/W/4 Rev. 3

Provision shall be made also for suitable procedures for negotiations on the elimination of non-tariff measures affecting trade in commodities.

This work shall continue through the post-modality phase to be concluded no later than the scheduling phase. The Secretariat will provide technical assistance in support of the commodity-dependent developing country Members throughout this period.

Source: GATT document TN/AG/W/4 Rev. 4

Notes

1. Communication from Oxfam and Friends of the Earth, 'Common Position in Support of the African Group Proposal Submitted to the WTO'; communication from the Institute for Agriculture and Trade Policy, 'The Right Path to Development: African Countries Pave the Way'. 7 June 2006.
2. See 'Call to Action on the basis of Agricultural Commodities', open letter from over 50 national and international networks and federations inviting support and early action on the proposal on commodity issues tabled by the African countries in WTO, 1 February 2007.

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6

Liberalisation of Trade in Non-agricultural Products

Introduction

This chapter provides an overview of the assistance provided to member countries of the Group to enable them to decide on their approach in the negotiations on the modalities that could be adopted for liberalisation of trade in non-agricultural products. The negotiations in this sector are referred to as 'market access' negotiations as they focus mainly on securing improved market access for these products by obtaining further reductions in tariffs and the removal of non-tariff barriers.

Background and context

The developed countries and some of the developing countries were the main proponents of the proposal that negotiations in the area of trade in goods should not be confined to agricultural products, but extended to non-agricultural (or industrial) products. They were influenced in this by the following considerations.

The first consideration was the increasing trend towards regionalism. It was argued that preferential trade among a few countries could result in discriminatory treatment for the trade of other countries that are not parties to the regional arrangement. Second, the EU and other countries, which followed protectionist policies in the field of agriculture, argued that if liberalisation was confined to the agriculture sector and no liberalisation took place in the industrial sector, the results would be unbalanced from their point of view. They would only be able to justify a reduction in the protection of agriculture if they could secure compensatory concessions in both the agricultural and industrial sectors, particularly from emerging economies like Argentina, Brazil and India. The emerging economies were becoming important markets but were maintaining high levels of protection in both the sectors. Third, developing countries that favoured negotiations being held felt they would prompt substantial reductions in peak tariffs applied by developed countries to products of export interest to developing countries, and elimination of tariff escalation in the tariff structures of developed countries. In addition, the developing countries themselves may be required to take tariff reduction on a most-favoured-nation basis, which could boost the growing intra-regional trade among these countries.

However, a number of the developing countries were cautious. Two factors appear to have influenced them. First, they had serious doubts as to whether developed countries would be able to make significant reductions in peak tariffs as their industries considered them to be import sensitive. Second, they were apprehensive that even though their trade may not benefit much from reductions in tariffs made by developed countries, if negotiations were held they may have to reduce their tariffs and bind them in return. Many of the developing nations were still feeling the negative effects of the IMF and World Bank liberalisation measures previously imposed on them. They felt their economies would need more time to adjust to the measures already taken before venturing into a process of further liberalisation, particularly in the context of multilateral negotiations where reduced tariffs have to be bound against further increases.

But despite the reluctance of a number of countries to engage in negotiations for further liberalisation of trade in industrial products, the decision to commence such negotiations as part of a single undertaking was taken at the Doha Ministerial meeting held in November 2001. It was agreed that negotiations should aim at improvements in access to markets of non-agricultural products by securing further reductions and where possible elimination of tariffs and removal of non-tariff barriers.

Negotiations on Tariffs

Average levels of developed and developing countries

The Uruguay Round had made significant progress in increasing the spread of binding and in reducing tariffs on non-agricultural products. Almost all tariffs of developed countries are now bound against further increases. In the round, these countries also cut their tariffs by 40 per cent overall. As a result of these reductions, the average level of tariffs of developed countries for industrial products declined from 6.3 per cent to 3.8 per cent by 2000, the year in which a staged reduction agreed in the Uruguay Round was completed. But this average concealed the differences that existed in the tariff levels of different developed countries. In most of the countries peak tariffs, which were more than three times the average level, applied to such products as textiles and clothing, leather and leather items and other simple manufactured goods of export interest to developing countries.

Developing countries were able to participate more actively in the area of tariffs in the Uruguay Round of negotiations because of the liberalisation measures they had already taken to open up their markets on an autonomous basis. These countries offered to bind tariffs on some products they had previously reduced independently and, where it was considered appropriate and possible, to further reduce applied rates. They reduced their tariffs by 30 per cent overall (i.e. 10 per cent less than developed countries reduced their tariffs). As a result of these reductions, the average level of tariffs (applied rates) of developing countries as a group is estimated to have fallen

from 15.5 per cent in the period prior to the Uruguay Round to 12.3 per cent after the implementation of the reduction agreed to in the Uruguay Round.

The least-developed countries were not required to abide by any target for overall reductions. They were, however, expected to reduce their tariffs taking into account their development and financial needs so most of them made some token reductions.

The Uruguay Round also witnessed a significant increase in the level of tariff bindings given by developing countries. In offering such bindings, these countries were permitted to use as a matter of special and differential treatment, a technique used in the past, mainly by some of the developed countries like Canada, Australia and New Zealand, to bind their tariffs at rates higher than the reduced rates agreed in the negotiations for a limited number of products. Such bindings permit the countries to raise their tariffs to the level of bound rates without breaking their GATT obligations.

Negotiating approach

To assist delegations in deciding on the approach that could be adopted in the negotiations on tariffs applicable to non-agricultural products, a working paper was prepared using information on the prevailing tariff contained in the project's various background papers. The Group discussed the working paper in expert and ambassador level meetings before deciding it should be circulated to Commonwealth governments to enable their national authorities to examine the various issues arising and suggestions on strategies. The Commonwealth Secretariat circulated 'Working Paper 4 of the Geneva Group of Commonwealth Developing Countries on Market Access for Non-Agricultural Products' to all members of the Commonwealth (Rege 2002).

Improvement in access to the markets of developed countries

The working paper suggested that in the negotiations with developed countries the developing countries approach of developing countries in the negotiations should seek to secure:

- Substantial reductions in the peak most-favoured-nation (MFN) rate of tariffs that apply to products of export interest to them;
- Reductions in all other MFN rates of tariffs; and,
- Reduction and/or elimination of tariff escalations in sectors where they exist.

However, it would be necessary to recognise in the negotiation that developing countries benefiting from preferential access under the Generalised System of Preferences may not have the same interest as other developing countries in securing substantial reductions in MFN rates of duties applicable to products in which they had meaningful preferential advantage. The measures taken by the EU for improvements in preferential access for imports from least-developed countries, and by the USA for imports from African countries (both least developed and other developing countries), had

increased the importance of such access for the trade of these countries. Therefore, in relation to the tariff lines on which the erosion of preferential margins through reductions in MFN duties was likely to adversely affect their trade, the developing countries should seek to ensure the ground rules for negotiations provided for flexibility that would enable them to request:

- Less than the average reductions envisaged (by the formula) being made; or alternatively,
- A longer period than provided for gradual staging of reductions to reach the level of tariffs agreed in the negotiations (e.g. 10–15 years instead of 5–8 years).

Determination of contribution by developing countries

In deciding on the extent to which they could liberalise, the developing countries should take into account the following factors.

In the past developed and developing countries had adopted different approaches in reducing tariffs. The developed countries had reduced tariffs gradually over a period of nearly 50 years through participation in the eight rounds of multilateral trade negotiations. The developing countries on the other hand had liberalised during the period unilaterally outside the framework of multilateral trade negotiations. While a few countries in Asia and Latin America, which were at a relatively high stage of development, took such unilateral measures gradually as part of their national policies for promoting export-oriented production, most of the countries in Africa were required to liberalise trade in keeping with the conditions imposed by the World Bank and IMF under their structural adjustment programmes or as suggested under their technical assistance programmes. These programmes required countries to make high percentage cuts across the entire range of tariffs. This left their agricultural and industrial producers without enough time to adjust to import competition. (UNCTAD called this a 'big-bang type' of liberalisation.) The result was that instead of improving the competitive strength of these industries, which had previously benefited from high levels of protection, liberalisation led to what some economists have called, a process of 'de-industrialisation'. For instance, a number of industries in Kenya, Tanzania and Zimbabwe were forced into closure, as they were unable to make the technological changes needed to face the increased competition (Wignaraja and Ikiara 1999). In a number of other African countries, the surge in imports following liberalisation also adversely affected the few existing consumer industries (e.g. beverages, tobacco, textiles, sugar, leather, cement and glass products), causing many to close down. In almost all these countries, unemployment increased instead of decreasing, particularly as no investment was being made for the development of new industries.

This dismal experience contrasts with the experience of a few of the developing countries such as China, India, Malaysia and Thailand in Asia and Brazil, Chile, Mexico and Peru in Latin America, which had liberalised gradually over a period on a selective basis

by reducing tariffs by small percentages. In most of these countries the liberalisation measures taken made a contribution, albeit a modest one, towards increased investment in the development of new industries, which resulted in increased employment. But the relative success of these countries in gaining modest benefits from liberalisation for economic growth cannot be solely attributed to the gradual pace of liberalisation and to proper sequencing. In fact, the governments in most of these countries, while pursuing import substitution policies, had been able to build up vital infrastructure necessary for the development of export-oriented production – that is: physical infrastructures (such as transport and public utilities); financial infrastructure (e.g. banking and insurance); human resource infrastructure (e.g. trained technical personnel).

Box 11 summarises the views of some of the leading economists who support the findings in the empirical studies, described above.

Box 11: Leading economists on how liberalisation has impacted developing countries

The unsatisfactory and somewhat dismal experience of the liberalisation measures taken by a large number of developing countries (particularly by low income, least-developed and small economies) has led some economists to argue that the classical principle 'free trade benefits all countries' needs rethinking. This should not be taken to imply that these economists are arguing in favour of a reversal to import substitution policies by developing countries, particularly by those at the lower stages of development. As Helleiner (2000) puts it, 'there are few reputable developing country analysts or governments who question the positive potential roles of international trade and capital inflow on economic growth and overall development. How could they question the inevitable need for participation in a considerable degree of integration with world economy? The real debate is not whether integration is bad, but over matters of policy (for liberalisation) and priorities.' In another context, he goes on to observe that 'it is not at all obvious that further external liberalisation is now in every country's interest and in all dimensions'.

Dani Rodrik (1999) points out that 'economic development is a lot more than just throwing borders open'. Trade policy is one of many policies countries have to follow simultaneously. These include, apart from policies needed for infrastructure development, policies that aim for:

- Reform of the tax structure to make up for loss in tariff revenues that would result from the reduction of duties;
- Safety nets to compensate displaced workers;
- Technological assistance to upgrade firms adversely affected by import competition;
- Establishment of legal and administrative framework required for taking contingency protection measures to provide additional protection for a temporary period to industries that are not able to withstand import competition and to protect them from unfair foreign competition, by imposing anti-dumping and countervailing measures;
- Training programmes to ensure export-oriented firms have access to skilled workers.

The success of liberalisation would depend on how far these policies form a part of the reform process and complement the measures that are taken for the liberalisation of trade.

Source: Rege 2007, pp. 23–25

Techniques for negotiations on reduction of tariffs

Against this background the working paper suggested that developing countries in negotiations on the techniques that could be adopted for reductions in tariffs, base their negotiating strategy on two main considerations.

First, in all the eight rounds that have taken place the developing countries had chosen to negotiate with developed countries on a product-by-product basis by following request and offer procedures – for example, in the Kennedy Round (when cuts were made by the developed countries on the basis of a linear formula), in the Tokyo Round (when they used a formula with a harmonising element) and in the Uruguay Round (when choice of the techniques to be used was left open). This was largely because product-by-product negotiations provided them with the flexibility they needed in determining the extent to which they could reduce tariffs, taking into account the capacity of the industry concerned to meet import competition.

Second, tariff reductions imply curtailment in the revenue collected from customs. For a large number of developing countries, customs revenue constituted a significant proportion of their total revenue and alternative sources for raising revenue were not readily available. Therefore it might be desirable for them to adopt a technique that resulted in least loss. In the case of a formula cut, duties are cut across the board whether they are protective or purely for revenue as these are levied on imported products for which there is no domestic production. In the case of product-by-product negotiations, on the other hand, it is possible to confine reductions in duties that are of a protective nature and avoid cuts in duties imposed purely for collecting revenue.

If all developed countries decided to adopt the harmonisation formula approach, would it be in the interest of developing counties to agree to apply such a formula to their tariff reductions? The answer to this question would depend on agreement being reached on the level to which developing countries could reduce their tariffs and on whether the ground rules for the application of the formula would provide for exclusion from, or reductions in, formula cuts on products requiring, in their view, the continued application of protection. The attitudes taken may vary from country to country and would depend on not only economic factors, but also on how far any such across-the-board reductions would be acceptable at political level. However, as a large number of developing countries are not 'demanders' in the negotiations for further reductions of tariffs in the industrial sector, and consider that their industries would need time to adjust to the liberalisation measures already taken by them on autonomous basis, it appears that most of them would prefer to make reductions in their tariffs through negotiations on a product-by-product basis rather than on the basis of a formula providing for a rigid level of percentage cuts.

State of Play in the Negotiations

In the initial period of the negotiations, a large number of developing countries had taken the position that while developed countries should reduce tariffs on the basis of a harmonisation formula, which results in deeper reductions being made in higher tariffs, developing countries should be permitted, as was done in the past rounds of negotiations, to participate on the basis of requests and offer procedures. They considered that this technique would provide them with sufficient flexibility to determine on which products tariffs should be reduced, and their level, and those that could be excluded from tariff reductions. The only obligation that the modalities should impose was that, as in the Uruguay Round, the average level of tariffs should be reduced by an agreed percentage.

However most of the developed countries, which were seeking markets for their exports particularly in the emerging economies, insisted that the developing countries should also reduce tariffs on the basis of a harmonisation formula. Ultimately, as a result of pressures from these countries, it was agreed that the reductions in tariffs should be based on a Swiss formula that would permit reductions being made by developing countries at rates lower than those of developed countries.

Table 4 explains the formula and how it results in lower reductions if a higher coefficient is used. Thus, a tariff rate of 10 per cent would be reduced to 4.44 per cent if a coefficient of 8 were used, while if a coefficient of 20 were used the same tariff would be reduced to only 6.7 per cent.

Table 4: Tariff-cutting formula

The formula that would be applied for reduction: $Z = AX/(A+X)$

X = initial tariff rate

A = coefficient and maximum tariff rate

Z = resulting lower tariff rate (end of period)

The rates that would result from the application of the above formula for developed and developing countries are as follows:

X/A	8	10	20	22	25
10	4.44	5	6.7	6.87	7.1

There is now general consensus that in order to ensure developing counties are able to reduce tariffs at rates significantly lower than those applied by developed countries, they should be allowed to use a higher coefficient than that used by developed countries. The differences on the coefficient that could be used for this purpose as well as the extent to which products should be excluded from reduction or tariff bindings or on which lower formula cuts could be made, have bogged down the negotiations.

In his report submitted on 12 August 2008, the Chairman of the NAMA (non-agricultural market access) Negotiating Group suggested there was some support for the proposal that developed countries should use a coefficient of 8, and the developing countries should have the flexibility to use one of the three high coefficients, that is 20, 22, or 25. However, as shown in Table 5, the flexibility for them to make reductions lower than the formula cut, or to leave tariff rates unbound, would vary according to the coefficient used. The higher the coefficient, the lower the level of flexibility available to developing countries.

Table 5: Level of flexibility against the coefficients

Coefficient used in the formula	Flexibilities available to developing countries	
	Option 1: Make less than formula	**Option 2: Keep tariffs lines unbound or not apply formula**
20	14% of tariff lines if they do not exceed 16% of total imports	6.5% of tariffs lines if they do not exceed 7.5% of total imports
22	10% of tariff lines if they do not exceed 10% of total imports	5% of tariff lines if they do not exceed 5% of total imports
25	No flexibility	No flexibility

Special and differential treatment to LDCs, countries with low binding coverage and SVEs

As in the case of agricultural products, it is now tentatively agreed that a large number of developing countries, particularly those in the least-developed and middle stages of development, would not be required to make reductions on the basis of the Swiss formula. The strategy adopted by developed countries to accommodate the interests of these countries in the negotiations on non-agricultural products was slightly different to that adopted for negotiations on agricultural products.

In the Uruguay Round all countries, including least-developed countries, had bound their tariffs applicable to agricultural products. No such requirement was applied in that round to non-agricultural products, with the result that a large proportion of tariffs of these countries remain at present unbound. At a very early stage of the negotiations, the developed countries made it known that they would not expect least-developed countries to make any reductions in tariffs if they agreed to bind all of their tariffs on non-agricultural products.

Likewise, before the Hong Kong Ministerial meeting in 2005, it was agreed that some 12 countries with binding coverage of less than 35 per cent (viz. Cameroon, China, Congo, Côte d'Ivoire, Cuba, Ghana, Kenya, Macau, Mauritius, Sri Lanka, Suriname and Zimbabwe) would not be required to make reductions on the basis of the tariff formula, if they agreed to increase the level of their bindings.

It is now agreed that countries with tariff bindings below 15 per cent should bind 70 to 90 per cent of their tariff lines while those with bindings above 15 per cent should increase them by 75 to 90 per cent. The tariffs should be bound in such a way that the average level does not exceed 28.5 per cent.

As in the case of negotiations on agricultural products, some 40 small and vulnerable economies would not be required to apply the tariff-cutting formula. The criteria used for identifying such countries for negotiations in the non-agricultural sector is much simpler than that adopted for negotiations in the agriculture sector. All countries with a share of less than 0.1 per cent in world non-agricultural trade are to be treated as small and vulnerable economies. The aim of the negotiations is to secure from these countries binding of all of their tariffs on non-agricultural products. The extent of the reductions that these countries would be required to make is related to the level of the existing bindings (Table 6).

Table 6: Small and vulnerable economies – modalities for tariff reduction on non-agricultural products

Present state of bindings	Percentage reduction if tariffs are fully bound
Above 50%	Overall average reduction of 28–32%
Above 30% but below 50%	Overall average level of 24 to 28%
Above 20% but below 30%	Overall average level of 18%
Above 50%	Minimum 5% reductions on 95% of tariff lines

Sectoral Negotiations

The Doha mandate for negotiations in the area of non-agricultural products envisages that in certain sectors negotiations should also take place for reductions in tariffs 'over and above what would be achieved by the formula modality' and where possible for their total elimination. It is agreed that participation in such negotiations should be on 'non-mandatory basis'. The developing countries participating in such negotiations would be provided special and differential treatment by, inter alia, providing them with more time to reduce or to eliminate tariffs. In pursuance of this mandate proposals have been tabled, mainly by developed countries that have an interest in exports, for negotiations on the above basis in the following sectors: bicycles and related parts, electronics and electrical products, fish and fish products, forest products, gems and jewelry, hand tools and machinery, health care, sports equipment, toys and textiles, clothing and footwear.

Most of the developing countries have so far shown a reluctance to participate in these negotiations. They have maintained that participation in such negotiations is non-mandatory and therefore left to them to decide on whether or not to participate. However some of the developed countries, particularly the EU and the

USA, have taken the stand that in order to ensure an appropriate balance between the benefits and costs of liberalisation in the negotiations it was necessary that the developing countries at a higher stage of development – the emerging economies – should participate in the negotiations, at least in the sectors where they have production and exports.

Negotiations on Non-tariff Measures

Aims of the negotiations

This brings us to the description of the proposals that have been tabled for the development of additional discipline in the area of non-tariff measures. Most of these proposals aim at ensuring that rules and regulations applied by countries at national level do not result in the creation of new barriers to trade by adopting complementary agreements clarifying the rules of the WTO Agreement on Technical Barriers to Trade. In addition, one of the proposals aims at establishing a framework of special procedures for consultations on non-tariff measures with a view to quickly finding solutions to the problems posed by these measures. It is expected that adoption of such procedures would negate the need of countries adversely affected by the application of non-tariff measures to resort to WTO dispute settlement procedures, which are both time consuming and expensive.

At the request of the members of the Group, an analytical paper was prepared explaining the issues that would have to be examined in clarifying the rules of the Agreement on Technical Barriers to Trade (TBT) on a 'product-specific basis' in such areas as: labelling of textiles, clothing, footwear and leather products; electronic products; lighters; fireworks; and forestry (wood) products used in building construction. Following is a brief summary of the main points made in the background paper and a description of the issues that need further examination (Rege 2008).

Proposals to clarify the TBT Agreement rules on a product-specific basis

Objectives and main rules

The aim of the Agreement is to ensure that the standards and technical regulations formulated and applied do not cause unnecessary barriers to trade. The Agreement envisages that this aim can be achieved if countries use international standards in formulating, developing and adopting technical regulations. The Agreement permits countries to deviate from the rule where it is considered international standards would be ineffective or inappropriate because of fundamental climatic or geographical factors, or technological problems. However, in such cases countries are required to publish their regulations in draft form and take into account the comments made by the governments of other countries in finalising and adopting them.

Understanding on labelling requirements

The proposal tabled by the US and the EU aims at clarifying the rules of the TBT Agreement by adopting an Understanding on labelling requirements for textiles, clothing, footwear and other leather articles. The Understanding would divide the labelling requirements into two categories. In the first category would fall the requirements in respect of which it would be presumed 'are not more trade restrictive than necessary' to attain the legitimate objectives. This category would include requirements to indicate in the label fibre content or material used, country of origin and in the case of textiles 'care instructions'. The requirements in the second category, which it would be presumed are trade restrictive, would include those that limit the languages used or require the label be pre-approved or prohibit inclusion of information on the brand names. Although the proposal does not make it explicit, the motivation behind the proposal appears to be to encourage development of harmonised and binding rules at international level for labelling of these products on the above basis.

Points needing further examination

The background paper emphasises that the question as to whether it should be presumed that mandatory requirements to show 'country of origin' in the label for textile products do not create barriers to trade would need further examination taking into account the following factors:

- Even when GATT was being adopted in 1948, it was recognised that regulations requiring 'country of origin' be included in the marking on a product (or a label) may in practice result in barriers to trade by causing exporting countries 'difficulties and inconveniences' in complying with these requirements. It therefore calls on countries to keep such requirements to the minimum (Art. XIX).
- Largely because of these considerations, very few countries appear to have adopted regulations providing for mandatory labelling of textiles, clothing, and footwear and leather products. Japan, South Korea and the US are among the developed countries that have such regulations while Canada, the EU and Switzerland do not. However, the European Commission appears to be under pressure from its domestic industries to adopt mandatory labelling regulations for these products. Only a few developing countries appear to have such regulations.
- The main motivation behind the pressures in the EU for the adoption of mandatory labelling requirements appears to be to increase indirect protection to domestic industries.
- There is a growing view in industry and trade circles that consumers make their choices on the basis of information relating to material content and size.

In the case of textiles consumers attach importance to information relating to care requirements. They attach less and less importance to the information on country of origin in the labels as they become increasingly aware that with globalisation of the world economy, most products are manufactured on a multi-country basis and 'country of origin' merely indicates where the last transformation of the product took place. It could therefore be argued that mandatory requirements to provide country-of-origin information in labels, places an unnecessary burden of compliance on the exporters.

- In countries where there are no mandatory requirements to provide information on country of origin through labels, the importers, retailers and departmental stores are opposed to the adoption of such requirements. These actors are increasingly marketing the products under their brand or trade names, and they are apprehensive that any such information could be used by interest groups to build pressure for boycotting imports from countries where, in the view of such groups, environment and labour standards are not being followed.
- The present situation in which there are differences in the rules adopted by countries in determining origin of goods is expected to undergo changes when the ongoing WTO work on harmonisation of origin rules used for determining origin of goods imported on a non-preferential basis is completed. The adoption of these rules by all countries as a basis for their labelling requirements would constitute an important and positive step towards harmonisation of origin rules on labelling. It would however be unrealistic to assume that their adoption would prevent countries from using labelling requirements for protective purposes. For instance there may be pressures from industry that labelling requirements for imported textiles products should, in addition to indicating the country where the last transformation took place, also indicate the county in which the fabric used in further processing was produced. Such additional requirements, by increasing the costs of compliance, could have an adverse impact on the competitive position of the exporters.

It is evident from the complex issues to be addressed that further work in this area would have to be undertaken in a forum where, in addition to governmental representatives, all interested stake holders such as manufacturers, importers and retailers, and consumers and environmental groups are able to participate. Since WTO rules do not permit such participation, it would be necessary for the WTO to agree to modify its procedures by establishing a separate ad hoc technical committee to permit participation of non-governmental representatives.

The WTO could also request the International Organization for Standardization (ISO) or other standardisation bodies, which provide for participation of various interest groups, to examine the issues and formulate standards that could later be used for

negotiations on technical regulations. When the issue was raised in the Negotiating Group on Market Access one view was that it was difficult to draw a clear dividing line between where the work on the adoption of standards ends and the work on the adoption of technical regulations begin. In practice however, it would be necessary to ensure that standards used in technical regulations are formulated and adopted with full participation of industries producing the product and other stakeholders.

It is relevant to note in this context that most of the work on developing international standards and rules for labelling is being undertaken in international standardisation bodies. For instance, Codex Alimentarius Commission is actively engaged in developing rules for labelling of food products. This practice would have to be taken into account when considering whether the WTO should get involved in developing rules for labelling of such products as textiles.

Understanding on electronic products

Two separate proposals – one by the EU and the other by the USA – have been tabled for the adoption of an Understanding to clarify the rules of the TBT Agreement relating to the 'standards, technical regulation and conformity assessment procedures' applicable to 'the safety of electrical equipment and electronic magnetic compatibility'. It would cover electrical and electronic equipment, electrical household appliances and consumer electronics. The objective is to take forward the work on standards, technical regulations and conformity systems that has been done under the auspices of the Information Technology Agreement by adopting an Understanding providing for agreed rules. There are, however, significant differences in the proposals tabled by the EU and USA.

Differences in the EU and US approaches

As noted earlier, the TBT Agreement obliges countries to use international standards in formulating and adopting technical regulations. But it does not identify the international standardisation bodies whose standards should be used for this purpose. The EU has suggested that the proposed Understanding should limit the international standards that could be used in technical regulations providing for 'safety of electric equipment and electro-magnetic capability' to those adopted by the ISO, International Electrotechnical Commission (IEC) and International Telecommunications Union (ITU).

The US proposal takes an opposing view. It provides that 'each member should be free to decide on' which international standard should be used taking into account 'the principles set out in the Decision adopted by the TBT Committee on Principles for the Development of International Standards, Recommendations and Guidelines'. The Decision does not specify any particular standardisation bodies whose standards could be used in technical regulations leaving it open to countries to pick and choose.

The US proposal thus reflects its consistent stand against any proposal that limits the standards for use in technical regulations to those prepared by the ISO, IEC and ITU. It holds that standardisation bodies situated in the country that permit participation of other countries also prepare standards that are international.

The US proposal aims further at making basic change in the concept and principles on which the rules of the TBT Agreement are based. The TBT Agreement encourages countries to base their technical regulations on international standards prepared by international standardisation organisations. However, it permits a country to deviate from the rule if, 'for fundamental climatic or geographic factors or fundamental technological problems', the relevant international standard is not found suitable or where an international standard does not exist. In such cases, the country adopting the standard is expected to publish the technical regulations or conformity procedures in draft form and take into account the comments and views of other countries before finalising them. The US proposal provides that this requirement should be applicable to electronic products in all cases, 'regardless of whether relevant international standards, guides or recommendations exist'.

In terms of operational provisions, the basic aim of the EU proposal is to secure acceptance of principles on which existing community regulations are based and which permit low-risk electronic products (such as electrical household appliances and consumer electronic products) to be marketed on the basis of a 'suppliers declaration of conformity'.

For a limited number of products for which it is considered inappropriate to rely solely on a 'suppliers declaration of conformity' because of the safety, health and other related risks they pose, the proposal would allow them to be marketed on the basis of an 'assurance of conformity' issued by a conformity assessment body (namely a testing laboratory) 'approved for the purpose by authorities of another WTO Member' (i.e. exporting country). It would, however, be open for a country to require proof of the technical competence of the issuing body as a condition to accepting the 'assurance of conformity' issued.

The proposal further provides that in all cases where an 'assurance of conformity' is considered necessary, the choice of testing laboratory should be left to the supplier. There should be no requirement that the product be blocked from entry unless it is tested in a laboratory in the importing country. Likewise, there would be no requirement for registration of the product with the authorities before it can be marketed.

While the EU considers it would be possible to develop through negotiation a multilaterally agreed list of 'low risk' products, which could be marketed on the basis of a suppliers declaration, and 'high risk' products that could be sold on the basis of an 'assurance of conformity' assessment issued by a testing laboratory in the importing country, the USA appears to be sceptical about agreements being reached on such multilaterally agreed lists. It has therefore proposed that each country be left to determine the type

of positive assurance it may require for a product to be marked, and that these requirements be listed in its schedule of commitments. Each country will have schedules and these schedules would form the integral part of the Agreement.

Issues for further examination

What are the likely implications of the proposal for developing countries? It would be necessary to examine this issue from both the perspectives of a) the few that have become, or have the potential to be become, exporters of electronic products, and b) the many that have no domestic production and must depend almost entirely on imports for their requirements of such products.

Producer countries

There are 27 developing countries with growing electronics sectors that are members of the WTO International Technology Agreement. They would certainly benefit if international rules were adopted requiring all countries to rely as for as possible on the supplier's 'declaration of conformity', and providing that importing countries should rely on the conformity assessment made by the testing laboratory in the exporting country and not insist on the product being tested again or for its registration.

Countries that are mainly consumers

The question is whether the large number of developing countries that are not producers of these products and depend entirely on imports, should list them in their schedules. The EU proposal emphasises that the policy of relying on manufacturer or supplier 'declaration of conformity' in ensuring consumer safety and protection depends on the existence in the country of a system for continuous surveillance of the market, supported by strong and well developed product liability laws.

Most of the developing countries, except perhaps a few that are at a higher stage of development, have not yet been able to establish systems for surveillance of markets. In countries where such systems exist, it is difficult to recruit the professional staff needed to identify non-compliant electronic products because of the lack of financial resources. As a result the surveillance in most cases is not effective. Further, in most of these countries the liability laws have not yet been fully developed, and even where such laws are on the statute books affected consumers often find that the legal costs for initiating a case for judicial redress is beyond their resources. Developing countries should therefore give careful consideration as to whether it would be in their interest to agree to rely solely on supplier declarations of conformity in allowing electronic products that are classified as involving low risk to be sold in their markets. More specifically, they should examine whether it would best suit them to delay accepting this new international discipline in this are until their national market surveillance mechanisms are fully operational and effective.

Proposals on other specific products

Lighters and fireworks

China contends that a number of countries have deviated from the ISO standard by imposing 'child resistant standards' on low priced lighters that are higher than those prescribed. China's argument is that the ISO international standard specifies 'the general requirements for lighters so as to ensure that lighters are safe when handled properly or even improperly in certain predictable ways', and therefore the imposition of a standard that is higher and stricter than the international standard on the 'basis of price' is not justified under the rules of the TBT Agreement. However, it may be possible to argue that it could be appropriate for a country to provide in its regulations that special 'child resistant devices' should be incorporated in low priced lighters for the protection of children, since it is children who generally buy them because they cannot afford high priced lighters.

In the area of fireworks the problems arise because, as yet, no international standard has been adopted and national standards vary considerably from country to country. China wants the adoption of an 'understanding' that 'WTO should' draw the attention of relevant international organisations to the absence of international standards and encourage them to prioritise fireworks standards development.

Timber products used in building construction

New Zealand has suggested the adoption of a Decision for two apparent reasons. First, is wants to secure recognition that the ISO, particularly its technical committees (EC9, 165 and 218), are the leading bodies for developing international performance standards for timber, timber products and timber used in building construction as they relate to building codes. It proposes that the ISO technical committees and the TBT Committee co-operate in expediting the work on the adoption of international standards. Second, it wants countries to use the international standards developed by these technical committees in their technical regulations.

Systemic policy issues

Would the negotiations on some understandings involve the writing of standards?

As noted earlier, the TBT Agreement calls on countries to base their technical regulations on international standards developed by international standardisation bodies. The rules thus clearly recognise that the WTO, which is an organisation dealing with mainly trade policy and development issues, lacks the scientific and technical knowledge needed for formulating and adopting such standards.

The WTO Workshop on Good Regulatory Practices (18–19 March 2008) went further in emphasising that national regulatory authorities should not get involved in

the formulation of standards that they propose to use in technical regulations. The general practice of most of the regulatory authorities appears to be to use international standards in adopting technical regulations and where such standards are not available to request either standardisation bodies in the country or the relevant international standardisation body to develop them. The regulatory authorities generally desist from developing standards that they propose to use in technical regulations.

What is considered to be a good regulatory practice at national level should also apply at international level to the adoption of understandings or decisions on developing product specific technical regulations that all countries would have to abide by. Such product specific rules should call on countries to use international standards and where such standards do not exist, efforts should be made to persuade international standardisation bodies to develop them before starting work in WTO on the adoption of product specific rules.

The proposal for adopting an understanding on labelling requirements for textiles and clothing and on footwear and leather and leather goods, could by its nature be considered to involve work on developing standards on the various elements of information that would be either permitted or not permitted to be included in the label. For instance, in relation to the elements in respect of which it is envisaged mandatory requirements to provide information would be presumed not to be causing barriers to trade, international standards have been evolved on 'care requirements' but not on the other two elements, 'country of origin' and 'fibre content'. Likewise, China is seeking a modification in the standard already adopted in the ISO. Negotiations on these issues should take place at a technical level in the standardisation body that has evolved the standard and not in the WTO.

Is it desirable to adopt a horizontal approach to ensure international standardisation bodies prioritise the formulation of standards used in technical regulations?

It would also be necessary to consider carefully whether the solution to the problems raised in other product specific proposals, should be found on a horizontal basis instead of on a product-by-product basis. For instance, the Chinese proposal on fireworks wants WTO to recommend that international standardising bodies give priority to the adoption of an international standard for the product. New Zealand is concerned with the ISO's slow progress on the adoption of an international standard for timber product and wants WTO to adopt an understanding reaffirming the 'technical committees' of the organisation as the most appropriate bodies for work on adopting standards on these products.

In some ways these proposals reflect the practical difficulties confronting countries, developed and developing, as international standardisation bodies are not giving priority to the preparation of standards required for use in technical regulations. Most of these bodies are private sector organisations; only a few are inter-governmental. The

procedures for selection of products for formulation of international standards as well as those adopted for technical work on evolving standards and for their adoption as international standards, vary greatly from body to body. In some of the bodies that are inter-governmental, the governments and their regulatory authorities may be able to influence the selection of products for standardisation. In others they do not have any such influence.

Against this background, it may be desirable to consider a shift in approach from the practice of making ad hoc requests to the international standardisation bodies to the following two-pronged approach. First, it may be desirable for the TBT Committee in co-operation with the international standardisation bodies to review the procedures adopted by each of them for selecting products, with a view to ensuring greater involvement of 'regulatory authorities' in the selection and formulation of standards that are used in technical regulations. Second, procedures could be adopted under which every one or two years, the WTO member countries would notify the TBT Committee of the products for which they propose to adopt technical regulations and on which international standards do not exist. The Committee, on behalf of the members, could then request the relevant international standardisation bodies to give priority to the products or subjects in the list and to provide periodic reports on the progress made in formulation of the standard. This approach would be both fair and equitable, as it would provide an equal opportunity for all countries to suggest products to be given priority attention by the international standardisation bodies.

Would it be desirable to agree a list of international standardisation bodies whose standards could be used in technical regulations?

The third issue in need of careful examination is whether the developing countries should support the EU proposal to recognise that the international standards prepared mainly by the ISO, IEEC and ITU can be used in formulating technical regulations for electronic products. In considering this issue, it would be necessary to ascertain whether there are others among the existing 50 or so bodies engaged in developing international standards that are preparing international standards on electronic products or have plans for developing such standards. Another issue that arises is how far developing countries have been able to participate effectively in the standardisation activities of the ISO, IEEC and ITU. The three bodies have taken steps for improving developing countries participation. However, it would be necessary to evaluate how these efforts have contributed to increasing the participation of these countries in the work of these three bodies, before taking any decision to support the proposal to make them responsible for standardisation activities in the field of electronics products at international level.

State of Play in the Negotiations

Much of the attention in this area of the negotiations has centred on modalities for reductions in tariffs but there is agreement that there should be an equal emphasis on work in the rule-making areas such as non-tariff measures. By and large, very few developing countries had been able to participate in the negotiations except perhaps in the area of labelling requirements for textile products. In the area of electronic products, there has been progress in reconciling the differences in the approaches adopted by the EU and USA. It is expected that in the coming months the Group on Market Access will pay greater attention to work in this area.

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7

Liberalisation of Trade in Services

Introduction

The previous three chapters were devoted to the assistance provided to the members of the Group for their participation in the negotiations for the liberalisation of trade on agricultural products, agricultural commodity issues and on non-agricultural products. This chapter describes the assistance provided for participation in the negotiations in trade in services.

The General Agreement on Trade in Services (GATS) specifically provided that negotiations for future liberalisation of trade should be held periodically and the first of such rounds should start 'not later than five years from the entry into force of the WTO Agreement', that is before 1 January 2001. Because of these mandatory provisions it was decided to commence negotiations in trade in services, even though no decision could be taken on the proposal for launching a new round of negotiations covering a wide range of subjects, because of the failure of the Seattle Meeting in 1999. The 'Guidelines and Principles for the Negotiations in Trade in Services', which were adopted in March 2001, provided as follows:

- The negotiations should cover all sectors of service trade and special attention should be given to the removal of barriers in sectors of specific interest to developing countries.
- The negotiations should take place on the basis of 'request and offer procedures' (unlike trade in goods, where the modalities that should be adopted was left to be determined in the negotiations).
- Under these procedures, each participating country is expected to make requests to countries with which it wants to negotiate indicating the liberalisation measures it wants them to take. After examining the requests the countries involved table 'offers' indicating the specific liberalisation commitments they are prepared to make. The negotiations then take place among interested countries on a bilateral basis with the aim of securing improvements in the offers and with the participating countries also trying to ensure that estimated benefits to their trade broadly conform to the criteria of 'mutual advantage' laid down by the GATS.
- Special and differential treatment should be extended to developing countries allowing them to liberalise their trade in fewer sectors, and they should also be

given credit for 'autonomous liberalisation measures' taken by them prior to the launching of the negotiations. Subsequently these guidelines were complemented by modalities for special treatment of least-developed countries.

These principles and guidelines were later suitably incorporated in the Declaration launching the Doha Round of negotiations.

Simultaneous negotiations are also being held for incorporation of provisions on emergency safeguard measures and on domestic regulations. These negotiations are being held in pursuance of the specific provisions contained in GATS and not in pursuance of the mandate contained in the agenda for the Doha Development Round.

Taking into account these guidelines, a three-pronged approach was adopted for providing assistance to the member countries of the Group for their participation in this area of the negotiations. First, the papers prepared identified the sectors in which there was potential for the development of trade with developed countries and provided an assessment of the extent to which trade may be liberalised in the present Round. Second, guidance was provided on the relevant factors that developing countries should take into account in liberalising their trade in pursuance of the requests received by them. Third, some proposals were made on how they could obtain credit for the liberalisation measures taken by them on an autonomous basis, in determining the extent to which they should liberalise in the present ongoing negotiations. The main features of the assistance provided in each of the areas are discussed below.

Sectors with Potential for Developing Countries to Increase Trade

Four modes of trade in services

As noted in Chapter 1, while international trade in goods only takes place across borders from one country to another, trade in services takes place in four ways, as follows:

- Cross border trade (Mode 1);
- Consumers or users moving to the country where the service is available (Mode 2);
- Establishment of a commercial presence in the country where service is needed in order to provide service (Mode 3);
- Movement of natural persons to the country where service is needed with a view to providing service (Mode 4).

The ability of countries to develop trade through the cross-border mode (1) is greatly dependent on how far infrastructure for communication through international technology means has been developed. A large number of developing countries (except

for those at a higher stage of development) are likewise unable to develop trade in financial and other sectors by establishing subsidiaries and branches in other countries through Mode 3. They have, therefore, a competitive advantage in supplying services to developed countries through Mode 4, as in the movement of natural persons to provide a service in another country, or Mode 2 when users of services move to the country where the services are available. To assist the delegations in deciding on the approach they could adopt the Adviser prepared a paper that provided an assessment of how willing developed countries would be to liberalise trade that is taking place under these two modes (Rege 2003).

Competitive Modes of Trade for Developing Countries

Movement of natural persons (Mode 4)

Unskilled and semi-skilled workers

In a large number of developing countries a significant proportion of service export earnings comes from remittances made by unskilled and semi-skilled workers who have moved temporarily to other developing countries to work. For example, workers from Bangladesh, India, the Philippines and Thailand working in the countries in the Middle East or those from many countries in Africa and Latin America who are working in neighbouring states.

Movement of unskilled workers from developing countries to developed countries is somewhat limited. The exceptions are women from countries like the Philippines and Thailand moving to European countries and Japan to work as housemaids.

Some of the developed countries do allow entry to a limited number of workers from other developed countries to do menial work that their nationals are not willing to do because of the prevailing high standards of living. However, most of these developed countries are witnessing dramatic changes in the demographic composition of their populations. Because of the fall in the birth rate and the rise in life expectancy, the proportion of the non-working population (60 years and above) is steadily on the increase. As the number of people available for work continues to decline in the coming years these countries will need to recruit more and more workers, mostly unskilled and semi-skilled, from overseas.

Some analysts have therefore argued that most of the developed countries may not have any alternative but to establish 'quotas' under GATS rules permitting unskilled and semi-skilled workers to work in their countries on a temporary basis. But this seems unlikely in the present round. Some of the developing countries, particularly the least developed ones, have made proposals requesting developed countries to allow such movement but there has been a general reluctance on the part of developed countries to accept legally-binding commitments to provide entry of unskilled and

semi-skilled workers on a 'most favoured nation' basis. However, as the work force available in their territories becomes insufficient to cope with work in areas like construction, repairs and maintenance, office cleaning and garbage disposal, it is possible that the number of unskilled and semi-skilled workers coming to developed countries to work for temporary periods may increase. The developed countries may wish to maintain a certain degree of discretionary authority in choosing the countries such workers could come from, taking into account factors like similarity of culture and religion and the preferences of their people, and allow such movement under bilaterally negotiated arrangements. They may further insist that workers speak the national language and have minimum educational standards.

Professionals and skilled workers

The attitude of most of the countries to the movement of skilled workers or professionals is somewhat more favourable. In the Uruguay Round and in the negotiations that were held soon afterwards, some of the developed countries gave commitments permitting such movement for providing limited types of services. However, in most cases the issue of temporary visas required for such movement is subject to 'economic needs' criteria. Most notable among these is the requirement that companies proposing to employ such professionals must establish that similarly qualified persons are not available locally. One of the demands of the developing countries is that the developed countries giving such commitments should not apply the 'economic needs' criteria.

It has been possible for some of the developing countries to develop trade through movement of natural persons among nurses and other hospital professionals and software and other information technology specialists. In relation to the latter, the serious shortage of software engineers and other information technology experts has led countries like Germany, Japan and the US to establish special quotas for visas for highly skilled workers. A number of such experts from India, the Philippines and other developing countries were able to take up these temporary visas during the 1990s technology boom, when the economies of the developed countries were expanding. The situation may change in future years as trends towards a slowing of economic activity become noticeable in these countries. In fact, there was increasing evidence to show that some of the professionals and skilled workers who had moved to developed countries in the boom years were returning to their countries. This drift is likely to be accentuated by the practice that is being adopted by companies to outsource some aspects of production to some of the developing countries, in order to take advantage of the prevailing low wages.

Another issue for developed countries is that local people who are losing their jobs are attributing their problems to workers coming from abroad on temporary visas. There is an increasing pressure from trade unions and other labour groups in these

countries for either discontinuing special quotas for highly skilled workers or for reducing their numbers. In light of these factors there are serious doubts as to whether in the present round, significant progress could be made by developed countries to permit movement of professionally qualified persons, by increasing the size of quotas for visas granted for this purpose or by removing the economic needs criteria. It is likely that improvements made would be superficial in nature and may not provide any meaningful advantage.

Consumers and users moving to the country where the service is available (Mode 2)

Tourism services

Under the GATS definition, tourism activities cover hotels and restaurants, travel agencies, tour operator services and tourist guides and services. Expansion of tourism is an important policy objective of a number of developing countries so they had taken measures to liberalise the sector even before the Uruguay Round. The measures were taken on an autonomous basis and have been bound by commitments in the Uruguay Round. In fact, the overall level of commitment made by the developing countries in this sector is far greater than in any other service sector.

Recent developments have shown that export earnings from tourism fluctuate with the changes in par value of currencies. Other factors contributing to the decline in tourist traffic are increasing threats of terrorist attacks and the spread of viruses. As a result of the decline the number of people employed in the sector has fallen in a number of countries that are dependent on tourism for a large proportion of their export earnings.

Back office services

Providing 'back office' services to companies in developed countries is becoming an important service industry in some of the developing countries. The development of information technology has made it possible for service companies from developed countries (e.g. banks, insurance companies and airlines) to get some of their functions performed in developing countries like India, where the electrical and telecommunication infrastructure is well developed and a well educated and trained workforce, fluent in English, is available. Other developing countries that are gearing up to take advantage of this opportunity include the Philippines and Thailand in Asia; Ghana, Kenya, Mauritius and South Africa in Africa; and some of the small economies in the Caribbean and in the Asia Pacific region.

The main factor influencing this trend towards outsourcing is the fierce competition in world markets that is forcing companies to reduce costs in order to remain competitive. Outsourcing enables companies located in developed countries to obtain

services from developing countries at half the cost or less due to the differences in the wage levels between developed and developing countries. These companies are getting a wide array of functions performed in countries where costs are lower including accounting and finance, processing of administrative operations, contact support, and call centre and hospital transcription services (involving doctor's reports on patients). The general pattern is for contracts to be awarded to local firms in developing countries, which is expected to greatly reduce migration of software and other experts from developing to developed countries. This suits the companies in the developed countries; there are no cost-savings when foreign experts work in the country for short periods as in most cases they are obliged by law to pay the same salary as that paid to local employees.

One of the consequences of outsourcing is the reduction in the number of people employed by the companies locally. Amid growing concerns that such migration of jobs could lead to higher unemployment, trade unions are increasing pressures on companies against outsourcing. Already, in countries in Europe where national laws require representation of workers on supervisory boards, worker representatives are pressing that companies should be run not only in the interest of the shareholders but also of the workers and should resort to outsourcing work to firms in foreign countries only in exceptional cases.

An Approach Developing Countries Could Adopt in Liberalising Trade

Assessment of the benefits

Each of the developing countries would have to decide on the approach that should be adopted in deciding on the contribution they could make by taking further liberalisation measures. These countries should also assess how far the developed countries show willingness to improve their offers for liberalisation in the sectors where developing countries have a competitive advantage, taking into account the situation described above, which may require a cautious approach in accepting further liberalisation commitments.

Regulatory mechanism

A related factor they should consider is whether an effective mechanism for regulating service industries after liberalisation exists in the country. As many industries provide services that are essential for the well being of its people, governments have found it necessary to regulate the activities of these firms. Traditionally, the main sectors that were regulated were banking and insurance. In recent years, as the governments both in developed and developing countries have been handing over to private enterprise those services previously provided by public enterprises (public utilities as they are

often called) in such sectors as telecommunications, gas, electricity and water, it has become essential to regulate their functions. In the UK for instance, the government has established separate regulatory bodies: OFTEL to regulate activities in the telecommunications sector; OFGAS for the gas industry; OFEL for electrical industries; and OFWAT for the water industry.

Broadly speaking, the primary aim of such regulatory bodies is to ensure that the producing companies in each sector, which in many cases enjoy monopoly positions, do not use their dominant positions to exploit the market. This is achieved by creating conditions for sustainable competition, which guarantees that services are provided to consumers at reasonable prices while ensuring that firms make enough profits that to keep shareholders happy and to agree to long term investment. See Box 12 for an overview of the purposes for which regulatory mechanisms are adopted by governments in various service sectors.

Box 12: Overview of regulatory systems adopted

Telecommunications

The Uruguay Round recognised that the process of liberalisation and privatisation may not always lead to efficiency and lower costs to the consumer as private firms providing basic telecommunication facilities would be able to exercise monopolistic control, due to the structure and nature of the industry. Thus, in taking liberalising measures it is important that countries establish regulatory frameworks to ensure users can access these basic facilities on fair terms. The following principles and rules guarantee access to the market for new entrants by prohibiting existing firms from adopting anti-competition practices:

- The establishment of independent regulatory authorities;
- The adoption of competitive safeguards;
- Measures to ensure interconnection;
- Transparent and non-discriminatory licensing practices; and,
- Universal service obligations.

Financial

This sector, one of the basic elements of an economy, is considered essential for development. Thus, regulatory policies and frameworks are seen as necessary for the correction of perceived market failures, the reduction of systemic risk, and for the maintenance of a safe and sound financial system. Government interventions take the form of:

- Macroeconomic policy management;
- Prudential regulations; and,
- Non-prudential regulations to pursue various public policy objectives.

The intermingling of the activities of various financial services and the elimination of the distinctions between different types of financial institutions, observed in many industrialised countries, has led to re-regulation and deregulation at the national level. As different financial/non-financial institutions enter markets hitherto reserved for certain types of

financial entities, there is a need for domestic regulation to ensure that various players entering the market do not distort competition amongst them.

Energy (gas and electricity)

Most countries regard this sector as crucial to economic and social development, which had resulted in the states taking responsibility for production and supply of utilities like electricity and gas. Countries that are privatising the state monopolies are finding it necessary to regulate the industry to ensure competition and reasonable prices as well as consumer protection, continuity of supply, universal service, environmental protection, and health and safety.

Health

As the health sector straddles both the public and private spheres it is subject to a variety of aims that are not always compatible, so a potential for misallocation may exist within it. When liberalising trade in services, the challenge for health authorities will be to define a consistent set of policy objectives, and then to create a regulatory framework for promoting efficient resource utilisation in respect of these objectives. The framework has to take into account changing policy priorities, which are evolving over time, as well as the emergence of new communication technologies that could gradually undermine geographical barriers to information, co-ordination and competition. The types of regulation that most directly affect supply and demand of medical and health services are:

- Licensing and qualification requirements for individual health professionals;
- Approval requirements for institutional suppliers (e.g. clinics or hospitals);
- Rules and practices governing reimbursement under mandatory insurance schemes (public or private); and,
- Rules governing supply of medicines via telecommunications channels ('telemedicines').

Education

The role of education is crucial in fostering economic growth, and personal and social development, and in reducing inequality. These services are primarily traded through:

- Consumption abroad (Mode 2) entailing student mobility across borders;
- Commercial presence (Mode 3) involving the establishment of facilities abroad (e.g. local branch campuses, subsidiaries), or twinning arrangements in which domestic private colleges offer degree courses overseas;
- Movement of natural persons (Mode 4) focusing mainly on scholars offering their services abroad; and,
- Cross border supply (Mode 1) facilitated by new technologies creating new possibilities for distance learning.

Due to the importance of 'consumption abroad' and the gradual opening of markets through 'cross border supply' and 'commercial presence', the regulatory systems adopted must take national objectives into account, particularly where the entry of foreign educational institutions may impact policies for providing financial support to national institutions to keep down costs for higher education.

The establishment of regulatory bodies and ensuring their effective operation is a difficult task for developed countries, and much more so for most of the developing countries. The establishment of such bodies requires personnel with the knowledge and technical expertise to understand and appreciate the technological developments taking place, which many developing countries may find difficult. Regulatory bodies also require substantial running costs. These may put an additional burden on the limited financial resources available to the governments and require them to divert financial resources earmarked for economic development. Additional problems could be expected in co-ordinating the activities of different regulatory bodies, with respect to each other and with the agency that is responsible for the implementation of competition policy.

The suitability of the regulatory mechanisms adopted by developed countries in relation to the situation prevailing in developing countries needs analysis and research on certain issues. For instance, how suitable is it for developing countries to adopt the concept that 'regulatory bodies' should be independent of government control in evolving pricing policies when public opinion favours that such policies should take into account social objectives like the need to provide such services to the poorer sections and in rural areas at lower prices.

Regulatory mechanisms in such sectors as banking, insurance and telecommunications exist in most of the developing countries. In most cases, however they are far from effective and need improvements and strengthening. This includes developing capacities to keep themselves abreast of the rapid changes that are occurring in the institutional arrangements used in providing new financial services and new products that are being introduced. In other service sectors such as telecommunications, energy, health and education, a large number of developing countries have not as yet developed regulatory mechanisms.

Against this background it would be necessary for the governments of developing countries to be extremely cautious regarding liberalisation of trade in service sectors where regulatory bodies have not been established. In sectors where regulatory bodies already exist such measures should be taken only after the regulatory mechanism has been overhauled to meet the new situations created by privatisation. These considerations are particularly relevant for liberalisation in sectors like electricity and water, where in many of the developing countries responsibility for providing services rests with state-owned enterprises, and in health and education where services are provided directly by the state.

Credit to Developing Countries for Autonomous Liberalisation Measures Already Taken

Relevance of autonomous liberalisation measures

It is important to note that in the Uruguay Round almost all developed countries only 'locked in' commitments to liberalisation measures they had already taken on an autonomous basis. By making such legally binding commitments they thus agreed to maintain a standstill on the imposition of new restrictions. The Round did not generally result in the removal of new barriers to trade by these countries.

Like the developed countries, the developing countries had also been taking measures to liberalise trade on autonomous basis. There were, however, two essential differences between the two groups of countries in the way the process of liberalisation developed. First, in the case of developing countries the process of liberalisation in the service sector started much later than in the case of developed countries. Second, while the motivation for liberalisation in the developed countries was provided by service industries that were seeking external markets, in the case of developing countries the liberalisation policies were by and large government induced. Whether acting under their own policy or under IMF and World Bank structural adjustment programmes, the governments have encouraged foreign suppliers to enter the market by removing restrictions on foreign investment with a view to improving the speed and quality of the services provided in the domestic market.

As in the case of developed countries, in the Uruguay Round the developing countries bound some of the autonomous liberalisation measures taken by them by making commitments. In so doing, the developing countries took into account the provisions of Article XIX of GATS, which permit them to open 'fewer sectors' and liberalise 'fewer transactions' in multilateral trade negotiations. Further, most of them have been able to limit the extent of liberalisation by specifying in their schedule of commitments conditions that could limit the freedom of action of the foreign suppliers or enterprises.

It is also important to note that, by and large, the commitments made by developed countries only resulted in making the autonomous measures they had already taken binding under the WTO system. This was not always the case with the developing countries as many of the commitments they made resulted in further liberalisation measures being taken.

As noted earlier, the rules adopted for negotiations in this area envisage, that in considering requests from developing countries for liberalising trade in sectors of trade interest to them the developed countries should 'give credit' for the autonomous liberalisation measures they have already taken or have shown willingness to take. The paper prepared under the project suggested that there might be greater willingness on the part of developed countries to give credit for such autonomous liberalisation if

the developing country taking such measures agrees to list them in its schedule (Rege 2003). For this purpose, it could be agreed in the negotiations that the GATS schedule of each country be divided into two parts: Part A listing all commitments given in pursuance of Article XVI of GATS for improved market access and for extension of national treatment under Article XVIII of GATS, and Part B listing autonomous measures for which the developing country concerned does not accept any binding obligation. The only obligation on a country listing such measures would be to notify the WTO if in exceptional situations modifications are made that adversely affect the trade of other countries. Such notifications would not give any rights to countries that consider their interests are adversely affected. If any consultation obligations are provided they could be similar to those assumed by developed countries, in case of modifications in their generalised system of preferences.

Adoption of such an approach would overcome the concerns that many of the developing countries appear to have about making legally binding commitments, leading to their improved participation in the ongoing multilateral negotiations on trade in services. The transparency resulting from the listing of autonomous measures in Part B of the Schedule would also enable their trading partners to take advantage of the liberalisation measures in further developing trade. However, there should be no pressures on these countries to bind the autonomous liberalisation measures listed in Part B except in the context of any future multilateral trade negotiations in the area of trade in services launched by 'explicit consensus'.

Even though there was broad support for these proposals, particularly on the part of some of the least-developed countries, they were not pursued in the negotiations as it was subsequently agreed that these countries need not make any contributions in the Doha Round.

GATS Provisions on Emergency Safeguard Measures

Lack of progress

Another area in which assistance was provided covered negotiations for inclusion of provisions in the text of GATS that would permit countries to take 'emergency safeguard measures' to restrict imports of services that were causing injury to the domestic industry. When GATS was being adopted no agreements could be reached on the inclusion of such a provision in the text so it was decided that the negotiations for this purpose should commence immediately after it became operational and be completed within a period of two years. But even though a number of years have elapsed since these negotiations commenced in a working group that was constituted for this purpose, very little progress has been made. Apart from the differences amongst delegations on the complex technical issues involved in the application of safeguard measure in trade in services, the main reasons for the lack of progress are political.

Most of the developed countries, and the developing countries that have been able to advance substantial trade in services, are not enthusiastic about securing in the immediate future a legally enforceable mechanism at international level for the application of safeguard measures in trade in services. They are apprehensive that if such clause is adopted it may be used arbitrarily by countries thereby resulting in increased conflicts and disputes.

Only a few developing countries that are planning on developing trade in the service sector are making these demands. These countries are also under considerable pressure from their developed country partners to give commitments to further liberalise further their trade because they provide potential markets for service products. In this group would fall the member countries of the Association of Southeast Asian Nations (ASEAN) Group and some of the countries of Latin America. It is important to note in this context that the draft submitted by the ASEAN Group for an Agreement on Emergency Safeguard Measures has provided the main basis for discussions in the WTO Working Group. The low income and least-developed countries and small economies of Africa, Asia and the Caribbean have not taken an active interest in these discussions. However, in their statements at the political level they have emphasised the importance they attach to the adoption of rules on the emergency safeguard measures and maintained that their ability to table offers for further liberalisation in the services sector is dependent on the adoption of such rules.

The main thrust of the negotiations in this area is to examine how far the principles and rules on safeguard measures and other trade remedy measures such as antidumping and countervailing measures that are applicable to trade in goods, could be adapted for application of emergency safeguard measures in trade in services. The papers prepared by the Adviser suggested that in developing rules for the application of safeguard measures, it may be possible to use the same basic principles for applying trade remedy measures as used in trade in goods – namely, increase in imports that cause injury to the domestic industry and the relationship between the increase in imports and serious injury. This approach was reflected in proposals tabled by the ASEAN countries suggesting that emergency safeguard measures in trade in services should be permitted where it has been determined in the investigations carried out by an independent governmental body that as a result of the commitments undertaken in Part III of GATS (relating to market access [Art. XVI], national treatment [Art. XVII], and additional commitment [Article XVIII]):

- An emergency situation has been created due to an increase in supply of the service concerned either in absolute terms or relative to domestic supply.
- Such an increase in supply or consumption thereof is causing or threatening to cause injury to the domestic industry.

Following are summaries of some related issues raised in the background papers prepared by the Adviser.

How should information on increased supplies be collected?

Collection of statistical data to establish that supplies have increased, particularly those from foreign firms, is far more difficult in trade in services than in trade in goods. In the case of the latter, required data can be gathered from the statistics on imports collected by customs or those on foreign exchange payments collected by the Central Bank. In the case of trade in services, a national level mechanism for the collection of the disaggregated statistical data needed to establish that increased supplies are injuring a particular sector or sub-sector of the service industry, has not been as yet well developed. In most cases the data needed has to be collected from various sources, which could vary from sector to sector. For instance, in financial services the main source of information on the developments of supplies could be data on value added tax or other taxes on financial transactions while certain other relevant information may be available with the Central Bank; in the case of telecommunications the needed statistical information may have to be collected from the regulatory authorities.

Given the difficulties that are likely to be encountered by the affected service industry in collecting the statistical and other information needed to substantiate claims that increased supplies by foreign firms are causing it injury, it would be necessary for the proposed Agreement to recognise governments may have to play a role in either collecting information themselves or in assisting the affected industries to so do. Though the Agreement on Safeguards does not contain any specific provisions covering this matter, some developed countries, notably the EU, have established a mechanism for surveillance of products (and their prices) for which imports are increasing, as a preparatory step towards imposing safeguard action. Such surveillance is triggered by the EU Commission either on its own initiative or at the request of member states.

In terms of the likely difficulties in collecting statistical and other information on the supply of services in order to establish a sudden increase in supply, the proposed Agreement on Emergency Safeguard Measures should contain provisions authorising governments, if they so wish, to establish an inter-ministerial committee to monitor trends in the supply of services and their prices and identify the sources from which the required information may be collected. The committee would consist of representatives of ministries with responsibilities for subject areas covered by GATS (e.g. ministries of finance, education, health, water and electricity, telecommunications, public works, aviation and railway).

Information on trends in the supply of services and their prices may be collected separately for services originating in other countries and for services supplied by foreign established service enterprises (FESEs) in cases where the problems of the domestic service industry may be due to an increase in services supplied by such enterprises.

How should safeguard measures be applied in the service sector?

Broadly speaking, it may be possible for a country to apply safeguard measures to services supplied by Modes 1 (cross-border trade), 2 (consumers/users move to country where the service is available) and 4 (movement of natural persons to another country to provide services needed). These measures may include imposing taxes or applying quantitative restrictions.

The decision on whether to apply such measures to a particular mode of supply shall be made by the country after establishing a causal link between increase in supplies and injury to the industry. Such measures may also be applied to services supplied by modes that are not responsible for causing injury if it is considered that the application of such measures is necessary to prevent or remedy injury, and in assisting industry to adjust to competition. Illustrative examples of how such measures could be applied under Modes 1, 2 and 4, the difficulties that may be encountered in applying them, and the possible special treatment that could be extended to developing countries are outlined in Box 13.

Box 13: Examples of emergency safeguard measures that can be applied under Modes 1, 2 and 4

Cross border trade (Mode 1)

Measures applied could take the form of taxes and/or quantitative restrictions. However, a number of analysts are sceptical about the possibility of applying either measure to cross border trade in services, particularly where the transactions are conducted via telephone, fax or electronic means. In most cases, it might not be possible to achieve effective application that is equitable to services supplied from different countries may. Another view is that new technologies would open possibilities for applying such limits on cross border trade.

Consumption abroad (Mode 2)

In certain situations, the local industry providing services (e.g. tourism, health, education) may be adversely affected because of the increase in the number of nationals moving to other countries to obtain services. It may be possible for the government to temporarily restrict trade under this mode by imposing a special tax on nationals visiting other countries as tourists, or by introducing a quota on the number of exit visas that may be granted to persons going abroad for tourism or educational purposes. To discourage residents from going abroad for medical treatment, the government could prohibit insurance companies from marketing particular new policies (e.g. reimbursement of expenditure on treatment received in hospitals in other countries) during the period for which safeguard measures are applicable.

Movement of natural persons (Mode 4)

In the case of natural persons moving to another country to provide needed services, the countries allowing such movement could apply emergency safeguard measures. These could include establishing quotas for visas granted to professionals and other workers, and levying high fees for obtaining temporary work visas.

Rules governing use of quantitative restrictions to suppliers under Modes 1, 2 and 4

The rules on quantitative restrictions in trade in services, as in trade in goods, should provide that the quotas allotted shall not restrict the supply of services (e.g. in relation to quantities supplied, number of transactions or visas granted) to levels that are less than those reached in the previous representative three-year period.

The quotas allotted (both overall and among supplying countries) should provide for annual growth rates, with higher rates on those allotted to developing countries. The use of growth rates would ensure that the safeguard measures applied are gradually loosened during the period of their application. The relevant provisions in the now terminated Agreement on Textiles and Clothing could provide a model for adopting rules on how annual growth factors could be developed and carried forward to subsequent years, if certain portions of the quotas allocated are not utilised during the year.

It would be necessary to examine whether the rules relating to 'quota modulations', which are similar to those in the Agreement on Safeguards, should be included in the proposed new rules on emergency safeguard measures. Under these rules quotas for countries where exports have increased 'in disproportionate percentage in relation to total increase in imports', are permitted to be fixed at levels below those reached in the previous representative period of three years. If any such provisions are included in the new EMS rules, it may be desirable to provide that those relating to quota modulations would not be applied to services supplied by developing countries to developed countries and to other developing countries.

The matter becomes more complex in relation to the application of the safeguard measures to Mode 3, under which foreign suppliers provide services by establishing a commercial presence in the country. At issue is whether a country should be entitled to take emergency safeguard measures to restrict the local activities of foreign enterprises, if these activities are causing injury to the domestic industry consisting of national enterprises. The opinion on this issue is widely divided.

The GATS defines national enterprises as those in which nationals of the country where they are established own more than 50 per cent of the equity or have the power to name the majority of directors or otherwise to legally direct operations. Enterprises that do not meet these criteria are to be treated as foreign established service enterprises (FESEs). But even those delegations in favour of applying safeguard measures to FESEs concede that a cautious approach may be necessary in order to avoid their disinvesting or shifting the service units to another country. To ensure such situations do not arise they have proposed that the rules governing application of the emergency safeguard measures should recognise that in applying such measures countries must respect the acquired rights of the FESEs. Such rights include those conferred on the FESEs as a result of the measures taken by the country for liberalisation of external and internal trade and for the attainment of other policy objectives. The safeguard measures should not require the FESEs to modify or withdraw actions they may have taken in pursuance of such acquired rights but only aim at restraining or prohibiting further exercise of these rights.

In practice this would mean that countries could not require foreign banks or insurance companies to close existing branches but only prohibit them from opening new branches during the period of the application of safeguard measures. It may be also possible to provide that foreign companies could not increase their sales beyond the level reached in the previous representative period or introduce in the country new types of services that they are marketing in other countries. However, it would not be open to countries to prohibit FESEs from marketing services they have already introduced in the market. In many ways the concept of acquired rights is analogous to the principle in the Agreement on Safeguards that where safeguard measures are applied through quantitative restrictions they should not lead to imports being restricted to levels below those of the previous representative period.

Those who are opposed to the proposal argue that in practice it would be difficult to divide domestic services industry into the two categories of FESEs and national suppliers. Moreover, the division might produce inequitable results, for example, an enterprise where 51 per cent of the equity is owned by persons in the country would be treated as a national industry but it would be treated as an FESE if the national share in equity is 49 per cent, just 2 per cent less. They therefore argue that safeguard measures should only be applicable to services originating from outside countries, and that it should not be open to a country to apply safeguard measures

to FESEs on the grounds that their increased activities are causing injury to the national service suppliers.

State of Play in the Negotiations

Negotiations in this area have centred on offers tabled by some countries in response to requests made on them by other countries for liberalisation of trade in sectors of export interest to them. All developed countries and a significant number of developing countries have made liberalisation offers covering a wide range of service sectors. The developing countries include those that have made significant progress in developing trade in services and a number of countries from Latin America and Asia that consider they have the potential for development of trade in services. By and large, countries from Sub-Saharan Africa have remained on the sidelines.

In the initial period, as noted above, the least developed and other low income countries, had shown some interest in pursuing proposals on how they could be given credit for the liberalisation measures previously taken by them on an autonomous basis. However, after the Hong Kong Ministerial meeting took a decision to exempt least-developed countries from undertaking in this round 'new commitments for liberalisations' in trade in services, they considered that in the changed situation it may not be necessary for them to pursue their proposals to obtain credit for autonomous liberalisation measures they have taken.

The Declaration adopted at the Hong Kong Ministerial meeting also introduced a new element into the negotiations – provision for countries to make requests on a plurilateral or group basis. As a result of this a number of plurilateral requests, targeted at a number of countries, have been made and discussed subsequently in plurilateral meetings.

Although this plurilateral approach has been useful in identifying sectors and areas that are of interest to a large number of countries, the overall quality of the offers made is far from promising. Anecdotal evidence would suggest that the developed countries are offering only marginal improvement on the commitments they already made. With respect to services in which developing countries have a significant trade interest, particularly those provided by Mode 4 (movement of natural persons), most of these countries consider that qualitatively the offers made by developed countries have been way below their expectations. Regarding the extent to which further liberalisation would be achieved in future negotiations, it is important to note that the service negotiations are part of the wider package so the final offers made would be greatly influenced by what happens in the negotiations in other areas of the Doha Round, particularly those on agricultural and non-agricultural products.

In the rule-making areas, it remains uncertain whether any agreements on the incorporation of the emergency safeguard provisions in GATS would be reached in

the near future given the wide differences in the negotiating approaches. In the area of domestic regulations, on which negotiations are seeking clarification of the relevant GATS provisions, it would appear that the financial crises, at the national and international levels, would greatly influence future negotiations on the draft text that has emerged.

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8

The Role of Industrial Policy in Attaining the Development Objectives of the Doha Round

Introduction

The previous chapters described the assistance provided to delegations for participation in the negotiations for liberalisation of trade in agriculture products, commodity issues, non-agricultural (industrial) products and trade in services. When the negotiations reached an advanced stage some of the members of the Group requested the Adviser to provide them with an assessment of the benefits that would accrue to their trade as a result of the liberalisation measures taken in the Round. They also wanted advice on steps that may have to be taken to ensure the attainment of the development objectives of the Doha Round. In pursuance of this request, the Adviser prepared a paper that examined the extent to which the Doha Round could be called a 'development round' (Rege 2007). The paper provided a useful basis for discussions and exchange of views on the strategy that would have to be adopted in the remaining part of the negotiations for achieving the development objectives. At the request of some delegations, the Commonwealth Secretariat circulated it at a meeting it had arranged for senior trade officials from selected countries of the Group of 90 (G90) developing nations to review progress in the Round. This Chapter provides an overview of the issues discussed in the paper.

Macroeconomic Studies

How far are the liberalisation measures taken in the Round likely to contribute to the economic development of developing countries?

The World Bank, international trade organisations and economic research institutions differ in their assessments of the benefits to the trade and income of developing countries from the liberalisation measures taken in the Round. Macroeconomic studies published by the World Bank prior to the launching of the negotiations overemphasised the benefits of liberalisation by making unrealistic assumptions about the extent to which trade would be liberalised. For instance, one of the macroeconomic studies that was widely publicised before the 2003 Cancun Ministerial meeting

estimated overall gains in world income of US$832 billion if trade was liberalised further, with the share for developing countries expected to be around US$530 billion. However, the projected gains were based on 'total liberalisation' of trade through elimination of all tariffs and all barriers to trade – an unrealistic proposition that no one expected to happen.

Since then the Bank has been significantly scaling down its projections of gains, relating them to the extent to which participating countries were willing to liberalise as reflected from time to time in the ongoing negotiations. Its projections going into the December 2006 Hong Kong Ministerial meeting, based on the likely scenario of liberalisation as reflected in the July package, showed a fall in total welfare gains to US$96 billion and in those of developing countries to US$16 billion. The Bank subsequently scaled its projections to take into account the possibility that sensitive and special products would be excluded from the formula cuts; as a result total welfare gains dropped to US$38.4 billion and those of developing countries to a mere US$6.7 billion. These findings coincided with other studies undertaken by economic research organisations. For instance, Carnegie Endowment for International Peace (CEIP) estimated total welfare gains of between US$38 and US$43 billion and that of developing countries between US$7 and US$21 billion. However, these projections do not include gains from service liberalisation – in projections that do, it is estimated that in a scenario resulting in 50 per cent reductions in service trade barriers, the additional gains for developing countries would not exceed US$6.9 billion.

This implies that despite all the political promotion of the Doha Round as a 'development round' by the international financial and trade institutions and by economists supporting the Washington consensus, the additional gains that would accrue to developing countries would not exceed even half of one per cent of their GDP. Moreover, hidden behind these extremely modest benefits are the 'adjustment costs' their economies would have to bear in implementing the liberalisation programmes and the financial resource constraints they would face as a result of a reduction in customs revenue collection (Wise and Gallagher 2006).

Relative share of manufacturing and agriculture in the welfare gains

Both the World Bank and CEIP studies project that the major gains for developing countries would come from liberalisation of trade not in agriculture, but in manufacturing. Even though some developing countries would gain from liberalisation in the agricultural sector – particularly large-scale producers of agricultural crops like Argentina, Brazil and some other countries in Latin America, and South Africa – overall gains from liberalisation of trade in this sector may be marginal or even negative. Both the studies recognise that some products may be excluded from tariff reduction by developing countries on the grounds that the existing level of protection is necessary for maintenance of 'food and livelihood security and rural development'

(special products) and by the developed and developing countries on environmental and other grounds (sensitive products). But the two studies take dramatically different positions on the effect of such withdrawals.

The authors of the Bank study hold that the negative overall gains in their estimates are primarily due to the exemption of special and sensitive products, so virtually all gains would be lost even if a relatively small number of products were excluded from tariff cuts. Taking an opposite view, the authors of the Carnegie study argue that since most of the developing countries have a sizeable population of small-scale farmers growing basic staples for self-consumption and for sale in home markets, liberalisation in their case cannot bring efficiency gains. In fact, liberalisation may swamp those producers with flood of imports, particularly of food and other agricultural crops that are subsidised in developed countries. Developing countries were therefore fully warranted in maintaining protection by designating a certain percentage of tariff lines as special products by excluding them from tariff cuts. Moreover, it should be left to the country concerned to determine the percentage of tariff lines that can be excluded. However, they viewed the situation of developed countries quite differently – in their case the reductions in the level of subsidies and in tariffs on an MFN basis could lead to increased productivity. There was, therefore, no justification for these countries to exclude the so-called sensitive products from tariff reductions (Anderson and Martin 2006; Polaski 2006).

Distribution of benefits among countries

As regards distribution of benefits among countries in both agriculture and manufacturing, the main beneficiaries among developing countries are likely to be those countries at a higher stage of development. Least-developed and other countries at the lower stage of development, particularly those of East and Sub–Saharan Africa and Asia are likely to emerge from the negotiations with extremely modest gains, if not as net losers, in both sectors.

The CEIP study suggests three reasons for this situation:

- First, in the manufacturing sector, the supply constraints may put serious limitations on the ability of these countries to take advantage of the new opportunities created by the liberalisation measures taken by other countries.
- Second, in certain products, where preferential access provides meaningful advantage to exporters from these countries in exporting to the preference-granting countries, reductions in MFN duties may lead to the loss of preferential advantage as a result of reductions in preferential margins.
- Third, since agricultural production is undertaken on a small scale and at subsistence level there are very few possibilities of these countries becoming significant exporters of agricultural products.

The study therefore emphasises the need for taking special measures in the negotiations to assist these countries in dealing with the negative effects on their trade, and providing increased technical assistance to them for taking advantage of the liberalisation measures that would be taken in the round. Such assistance to these countries would serve to:

- Meet the challenge posed to export trade as a result of the erosion of preferential margins;
- Overcome supply constraints faced by industrial and agricultural producers in marketing their products in other countries; and,
- Meet adjustment costs of liberalisation measures they may have to take.

Past Experiences of Liberalisation Confirm the Findings

How far would it be desirable for countries participating in the negotiations to rely on the forecasts in these macroeconomic studies in determining the policy approach they could adopt?

The general view is that it is necessary to treat the forecasts with great caution and scepticism. The results of the studies depend greatly on the assumptions made. These assumptions must therefore be carefully weighed before assessing how far the results would be relevant, taking into account countries economic and trade situation. Moreover, even though it is now common practice, particularly for international financial institutions, to publish such studies periodically to highlight the importance of following open and liberal trade policies, there has been so far no systematic evaluation of how far their estimates of welfare gains have been realised.

Despite this note for caution these projections need serious consideration, for two reasons. First, projections in other macroeconomic studies confirm the estimates in the World Bank and CEIP studies that a number of countries, particularly those that are poor or least developed, would benefit only marginally, if at all, even though their total estimates of welfare gains and how these would be shared between industrial and agricultural sectors are different. Second, and perhaps more importantly, the experience of a number of countries in Africa and Latin America that had undertaken liberalisation measures during the last two decades or so under structural adjustment programmes supported by the World Bank and IMF shows that liberalisation can lead to de-industrialisation and increased unemployment, unless it is gradual and properly tailored to the needs of the country. The analysis that follows sets out the findings of the empirical studies on the past experience of developing countries in following open and liberal trade policies.

Contrasting Experiences: Imposed and Voluntary Liberalisation Measures

It is often not widely known that so far the major steps towards liberalisation of trade have been taken by developing countries outside of trade negotiations held under the legal framework of GATT. As indicated above this has occurred through structural adjustment programmes supported by the World Bank and the IMF or on a voluntary basis by governments as part of their policies for promoting economic development. The experiences from the two approaches have been quite different.

Disappointing experience under structural adjustment programmes

A number of countries, particularly those of Africa and Latin America, were required to liberalise their trade and internal polices under these programmes in order to obtain the foreign exchange resources needed to cover balance of payments deficits. The approach was based on the Washington consensus', which is supported by neo-liberal economists and international financial institutions, and calls on developing countries to adopt the following three-pronged approach:

- Liberalise trade by reducing tariffs and removing quantitative restrictions;
- Reduce governmental intervention through privatisation of state enterprises; and
- Deregulation of economic activities.

Prior to having these policies imposed on them many of the countries had been following import substitution policies and were trying to develop domestic production by providing protection from foreign competition. Now they were required to liberalise by reducing tariffs and removing quantitative restrictions in both in the industrial and agricultural sectors. The tariffs were to be reduced by high percentages, so that the economy could have what UNCTAD has called the 'big bang' effect.

These liberalisation polices were further complemented by policies for deregulation. For instance, a number of countries in Africa were required to abolish institutions like marketing boards, which played a useful role in ensuring that farmers got reasonable prices for the agricultural commodities they produced for exports. It is no doubt true that many of these boards were used by governments to get additional revenue, which sometimes resulted in taxation of farmers, and that many of the boards were also extremely corrupt. However, the desirable course would have been to reform the boards; abolishing them meant farmers lost the protection of assured prices for their produce, and the assistance they received for maintenance and improvement of the quality of their products was discontinued.

In the industrial sector, the liberalisation measures did not improve the competitive strength of industries, resulting instead in what economists call 'de-industrialisation'.

The term is used to describe a situation in which existing industries are compelled to reduce or shut down production and no new investment for the development of new industries is taking place. The reasons for this situation were twofold.

First, the governments could not protect domestic industries from the increases in dumped or low priced imports, as most of them had not yet been able to establish effective mechanisms to investigate petitions for the application of anti-dumping or countervailing duties or other trade measures such as safeguard actions. The international financial institutions insisted that if such measures were to be applied, they must be applied according to GATT rules and provisions, but did not assist in establishing the necessary institutional framework for the application of such measures on the grounds that their national bureaucracies often did not have the expertise to apply the complex rules. The countries concerned could have provided increased protection for temporary periods by increasing tariffs, as most of the rates were not bound. They were, however, prevented from doing so because of their commitments assumed under the structural adjustment programmes not to increase tariff rates.

Second, the neo-liberal policies to which the international financial institutions were committed required governments to refrain from adopting policies for assisting affected industries to improve their competitive position by giving them subsidies or loans for technological upgrades.

The experience of countries in Latin America and Africa that had taken trade liberalisation measures under structural adjustment programmes since the early 1980s shows that more than half of these poor and low-income countries faced de-industrialisation. These reforms failed to encourage private investment in the manufacturing sector resulting in increased unemployment, particularly in the rural areas.

Positive Asia experience

Developing countries that adopted liberalisation measures on a voluntary and autonomous basis as a part of national policy for promoting economic development, fared better than those described above. These countries, which were mostly located in Asia, started resorting to liberalisation only after they had developed a certain minimum level of physical and financial infrastructure. Further liberalisation measures were taken on a selective basis to expose those industries that had been provided protection under the import substitution polices to foreign competition.

Some analysts and the international financial institutions initially argued that the phenomenal success of the four countries known as 'Asian Tigers' in developing exports of manufactured products, was largely due to the liberal and open trade policies they had followed right from the beginning. This was however far from the case. Two of the four, South Korea and Taiwan, had been following highly protectionist policies before they started liberalising gradually on a selective basis. The remaining two, Singapore and Hong Kong, had low levels of protection. However, these are small

city-states with different development needs due to the absence of agriculture and an almost entire dependence on foreign trade in the absence of a significant domestic market (Lall 2005; Chang 2005).

Apart from initially maintaining a high level of protection and adopting a gradual and selective approach in liberalising, both South Korea and Taiwan had adopted complementary industrial policies. The industries to be liberalised were carefully chosen on the basis of expert reports and in consultation with the business community. They also offered a variety of incentives to promote exports, such as export credits and exemption of export profits from income tax. 'Local content requirements' obliged foreign multinationals to produce in the country some portion of manufacturing inputs. Export performance requirements obliged industrial units to export a certain portion of production or face penalties. The two countries screened foreign investment and directed it to industries targeted for development.

In the last decade a number of other countries in Asia, notably China, India and Malaysia, have pursued similar liberalisation policies. Trade liberalisation was undertaken on a selective basis and was properly sequenced. Further support came from complementary measures introduced under industrial policy. The nations that pursued these policies experienced per capita growth rates of 5 per cent a year between 1980 and 2000.

Industrial Policy as a Complement to Liberalisation Policies

What is industrial policy?

The contrasting experiences of countries of liberalisation measures taken on an across-the-board basis and those taken on a selective basis goes to show that liberalisation policies can succeed only if such measures are taken on a selective basis after the industry has reached a certain degree of maturity to meet import competition, and are properly sequenced. It also brings out that for such policies to succeed they must be complemented by incentives and other appropriate measures by adopting appropriate industrial policies. Economists, however, take widely differing views on the need and desirability of developing countries adopting industrial policy, particularly if it involves selective interventions by governments in the economy.

Most of the economic literature on the subject recognises the importance of governments intervening through 'functional polices' for improvements in physical infrastructure, human capital and functioning of capital markets. There appears to be general support for 'selective' government intervention in cases where there is 'information failure' arising from the lack of information about opportunities to make productive investment, or 'co-ordination failure' where profitable investment is not likely to be forthcoming unless upstream and downstream industries are developed simultaneously.

Opinions vary widely, however, on the form such selective intervention should take and whether it would be in the interests of developing countries to make such interventions. Neo-classical liberal economists think the case for increasing protection through trade measures in order to promote development of infant industries, is weak. Governments generally lack the information needed for identifying industries with potential for exports and would not be able to compete in international markets after the protection is withdrawn. The danger is that the decision to give protection through trade measures on the basis of the 'infant industry' argument could lead to misallocations of resources. The second best alternative is to use 'subsidies', where the level of protection granted is measurable and transparent. It is also possible to keep the granting of a subsidy under review and to modify or withdraw it when such assistance is considered to be unnecessary. In the case of protection granted through trade measures, it is generally difficult to reduce the level of protection or to withdraw it because the protected industries develop a strong vested interest in its continuation.

While recognising that there could be an argument for selective intervention in the case of market failure, some analysts caution against developing countries adopting industrial policies that provide for selective interventions, on political economy grounds. These analysts argue that the implementation of selective interventions requires detailed information about the nature and location of the market failure as well as the organisational skills required for selecting industries for continued or higher level of protection or for administration of subsidy programmes. Such skills are often in short supply in developing countries. Moreover, they say, such policies are open to political capture, corruption and rent seeking, therefore for most developing countries policies 'that are rule based' and provide little or no discretionary authority to the bureaucrats are preferable to those that give them authority to intervene in the market.

While sharing some of these concerns, other analysts argue that the governments can be helped to improve their capacities to intervene efficiently. They point out that developing countries would not be able to achieve development that is equitable and results in poverty alleviation simply by being required to liberalise and integrated in the WTO system. Dani Rodrik, for instance, describes the view that the developing countries lack expertise to adopt appropriate industrial policies, as superficial and in need of more analysis. Liberalisation has become a substitute for a development strategy, despite its 'shaky empirical ground' and its serious distortion of policy-makers' priorities, and this has to change (Rodrik 2001).

An increasing number of economists now hold the view that the liberalisation programmes adopted by countries under the World Bank/IMF structural adjustment programmes failed to achieve the desired results. This failure was not only because liberalisation was rigidly applied on an across-the-board basis without assessing whether the industries involved could withstand foreign competition but also because of the failure of the reform programmes to support the liberalisation measures by the adoption of appropriate industrial policy. Ho Joon Chang (2005) and Sanjay Lall (2005)

point out that developed countries had, in the past, encouraged industrial development by providing protection through tariffs on a selective basis. In recent years they have been relying on selective interventions by granting subsidies since they can no longer provide additional protection through tariffs because of the bindings given in tariffs negotiations and other GATT rules (Chang 2005; Lall 2005; Stiglitz 2003).

For example, under its industrial policy the EU grants subsidies for the development of the aerospace industry, and it has adopted programmes for improving industrial skills (in engineering, textiles and leather), managing structural changes (in textiles, leather, furniture, footwear, ship building, steel and certain food industries), and for research and innovation (WTO 2007). The USA also has policies for assisting and promoting certain industries; it heavily subsidises its aircraft industry and also has a programme for assisting other industries and for the development of small-scale enterprises.

These analysts hold that it is both short-sighted and unfair to advise developing countries not to adopt industrial policies and to require them to reduce tariffs and to remove barriers to trade on an across-the-board basis by adopting a tariff-cutting formula. It is short-sighted because experience has shown that liberalisation, if it is to lead to economic growth, must be made on a selective basis so as to expose only those industries that are ready to meet foreign competition. Across-the-board liberalisation, instead of promoting economic growth, can lead to de-industrialisation by causing the closure of industries that are not able to withstand competition. Such liberalisation programmes are unfair because they do not allow developing countries to provide the protection needed for the development of their industries while the developed countries are able to nurture and support the development of their industries through subsidies. The budgetary constraints that developing countries face place serious limitations on the extent to which they could use subsidies for the development of industries.

An Approach For Future Discussions

Modalities for negotiations

Based on the macroeconomics studies and the past experiences of the liberalisation measures taken by developing countries referred to earlier, the ongoing round of negotiations will likely make only a modest contribution to promoting development in the agricultural sector. The major beneficiaries among developing countries are going to be large-scale producers like Argentina and Brazil, while for a large number of countries, where production is undertaken on small scale and at subsistence level, liberalisation in itself is not expected to lead to improvements in productivity and efficiency. On the contrary, reductions in the protection levels will likely result in increased imports leading to displacement of local production and loss of income

and livelihood to poor farmers. Already, even at existing levels of protection, there is growing evidence of heavily subsidised dairy and poultry products from developed countries displacing local production in some of the African, Latin American and Caribbean countries.

In the industrial sector, the major beneficiaries are likely to be countries like China and India, which are already major exporters of manufactured products and have potential for development of trade in such products. For many of the countries, particularly those that are least developed, liberalisation of trade may result in de-industrialisation and increased unemployment, unless they are permitted to liberalise on a selective basis, and exclude sectors of production that are not as yet ready to meet open foreign competition.

In the situation the extent to which the results of the negotiations would contribute to increased trade of developing countries would depend on three factors. First, the willingness of the developed countries to make substantial reductions in the trade-distorting subsidies they grant to agricultural products, and deeper cuts in tariffs applicable in both the agricultural and industrial sectors. Second, whether the negotiations on modalities for reductions in tariffs adhere to the principle that in the round developing countries should not be required to make reductions in tariffs, on the basis of 'less than full reciprocity'. Third, the willingness of developed countries to concede to the following demands made by a large number of developing countries:

- In the agricultural sector they should be permitted to exclude from tariff reductions at least 20 per cent of tariff lines where the existing levels of protection are considered necessary for ensuring food security and for promoting rural development, and allowed to use 'special safeguards measures' to restrict imports, in cases of sudden surges; and
- In the industrial sector they should be permitted to exclude tariff lines (say 10%) covering industries that are not as yet ready to meet foreign competition.

In the area of services, for a large number of developing countries (barring those that have now become important exporters of back-office services) the benefits from liberalisation would accrue from the supply of services through the mode of movement of natural persons. (None of the developed countries has so far made offers for significant improvements in the existing access for supply of such services through movement of skilled or unskilled workers.)

Modifications in the rules of GATT

It would be further necessary to secure clarifications in some of the rules of the GATT to enable developing countries to derive maximum benefits from the liberalisation measures taken in the post-Doha Round period. These would include rules relating to:

- Application of trade remedy measures by developing countries; and
- Granting of temporary protection by developing countries, for the development of new industries.

Trade remedy measures

It would be necessary for all developing countries to ensure that they have in place a viable and effective mechanism to provide protection to their agricultural producers and industries by imposing trade remedy measures such as anti-dumping or countervailing duties, where dumped or subsidised imports are causing them injury. It would also be necessary to provide temporary protection in the form of safeguard measures to any industry that is being hurt by increased imports, even when such imports are not dumped or subsidised. The aim of providing temporary protection in such cases should be to enable the domestic industry to take appropriate steps to improve its ability to meet the competition posed by foreign suppliers.

The GATT rules require that trade remedy measures can be taken only after it is established, on the basis of investigations undertaken by an independent investigating authority, that increased imports are causing injury to the domestic industry. A number of developing countries have not yet found it possible to establish the institutional framework required for such investigations. Moreover – barring a few developing countries at a higher stage of development like Argentina, Brazil, Chile, India and Pakistan, which have now become important users of trade remedy measures – many others that have established the legal framework needed for taking such measures lack the necessary expertise for initiating and conducting investigations on the basis of the detailed principles and rules laid down by the relevant GATT article.

Further difficulties arise from the requirement that applications for investigations must be made by the industry that is alleging injury, and from the breadth and complexity of information required in support of the submission – for example, detailed information on volume of imports and data on prices for goods in both the domestic market and the home markets of the exporters. The issue is that the affected industries in developing countries lack the expertise and resources required for the collection of such information, and this often prevents them from applying for investigations.

In order to overcome the difficulties industries encounter in applying for investigations, the rules of the Agreement on Anti-dumping and the Agreement on Subsidies and Countervailing Measures would have to be clarified to recognise that governments of developing countries may have to play a role in assisting the industries to collect the information they need to apply for investigations.

To ensure that the information required is readily available, the governments could establish a mechanism for putting under 'surveillance' products with rapidly rising import levels. For products put under surveillance customs could be requested to collect

information on the volume of imports and their prices on a transaction-by-transaction basis. Alternatively, the relevant products could be subjected to a system of licensing requiring importers to indicate in the application for licence the quantities they propose to import and the price. In cases where it is alleged that goods are being dumped, the importer may be requested to indicate in the application, the price at which the product is being sold in the domestic market of the exporting country by obtaining such information from the exporter. The licences should be issued automatically on receipt within a period of 10 days, as required by the Agreement on Import Licensing Procedures. The information obtained under the system would be collated and published in a way that ensures it is readily available to all interested parties from the business community. The establishment of such a mechanism for surveillance of imports would also help countries to make effective use of the 'special safeguard measures' that would be permitted for restricting imports of agricultural products in proposals that are under consideration in the Negotiating Group on Agriculture.

A proposal embodying the above ideas was initially tabled by Kenya in the Negotiating Group on Rules. It has since received support from countries belonging to the ACP and African groups and they have tabled it as a joint proposal.

It is important to note in this context that some of the developed countries are adopting the practice of putting products with rapidly rising import levels under surveillance. The EU's safeguard regulations authorise the Commission to put all such products under surveillance for two reasons. First, it enables the Commission to consider whether the imposition of safeguard actions to restrict imports is warranted. Second, it provides a warning to the exporters that if exports increase further safeguard action may be taken. There is also US legislation that authorises the US Administration to put under surveillance products with rising import levels in cases where the industry is alleging that imports are causing them injury.

Rules on temporary protection for development of new industries

One of the likely results of the Round would be that the flexibility available to developing and least-developed countries to provide increased protection for the development of 'new or infant or recently established industries by raising tariffs' would be greatly reduced.

In the Uruguay Round these countries bound all of their tariffs in the agricultural sector. They were, however, permitted to bind them at rates that were higher than their applied rates. Since the reductions would be made on the basis of a formula to be applied primarily to bound rates, their application would further lower the bound rates. The harmonisation factor in the formula would result in greater reductions being made in the rates where binding is given at higher level. This would greatly reduce the difference between the applied and bound rates (or the water between the two as it is sometimes called).

In the industrial sector the extent to which these countries have bound tariffs varies widely. However, it is expected that the modalities for negotiations in this area would provide that countries should bind all of their tariffs. Bindings could be given at levels that are higher than the applied bound rates, but the modalities being adopted aim at ensuring that the difference between the lower applied rate and the bound higher rate remains small.

The result, both in the agricultural and industrial sectors, would be that the flexibility available to these countries to increase tariffs in order to provide for higher level of protection would be greatly reduced. They would therefore have to invoke the GATT provisions that permit countries to provide increased protection for temporary periods for the development of new or recently established industries. These provisions are contained in sections A and C of Article XVIII. Both sections deal with situations where countries 'consider it desirable' to take trade protective measures in order to promote the 'establishment of a particular industry with a view to improving standards of living of its people'. Section A deals with situations where the tariff rate is bound and the country is planning on providing protection by increasing the bound tariff rate. Section C deals with situations where a country has decided to provide such protection by applying quantitative restrictions on imports or by applying any other measure that is not permissible under GATT rules. The provisions of the two sections were clarified by the decision, adopted in 1979, to broaden their application to include the 'development of new, or the modifications or extension of existing production structures'.

Procedures that must be followed before applying the measures

Section A requires that before applying the rate that is higher than the bound rate, the country concerned must enter into consultations with the exporting countries with a view to offering them compensation for any loss of trade they may suffer as a result of increased duties. Such negotiations must ordinarily be completed before the new rates are applied. If no satisfactory agreement is reached, it is open to the country concerned to bring the matter to WTO for examination and consultations. If it is then found that the country proposing to increase the bound rate has made every effort to reach an agreement on compensatory concessions, and that the concessions offered are adequate, the country concerned could proceed to make changes in the bound rate. In such a case, however, the countries that are adversely affected are entitled to take retaliatory action by modifying the bound rates on products of export interest to the country applying the increased tariff rate.

Section C provides that where a country has decided to grant additional protection for the development of an industry by applying quantitative restrictions, it should follow simultaneously a two-pronged approach. First, it must commence negotiations with countries that have an export interest in the product if the rate of tariff is bound

against further increases, in order to offer them compensatory concessions. The procedures prescribed are similar to those described above under Section A for negotiations with the exporting countries when the bound rate is to be increased. The negotiations on compensatory concessions are considered necessary in the application of quantitative restrictions because even though tariff rates may not be increased the restrictions reduce the value of concessions for the exporting countries. Second, the country concerned must notify the WTO of its intention to apply the quantitative restrictions to imports of a product or products for which it proposes to promote development of domestic industries, in order to obtain its approval. In granting such approval the WTO member countries are expected to examine whether the objective 'for which the measure is proposed to be applied' could be achieved by using measures that are consistent with GATT and the possible effect the imposition of the quantitative restrictions could have on the commercial and economic interests of other countries. Section C permits the notifying country to apply the measure if the WTO does not grant such approval within 90 days of its notification. However, in such an event, the exporting countries with an interest in the products that are subjected to quantitative restrictions are entitled to take retaliatory action by withdrawing tariff concessions on products, in which the country taking the measure has trade interest.

Section C's complex procedures for seeking approval and the rigour with which the member countries were examined in the first two or three cases brought to the GATT in the initial years, made the developing countries reluctant to invoke its provisions. GATT members assigned the responsibility of reviewing the proposed measures to small working groups. These groups went to the extreme of drafting alternative plans for industrial development, which in their view were more appropriate than the original proposals. These developments left countries reluctant to invoke the provisions of the Article. Instead they justified the quantitative restrictions they imposed in the context of restricting the outflow of foreign exchange resources because of the balance of payments difficulties.

The GATT rules permitting countries to impose quantitative restrictions, to protect their balance of payments situation, were adopted under IMF rules when it was obligatory for all countries to have fixed exchange rates (Section B, Article XVIII). With the discontinuance of the mandatory obligation to have fixed exchange rates, almost all countries, including developing and least-developed countries, are presently adopting systems that provide for either floating or variable exchange rates. These systems also provide an automatic mechanism for adjustments in the balance of payments. The developing countries would therefore find it difficult to justify the imposition of quantitative restrictions on balance-of-payments grounds; indeed, the number of countries that are applying restrictions on balance-of-payments grounds has already declined.

In the post-Doha Round period, therefore, if the developing countries consider it necessary to provide increased protection for the development of a new or existing

industry, they would have to invoke the provisions of Section A if they want to provide such protection through tariffs and the tariff rate to be applied exceeds the bound rate. Likewise, if protection were to be provided through the imposition of quantitative restrictions, countries would have to justify them under the provisions of Section C and apply them only after they have been able to secure approval from the WTO. As such it would be necessary to ensure that the procedures the two sections lay down, are in practice implemented and applied in such a way that the right to take trade policy measures for assisting development of new or existing industries, which Article XVIII provides to the governments of developing countries, is not unnecessarily restrained.

Simplifying the rules to conform with those on safeguard actions

Many of the elements in the procedures prescribed under sections A and C are based on the procedures for the application of safeguard measures, which were adopted in the early years of GATT under Article XIX. The drafters of these provisions appear to have considered that there was a marked degree of similarly between the way in which safeguard measures were permitted in emergency situations and the actions that the governments may wish to take to restrict imports for the development of new or existing industries. In the first case governments are permitted to restrict imports, either by raising tariffs or by imposing quantitative restrictions, as increased imports are causing material injury to the domestic industry. In the second case, governments are permitted to take such measures in order to ensure that imports do not prevent the establishment of a new industry or development of a recently established industry. This is one of the reasons why the provisions of sections A and C are often referred to as safeguard actions that are permitted for economic development purposes.

The basic rules of Article XIX were clarified and elaborated by the Agreement on Safeguards adopted during the Uruguay Round. This was due to the realisation that countries were not invoking the provisions of Article XIX and were circumventing its rules by adopting measures such as voluntary export restraints and orderly marketing arrangements. These measures were not consistent with the principle that safeguard actions should be taken only after it has been possible for a country to establish through investigations by an independent investigating authority, that increased imports are causing or threatening to cause injury to the domestic industries.

One of the reasons countries circumvented the rules of Article XIX was the requirement that the country applying the measure must make compensatory concessions to countries exporting the product and if no agreement was reached on such concessions, the exporting countries would have a right to take retaliatory action for withdrawal of concessions on products of export interest to the country taking the measures. The Agreement found a solution in providing that the right of exporting counties to take retaliatory action shall remain suspended during the first three years

of the application of the safeguard measures. In order to ensure that the rights of exporters are not unnecessarily compromised, it lays down precise rules governing the duration for which such measures can be applied and provides that restrictive measures should be progressively liberalised during the period of their application.

The rules require countries to notify the WTO about safeguard measures taken by them, but there is no requirement that the WTO Committee on Safeguards should approve all such measures.

To enable developing countries to make full and effective use of their rights under sections A and C to provide a higher level of temporary protection for the development of new or recently established industry, it would be necessary to review the procedures in Article XVIII for WTO notification and approval, to bring them in conformity with the applicable rules under the Agreement on Safeguards. The broad features of the rules that could be adopted in this area are as follows:

- Such measures could be applied in the first instance for a period of 10 years. The period could be extended by five years to enable new or recently established industries to prepare themselves for competition. However, the total period should not exceed 15 years. (It should be noted that the total period for which safeguard measures could be applied is 10 years.)
- The measures taken should be digressive and, where possible, progressively liberalised.
- Countries proposing to take measures should enter into consultations with exporting countries immediately after notification to WTO with a view to offering compensatory concessions. These consultations would be based on the principle that the country taking the measure shall not be required to make concessions that are inconsistent with its development, trade and financial needs in cases where the affected country is a developed country.
- The negotiations should be completed within a reasonable period of time. However, the right of countries to take retaliatory action if no agreement is reached on compensatory concessions shall remain suspended for the first six or eight years. (In the case of safeguard measures, the right of the exporting countries to take retaliatory measures remains suspended for the first three years.)
- The notifying country would be expected to take into account the comments and views expressed in the WTO discussions on the measures taken and to modify them where possible. As in the case of safeguard actions, there would be no requirement for formal approval of the measures by WTO.

Preventing Extension of WTO Law to New Areas

As emphasised earlier in this chapter, it is unrealistic to hold that liberalisation of trade by itself would lead to economic and social development. Experience has shown that liberalisation measures are more likely to succeed if governments adopt 'industrial policy' in co-operation with industry and business associations, and guide development in different sectors of the economy by providing incentives or imposing conditions, where necessary. However, it would not be possible for developing countries to use all of the policy measures used by some of them in the past (like export subsidies, import content and export performance requirements) as they are now prohibited under modifications to the WTO law made in the Uruguay Round.

The policy measures adopted by developing countries to promote development in the agricultural and industrial sectors are aimed at complementing the measures they have taken for deregulation and liberalisation of their internal economies and for the liberalisation of their external trade. In the agricultural sector the main measure is the provision of fertilisers, insecticides and other inputs either free of cost or at lower prices. In the industrial sector the aim is to promote export-oriented industries. The measures include:

- Industrial zones with subsidised rates for land, electricity and water.
- Tax holidays to industrial units established in such zones, including exemption from paying direct taxes like income tax for the first 10 years.
- Exemption from payment of customs duties and excise taxes on inputs used in the manufacture of products to be exported.
- Incentives in the form of government commitments to meet a percentage of the cost of infrastructure and machinery used in manufacturing products for exports.
- Incentives to foreign investors in the form of tax holidays or lower rates of taxes on profits to be remitted.
- Adoption of systems for regulation and direction of foreign investment to certain sectors of the economy or to certain regions in the country.

Most of these measures are considered to be permissible under the present WTO rules. However, developing countries must ensure that the flexibility on subsidies available to them under the Agreement on Agriculture is not reduced or eliminated in the negotiations that are underway in the agricultural sector. In the industrial sector the developing countries would need to carefully examine proposals that may be made to modify the rules of the Agreement on Subsidies and Countervailing Measures in terms of the implications for their trade and development.

After relying extensively on the use of subsidies for the development of high technology and other industries, the developed countries are now complaining that the subsidies granted are causing distortions and adverse effects in international trade. They are likely to press for development of disciplines on the use of subsidies in these and other sectors where, in their view, industries have been able to develop the strength to compete in the international markets by taking advantage of subsidies that have been granted. The proposal that has been floated for an international agreement to tighten the discipline on the use of subsidies in the aircraft sector is an example of this trend.

As the negotiations enter the final phase and discussions commence on how the work relating to 'unfinished business of the Doha Round' and 'future work programme of WTO' could be organised, there may be proposals for the development of agreements strengthening the disciplines on a sectoral basis, as imposed by multilateral agreements like the Agreement on Subsidies and Countervailing Measures, Technical Barriers to Trade. There would also be pressure to commence negotiations by an agreed future date, in the three subject areas excluded from the present round of negotiations – that is, trade and investment, trade and competition policy and government procurement. It is important to note that these subjects have been excluded from negotiations during the Doha Round only. Countries that secured the inclusion of these subjects in the Doha Round are likely to press for recommencement of study and analysis in these areas during the concluding phase of negotiations. It would be necessary to examine carefully the implications of accepting any new disciplines in these areas (particularly trade and investment) with respect to the policy space that developing countries have in regulating and directing foreign investment to priority sectors and in providing tax and other incentives to foreign investors. One of the aims of the developed countries in the adoption of an Agreement on Trade and Investment would be to prohibit such practices.

Lastly, it would appear from discussions in the United States Congress that the US might press for developing rules on trade aspects of labour standards. There would be particular demands for the WTO rules to recognise that countries could restrict or prohibit imports of products produced in countries where minimum standards regarding wages or working conditions in factories are not followed. In the past most of the developing countries had taken the stand that the International Labour Organisation (ILO) was the appropriate forum for dealing with such standards and they should not be brought for negotiations in WTO. It would be necessary to consider whether they would like to maintain the same position.

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9

Agreement on TRIPS and Public Health

Introduction

As we have noted in Chapter 1, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) was added to the body of multilateral rules in 1995 when the WTO was established. The inclusion of the Agreement on TRIPS in international trade rules had been a matter of some controversy from the time when initial proposals were made for the adoption of an instrument at the time the Uruguay Round was being launched. A number of countries, mainly the developed ones, considered that with the increasing technological content of products traded internationally, and in order to stimulate and facilitate international trade, it was necessary to develop rules on trade-related aspects of intellectual property rights, such as patents, trademarks, copyrights and industrial designs. They also considered the adoption of rules in this area was also necessary to bring under control the growing international trade in counterfeit goods (goods that are marketed using trademarks to which the seller has no right) and pirated goods (goods that infringe copyright and other rights).

This desire to include intellectual property rights in the Uruguay Round was not shared by developing countries. They contended that since intellectual property provides 'monopoly rights' to the holders of patents and other property rights within the full scope of trade law, including it would result in an anomalous and iniquitous situation, especially as the main objective of the existing multilateral trade framework was to create conditions that would enable producers to compete freely in world markets by removing tariffs and other barriers to trade.

The TRIPS Agreement that was nevertheless concluded in the Uruguay Round is intended as a complement to the international conventions developed over the years by the World Intellectual Property Organization (WIPO). The Agreement stipulates minimum terms of protection that countries must grant to the various categories of intellectual property. Its provisions have therefore to be applied in conjunction with those contained in the WIPO Conventions. For example, rules relating to patents have to be read with the relevant provision in the 1883 Paris Convention, the 1970 Patent Cooperation Treaty[1] and the 1977 Budapest Treaty covering patents for microorganisms.

One of the major concerns of developing countries in relation to TRIPS has always been the impact its rules can have on prices, particularly the prices of pharmaceutical products and the ability of the governments in developing countries to make drugs available to their peoples at affordable prices. The issue of prices for patented drugs created controversy in public debate soon after the adoption of the TRIPS Agreement due to the high prices charged by the pharmaceutical companies for new drugs they had developed and patented for the treatment of diseases such as HIV/AIDS. These prices were perceived by many as being very high and, in any event, were outside the financial reach of millions of people in the developing world.

Against this background, the Geneva project assisted delegations in examining how the TRIPS rules could be clarified and improved to ensure that people in the developing world, including the poor, could access drugs at prices they could afford. The various papers explaining the complex rules of the TRIPS Agreement and describing the modifications that could be made in them, particularly in the rules applicable to 'patents' were consolidated into a Working Paper on TRIPS, which was widely circulated by the Commonwealth Secretariat in October 2001 (Rege 2001). The main points are summarised below.

International Rules on Patents

Exclusive rights of holders

Patents give the owners of inventions exclusive property rights. Manufacturers wishing to use patented inventions must obtain licences or authorisations from the patent owners, who normally require them to pay royalties. The Agreement clarifies these exclusive rights of patent owners. In particular it states that where a patent applies to a product, third persons can only make, sell or import the product with the consent of the owner. Where the patent covers a process, third parties cannot use the process, nor sell or import products directly obtained from using the process, without the patent owners consent.

The exclusive rights to sell or import implies that the patent holder can prevent third parties from selling an imported product for which they hold the patent, at prices lower than the prices being charged in the markets where the patent was registered.

The Agreement recognises that in cases where the process used in the manufacture of a product has been patented it is difficult for the patent holder to gather evidence on how the identical product introduced in the market by a third party may have been produced; in civil proceedings, the burden of proof would be on said third party to establish that the product has been produced using a process that is different from the patented process. In particular, the Agreement states that where the process is patented, in the absence of proof to the contrary, it shall be deemed to have infringed the patent owner's rights for exclusive use if the product was identical and new, and

if there was a substantial likelihood that the new product would have been produced by the patent owner using the patented process.

Criteria to determine whether an invention is patentable

Not all inventions can be registered as patents. The laws of almost all countries require that before an invention can be registered it must conform to the following criteria:

- It must be new (novelty test);
- It must involve inventiveness (non-obviousness test);
- It must be capable of industrial applications (utility test).

Even after these criteria are met the patent office must be satisfied that the applicant has provided information relating to his/her invention as would enable any person well versed in the field to understand it and use it in future research and analysis. The requirement for public disclosure of information balances two objectives of governments in granting patents. By giving exclusive rights to patent holders the governments provide an incentive to persons engaged in scientific research and reward their inventive work. At the same time by requiring the inventors to make public disclosure of information on their invention when applying for patent, the governments seek to ensure that the inventions are used for the benefit of the community at large and for further technological research and development.

While the information contained in the 'disclosure' can be employed for further research and analysis by universities and other organisations or by even competing business firms, it cannot be used for commercial purposes before the expiry of the patent. It is however open to those actors wishing to use the information to apply for a secondary patent, using as a base the earlier patented invention. Pharmaceutical firms planning to produce generic versions of patented drugs rely on such information to conduct experiments for stabilisation of the generic version in order to get market approval from the drug control authorities in advance of the expiry date for the patent. This helps them in introducing the generic version in the market immediately after the expiry of the patent.

In the Uruguay Round developing countries attached great importance to the inclusion of the provisions relating to disclosure as they considered that such information could be useful to them in producing generic versions. Article 29 of the Agreement imposes an obligation on members to disclose in their patent applications, in 'sufficiently clear and complete form', such information as would enable a person skilled in the art 'to carry out the invention', and the best-known method for doing so.

In pursuance of these provisions, the Patent Office could require the applicants to disclose, against the setting of the present 'state of art' in the relevant field of technology; the essence of the invention, (including where relevant the chemical composition,

specifications, proportions, techniques and drawing) its essential novelty and the scope of the claim. The test the patent office would generally apply in determining the adequacy of disclosure, is to examine whether given the conditions prevailing in the country the information provided is sufficient 'to enable the local experts to reconstruct the invention through reengineering'.

Coverage of products

The TRIPS Agreement imposes an obligation on countries to grant patents for invention in all 'fields of technologies' and for both products and processes including those used in manufacturing.

Limitations applicable to exclusive rights

The exclusive rights of patent owners are however subject to three limitations. First, the exclusive right is territorial in that the patent holder can only claim it in countries where he/she has registered. Second, exclusive rights are exhausted after the patent holder sells the product to a wholesaler or trader, or gives a licence to another manufacturer to produce the patented product. The patent holder cannot then prevent the wholesaler, trader or manufacturer from selling it at prices lower than that being charged by makers with whom he/she has patent rights.

Third, the right is limited in time. In order to ensure that patent owners get a reasonable period of time to enjoy their exclusive rights and recover any research costs incurred, the TRIPS Agreement provides that the patent owner should have exclusive rights for a uniform period of 20 years from the date of the filing of the application for obtaining the patent. These provisions were perhaps the most controversial in the negotiations on the TRIPS Agreement. In the pre-Uruguay Round period legislation in a number of developing countries provided patentability exclusion for pharmaceutical products and processes. About 31 developing countries that had excluded pharmaceutical products from patentability and eight others had excluded the process used in the manufacture of such products from patentability. Most of the developing countries provided a period of protection of five to seven years for patented pharmaceutical products while in most of the developed countries the industry was able to obtain protection for a period of 15 to 20 years (Wattal 2001).

In the case of the developing countries these were conscious decisions that reflected the prevailing thinking about the adverse effects patent protection in sectors like pharmaceuticals and agricultural chemicals could have for their developmental and social policies. These countries also considered that they were under obligations to provide health-care facilities and to make available to their people drugs needed for the treatment of diseases prevailing in their territories either free of cost or at prices the poorer sections of the population could afford.

In countries where the pharmaceutical sector was excluded from patents, industries could produce patented products through re-engineering by using the information contained in the 'disclosure' made at the time of applying for the patent. In countries with shorter patent protection periods, substitutes copied from patented products were introduced in the domestic markets immediately after the expiry of the protection periods. As a result some of the developing countries such as Argentina, Brazil and India developed their own pharmaceutical industries, supplying low-priced generic versions of patented products to their people and even exporting some of these products to countries where the patent holders had not registered their patents. In most cases the governments adopted regulations and controls to maintain prices at reasonable levels.

Most of the developing countries were apprehensive that the removal of the flexibility to provide shorter patent periods would lead to price increases and thus compromise their ability to provide affordable drugs. But their pleas to retain the flexibility provision, at least for pharmaceuticals and agricultural chemicals, were completely ignored; it was decided that all countries should be required to provide a uniform protection period of 20 years. They were, however, given transitional periods of 5-to-10 years from 1995 when the Agreement became operational in which to modify their national laws and rules in line with the rules of the TRIPS Agreement. This transitional period has now expired. The least-developed countries have until 2016 to apply the provisions of the Agreement.

Proposals to Improve Patent Rules

Compulsory licence

The TRIPS Agreement leaves it open for a country to compel the patent holder to grant a licence to a domestic producer to manufacture and market the patented product in the country. A compulsory licence may be granted in the following (or similar) situations:

- A national emergency resulting from unreasonably high prices of pharmaceuticals or other essential products;
- Abuse of exclusive rights through refusal to activate the patent or insufficient activation;
- Protection of public health and nutrition;
- Promoting the public interest in sectors of vital importance for socio-economic development;
- Facilitating transfer of technology; and
- Anti-competitive behaviour.

However the TRIPS Agreement also places restrictions on the granting of such licences by laying down rules relating to their use and duration. These are as follows:

- Compulsory licences should be granted only after the failure of efforts by a private firm to obtain a licence from the patent holder to manufacture the product at reasonable commercial terms;
- They should be granted 'predominantly' for the supply of the domestic market;
- Remuneration that is considered adequate (taking into account the economic circumstances of the country granting the licence) must be paid to the patent holder; and
- The granting of a compulsory licence should not affect the patent holder's right to grant a licence on a voluntary basis to other firms or to commence production themselves.

However, for most of the low-income and least-developed countries and small economies the right of the governments to apply a compulsory licence is of no meaningful advantage as most of them do not have a pharmaceutical industry with enough skills and resources to produce a generic version of a patented product. It is those countries with well-established pharmaceutical industry that can take advantage of the provisions to produce generic versions under compulsory licences.

Proposals on exports under compulsory licence

As noted earlier the TRIPS Agreement provides that the production under compulsory licence should be undertaken 'predominantly' for the domestic market. The question was how should the term 'predominantly' be interpreted? Should it be interpreted to permit at least some exports? Some commentators held that the term should be interpreted broadly to allow exports of 50 per cent or more while others argued for a small percentage. However, such exports could take place only to countries where the patent holder has not registered the patent.

The working paper prepared under the Geneva project (Rege 2001) suggested that pharmaceutical firms producing under compulsory licences could export part of their products subject to the following conditions (and taking into consideration product and territorial limitations):

- The flexibility to export would be available only in respect of a limited number of pharmaceutical products manufactured under compulsory licences. The scope could be confined to those products designated as 'key pharmaceuticals' in the World Health Organization's model list of essential drugs.
- The countries to which export of such key pharmaceutical products may be allowed could be selected using the same criteria used for selection of countries

eligible for receiving pharmaceuticals under the WHO differential price system. One of the criteria for a country to participate in the system is that it must be eligible for loans granted by the World Bank International Development Association (usually applies to countries with a per capita income of less than US$885).

- The governments granting the compulsory licence must ensure that adequate 'remuneration' in the form of royalty is paid to the patent-holding company. One of the factors to consider in determining the level of remuneration should be whether or not the government granting the licence wishes to authorise exports. However, any such authorisation should be limited to exports for low-income countries listed under the WHO differential pricing system.

It was further suggested that where a pharmaceutical product is produced by an industry under compulsory licence in a country belonging to a regional economic grouping, it should be allowed to export such a product to other member countries. However this principle should apply only to those regional groupings in which all members are developing countries. Any such flexibility would provide an incentive to foreign pharmaceutical firms to establish production units in developing countries that have no manufacturing capacities, if the governments agree to give them a compulsory licence to produce the patented product. One issue foreign firms have in locating production facilities in developing countries is the small size of the domestic market, so wider access to regional markets would further encourage investments.

Affordable Medicines for Countries with no Manufacturing Capacities

The ideas and proposals contained in the working and other papers prepared under the project assisted the members of the Group in pressing for solutions to the problems faced by developing countries with no manufacturing capacities in providing medicines for the treatment of diseases prevailing in their territories.

The Declaration on TRIPS and Public Health, which was adopted in November 2001 during the launching of the Doha Round, affirmed that each WTO member country had a right to decide the grounds on which compulsory licences could be granted. But it also recognised that a large number of countries with no capacities for manufacturing pharmaceutical products could face difficulties in using compulsory licensing to provide the necessary medicines at reasonable prices. It called on the WTO Council on TRIPS to find 'an expeditious solution' to the problem.

Decision on access to medicines

The negotiations that took place in pursuance of this mandate resulted in the adoption of the Decision on Access to Medicines (30 August 2003). The Decision, which is

largely based on the proposals contained in the working paper (Rege 2001), creates a framework for 'production for export' of patented products under compulsory licence. For this purpose it divides the countries into two categories: countries with manufacturing capacities (referred to as 'exporting countries') and countries with no, or insufficient, manufacturing capacities (referred to as 'eligible importing countries').

All least-developed countries are treated as eligible importing countries. The developing countries, in order to be eligible as importing countries, have to meet the criteria laid down by the Decision to determine that they have at present no, or insufficient, capacity to manufacture the pharmaceutical products they wish to import.

The Decision authorises the governments of the exporting countries to grant a compulsory licence for production for exports to an eligible importing country or countries, subject to the following conditions:

- The production under the licence is limited to the amount required by the eligible importing member or members;
- The entire amount produced under each licence should be exported to the member countries;
- Products produced under the licences are be clearly distinguished through inter alia special packaging, and/or shaping of the products or colouring to ensure identification of the products in the event of diversion for sale in countries other than the eligible importing countries.

The Decision further imposes an obligation on the governments of exporting countries (and also exporting firms) and on the governments of the importing countries to notify the WTO. The basic purpose of these notification obligations is to ensure transparency in relation to production for export under compulsory licences and that there is no diversion of such exports to countries other than the importing countries.

The Decision incorporates the working paper proposal that a country with no manufacturing capacity that grants a compulsory licence to a foreign firm to produce a generic version of a patented product by establishing manufacturing plants in its territory could export such generic versions to other countries in the regional group to which it belongs. To encourage production on this basis the Decision calls on both exporting and importing countries to 'use the system' it has created for 'promoting transfer of technology for capacity building pharmaceutical products' in countries with no manufacturing capacities. It should be noted however, that the flexibility provided by the Decision is available only where:

- At least half of the current members of the regional grouping are LDCs;
- The member country to which products are exported shares the same health problem;

- The territorial nature of the patent right is respected by ensuring that where the 'original product' is under patent in a member country the generic version is exported only if a compulsory licence to import it has been issued by that country.

The Decision has subsequently been used to amend the provisions of Article 31 of the TRIPS Agreement.

Workshop on WTO Decision

After the adoption of the Decision a workshop was arranged in Geneva (12–14 October 2004) to assist developing countries in meeting challenges that may be encountered in its implementation. To encourage the widest possible participation of developing countries it was held in co-operation with the ACP Group and the Agency for International Trade Information and Co-operation (AITIC).

Discussions were based on case studies prepared by national experts on intellectual property regulations from nine Commonwealth developing countries (Barbados, Bangladesh, India, Jamaica, Kenya, Mauritius, South Africa, Tanzania and Uganda). The case studies focused on the steps that may have to be taken at national level to facilitate exports and imports of generic versions of patented pharmaceutical products produced under compulsory licences, granted in pursuance of the provisions of the Decisions. Following is a summary of the report on the workshop discussions (Rege and Kataric 2005):

Quality, safety and effectiveness of products

Most countries prohibit the marketing and sale of pharmaceutical products unless the products have been properly registered for sale in their domestic markets. Such registration is granted only after the health regulatory authorities have evaluated the product and found that it has been produced at sites meeting the recommendations and standards of good manufacturing practices, and that the product meets quality, safety and effectiveness standards.

For approval of drugs introduced in the market for the first time, the regulatory authorities require the manufacturer to submit information on the product – for instance chemical composition, packaging and labelling, and the results of tests undertaken on animals and of clinical studies undertaken on human beings to determine, inter alia, the maximum tolerated dose, the pharmacodynamic effects and the adverse effects, if any.

Regarding generic versions of products that are not already on the market, manufacturers are not required to undertake such clinical trials or tests on animals. They are only required to submit evidence confirming that the generic product is 'therapeutically

equivalent' to the innovative product and of the same quality, efficacy and safety level to be considered 'interchangeable' with the innovative product. For this purpose, the manufacturer is generally required to undertake studies to establish its stability and carry out clinical studies on a limited number of healthy patients in order to establish *in vivo* bio-equivalence of the generic version to the innovative drug.

For imported generic versions the practice in most developing countries is to grant registration and marketing authorisation for sale and use in the domestic market, on the basis of evidence presented by the importer that the product has already been authorised for marketing in the producing country.

For this purpose, most of these countries require the interested importer to obtain a certificate from health authorities in the producing countries, that the product has been granted authorisation for marketing in their territories, following the procedures of the WHO 'Certification Scheme on the Quality of Pharmaceutical Products Moving in International Commerce'. The drug regulatory authorities in importing countries carry out detailed evaluations of the product and test data submitted by the manufacturer, before granting approval only in relation to products for which the manufacturer has not obtained marketing authorisation for sale in the country of production.

In this context it is important to note that while almost all countries producing pharmaceutical products require that both domestically produced and imported products must be approved for sale in the domestic market, not all require manufacturers to obtain such approval for products produced exclusively for export. Therefore the responsibility for undertaking evaluations of the generic versions of such products lies with the registration and regulatory authorities in the importing countries.

The WTO Decision on Access to Medicines requires that production should be undertaken only for exports to eligible importing countries that have notified the WTO of their requirements. In relation to such products, national legislations of most countries with production capacities do not presently require manufacturers to secure approval from the drug regulatory authorities in their countries, of the quality, efficacy and safety of the products that will be exported. However, the countries with no or insufficient manufacturing capacities, which would be importing these products, would not be able to carry out effective evaluations to establish that the products meet required standards, as the regulatory authorities do not have access to qualified and trained human resources and adequate well-functioning laboratory facilities. Some of them have not even been able to establish regulatory authorities.

Against this background the workshop proposed the following guidelines to ensure that the products produced and exported under compulsory licence meet the required quality, effectiveness and safety standards:

- Legislation and other regulations adopted should provide that the producing country would allow the export of products produced for export in accordance with the provisions of the Decision only after drug regulatory authorities have evaluated them and found to meet the quality and safety standards of the patented products.
- The country wishing to import such products could request the drug regulatory authorities of the producing and exporting country to make such an evaluation.
- The compulsory licence for exports should impose conditions stipulating that exports could be made only after being evaluated by the drug regulatory authorities and approved for sale.
- The exporting and importing countries may agree to rely on the WHO system for pre-qualification of pharmaceutical manufacturers and their products.

In this context the workshop noted that Canada, where previous patent legislation did not require manufacturers to obtain marketing approval for products produced solely for export, had amended its legislation to provide that generic versions produced for export to developing and least-developed countries must be approved by its drug regulatory authority before they are exported. The amendments further called on the authority to apply the same regulatory process to such products as is applied to products intended for sale in the Canadian market.

The workshop also discussed the feasibility and appropriateness of importing countries using the WHO system for pre-qualification of manufacturers and their products. The WHO representative informed the meeting that the evaluation of the quality of the medicines and of the manufacturing sites are made by the world's leading regulatory agencies, approved by the WHO Expert Committee on Specifications for Pharmaceutical Preparations. For this purpose the interested manufacturers are requested to provide comprehensive data on quality, safety and efficacy of their products, including the purity of all ingredients used in the manufacturing process. Furthermore, they are required to provide data on finished products, such as information about clinical trials conducted on healthy volunteers. If the evaluating authority finds the data satisfactory the products are sent to professional control testing laboratories, contracted by WHO in France, South Africa or Switzerland, for analytical verification of the quality. Simultaneously, an inspection team visits the manufacturing site to assess compliance with WHO Good Manufacturing Practices (GMPs) in the production of pharmaceutical products. If the products meet the specified requirements and the manufacturing site complies with the GMPs, both the products and the manufacturing site is included in the WHO list of pre-qualified manufacturers and products.

The list was originally intended for use by the United Nations procurement agencies but over time it has become a useful reference tool for non-governmental organisations and agencies as well as for countries in making bulk purchases of medicines. Therefore, it should be possible for any country importing pharmaceutical products in accordance with the provisions of the Decision, to require the exporting manufacturing firm to have its products and manufacturing site evaluated and approved under the WHO pre-qualification scheme. The estimated time for completion of the process is three months.

Another feature of the WHO system is that pre-qualified products are kept under continued surveillance and the firms are required to withdraw the products from the market if they no longer meet the required quality standards.

Steps to improve the effectiveness of regulatory systems

The meeting briefly discussed the steps that could be taken to assist developing countries in improving the effectiveness of their regulatory systems for registration and marketing approval, and post-market surveillance of products.

The workshop noted that an analysis of the information in case studies submitted by the participants suggested that in relation to quality developing countries encountered two sets of problems. First, in a number of medicines the contents of active ingredients were either too low or too high and a few failed to meet the required dissolution and stability standards. Second, in some of the countries there was a large quantity of counterfeit goods produced either locally, or brought into the country illegally.

WHO organises workshops and training of inspectors to assist developing countries in building up effective regulatory systems for granting of marketing approvals and for post-market surveillance of the products sold in the countries. The countries could also utilise the WHO manuals for drug regulatory authorities and background documentation on the system for pre-qualification of products and manufacturers, to build up their own systems for marketing approvals and for post-market surveillance. The WHO representative noted however that the main effort for building up a system of inspections and control must ultimately be made by the countries concerned if they wished to ensure that domestic and imported products meet the required quality standards.

Guidelines on the level of remuneration

The meeting discussed whether guidelines could be elaborated for future national laws with the purpose of facilitating the implementation of the specific provisions of the WTO Decision, on the remuneration issue. Each country should have the freedom to determine the appropriate level of remuneration to be paid, taking into account the provisions of the Decision. These provisions allow that the exporting

country, when granting a licence for production under a compulsory licence, shall decide the level of remuneration to be paid by the licensee to the patent-holder taking into account the 'economic value to the importing member of the use of the patent right that has been authorised'.

In this scenario it may be appropriate for the exporting country to seek information from the importing country on how the medicines would be supplied. For instance, would they be free, and if not, what price would be charged? Is the price comparable to that of the patented product in the country of origin? What are the prices of substitutes or other generic versions available in the country?

Some participants pointed to an emerging consensus on the capping of royalty payments in the range of 4–5 per cent. In this context, it was mentioned that the sliding scale for determining royalty payments adopted by Canada, using the United Nations 'Human Development Index' (UNHDI) system, could provide a useful basis for further examination of the criteria that could be used in determining the level of remuneration. Under this criterion the royalty payable by the patent holder to a firm producing for supply to the eligible country with the lowest standing on the UNHDI would be 0.2 per cent. Mathematically, the criterion cannot result in a royalty rate in excess of 4 per cent. This ceiling was considered to be consistent with the humanitarian and non-commercial considerations for which the WTO Decision on Access to medicines was adopted.

Development of regional trade and production

The Decision provides additional flexibility to developing countries belonging to regional economic groupings of which 'at least half of the current membership' is made up of 'countries presently on the United Nations list of least-developed countries'. The basic objective of this additional flexibility is to harness 'economies of scale' for the purpose of enhancing purchasing power for, and facilitate local production of, pharmaceutical products.

The Workshop discussed the development of regional trade and production in accordance with the above provisions. The main points discussed are summarised below:

General issues

A number of participants noted that by limiting the application of the rules on development of regional trade and production to member countries of regional economic groupings in which at least a half of the members are LDCs, the Decision prevented regional developing country groupings in regions other than Africa from taking advantage of this additional flexibility. Therefore, it would be necessary to review these provisions at an appropriate time to examine whether this additional flexibility could be extended to member countries of other regional economic groupings of developing countries.

Co-operation between countries: pooling import requirements

One co-operation possibility for member countries of the regional economic groupings is to 'pool' their import requirements of pharmaceutical products and issue joint tenders in order to benefit from discounts available on bulk purchases. One of the most successful systems in this respect, the OECS Procurement Services System (PSS), enabled Member States to obtain drugs at prices as low as 40 per cent of the price they might have been charged if each country had purchased drugs individually.

But even though procurement of pharmaceutical products on a pooled basis may result in price and other advantages for each individual country many countries were reluctant to take part as they wished to retain the right to make decisions themselves on the specific product to be imported (patented or generic), taking into account their price and quality.

Despite this general reluctance the meeting considered it would be desirable for countries belonging to eligible regional economic groupings to co-operate in purchasing pharmaceutical products produced under compulsory licences issued in accordance with the provisions of the Decision. Since the producing firms are not expected to sell such products in the domestic market or to export it to any other country than that indicated in the licence, the costs of production for manufacturing relatively small quantities, required by one or two importing countries, is likely to be high. In this situation, negotiating for price and other conditions on the basis of pooled requirements of countries in the region may result in lower prices, as the firm would be able to derive advantages of 'economies of scale' by being able to produce larger quantities.

Intra-regional trade in imported products

The meeting noted that some trade in pharmaceutical products (both in imported and domestically produced products) was taking place among member countries of regional economic groupings but the level of such trade was low compared to the total imports. One of the obstacles to developing trade arose from differences across countries in the regulations relating to manufacture, import, export and distribution of pharmaceutical and health products. The meeting noted the need, therefore, for collaboration among regional trading blocks to harmonise drug licensing and requirements relating to good manufacturing practices (GMP), enter into arrangements for mutual recognition of marketing approvals of drug inspections, and create free port facilities to act as a hub for re-exports to neighbouring countries. In addition, they would have to take steps to comply with the conditions of the Decision, which would have to include measures to ensure that products are re-exported only to member countries that 'share the health problem in question'.

Development of production to meet regional health needs

The workshop noted that development of a pharmaceutical industry requires not only the existence of a physical infrastructure (e.g. availability of electricity and clean water), but also availability of chemists, pharmacists and persons trained in related scientific fields as well as laboratory and other facilities to undertake research on production of both new and generic drugs. Participants exchanged views on the type of incentives that governments of countries wishing to establish a pharmaceutical industry could provide to encourage development of human resources and other required facilities, and those that the governments of countries with well-established pharmaceutical industries could provide to their firms, to encourage them to transfer technology and establish production capacity in countries with no or insufficient manufacturing capacities. They also discussed steps that would have to be taken to ensure 'resource sharing', 'industrial complementarity' and 'industrial co-operative activity' among the countries of regional economic groupings in developing the pharmaceutical industry.

Box 14 lists specific measures that the workshop participants suggested could be taken at national level for development of production on a regional basis.

Box 14: Measures for the development of production on a regional basis

A. Undertake background studies to:

- Take stock of the patent protection regimes in countries in the region;
- Make an inventory of the existing patents in these countries;
- Assess the needs of individual countries of the variety and volumes of patented and generic drugs.

B. Steps for development of production at national level

- Promote joint ventures on the basis of public–private partnerships aimed at limiting financial commitments and risks.
- Grant tax incentives on profits over a number of years.
- Waive custom tariffs on essential equipment and material.
- Make available purpose-built buildings for the commissioning of factories.
- Create awareness among entrepreneurs through industrial pharmaceutical forums, exhibitions and similar events.
- Limit control on the prices of selected classes of non-essential drugs.
- Adopt comprehensive preferential treatment clauses in legislations dealing with national procurement of goods for local manufacturers.
- Encourage foreign enterprises to delocalise parts of their services, e.g. accounting or invoicing, to a developed country.
- Carry out or assist companies in undertaking marketing studies in the region.
- Create regional directories of industries, particularly those supporting pharmaceutical industries.
- Create and maintain a database of regional manufacturers to avoid duplication.
- Determine a 'break even point' for the cost effective production of each drug.
- Exchange information on drug requirements of countries in the region, their sources of supply and impediments to sustained supply.
- Promote local pharmaceutical industries in regional trade fairs.
- Establish mechanisms to ensure complementarities throughout the chain of production and processes in drug manufacturing in the region to avoid duplication of efforts, investments and scarce resources.
- Encourage co-operation with countries, particularly developing countries that have developed a pharmaceutical industry, such as China, Egypt, India and Malaysia.

Note

1. An international patent law treaty that provides a unified procedure for filing patent applications to protect inventions in each of its contracting states.

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10
Trade Facilitation

Introduction

As noted in Chapter 3, the subject of trade facilitation was included in the work programme of WTO at the Singapore Ministerial meeting held in 1996 together with three other subjects – trade and investment, trade and competition policy and transparency in government procurement. However, it was included only for study and analysis and the decision on taking up this subject for negotiations on rule making could be taken only in 2004, while it was decided the other subjects would not be taken up for negotiations in this Round.

This chapter provides an overview of the assistance provided to members of the Geneva Group in deciding whether the subject should be included for rule making in the agenda for negotiations in the Doha Round, and a description of the handbook developed for negotiators after the decision was taken to include trade facilitation as a subject for negotiation. The last section describes briefly the present state of play in the negotiations in this area.

Deciding whether new rules on trade facilitation should be adopted in WTO

Background

There is no agreed definition of the term 'trade facilitation'. Broadly speaking, however, the term is used to denote work on the simplification and harmonisation of international trade procedures including 'activities, practices, formalities and processing of movement of goods in international trade'.

The clearance of imported goods through ports and customs in a large number of developing countries can take an inordinately long time. In most of the developed countries, imported goods are cleared by customs in less than two days after their arrival in the country. The situation is entirely different in the case of developing countries, the average time for Asia Pacific countries being five days, Latin America and Caribbean nine days and Africa ten days. Importers in landlocked countries suffer most in this respect as it takes 20 days or more for the goods to reach their customs ports after their arrival at the ports of transit countries.

It is estimated that import costs can increase by as much as 10 to 15 per cent as a result of these clearance delays. Where imported products are used as an input in further production, clearance delays often lead to increased costs of the final products. The rise in processing costs makes it difficult for processing firms to market their products in foreign markets.

Based on these considerations some of the developed countries were able to secure inclusion of the subject for study and analysis in the work programme of WTO at the Singapore meeting. They argued that work in WTO in the area of trade facilitation could result in a win–win situation for both developed and developing countries. Importers in developing countries would benefit from the reduced clearance time resulting from new rules. Exporting firms, both in the developed and developing countries, unable to take full advantage of the reduction in tariffs made by developing countries in trade negotiations as the advantage is offset by the cost of delays, would also benefit from the adoption of such rules.

Reluctance of developing countries

Given the benefits that were expected to occur as a result of the adoption of uniform trade facilitation procedures, the question that arises is why developing countries were reluctant to agree to the negotiations for the development of new rules in this area in WTO.

Policy-makers in these countries recognised the urgent need, both at national and international levels, to simplify and improve the procedures adopted by them for the clearance of goods, with a view to reducing the clearance time. However they considered that at international level the work should be carried out in international organisations with expertise in the development of standards in this area that could be adopted at national level, like the World Customs Organization and UN Centre for Trade Facilitation and Economic Business. Their main objection was to WTO getting involved in substantive work in developing rules in this area. Many of them expressed doubts as to whether it would be possible to develop at international level, a harmonised set of rules for application by all countries, as there were wide differences in the procedures and practices followed by the customs officials in developed countries and those followed in developing countries. However, despite the continued opposition of developing countries, this subject, together with the three other new subjects, found a place in the Declaration adopted in 2001 launching the Doha Round of negotiations; the work on study and analysis would continue and the decision on negotiations for rules making was deferred to the next Ministerial meeting two years later.

Workshop on trade facilitation

In order to facilitate further examination at national level and to enable the governments of developing countries to decide on the approach they could adopt, the Geneva

Group organised a workshop on trade facilitation in Montreux (26–28 September 2002). Ambassadors and officials from Geneva-based missions of the Commonwealth developing countries attended along with customs experts from seven countries – Barbados, Ghana, Jamaica, Kenya, Malaysia, Sri Lanka and Uganda. Representatives from WTO, WCO and UNCTAD with responsibility for work in this area also participated in the discussions. The experts attending the meeting were required to prepare case studies on the practices followed by them in the clearance of goods and the feasibility of applying the various innovative methods that were being suggested for the adoption by all countries in the discussions that were taking place in WTO.

The Adviser laid the basis for the workshop discussions in a paper on the theory and practice of regional and international harmonisation of rules in relation to trade facilitation (Rege 2002). The paper pointed out that both theory and practice of harmonisation of rules on an international level assume a degree of coherence and similarity in the basic rules followed by countries participating in the negotiations for development of common harmonised set of rules for application by the participating countries. Moreover the theory of harmonisation recognises that where the differences in the domestic regulations of countries are 'legitimate and justifiable' and reflect the fundamental differences prevailing in the various participating countries, the case of the harmonisation of rules on multilateral basis might be weak or premature.

The paper pointed to the wide differences in the practices followed by developing and developed countries in the clearance of goods. These differences were the result of wide disparities in the levels of customs duties imposed by developed and developing countries and in the share of customs duties in the total revenue of these two groups of countries.

Broadly speaking, in the case of developed countries the level of customs duties has gradually declined over the years and the average level of tariffs of all these countries as a group is around 4 per cent. The importance of customs duties as a source of revenue has also declined in most developed countries to about 3 per cent or so of total revenue.

This contrasts with the situation prevailing in most of the developing countries. The average level of tariffs applicable to imports of agricultural and industrial products is around 12.5 per cent for this group. This average conceals the differences in the tariff levels among countries; in some of the high tariff countries the average rates reach 30–40 per cent. The share of customs duties in total revenue is also high. In a number of these countries, customs duties contribute roughly 25–30 per cent of the total revenue. In some countries, particularly those that are least developed, the share is higher than this average.

These disparities, both in the level of duties applied to imported products and in the share of custom duties in total revenue, influence differently the approach of the cus-

toms administrations towards their role and functions, and the behavioural patterns of the importing industries and traders.

In the case of developed countries, as a large portion of imports entered duty free and the level of duties applicable to other products was low, there was no incentive for traders to deliberately undervalue the goods they import, in order to reduce the incidence of duties or to engage in other customs-related fraudulent practices. The procedures adopted for clearance of goods were therefore based on the assumption that, barring a few exceptions, it would be possible to rely on the statements made in the declarations submitted by the importers. As the import duties constitute only a small or negligible proportion of the total revenue, the governments were willing to allow customs administrations to adopt procedures that allow quick clearance of goods, even though this may result in a few cases where the full revenue due is not collected.

By contrast, high rates of duties in developing countries provided an incentive to traders to reduce their incidence by resorting to undervaluation of imported goods. The practice of under valuation of goods was therefore widely prevalent in these countries. The relatively high rates of duties also encouraged fraudulent practices like smuggling and importation of sub-standard goods or goods that were barred from being sold in the markets of exporting countries. In many of the countries, particularly in Africa, new consumer articles like clothing and other apparel, and even consumer durables were often imported by unscrupulous traders as second-hand articles, on which lower rates of duties than those levied on new articles were payable. Moreover, since customs duties constituted a high proportion of total revenue, the governments of developing countries tended to err in favour of ensuring that procedures adopted for the clearance of goods were followed and that the full revenue due was collected, even though this may in certain situations lead to delays in clearance of goods through customs.

In these circumstances the procedures adopted at national level for the movement and release of goods through customs must strike a careful balance between the perceived role and responsibilities of the customs as collector of revenue, and ensuring they do not create unnecessary barriers to trade, taking into account the behavioural pattern of the business enterprises directly or indirectly associated with imports and exports.

In the case of developed countries, mainly because of the gradual decline and almost insignificant share of customs revenue in the total revenue, the role of customs administration is increasingly viewed as a facilitator of trade rather than as an agency responsible for the collection of revenue. With relatively fewer traders engaged in customs malpractices due to the low rates of duties, it was possible to adopt procedures that are based on the principle that traders would not ordinarily resort to undesirable practices. Consequently the procedures are balanced more in favour of ensuring against undue delay than in ensuring 'revenue due is fully collected'.

On the other hand both the revenue element and the control functions of customs continue to be of importance in the procedures adopted by developing countries for

the release of goods. These countries do recognise the importance of facilitating trade but they are prevented from adopting some of the more innovative methods developed countries have in place to secure speedy clearance of goods for two reasons. First is the paramount need to ensure that all revenue due is collected. Second, systems of checks and cross checks are essential because of the tendency on the part of traders to indulge in customs malpractices and the prevalence of customs-related corruption.

There was broad support in the workshop for the points made in the paper and the need to adopt a cautious approach in further work in WTO in this area. In particular a large number of participants supported the following proposals:

- The case for developing new disciplines in WTO in the area of trade facilitation was weak. As a number of international organisations were working in the area of trade facilitation it may be more desirable for WTO to adopt an understanding or a decision in the round calling on member countries to a) participate actively where work on the development of standards that could be applied at the national level for facilitating trade is undertaken, and b) make their 'best efforts' to apply such standards developed by these organisations in their customs procedures.
- The alternative could be to adopt rules in WTO on selected issues that are non-binding and impose obligations on countries to 'make their best endeavours' to apply them at national level. If such non-binding rules are adopted, the WTO's dispute settlement mechanism should not apply to these rules; it would however, be desirable to establish a separate mechanism for consultations and for consideration of complaints by a country that another country was not making 'enough efforts' to comply with the obligations.
- The developing countries would need technical and financial assistance for modernisation and reform of their existing customs procedures. The assistance required for this purpose would be considerable, as the customs reform programmes are costly and involve sizeable expenditure of capital (e.g. development of information technology infrastructure for customs operations and equipment for scanning of imported goods).

Despite the opposition from a large number of developing countries, the developed countries, with support from some of the developing countries, continued to press their demand for taking up for negotiations for development of rules in WTO on trade facilitation. They argued that even though useful work was being done by international and other organisations in this area over the last few decades, it would be necessary for political reasons to complement their work by including a trade facilitation discipline in the legal framework of the WTO. The progress in making countries accept the standards developed by these organisations had been slow. One reason for this was the low political clout of these organisations. The WTO, on the other hand, had gained political importance in most countries. The vital role of its legal

framework has been recognised not only by governments but also by the business community and the general public in many countries. Thus, the development of a new discipline at the WTO would galvanise the political will of developing countries to undertake reforms, and of developed countries to provide the financial and technical assistance needed for these reforms by developing countries.

Deadlock and compromise

As a result of these pressures from developed countries, the question of whether trade facilitation and the other three new subjects should be taken up for negotiations for rule making was again taken up for consideration at the Ministerial meeting held in Cancun in 2003. However, strong opposition from a large number of developing countries resulted in the total failure of the Cancun Ministerial meeting.

Ultimately a compromise solution was found in consultations that were held in Geneva under the auspices of the General Council in July 2005. It was agreed that three of the four new issues – trade and investment, trade and completion policy and transparency in government procurement – would not be taken up for negotiation for rule making during the negotiations in the Round. The developing countries were persuaded to agree to the inclusion of trade facilitation in the agenda for negotiations by offers to provide, on a legally binding basis, the technical assistance that they may need for the implementation of the new rules. It was further agreed that developing countries would be bound only by those rules of the agreement to be adopted that they considered they had the technical capacity to implement at the time of their adoption. With respect to the rules for which they considered they did not have such technical capacity, they would be required to apply the relevant rules on binding basis, only after they had been able to develop the required technical capacity by taking advantage of the technical assistance provided by developed countries.

The compromise solution, which has come to be known as the 'July package', further provides that the aim of the negotiations would be to adopt new rules clarifying the existing provisions in GATT 1994 that are relevant for work in the area of trade facilitation. These are:

- Article VII, which lays down rules governing the fees imposed and formalities adopted by countries in connection with importation and exportation;
- Article X, which imposes an obligation to publish the regulations applicable to the clearance of goods through customs in order to ensure transparency;
- Article V dealing with transit trade.

Assistance Provided After the Decision to Include Trade Facilitation

Handbook

After the decision was taken to include the subject of trade facilitation in the agenda for negotiations on rule making, the focus of the assistance provided under the project was shifted to helping delegations decide their position on the proposals tabled by various delegations for adoption of new rules. The Adviser prepared a number of papers on these proposals, which were discussed in a number of expert-level and Ambassador-level meetings of the Group (Rege and Kataric 2005; Rege 2006). In view of the interest shown the meetings at expert level were opened to participation by delegations from all developing countries. As a result a large number of developing countries that were not members of the CDC Group participated actively in the discussions in the expert level meetings. The various papers prepared by the Adviser were consolidated in the *Trade Facilitation: A Handbook for Trade Negotiators* (Rege and Kataric 2007).

The draft of the handbook was discussed and reviewed at a briefing session in Geneva on 21 July 2006. In order to provide for wider participation of developing countries, it was arranged by the Commonwealth Secretariat in co-operation with the ACP Geneva office and AITIC. Ambassadors and officials from the missions who had taken an active interest in the work acted as panel members and commented on the issues raised in the draft of the handbook. The draft was reviewed in the light of these comments and views, and subsequently published by the Commonwealth Secretariat (Rege and Kataric 2007).

The handbook has been well received not only by those who are involved in the negotiations but also by the general public and academic institutions. It addresses the institutional framework that may have to be adopted to ensure that developing countries are not required to adopt rules for which they have no technical capacity to apply and the developed countries abide by their commitment to provide technical assistance to build up capacities for applying such rules. The handbook includes the issues that would need further consideration in relation to the specific rules that would be included in the Agreement. Following is an overview of the main points of the handbook's proposed institutional framework:

Adoption of an appropriate scheduling technique

In order to ensure that developing countries are not required to accept obligations for which they do not have the technical capacities to implement, the handbook suggested the application of the 'technique' used for the scheduling of commitments assumed by countries under the General Agreement on Trade in Services (GATS). Under this technique a country taking a binding obligation or commitment to liberalise, can

specify in its schedule the conditions to which the obligations that it is assuming is subject. The flexibility to apply such a scheduling technique should be available only to developing countries. The developed countries would be expected to abide by all of the obligations of the proposed Agreement on Trade Facilitation from the day of its coming into force.

Each of the developing countries would have a schedule of commitment listing all of the rules included in the Agreement. For each of these listed rules the countries would be expected to indicate in the schedules whether they: commit to apply the rule on a binding basis; undertake to apply the rule on a binding basis after the expiry of the transitional period; or make the application of the rule conditional on the provision of technical assistance and indicate the type and the nature of the assistance required.

It was further suggested that there should be periodic reviews of the progress made in acceptance of obligations on a binding basis, particularly of those rules where it was indicated that the acceptance of the obligation was dependent on the technical assistance being provided for building of the necessary capacities. Such reviews could be undertaken in the Committee on Trade Facilitation, which would be established under the Agreement. The procedures adopted by the Committee for undertaking such reviews should provide that the responsibility for determining whether a developing or least-developed country has acquired the necessary capacity for the implementation of a particular rule as a result of the technical assistance that it had received, should primarily rest with the country receiving such assistance.

Establishment of a separate standby fund

To ensure that developed countries abide by the binding commitments they have undertaken to provide technical assistance where necessary to build technical capacities for the application of the rules of the Agreement, it was suggested that a separate 'standby' fund might have to be established in the area of trade facilitation. This proposal was based on recommendations on 'Aid for Trade' made by Noble Peace Prize Laureate, the economist Joseph E Stiglitz and his associate Andrew Charlton (2006). They had recommended the establishment of a special facility consisting of separate dedicated funds to provide aid for trade, with the aim of ensuring transparency and facilitating assessment of how far developed countries were adhering to their commitments to provide assistance. Box 15 lists some of the considerations in establishing such a fund.

Box 15: Trade Facilitation Fund

Issues to consider in establishing the Fund:

- The initial size would have to be negotiated by taking into account the approximate assessment of needs being made by the World Bank, WCO and other organisations.
- It should be managed by an inter-agency committee. In determining the management structure of the fund, ways to avoid the problems and difficulties in management by interagency committees would need careful consideration.
- In order to ensure that the programme is recipient-driven and focuses on providing assistance that is based on need, the management structure should provide for the establishment of an Advisory Board with balanced representation of both donor and recipient countries. At least half of the members appointed to the Board should have the background and experience of working in customs administration. The agencies responsible for the management of the Fund (WTO, WCO, ITC, UNCTAD, UNECE, World Bank and the IMF) should be ex-officio members of the Advisory Board. Due consideration should also be given to how regional organisations that are actively engaged in providing assistance in this area, such as the Asia–Pacific Economic Cooperation (APEC), and other international organisations such as the Commonwealth Secretariat are associated with the work of the Advisory Board.
- Developed countries and international financial institutions may be unwilling to change fully their existing practices for providing assistance in the area of trade facilitation. The procedures should therefore provide that, while pledging resources, they should indicate clearly the amount of resources allocated to providing assistance on a bilateral basis, and as a direct contribution to the Fund.
- The procedures should provide that at least [x] per cent of the resources be earmarked for disbursement through the Fund (the exact percentage could be agreed in the negotiations). Such a requirement was considered necessary because a) donor countries often allocate their aid to those countries with which they have close historical ties while giving low priority to other countries, and b) when aid-giving countries do not have friendly political relations with a particular country, that country is often excluded by law from the list of countries to which aid can be given. However, if aid-giving countries were required to contribute some proportion of their resources to the Fund, the disbursement of aid on an equitable basis could be greatly facilitated.

The purpose of the resources

The resources from the Fund should be available to provide assistance for the preparation of diagnostic studies to identify needs and the preparation of project documents. They should also be available for the implementation of capacity-building projects, including for the application of the rules of GATT Articles V, VIII and X and the new rules that may be adopted under the proposed Agreement on Trade Facilitation, and for implementation of the commitments that may be assumed by the countries during the course of the negotiations for the adoption of the Agreement.

Experience showed that some assistance-receiving countries had not been able to maintain the reform programme after the technical assistance project was completed

because of their inability to meet the necessary recurring expenditure from their own budgets. To avoid such a situation, the provision of assistance from the Fund should be made conditional on the recipient country agreeing to contribute a certain percentage of the expenditure on a project (say 5 per cent in the case of least-developed countries and 10 per cent in the case of others), and undertaking to meet the recurring costs afterwards from its own budgets. The imposition of such conditions may also result in the creation of a feeling of 'ownership' of the reform programme by the government of the recipient country.

Mentoring and twinning

To ensure transparency in the assistance given, and to provide a greater degree of choice in deciding on the agencies or donor countries from which a country could obtain assistance, it may be necessary to establish a complementary mechanism under the umbrella of the Trade Facilitation Fund. The purpose of such a mechanism would be to facilitate the exchange of information between the country needing the assistance and the country or agency with the necessary technical competence to provide such assistance. Such a mechanism could take the form of a 'mentoring and twinning' arrangement.

Under such an arrangement the WTO could play the role of co-ordinator and catalyst. It could bring together 'mentor' countries capable of providing the advice and 'twin' them with countries needing the assistance. The actual areas of assistance, and the accompanying terms and conditions, should be left to be negotiated on a bilateral (or plural-lateral) basis between the interested mentor country and the country or countries wishing to obtain the assistance. The advantages would be as follows:

- Countries may have the opportunity to select the mentor country they consider best equipped to provide the type of assistance they need.
- Countries may have the opportunity to seek assistance from other developing countries if they feel that the assistance provided by them is likely to be more responsive to their needs because of the similarities in their trading environments.
- Because the assistance would be obtained through bilateral agreements, the probability of the mentoring-and-twinning countries developing a long term and continuing relationship of mutual co-operation becomes much higher. This would be of great help should problems arise in the period following the completion of the assistance project.

The use of a mentoring-and-twinning arrangement for providing assistance to developing countries is not new. It has been tested with some success in the last few years by international standard-setting bodies, particularly by the International Organization for Standardization and the Codex Alimentarius Commission in certain areas.

One of the main advantages of the mentoring and twinning mechanism is that it could provide opportunities for co-operation on a South–South basis in providing technical assistance. Because of the similarities in the environment and practices among developing countries, there is an increasing recognition that in certain trade-related areas, the assistance provided by experts or consulting firms from developing countries to other developing countries is likely to be more responsive to their needs than if such assistance were to be provided by developed countries. In this context, participants at the 'Meeting and Influencing Standards Workshop', organised jointly by the Commonwealth Secretariat and the International Trade Centre in 2005, were nearly unanimous in believing that, given the similarity of processes and methods used in production, and consequently of product standards used, it might be desirable for developing countries to seek technical assistance from other developing countries for participation in the work of international standards-setting bodies on the formulation of standards.

The view was also reflected in relation to customs matters. The Commonwealth Secretariat Workshop on Trade Facilitation to which reference was made earlier, recommended that the potential benefits of South–South co-operation in providing assistance should be examined further. Case studies about the measures taken for the reform of customs procedures, which were undertaken in the preparatory work for the workshop, indicated that some Commonwealth developing countries possessed the technical capacity to provide assistance to other developing countries. These included India, Malaysia and Singapore in Asia, and Barbados in the Caribbean.

Forum on 'trilateral' development co-operation

One of the problems encountered by 'mentor' developing countries is that they are sometimes unable to meet the entire costs of providing assistance to other developing and least-developed countries from the limited resources earmarked for such purposes by their governments. A forum organised jointly by the OECD Development Committee and UNDP in February 2005, recommended that one way of making this possible is for the international community to enter into 'trilateral development co-operation arrangements'. Under such arrangements an international financial institution or organisation, or a bilateral donor agency, would agree to provide the financial resources required to pay for a developing country's experts or consultancy firms to provide assistance to other developing and least-developed countries.

The effectiveness of such assistance provided by mentor developing countries was evidenced in the Workshop on the Agreement on Customs Valuation held in May 2002 in Mumbai, India. The workshop was organised by the Commonwealth Secretariat under the Geneva-based project in co-operation with the WTO for senior customs officials from the Commonwealth developing countries in Asia, Africa and the Caribbean. The Commonwealth Secretariat provided the funds for the workshop

and the Indian customs authorities were responsible for providing technical support, including 'on-the-spot training' at the customs port. According to an evaluation of the workshop the participating officials found the training very useful mainly because of similarities in the trading realities between India and the other participating countries in the practices used by traders, for instance in the area of undervaluation of goods. Participants assessed that the methods used by the Indian authorities to deal with such malpractices would be appropriate for use in their countries.

The establishment of arrangements for mentoring and twinning at the WTO under the umbrella of the Trade Facilitation Committee could help in the negotiation of such trilateral arrangements and thus enable the international community to make the best use of available expertise in the field of trade facilitation.

Issues arising in proposals for adoption of new rules

The major portion of the analysis in *Trade Facilitation: A Handbook for Trade Negotiators* explains the issues-based questions underlying the proposals for clarification of the GATT rules relating to: fees and charges; publication of rules and procedures; rules governing techniques and modalities used in the clearance of goods through customs; and transit trade. These proposals had been tabled by participants in the negotiations and which would have to be examined further at the national level. An overview of the points made in the handbook in relation to some of these issues-based questions is provided below.

Fees and charges

How should the rules of Article VIII stipulating that the fees and charges levied in connection with importation and exportation should not exceed 'the cost of services rendered in connection with importation and exportation' be clarified? Should the provisions in the Agreement on Trade Facilitation recognise that in calculating such costs, the countries may take into account not only recurring but also non-recurring or capital costs?

The question of how the rules of Article VIII should be clarified was discussed and debated during the revision of the WCO Kyoto Convention in 1999. However, no standard could be agreed due to the divergence of views among countries on how the cost of services for determining the fees should be calculated, among other issues.

Computerisation of the customs services is a pre-condition for the adoption of a customs reform programme based on methods such as risk assessment, establishment of single windows and designation of authorised importers. But procurement of computer equipment and establishing access to telecommunications infrastructure involves high capital outlay. Additional expenditure must also to be incurred to refurbish customs headquarters, each of the regional offices and border posts where automation components have to be installed.

UNCTAD's experiences in providing automated systems (ASYCUDA) through its technical assistance programme suggests that it may cost between half-a-million and several millions of dollars and take about two years, depending on the level of computerisation existing in the country. While the initial costs are covered under the technical assistance programmes, the customs administration will have to bear the costs of replacement and keeping the system up to date. Moreover, with the fast pace of technological developments the systems become obsolete in relatively short periods.

Customs administrations introducing computerisation under technical assistance programme would therefore have to ensure that the required resources are available to replace and upgrade equipment and to train staff. This might require collecting additional fees, such as a customs reform fee, from importers and exporters.

Any clarification of the rules of Article VIII that the fee charged should not exceed the cost of services rendered, would therefore have to provide that in determining the level of fees the customs administrations could take into account not only recurring costs (maintenance of equipment, rent for office premises, etc.) but also non-recurring or capital costs (equipment, material, utilities).

In this context, the proposal made by one of the delegations suggesting that both the recurring and non-recurring costs should be included in the calculation of costs, could provide a useful basis for further examination. It may also be necessary to consider whether the costs should include other elements, such as expenditure on the training and salaries of additional staff that may have to be employed as a result of the adoption of the reform programme.

To ensure that the fees or charges calculated on such a basis do not impose a heavy additional burden on importers and exporters, the recovery of direct costs must be spread over a 'reasonable' period of time with the country concerned left to determine how long this should be.

The rules should also recognise that any fee aimed at recovering the non-recurring costs of the reform programme as well as meeting the recurring expenditure on its implementation should not be considered as constituting 'direct protection of the domestic industry' or as 'taxation of imports for fiscal purposes' provided that: a) the fees levied did not exceed the actual expenditure incurred on meeting non-recurring and recurring costs; and b) in the case of non-recurring costs, the recovery of such costs was spread over a reasonable period of time.

Should the Agreement provide that fees and charges should be collected only on a specific basis and prohibit their collection on an ad valorem basis?

The EU and some other countries have suggested that fees should be collected only on a specific basis and not on an ad valorem basis. It is, however, important to note that the existing GATT rules are silent on which basis the fees should be collected.

From the readily available information, it would appear that a large number of developing countries collect such fees on an ad valorem basis.

The view that fees should not be collected on ad valorem basis is greatly influenced by the findings of the Panel in the 1987 'United States Customs User Fee' case. The Panel held that the ad valorem duty was not consistent with the provisions of Article VIII as it resulted in the collection of fees on high value import transactions that were higher than the cost of services rendered to importers (WTO 2007).

There is considerable debate on whether the Panel had erred in taking such a rigid view in envisaging prohibition of the ad valorem method in the collection of fees. Some commentators consider that even though the ad valorem method could result in higher fees being paid where the transaction value was higher than was the case when it was lower, it may be possible to correct this by providing for 'caps or maximum limits' on the amount of fees to be paid.

In determining the approach that could be taken on the proposal in the legal text submitted by the EU, it would also be necessary to take into account the fact that a large number of developing countries levy fees on an ad valorem basis. These countries would be required to change over from ad valorem to specific duties. The specific duties or fees could also in practice produce inequitable results as they impose a higher burden on importers with lower transaction value as compared to those with higher transaction value. For instance, a uniform specific fee of US$5 on a transaction of US$1,000 would have a higher cost burden than the same fee would have on a transaction of US$100,000. In this situation, it would appear desirable to leave the decision on how fees should be collected – whether on an ad valorem or specific basis – to be determined by the country concerned.

Not all additional duties and charges that developing countries impose on imported or exported goods would meet the criteria Article VIII lays down for determining fees. The strengthened rules that would become applicable after the Agreement on Trade Facilitation becomes operational may require countries to stop imposing duties and charges that do not qualify as fees. Since these duties may constitute an important source of revenue, what could be done to ensure that countries do not have to terminate them immediately after the Agreement becomes operational?

As noted earlier Article VIII permits countries to collect from importers and exporters fees to cover the cost of services rendered by the customs administration or any other government department 'in connection with importation and exportation'. The Article clarifies that these provisions would ordinarily permit customs or other government departments to justify imposition of fees on importers and exporters for the following types of services:

- Documentation used in customs clearance;
- Services rendered in undertaking physical inspections and post audits and scrutinising invoices;

- Analysis and inspection of imported or exported products;
- Quarantine, sanitation and fumigation;
- Licensing of imports and exports.

The available information on duties and charges that are levied on imported and exported products (in addition to tariffs and export duties) by some of the developing countries is summarised in an Annex to this Chapter. There could be certain doubts as to whether all of the taxes and charges listed in the Annex could be considered as 'fees'. Prima facie it would appear only those taxes and charges listed under headings 'fees related to imports and exportation' and 'import licensing' could be considered from a legal point of view to be consistent with the rules relating to 'fees' prescribed by GATT Article VIII.

Other fiscal measures listed may not meet the criteria prescribed by Article VIII for determination of whether a particular fiscal measure constitutes a fee or duty. Such measures could include, for example, those falling under the following headings:

- Customs surcharge for infrastructure developments or other purposes;
- Taxes on sensitive products;
- Tax on transport facilities;
- Community levies on imports from countries that do not belong to regional preferential arrangements; or,
- Taxes specifically aimed at raising financial resources for the development of ports or development of certain sectors of production.

So far the GATT consistency on these taxes has not been raised in WTO discussions on the industrial sector, as most of the countries applying a large proportion of tariffs were not against further increases. In the agricultural sector these countries have bound their tariffs, but the bindings given are at rates that are higher than their applied rates. From the legal point of view these countries were therefore not prevented from levying, in addition to tariffs, additional duties such as customs surcharge or community levies on products on which duties were not bound. They could also levy such duties on products on which tariffs were bound at higher levels, so long as the total amount of duties collected (applied tariffs plus other duties) did not exceed the higher bound rates.

This situation is going to change in the post-Doha Round period. The Round would result in tariffs of all developing countries (both in the industrial and the agricultural sectors) being bound against further increases. The least-developed countries are not expected to reduce their tariffs but for other developing countries reductions in tariffs would be made on the basis of the bound rates agreed in the Uruguay Round. This would significantly reduce the difference that exists between applied and bound

rates. There are therefore possibilities that the imposition of the taxes and surcharges being levied could result in the total amount of duties payable on imported products being higher than the reduced post-Doha bound rates. Any such development would constitute a breach of the obligations countries have under GATT Article II:1(b) not to collect on GATT bound items tariffs (including other duties) that are higher than the level listed in their schedules.

There are two exceptions to this rule. First, fees and charges that meet the criteria laid down in Article VIII that they should not exceed 'the cost of services rendered in connection with importation or exportation'. Second, internal taxes (such as value added tax or sales tax) that are levied at an equal rate on imported and similar domestically produced products, and third, anti-dumping and countervailing duties.

It would therefore be necessary for developing countries to examine whether all of the duties, surcharges and levies imposed only on imported products, could be justified as fees. Prima facie, it would appear that many of the duties and charges listed above cannot be treated as fees as it could be considered they are being collected for services 'rendered in connection with importation and exportation'. Neither can they be treated as internal taxes, on which levies are permitted under the provisions of Article III, as they are collected only on imported products and are not imposed on like domestic products.

Countries levying these duties, charges and taxes may wish to continue to impose them in the post-Doha Round period in order to collect revenue required to meet planned expenditures. It may be necessary therefore to consider, either in the negotiations on trade facilitation or elsewhere, whether any legal cover could be found to permit these countries to continue to collect them. It would appear that the legal system provides them with two options.

First, it is envisaged that developing countries could request transitional periods to prepare for the application of new rules relating to fees. Countries applying duties or charges on imported products that cannot be justified as fees could use the transitional period to seek alternative sources of revenue for the planned expenditures for which the levies were put in place. But this approach is limited given the extremely narrow base available for raising taxes in developing countries; in practice the scope for raising lost revenue from alternative sources, such as increasing or broadening taxes on consumption or taxes on income, may be restricted.

The second option would be to consider whether the existing rules relating to scheduling of bindings could be clarified to permit developing countries to list in their schedules, duties and charges they collect on imported goods that cannot be treated as 'fees' or 'internal taxes'. The GATT schedules contain a column for the listing of 'other duties and charges' that are levied only on imports.

The legal situation in relation to duties and charges that can be listed in this column of the schedule is complex however. GATT Article II: 1(b) prohibits countries from levying on products listed in the schedule any 'other duties and charges' that would result in importers having to pay duties that are in excess of the bound rate of tariffs. But it also exempt from the application of this rule, all taxes and other duties countries levied at the time when the GATT came into existence – although countries were not expected to increase them beyond the level applicable at that time. As the Article did not impose any obligation to notify, there has been no transparency at international level in relation to these duties and charges.

In order to provide this transparency, it was decided in the Uruguay Round that countries applying pre-GATT duties and charges on bound items must list them in their schedules of concessions by adopting an Understanding on Interpretation of GATT Article II:1(b). Following these procedures, a number of countries included such duties in their schedules.

But it would appear that some of the developing countries took advantage of these procedures and also included in their Uruguay Round schedules duties and charges introduced post-GATT. Developing countries that subsequently became GATT members appear to have included in their schedules, other duties and charges they were levying on imported products on the date of their accession. The question of compatibility of these actions with the provision of GATT Article II and the subsequent Uruguay Round Decision was raised by some of the developed countries during the discussions on verification of the commitments included in the schedules. However, the matter was not pursued.

It would therefore be necessary for countries to examine on an urgent basis whether all of the fiscal measures termed as fees and collected at the border, would meet the criteria in the Agreement for the determination of fees, and where they do not meet the criteria, whether their continued application is necessary. Based on such a study, it would be necessary for countries to raise for discussions in the Negotiating Group, the question of finding an appropriate solution that could give legal cover for continued application of fees considered necessary for raising revenue required for development.

Should the Agreement impose an obligation on countries to notify the WTO about fees and charges they are levying in connection with importation and exportation?

Whether the rules should impose an obligation on countries to notify fees to the WTO is a question that may need careful consideration. The main purpose of requiring notification is to ensure transparency. As countries start publishing information regarding customs laws and regulations on the Internet, interested traders and the governments of other countries will have easy access to such information. An obligation to notify the WTO could impose an unnecessary and avoidable additional administrative burden on the governments of member countries.

Publication obligations

Should there be an obligation on countries to review periodically and at regular intervals customs procedures and practices?

Keeping the procedures adopted for the implementation of rules (whether they apply in the area of customs or other areas) constantly under review is a management function and an important element in good governance. Thus, it should be left to each country to decide whether there is a need for review and if so, when it should be undertaken. International rules requiring countries to undertake reviews on a periodical basis could be counterproductive and add unnecessary administrative burdens and costs.

In this context it is important to note that the provisions of Article VIII (paragraph 2) provides that counties should review the procedures, if requested to do so by a country that considers the procedures being applied in certain areas are causing barriers to its trade. Against this background, it may be desirable to consider whether the new rules, while encouraging countries to keep under review their customs procedures, should also call on them to review said procedures if requested by other countries.

Should the Agreement impose an obligation to consult other countries and to take into account their comments before adopting new laws or regulations or amending the existing laws and regulations?

There is increasing recognition on the part of most governments, including those of developing countries, of the need to consult all interested stakeholders when formulating new laws and regulations, or when reviewing existing ones. However, as one of the proposals tabled earlier recognises, it would be necessary to leave it to the judgement of the concerned country about how such consultations should be arranged, and whether any views expressed by traders or other stakeholders should be accepted or not.

The proposals that are under consideration, however, envisage that a right to comment on the draft of new legislation should also be available to the governments of other countries. This idea of giving the right to comment to the governments of other countries appears to have been borrowed from the Agreement on Technical Barriers to Trade (TBT) and Agreement on Sanitary and Phytosanitary Measures (SPS). The agreements require countries to provide an opportunity to other countries to comment on the draft TBT regulations and SPS Measures in all cases where they are not based on international standards. It is important to note that the obligation to provide foreign governments with an opportunity to comment does not apply where the regulation or measure adopted is based on international standards.

Any examination of whether this concept should be applied while adopting rules relating to customs procedures will have to take into account that the basic condition

applicable to the adoption of technical regulations and SPS measures – i.e. that they should ordinarily be based on international standards – does not apply to customs-related laws and regulations. These are adopted by governments after taking into account the views and needs of their customs authorities and, where considered desirable and appropriate, the views of the industry, trade associations and other stakeholders. In other words, they are tailored to the trade situation prevailing in the country, and aim to strike a balance between the need for controls on import and export transactions (given the prevalence of malpractices such as the undervaluation of goods and related corruption) and the desire of the business community to keep such controls to a minimum in order to facilitate trade. Consequently, the approach adopted and the detailed provisions included in the laws and regulations may vary from country to country.

A number of countries appear to be apprehensive about giving the right to other member countries to comment on the drafts of their domestic laws and regulations. It is feared that such a right may lead foreign governments to press that the country wishing to adopt new legislations should follow the procedures or practices they (the foreign governments) are following. Any such rule may therefore create unnecessary tensions, particularly if a country is put under obligation to justify the non-acceptance of the comments of other governments while adopting the legislation or regulation. In the case of laws, such a requirement may be considered as unnecessary interference by a foreign government in the work of a national parliament.

It is relevant to note in this context, that taking into account concerns expressed by delegations on the initial formulation, the revised text limits the right of foreign governments to comment only on the 'policy objectives' of the proposed rules and regulations. The proposal by China, Hong Kong and some other countries states that 'members shall provide information of their policy objectives pursued and allow a reasonable period for interested parties to submit comments'.

Would it be feasible to apply the concept 'that formalities adopted are not more trade restrictive than necessary to achieve legitimate objectives' to the rules or procedures that customs adopt in connection with importation and exportation?

The procedures and practices adopted by customs and other government departments in relation to imported and exported goods, have to be tailored to the trading environment, prevalence of corruption and other constraints confronting the authorities in applying them. The methods used and rigour with which rules are applied would be greatly different in countries where the undervaluation or smuggling is widely prevalent and corruption is rampant, than countries where traders do not engage in such practices and customs have a reputation for integrity.

In considering this issue it has to be borne in mind that under the present WTO law this concept is applied to the measures permitted under the provisions providing

exceptions to the main rules which it lays down. Thus for measures taken under general exceptions provided under Article XX, panels have developed the practice of examining whether deviation from the rule was 'necessary', and if it was necessary to achieve the legitimate objectives, whether an alternative measure that was less trade restrictive could have been adopted. Similar provisions are to be found in the TBT and SPS Agreements. These provisions, however, apply in cases where the governmental authorities have found they have to adopt technical regulations or sanitary and phytosanitary measures different to the relevant international standard they are under obligation to apply.

The question of whether such a concept should apply to the procedures applied in the administration of national laws and regulations needs careful examination. In the case of procedures governing imports and exports, while the customs authorities could be required to follow the norms laid down by rules contained in an international agreement, the decision on the way and the rigour with which they should be applied has to be left to the national administration. In countries with widespread corruption, the authorities may wish to introduce procedures for 'checks and cross checks' that are more rigorous than those applied in countries where such practices do not exist.

Consequently, if a complaint is made that practices used by a country are more trade restrictive than necessary, to attain the legitimate objectives the WTO panels would have to make an assessment on the basis of the 'facts' relating to the situation prevailing in the country. The WTO dispute settlement bodies are not presently equipped to undertake such an examination of the facts and have in general preferred to give 'deference' to the judgement by the national authorities in such cases.

Apprehension that panels may not be able to make objective assessments on the basis of facts resulted in the addition of Article 17.8(c) in the Agreement on Anti-dumping Practices. The Article imposes an obligation on the panel to show deference to the judgement made by the national investigating authorities on issues such as increased imports causing injury to the domestic industry, even though it may have arrived at a different assessment on the basis of the facts before it.

This Article in particular states that 'in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether the evaluation of those facts was unbiased and objective. If the establishment of the facts was objective and the evaluation was unbiased, the evaluation by the national authorities should not be overturned.'

Rules governing techniques and methods used by customs

What obligation should the Agreement provide in relation to the 'techniques and methods' customs would be required to apply (such as application of risk management techniques, appointment of authorised persons), taking into account that the World Customs Organization,

UN Centre for Trade Facilitation and Economic Business and some other organisations have adopted international standards, recommendations and guidelines on all these measures?

The handbook points out that measures on which it is proposed to adopt new rules under the proposed Agreement can be broadly categorised into two groups: those that raise trade policy issues and those that do not. In the first category would fall measures such as publication of custom rules and regulations, level of fees and charges, and establishment of procedures for appeals. In the second category would fall measures relating to techniques and methods applied in the clearance of goods through customs. These include methods that customs are encouraged to use such as:

- Adoption of risk assessment and management techniques;
- Appointment of authorised persons;
- Adoption of procedures for pre-clearance processing;
- Post clearance audit; and,
- Establishment of single windows.

On all of these measures, the international standards, recommendations and guidelines adopted by the WCO, UN/CEFACT and others are being applied by almost all developed countries and by some of the developing countries.

Against this background, the handbook suggested that the most appropriate course would be to adopt the approach of the present WTO legal system that WTO should not engage in writing standards in technical areas and leave such work to the organisations with the expertise and technical capacity to develop such standards. Therefore the TBT and SPS agreements impose an obligation on countries to use in their technical regulations and sanitary and phytosanitary measures, the standards developed by the international standard-setting bodies with the necessary competence and expertise (such as ISO, IEEC and Codex Alimentarius Commission).

However under two agreements the obligation to adopt and apply the standards developed by the international standardisation bodies is open-ended; it applies to all existing standards as well as those that may be adopted in the future. In the case of the proposed Agreement on Trade Facilitation it would be more desirable and appropriate to limit the obligation to apply those standards developed by WCO, UN/CEFACT and other organisations, which have been found suitable for adoption by all countries after discussions in the WTO Negotiating Group.

There was broad support for the adoption of this approach in formulating new rules in the area of trade facilitation in the July 2006 workshop arranged under the project by the Commonwealth Secretariat in co-operation with AITIC and the Geneva ACP Office to discuss the handbook's recommendations. A number of participants considered that it would not be desirable for WTO to adopt new rules, paraphrasing the

language used in the standards developed by other international organisations for the following reasons:

- The rules adopted in WTO are 'prescriptive'. Moreover once adopted they cannot ordinarily be changed. On the other hand standards adopted by WCO and other international organisations are often modified and adapted to take into account technological developments that have taken place and experience of their application.
- The standards adopted by these organisations are complemented by guidelines for their application. They are thus user friendly.
- These standards have been developed after negotiations involving the participation of both customs experts and the trading and business community. The WTO rules do not permit participation by the business community. Moreover in the current negotiations in WTO, most of the developing countries are being represented by trade diplomats without any assistance from customs experts.

It must be admitted, however reluctantly, that even though such concerns were being expressed by delegations of some of developing countries in informal discussions, these delegations had not raised them so far in the actual negotiations that are taking place in the Negotiating Group on Trade Facilitation. This situation could be attributed to two factors.

First, the major players, particularly the EU and the US, had made it clear for political and other reasons they were reluctant to adopt the approach taken under the TBT and SPS agreements. They preferred to see that complimentary rules covering these standards were incorporated in the Agreement, even on measures where WCO and other organisations had adopted standards.

Second, even though WCO and other organisations had initially suggested that the obligations under the Agreement should require countries to use standards developed by them, they gradually started showing willingness to go along with the above approach. This was the only practical way in which they could see that the standards developed by them are applied on universal basis, taking into account the policy approach adopted by major players. They also considered that this approach could bring them benefits as with the coming into existence of the Agreement in WTO, increased resources would be made available to them for providing technical assistance to developing countries in the area of trade facilitation.

The result has been that on all the measures on which international standards already exist, the texts that are under consideration aim at imposing a binding obligation to apply the rules. A complementary provision states that in applying these rules, the countries should endeavour to put in place, where possible, standards developed by the relevant international organisations.

It would be necessary for customs administrations in developing countries to examine how far they would be able to accept binding obligations to apply the rules governing methods and techniques that could be adopted in such areas as 'risk management techniques', 'designation of authorised persons' or 'post audit'. One of the objectives of such an examination would be to ensure that the new rules do not negate the 'flexibility' they may need to make suitable adjustments in applying them given the trading realities and the environment prevailing in the country (e.g. prevalence of undervaluation of imported goods, capacity of customs to control smuggling and other such practices, and the prevalence of corruption among customs officials).

Further since from the legal point of view the word 'shall' imposes a more binding obligation than the word 'should', it may be necessary to consider whether to use the word 'should' in relation to certain provisions.

It would be also necessary to examine whether differences in language used in the standards developed by WCO and other international organisations and the legal texts under consideration in WTO, would pose problems in implementation, as the Agreement would impose obligations on countries to rely on these international standards in applying the rules.

Rules that impose a binding obligation give a right to countries to invoke WTO dispute settlement procedures in cases where they consider that a country is not complying in accordance with the terms and conditions laid down. Once these procedures are invoked a Panel, consisting of three to five legal and trade policy experts, examines the case. If one of the parties to the dispute appeals against the decision of the Panel, the case may go to the Appellate Body. The question that would need closer examination is whether the type of differences or dispute that may arise in relation to the application of rules of the Agreement are amendable to settlement under the WTO dispute settlement procedures (particularly those rules relating to issues such as application of risk management techniques, or appointment of authorised persons or to the techniques and methods customs should follow).

Should the WTO dispute settlement procedures be applicable for the settlement of differences and disputes that may arise in the application of rules of the Agreement, particularly those relating to techniques and methods which customs would be required to apply in the clearance of goods? If not, should the Agreement provide special procedures for consultations on differences among member countries?

In considering this question, it is necessary to note that WTO law leaves it to negotiators to decide on whether or not its dispute settlement procedures should apply to the disputes that may arise in the application of the rules of any new Agreement they negotiate. The Understanding on Dispute Settlement, which lays down rules and procedures governing settlement of disputes brought to WTO, allows that its provisions shall apply 'only to multilateral and plurilateral agreements listed in the

Appendix'. The countries negotiating the Agreement have therefore to decide whether or not the WTO dispute settlement procedures should apply and if they decide on applying them, get the Agreement included in the Appendix to the Understanding. Alternatively, they may decide on providing in the Agreement special procedures for the settlement of disputes that may arise under its provisions.

The need to adopt special procedures for the settlement of differences or disputes in relation to at least some of the provisions of the proposed Agreement on Trade Facilitation (particularly those that deal with practices and procedures customs or other departments have to follow at a practical level in the clearance of imported or exported goods) arises because of the nature of the problems that would be brought to WTO for the settlement of disputes. In most cases the question the dispute settlement body would have to address is not whether the rule is being applied or not according to the letter, but whether its purpose and objectives are being achieved. The issues raised for settlement would be therefore not questions of law but of fact, in most cases.

In this context it is relevant to note that the new methods for clearance of goods that customs would be required to adopt (e.g. appointment of authorised persons, adoption of procedures for pre-clearance processing and post clearance audit) are based on the concept that customs must use 'risk assessment techniques' in order to facilitate trade and subject products to rigorous checking only where there is a high risk of traders flouting customs rules. The theory and practice of the 'application of risk assessment' emphasises that it is a 'management concept' (also used in other branches of economic activity such as banking and insurance) and cannot be subjected to strict legal process as ultimately how it should be applied must be left to those doing the applying and they have to be judged on the basis of performance and results.

For example, let us assume that country A has complained that country B has unjustifiably refused to grant 'authorised importer status' to an importer who imports from country A. The WTO panel finds on examination that country B, in coming to the decision not to grant authorised importer status to the particular importer, has taken into account all the of the criteria the relevant rules lay down. Country A, however, maintains that even though the rules have been followed, the decision taken by the authorities is not justified taking into account the facts of the case. As noted earlier, the WTO panels have generally confined themselves to the examination of questions of law and on facts, particularly where different assessments or judgement are possible, have chosen to show 'deference' to the judgement made by national authorities.

Taking into account this situation, the handbook suggested that it might be desirable to provide for special procedures, based on a two-track approach, for settlement of differences and disputes that may arise among countries regarding the application of the rules of the Agreement. The main responsibility for settlement of disputes shall be with the Committee on Trade Facilitation that would be established under

the Agreement. The Committee shall authorise a complaining country to invoke the WTO dispute settlement procedures, in the case of a complaint against a developed or a developing country, if after preliminary examination it has reason to believe that the country is in breach of the obligations under GATT Articles V, VIII and X, and/or under the Articles of the Agreements that deal primarily with trade policy issues.

In all other cases the primary responsibility for the settlement of disputes shall rest with the Committee on Trade Facilitation. The Committee shall for this purpose establish a standing group of experts for examination of both questions of law and facts. The group shall consist of five members, at least two of which must have expertise and experience on customs matters. The group shall, after examining both the questions of law and fact, submit its report to the Committee on Trade Facilitation. On questions of fact the Committee shall show deference to the 'decisions taken by national customs administrations' unless it finds that the evaluations made by the national authorities was biased or not based on objective examinations.

The Committee shall on the basis of such examination make appropriate recommendations and shall try to settle the dispute through conciliation. Where the Committee finds that a developing country against which a complaint was made has failed to comply with the rule due to lack of infrastructure or of technical capacity, the Committee should examine how the assistance required for this purpose could be provided and make appropriate arrangements for providing such assistance.

Should the Agreement provide rules prohibiting the use of services provided by the pre-shipment inspection companies?

Over 30 developing, least-developed and transition economies are using the services of pre-shipment inspection (PSI) companies. These companies conduct physical checks of the goods to be imported in the countries of export, and give advice on the prices of the products to be imported and on tariff classification.

Much of the evidence on the usefulness of PSI companies is anecdotal, and there is a wide gap between the views of analysts who consider such services useful and those who do not, and some who even maintain that such services should be prohibited. However, it appears that in many countries where the undervaluation of goods is widely prevalent and where it is not possible for customs to ascertain the true value of the imported goods, the use of such services seems to have resulted in the facilitation of trade, and a fuller collection of revenues due. The above considerations would have to be taken into account while examining further the proposal on the use of PSI services that has been tabled.

The practice followed in the past was to undertake inspections in the country from which the goods were to be exported prior to their shipment (hence the term 'pre-shipment inspection'). Before the Uruguay Round, many firms considered that the practices followed by PSI companies in inspecting goods for export in exporting

countries constituted barriers to trade. Thus the PSI Agreement lays down rules that PSI companies are expected to follow while assessing whether the invoice price correctly reflects the value of the goods as well as during the physical inspections undertaken in exporting countries prior to the shipment of goods.

The technological developments that have taken place in recent years are increasingly making it possible for these companies to arrange for price verification and physical inspection services in the country of import ('destination country') instead of in the exporting country. For this purpose they utilise cargo-scanning equipment, risk management databases and IT solutions, such as trade community network systems, to facilitate the implementation of the 'single window' concept. In providing such services, these companies often work in co-operation with customs authorities.

Thus, there is a gradual shift in the way services are being provided by PSI companies; instead of carrying out inspections and price verifications in the exporting country 'prior to the shipment of goods' they are now undertaking such functions in the country of importation. From a strictly legal point of view, the provisions of the WTO Pre-shipment Agreement are not applicable when such services are provided in the country of importation after the goods have arrived, even if a company that is registered as a pre-shipment inspection company provides them. The question that needs to be examined is whether it would be appropriate to deal with the pre-shipment inspection issues in the context of the ongoing negotiations on trade facilitation or whether a more desirable course would be to modify the provisions of the Agreement on Pre-shipment Inspections to take into account the changes that are occurring in the provision of such services from a 'pre-shipment' to a 'destination' basis.

Should the Agreement impose an obligation to publish the average release time of the clearance of goods through customs?

The average time taken for the clearance of goods varies from country to country depending on the prevalence of factors such as customs malpractices (e.g. the tendency on the part of importers to undervalue imported goods) and whether the imports are made in bulk by a few large firms or by numerous smaller companies. Differences in the composition of imports can also influence variations in clearance time. In countries where a high proportion of imports are in products that must conform to national sanitary and phytosanitary measures or other standards and therefore require approvals from the ministries of industry and/or health, the average time taken for the clearance of all imports may be longer than in countries where such imports constitute only a small proportion.

Experience has also shown that where countries have been able to reduce the time taken for the clearance and release of goods following the adoption of a reform programme, experience has shown they have not been able to maintain the speed of

clearance after the termination of the assistance programme due to the inability of the government to provide the required financial resources.

A number of countries therefore consider that if average times are to be published this should be done separately for different types of goods. Moreover it may be premature to give a right to traders to demand explanations for the delay in the clearance of goods, as the delays are often due to the lack of adequate staff and other similar reasons.

Transit trade

Should the definition of transit trade be broadened to cover goods that are transported not only through 'mobile means of transport' but also through fixed infrastructure such as 'pipelines'?

Under GATT Article V, the scope of transit trade is confined to goods that are transported by 'mobile means of transport' (such as vessels or ships, lorries and airplanes). The legal-based texts that have been tabled aim at broadening the scope of the term 'transit trade' to goods and services transported underground (through pipelines for products like petroleum and natural gas or underground cables) and overland (e.g. electricity and telephone).

The political and economic implications of broadening the scope of transit trade would have to be carefully considered, particularly in the light of the provisions in the Article on 'freedom of transit'. The proposals that have been tabled paraphrase the existing provisions and reaffirm that 'there shall be freedom of transit through the territory of each Member via the routes most convenient to international trade, not only for goods transported by mobile means but also through fixed infrastructure'. The nature of the obligations these proposals would impose on transit countries, particularly whether the scope of the definitions should be widened to cover goods transported through fixed infrastructure, would need careful examination.

What provisions should be included in the Agreement to facilitate further strengthening of the activities at regional and international level for harmonisation and standardisation of the transit documents and procedures and for facilitating transit trade?

Countries have attempted in the last 40 years or so to simplify documentation requirements for transit trade and to complement GATT rules by adopting international conventions and instruments and recommendations. These include Specific Annex E of the WCO's Revised Kyoto Convention, the UN TIR Convention,[1] the ATA Convention and the International Convention on the Harmonisation of Frontier Control of Goods, and the UN Layout Key for Trade Documents.

Of these, in addition to the Special Annex E of the Revised Kyoto Convention, the UN TIR Convention provides a system that could be used by transit and landlocked countries to facilitate transit trade. One of its main features is that the 'national

associations of transport operators' are responsible for the application of the procedures by transport operators. They issue the appropriate documents and provide a guarantee for the payment of customs duties and other taxes, in cases where the transport operators may be required to pay such taxes to the customs authorities of the transit countries (e.g. leakage of goods).

From the point of view of the customs administrations, the system has two advantages. First, duties and taxes of up to US$50,000 are guaranteed on risk products during international transit movements (with a higher maximum for alcohol and tobacco). Second, only registered transport operators are permitted to use TIR carnets (or 'merchandise passports') containing transit documents, thus ensuring the reliability of the system.

The TIR Convention however has been a success mainly in Europe. Though the system is being used by transport operators in Central Asia, the Caucasus and Maghreb, and in some parts of the Middle East, results in these countries has so far been modest. In June 1982, 16 countries belonging to the Economic Community of West African States (ECOWAS) also established a system that is commonly known as TRIE (Transit Routier Inter–Etats), which is similar to the TIR Convention. However, transport operators in the membership countries are ignoring it; about 70 per cent of transit procedures in the ECOWAS region stem from bilateral accords, and national regulations and procedures.

The main reason for the lack of success in the use of the Convention in countries other than Europe is the general absence of efficient and well-functioning national associations of transport operators in most of these countries. Even in countries where effective and credible national associations exist, they are not in a position to set up the required system for guaranteeing payments of duties to customs of transit countries (in cases of the leakage of goods). This is due to the under-development of the local financial infrastructure as well as the unwillingness of international insurance companies to provide cover given their perception of political and commercial risks.

In addition to the TRIE, the one example beyond TIR of an agreement dedicated only to transit, a number of other regional agreements on transit trade have also been adopted in recent years. These include: Association of Southeast Asian Nations (ASEAN) Framework Agreement on the Facilitation of Goods in Transit; Greater Mekong Sub-region Agreement for Facilitation of Cross Border Transport of Goods and People; Economic Co-operation Organisation (ECO) Transit Transport Framework Agreement (formed by Afghanistan, Azerbaijan, Iran, Kazakhstan, Kyrgyzstan, Pakistan, Tajikistan, Turkey, Turkmenistan and Uzbekistan); and Common Market for Eastern and Southern Africa (COMESA) Agreement on a Single Administrative Document.

These regional agreements lay down broad goals and frameworks for co-operation among member countries for facilitating transit trade. Unfortunately it would appear

there has been very little progress in implementation of the agreements at the national level.

Given this situation, the provisions in the Agreement that urge countries to draw upon international standards contained in the international conventions and to promote regional agreements on trade facilitation, are not likely to provide meaningful solutions to the problems in transit trade, unless they are supplemented by provisions on technical assistance to transit countries. Such assistance would prepare them to deal with the practical problems encountered in applying the international standards and in the implementation of the regional agreements.

For instance, the main reasons for delay in transit are often not the customs formalities and procedures, but the lack of physical and financial infrastructure that is necessary for transit trade to move smoothly and efficiently. In the situation the improvements in international rules in the proposed legal text is likely to have only marginal effect on the movement of transit trade. The main efforts would therefore have to be directed towards assisting transit and landlocked countries in building up the physical and financial infrastructure that is required for ensuring that goods in transit reach without delay and expeditiously the landlocked countries. In a number of countries, the specially constructed vehicles that are required for transit trade are not available. Most of these vehicles do not have compartments that are sealed, in order to ensure that no goods are removed or added during transit. Further, there are no transport associations that can guarantee the vehicles are properly maintained and obtain a bank warranty to assure customs that if the goods do not reach the country of destination, they would be able to recover the duties payable from the bond.

The provisions on technical assistance that could be included in the Agreement to enable developing countries to build up the physical and financial infrastructure needed for facilitating transit trade could incorporate the following actions.

Countries that are members of the organisations that have developed international standards applicable in the area of transit trade, should request the concerned organisations to undertake studies on the problems facing non-member developing countries in applying the international standards and assess the technical assistance needs of these countries to:

- Develop the physical and financial infrastructure (including the institutional framework for private/public co-operation) for the efficient application of the international standards; and
- Train customs officials for the application of such international standards.

Countries that are members of the regional economic organisations should also make requests to the concerned organisation to:

- Undertake studies on the problems member countries are encountering in applying and implementing the provisions of the regional agreements, including

those arising from bad conditions of roads and absence of an institutional framework to guarantee payment of customs duties, in case goods do not reach their (landlocked) destination;

- Examine whether any changes or modifications in the rules are needed taking into account the provision of the WTO Agreement on Trade Facilitation;
- Assess the technical assistance needs of the members for effective application of the rules of the agreements at the national level.

It could be further agreed that the Committee on Trade Facilitation shall, before the expiry of the third or fourth year from the date of the adoption of the Agreement, arrange for a conference of the customs and other experts from transit and landlocked countries and the representatives of international and regional organisations. Based on the studies, the conference would consider how the technical-assistance needs of the transit and landlocked countries are being met, and review the provisions in the Agreement relating to transit trade with a view to finding out if any changes or modifications were needed.

State of Play in the Negotiations

The handbook has been found most useful not only by the trade officials in national capitals and by the officials from Geneva-based missions, who are actively engaged in preparing and participating in the WTO negotiations for the adoption of the Agreement on Trade Facilitation, but also by the chambers of commerce and research and other organisations interested in work in this area. Its particular usefulness to those engaged in the negotiations is evident from the fact that for over a year it had the highest sales in the WTO bookstore. In the meetings of the Group, a number of delegations emphasised the value of the detailed points and suggestions made in the handbook and other papers prepared by the Adviser, in the highly technical negotiations in which some 39 legal-based texts have been tabled by various delegations.

It is difficult to provide a detailed account of the progress made in the discussions on each of the above proposals. But a few general observations can be made, in relation to the participation of developing countries in these negotiations.

There is now a general consensus that the adoption of the Agreement in WTO would be a 'win–win situation' bringing benefits for all countries, irrespective of their stage of development.

The developing countries, particularly the LDCs, SVEs and those at a lower stage of development, have participated most actively in the negotiations on the provisions in the Agreement that would extend to them special and differential treatment and on assistance to develop their technical capacities for the implementation of the provisions.

For the purpose of identifying the provisions on which they would require assistance for implementation, the handbook suggested using the scheduling technique used in the GATS, which enables countries to impose conditions while giving commitments. Instead there is now a broad degree of support for the proposal that each developing country should, before the Agreement becomes operational, notify WTO of their needs by categorising the provisions as follows: Category A would contain provisions in the Agreement that they are implementing at present and could agree to implement from the day it becomes operational; Category B would contain those provisions for which they would need a transitional period to implement; and Category C would list all provisions for which they would need technical assistance to implement. It is further agreed that in order to ensure transparency, the notification made by each country should be appropriately published by the WTO in its Trade Facilitation Protocol.

Intensive discussions are taking place on how to ensure that commitments given by developed countries to provide technical assistance are implemented. The proposal contained in the handbook that a separate fund should be established for this purpose, which would also facilitate surveillance of whether the commitments are being implemented, is not being pursued as most of the developed countries did not wish to change the practices they have adopted for providing assistance.

In the discussions that are taking place on the proposals that have been tabled for clarification of GATT Article V, VII and X, the developing countries have taken an active interest and they appear to have relied on the information contained in the handbook in deciding on their negotiating approaches. It is expected, that as the negotiations proceed, and the focus of these countries shifts from the provisions for special and differential treatment, to the negotiations for clarification of the above provisions, they would make increasing use of the handbook and other papers prepared on the subject.

Notes

1. The 1975 Customs Convention on the International Transport of Goods Under Cover of TIR Carnets.

Examples of customs fees and charges levied by selected developing countries[1]

A. Customs Surcharges

Country	Purpose	Rate (%)	Date of introduction
Bangladesh	Temporary infrastructure development surcharge.	2.5	1997
Benin	Specific fee for National Dockers' Council.		
Brazil	Merchant Marine Renewal tax to modernise and improve the merchant fleet; Dock Worker Severance pay to indemnify workers whose registration had been cancelled.		
Costa Rica	Welfare, medical and childcare centres.	1	
Haiti	Fund for the 'Management and Development of Local Communities' programme.	2	
Ghana	Import levy on all non-petroleum products imported in 'commercial quantities'.	0.5	
Nigeria	Port Development Tax. Raw materials and Development Council surcharge. Shippers' Council surcharge.	5 1 1	
Peru	Surcharge to pay for the Agricultural Development Fund (tariff surcharge on 331 agricultural products).	5	1997
Senegal	Senegalese Loaders' Council Livestock Fund levy.	0.2	
Turkey	Mass Housing Fund – imports on fish and fishery products to finance Government low-cost housing schemes for poor and middle-income families.	3	
Uruguay	On imports transported by sea, to finance the severance packages of the national Ports Administration personnel.	0.25	

B. Tax on Foreign Exchange Transactions

Country	Purpose	Rate (%)	Date of introduction
Antigua and Barbuda	Foreign exchange transaction tax on all transactions.	1	

C. Stamp Tax

Country	Purpose	Rate (%)	Date of introduction
Jamaica	Additional stamp duty on customs warrants to protect local production of certain product categories, e.g.:		
	Primary aluminium products	20–25	
	Vegetables and beans	35	
	Alcoholic beverages	34	
	Tobacco products	34	
Madagascar	Customs stamp duty.	1	
Morocco	Verification and stamp tax on carpets.	5	
Niger	Stamp tax discriminating between WAEMU and non-WAEMU countries.	(small fee)	

D. Import Licence Fee

Country	Purpose	Rate (%)	Date of introduction
Bangladesh	Ad valorem import licence fees on imports valued above Tk100,000.	2.5	
Sri Lanka	Ad valorem import licence fees on 474 items.	0.1	
Swaziland	Ad valorem import licence fees.	0.05	
Uganda	Ad valorem import licence fees on all imports.	2	

E. Consular Invoice Fee

Country	Purpose	Rate (%)	Date of introduction
Dominican Republic	For approval of transactions.		
Nicaragua	Ad valorem fee.	0.05	
Paraguay	Consular tax on total merchandise value.	7.5	1972

F. Statistical Tax

Country	Purpose	Rate (%)	Date of introduction
Benin	Fees on imports from non-ECOWAS and non-WAEMU countries.	1	
Burkina Faso	‘	1	
Mali	‘	1	
Niger	‘	1	
Senegal	‘	1	
Madagascar	Statistical taxes.	2–3	
Côte d’Ivoire	‘	2–3	
Mauritania	‘	2–3	
Togo	‘	2–3	
Suriname	On the c.i.f. value of all imports, except those of bauxite companies for which statistical tax quadrupled.	0.5	

G. Tax on Transport Facilities

Country	Purpose	Rate (%)	Date of introduction
Israel	Wharfage fee/port use fee:		
	Importers	1.1	
	Exporters	0.2	

H. Taxes and Charges on Sensitive Product Categories

Country	Purpose	Rate (%)	Date of introduction
Korea	Environmental waste charges on certain plastics.	0.7	
	Domestic producers: specific fee.		
	Foreign imports: Ad valorem fee.		
Belize	Environmental tax on most imported products.	1	
Grenada	Environmental levy on a range of goods.	1	

I. Additional Charges (n.e.s)

Country	Purpose	Rate (%)	Date of introduction
Belize	Administrative charge.	1.5	
Mauritius	Tea.	20	
El Salvador	Empty sacks and bags of synthetic fibre.	80	
Chile	Dispatch tax on merchandise exempt from import duties.	5	
Morocco	Para-fiscal tax.	0.25	
Suriname	Consent fee.	1.5	
Nicaragua	Municipal tax.	1	

J. Fees Related to Customs Procedures

Country	Purpose	Rate (%)	Date of introduction
Bangladesh	Ad valorem customs service fee.	1	
Venezuela	‘	1	
Uruguay	‘	0.35–1.1	
Dominica	‘	2	
St Lucia	‘	4	
St Vincent and the Grenadines	‘	4	
Antigua and Barbuda	‘	5	
Grenada	‘	5	

St Kitts and Nevis	‘	5
Cambodia	Pre-shipment inspection fee.	0.8
Laos	Pre-shipment inspection fees with minimum fees and 1% of goods valued above US$30,000.	1
Myanmar	Landing charge.	0.5
Argentina	Ad valorem fees for inspection or pre-shipment inspection of imports.	
Bolivia	‘	1.92
Burkina Faso	‘	1
Ghana	‘	1
Guinea	‘	1.05
Haiti	‘	4
Malawi	‘	0.85
Mauritius	‘	Specific fee.
Niger	‘	1
Nigeria	‘	1
Peru	‘	Up to 1
The Gambia	Processing fees.	1.05
Mexico	‘	0.8
Norway	Inspection or foodstuff taxes.	0.58–0.82
Egypt	Service and inspection fee 1%. Additional service charge of 2% on goods subject to import duties of 5.29%. 3% on goods subject to duties of 30% or higher.	123
Burundi	Service tax on all imports in addition to the pre-shipment inspection fee (for imports of a value of more than US$5,000) that amounted to 1.5% of the customs value.	6
Côte d’Ivoire	Service fee on imports carried by sea. Inspections firms charge an additional 0.75%.	0.6 0.75
Romania	Customs commission.	0.5
Hong Kong, China	Mandatory electronic system (EDI) for trade declarations: charge in 1999.	11HK$.
Kenya	Import declaration fee on customs value of all imports.	2.75

K. Community Levies

Country	Purpose	Rate (%)	Date of introduction
Benin (ECOWAS)	ECOWAS customs community levy on imports from non-ECOWAS members.	0.5	
Burkina Faso (ECOWAS)	‘		
The Gambia (ECOWAS)	‘		
Ghana (ECOWAS)	‘		
Guinea (ECOWAS)	‘		
Mali (ECOWAS)	‘		
Niger (ECOWAS)	‘		
Senegal (ECOWAS)	‘		
Togo (ECOWAS)	‘		
Benin (WAEMU)	WAEMU community solidarity levy from non-WAEMU members.	1	
Burkina Faso (WAEMU)	‘	1	
Mali (WAEMU)	‘	1	
Niger (WAEMU)	‘	1	
Senegal (WAEMU)	‘	1	
Togo	WAEMU community solidarity levy in the beginning of 1998.	0.5	
Niger	Special import tax (TCI) on rice during 2000–2002.	10	

Note

1. The information in the table draws on data from the OECD Trade Policy Working Paper No. 14: ‘Analysis of non-tariff measures: Customs fees and charges on imports’ (TD/TC/WP (2004)46/FINAL), 8 March 2005.

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Part Three

Assistance provided to individual delegations and in the pre-Doha period

11

Assistance Provided to Individual Delegations

Introduction

From the beginning of the project it was recognised that in addition to providing assistance to the members of the Group as a whole, the Adviser should be available to assist individual delegations or small groups of like-minded delegations with advice on any WTO-related issue. It was further agreed that such advice should be treated as confidential. Where the assistance was provided through the preparation of papers it should be left to the delegation(s) involved to decide whether they should be made available to all members of the Group.

The assistance provided generally took the following forms:

- Briefings on WTO law and practice on the issues raised in ongoing discussions and negotiations;
- Analysis and feedback on the drafts of national legislations or on the approach that could be adopted in the discussions, on a bilateral or plurilateral basis;
- Preparation for participation in opinion forming seminars or workshops arranged by academic institutions and other research organisations.

Briefings on WTO law and practice

A number of delegations approached the Adviser for background information on legal aspects of issues that were under discussions or for advice on how they could respond to the points that had been raised in the discussions. The assistance required was provided through discussions with the requesting delegations over the telephone or in informal meetings in the WTO coffee room. In some cases, briefing notes on the issues raised were made available to the delegations.

The assistance provided to individual delegations was one of the most important features of the project. It was unique – no other Geneva-based international organisation provided such advice and assistance on demand and almost immediately, on a 'hotline basis'. Providing such assistance took nearly 20 per cent of the time devoted by the Adviser to the work under the project.

It is important to note in this context that some of the papers prepared at the request of individual delegations were later circulated, with their consent, to all members of the Group. In these cases the requesting delegations considered that the issues analysed in the papers would be of interest to them. Following are highlights of some of these briefing papers.

Synoptic Listing of the Problems in the Implementation of the WTO Dispute Settlement Procedures (April 1999)

The paper provides an overview of some of the problems that had arisen in the implementation of the dispute settlement procedures and suggests some improvements that could be made in the selection of members of the panels and the working methods adopted by them. It expresses particular concerns at the trend on the part of the Appellate Body to create 'new law' where it considered that the existing WTO law failed to take into account fully the changes that had occurred since it was adopted or was not clear. It emphasises that in doing this the Appellate Body was going beyond its mandate to confine itself to the interpretation of the rules contained in WTO legal instructions (Rege 1999).

Workers Rights and International Trade (July 2000)

At the 1996 Singapore Ministerial meeting it was agreed that ILO was the only competent body to deal with labour standards. It was further agreed that while the WTO and ILO Secretariat should continue to collaborate in work in this area, the WTO law should not be changed to permit countries to prohibit or restrict imports from countries that failed to comply fully with international standards adopted by ILO. In 1997 some of the developed countries, as a result of demands by trade unions and other labour organisations in their countries, started building pressure for discussions on incorporation of the 'social clause' in the WTO law. This would establish linkages between trade and labour standards and permit countries to restrict imports if 'labour standards' relating to such matters as child and forced labour, minimum wages and hours of work, and safety and health of workers were not followed.

The paper provided a historical perspective of the efforts made by some of the developed countries since the establishment of GATT to secure inclusion of the social clause in WTO law and the reasons why they were not successful. This is followed by an analysis of arguments for and against inclusion of the social clause in WTO and of the proposals by some delegations for modifications in various GATT Articles that would permit countries to levy additional duties or restrict imports from countries that failed to apply internationally agreed labour standards. The paper concludes with some observations on why it may not be in the interest of developing countries, at their present stage of development, to have legally binding rules that would enable countries to deny or restrict imports, if they considered that the exporting countries were failing to abide by internationally accepted labour standards (Rege 2000).

WTO Procedures for Decision-making: Experience of the Operation and Suggestions for Improvement (May 2002)

The paper was prepared at the request of some delegations to assist them in the discussions that took place after the failure of the Seattle Ministerial meeting in 1999 on how the present procedures for resolving differences and for taking decisions could be improved.

It describes and compares the procedures adopted by the World Bank and the IMF and those adopted in WTO, for resolving differences and for taking decisions. The main differences in the procedures followed arise from the fact that in the World Bank and IMF the work is 'secretariat driven' while in the case of WTO it is entirely 'delegation driven'. Because of this, the proposals made by some analysts for the establishment of an Executive Committee, similar to that existing in IMF and the World Bank and consisting of 20 or so member countries, to make decisions on important matters (such as inclusion of new subjects in the work programme of WTO in the agenda for negotiations) may not be acceptable to a large number of member countries. These countries are likely to insist that the existing practice under which each member country has one vote should not be changed and that the decision on important policy-related matters should be taken by consensus (Rege 2002a).

Genetically Modified Products: Need for the Adoption of Regulatory Framework at National Level (May 2001)

The paper was prepared at the request of some delegations whose governments were considering adopting rules and regulations governing imports and sales of genetically modified food products. The paper explained the provisions of the WTO Agreement on Sanitary and Phytosanitary Measures and of the Cartagena Protocol on Biodiversity and pointed out that it may be possible for a country to temporarily prohibit or restrict imports of genetically modified products that are approved for sale in the domestic market of the exporting country, by applying the 'precautionary principle'. Continuation of such restrictive measures on a long-term basis would have to be justified on the basis of an 'assessment of risk' showing that the products may pose a threat to the conservation and sustainable use of biological diversity and to the human and animal health within the territory of the importing country. As undertaking such risk assessment may be beyond the technical capacities of a large number of developing countries, the Protocol on Biodiversity has established a database on risk assessments carried out by different countries. The countries wishing to ban or restrict sale of generally modified products can base their decisions on the information contained in the database if they are not able to carry out the risk assessment themselves. The paper further describes the principles and rules that would have to be taken into account in adopting regulations for mandatory labelling of such products (Rege 2001).

Principles and procedures that could be followed in the selection of a Deputy Director General (May 2002)

The paper was prepared in 2002 as the term of the then incumbent Director General was about to expire and the new person was expected to take over. It explains past procedures and recognises the right of the Director General to select his/her deputies, but argues that it may be necessary to establish a mechanism to ensure that persons selected have both knowledge and expertise in WTO-related work and at the same time are supported by the countries of the region from which they come. For this purpose, the applications received for the post should be screened by a panel consisting of independent trade policy experts, and the Chairman of the General Council and some of the other councils (Rege 2002b).

Feedback on national legislation, regional/bilateral negotiations

The Adviser was often asked for comments and views on the drafts of new legislations in the field of trade and economic development that countries proposed to adopt, particularly with a view to ascertaining whether they were consistent with WTO rules. Likewise, some delegations requested his views on whether their approach in the negotiations for bilateral or plurilateral trading agreements was consistent with WTO rules. The delegations making such requests desired absolute confidentiality, as very often ministries in their governments took different positions on the issues on which opinion was sought and they did not wish these differences to become public.

Assistance for participation in opinion-forming seminars, workshops

Ambassadors from member countries of the Group often requested help in deciding on the approaches they could adopt on special trade and development problems of developing countries in high-level seminars or workshops arranged by academic institutions and research-oriented non-governmental organisations. The aim of the assistance was to ensure wider dissemination of the views expressed in the papers prepared by the Adviser for the Group on the possible measures that could be taken in the Round so that the trade and development interests of developing countries were fully taken into account.

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12

Main Features of the Assistance Provided in the Pre-Doha Period (1997–2001)

Introduction

Prior to the establishment of WTO, the multilateral trading systems consisted of GATT and of its associate agreements, which elaborated on some of its provisions. However membership of the Associate agreements was optional. As a result while all developed countries had become their members, only a few developing countries had acceded to them.

The situation changed dramatically towards the end of the Uruguay Round when the negotiations for the establishment of the WTO commenced. It was decided that since the multilateral trading system was a single undertaking, members of the WTO should be bound by all of its legal instruments. A large number of developing countries that had not acceded to the associated agreements of GATT suddenly found they were legally bound not only by the main provisions of GATT but also by its associate agreements. Simultaneously they became bound by the two other major legal instruments negotiated in the Uruguay Round and made part of the WTO system – GATS, which laid down rules applicable to trade in services, and the Agreement on TRIPS, which prescribed rules applicable in the area of trade-related aspects of intellectual property.

Thus, with the establishment of WTO the developing countries found they would have to broaden the institutional framework they had adopted at national level to deal with these additional legal instruments. Moreover they were required to post senior officials in Geneva who could represent them in the various committees that were established under the provisions of these legal instruments. These developments provided major challenges to the national administrations in most of these countries since they did not have in their bureaucracies, officials with the expertise in the various fields that were covered by the multilateral trading system. Indeed, broadening the scope of the multilateral trading system to cover trade in services and trade-related aspects of intellectual property rights implied that knowledge and understanding of WTO rules was necessary not only for officials from ministries with functions related to trade in goods, but also for officials from ministries dealing with the new subjects (e.g. ministries of finance, telecommunications and education).

Difficulties encountered by developing countries

As a result many of these countries faced serious problems in applying some of the rules of the various WTO Agreements at national level. These problems often arose because of the lack of expertise on the part of the officials in applying the rules. The preliminary analysis and examination of these problems, however, also revealed that the difficulties in applying the rules in certain areas arose because in formulating them, not enough attention was paid to the trading and administrative realities prevailing in developing countries. These countries therefore considered that it would be necessary in the work in WTO to give priority to identifying these problems and to securing changes in the rules that would go towards resolving these implementation problems.

These problems were further compounded by the decision taken at the first Ministerial Conference held in 1996 after the establishment of WTO, to include four new subjects for study and analysis – trade and investment, trade and competition policy, transparency in government procurement and trade facilitation – with a view to deciding on whether they should be taken up at an appropriate time for negotiations on rule making. This decision was taken following pressures from developed countries. By about the middle of 1997 the major developed countries also started pressing for a new round of negotiations to be launched as early as possible for further liberalisation of trade both in goods and services and for rule making in the new subject areas included in the work programme. They emphasised that the WTO member countries were under an obligation to launch such negotiations for liberalisation of trade in agricultural products and in services. This was because the Agreement on Agriculture and GATS provided that negotiations in the areas covered by them should commence within five years of them coming into effect – that is before the end of 2000. Instead of confining negotiations to these two subject areas it would be desirable if a round of negotiations covering subjects of interest to all countries, were launched in the near future (Rege 1998a).

In order to assist delegations from developing countries in dealing with the problems which they encountered as a result of these developments, WTO and other international organisations like UNCTAD adopted intensive programmes for holding workshops and seminars in developing countries, both at country and regional levels. These organisations also made efforts to provide on request assistance to these countries to build at national level the necessary institutional framework for co-ordination among the various ministries involved in WTO-related work and for the implementation of some of its rules.

However, most of the officials posted in Geneva from the developing countries found that while they had some knowledge of the rules of GATT and how it worked, they had very limited understanding of the detailed rules laid down in the associate agreements of GATT or of the rules of GATS and the Agreement on TRIPS. In the

situation, soon after the appointment of the Adviser, the Group decided that in providing assistance he should give priority to helping delegations to:

- Improve their knowledge and understanding of the WTO rules-based system and of the new subjects that were included in the WTO work programme for study and analysis;
- Decide on the approach they could adopt on the proposals that were being made for launching of a new round of negotiations.
- Identify the problems encountered in applying the rules at national level (Implementation Issues);

Following is an overview of the specific assistance provided under these priority areas.

Improving understanding of WTO rules and new subjects

To brief delegations and to improve their understanding of the rules of WTO system and of the issues that were under discussions, a two-pronged approach was adopted.

Background papers

First was the preparation of background papers that used simple language to explain the complex rules laid down in the various WTO Agreements. The subject areas covered included all of the associated agreements of GATT that were negotiated in the Uruguay Round, and the main features of GATS and of the Agreement on TRIPS.

In relation to the negotiations on new subjects to be included in the WTO work programme for study and analysis, papers were prepared providing an overview of the discussions that were taking place. These papers prepared by the Adviser summarised the views expressed in the papers prepared by OECD, UNCTAD and other organisations on the desirability and appropriateness of taking up these subjects for rule making in the WTO.

After the circulation of the papers meetings were arranged, first at the level of officials from the missions and later at Ambassador level, for briefings and discussions on the points made and issues raised. To facilitate attendance the meetings were held during lunch periods over a sandwich lunch.

In order to ensure that these papers were available for further examination at national level, to governments and also to the general public, these papers were included in the *Business Guide to the World Trading System* published by the Commonwealth Secretariat in co-operation with the International Trade Centre (Rege 1999a). The Adviser also met individually with officials who considered that they needed further clarification and information on certain aspects that were not fully covered by the papers, and where necessary made available to them the required additional information. The

practice was also adopted of holding special meetings every six months or so to brief new ambassadors and officials on the WTO system and its ongoing work.

Securing rule changes to find solutions for implementation problems

A comprehensive document prepared in April 1999 (Rege 1999b) provided members of the Group with a broad picture of the implementation problems confronting many developing countries. The document analysed on an agreement-by-agreement basis the problems these countries face in implementing the rules at national level or in taking full advantage of the benefits that were expected to accrue to their trade from the application of the rules by other countries. It included an easy access 'check-list' of the issues.

The document was well received by the members of the Group and some of the members – Kenya, Mauritius, Tanzania, Uganda and others – requested the WTO Secretariat to circulate it as a 'non-paper' to WTO members. The non-paper made a useful contribution in clarifying the nature of the problems encountered by developing countries and provided a basis for exchange of views on the modifications that needed to be made in the rules to find solutions to the problems.

As a result of the examination made at national level, countries belonging to African and other Groups tabled a number of proposals. The proposals set out specific suggestions for modifications of the rules in GATT and its associate agreements (such as those on technical barriers to trade, sanitary and phytosanitary measures, and customs valuation) as well as GATS and the Agreement on TRIPS. The main body responsible for negotiations on these proposals is the Special Session of the Committee on Trade and Development. The Special Session has developed a practice of referring the proposals that call for modifications in the rules of the associate GATT Agreements for examination at technical level by the Committees established under these Agreements.

Delegations from member countries of the Group often consulted the Adviser, both before submitting the proposal and during the negotiations to get his views on changes made by delegations. The negotiations have so far resulted in agreements being reached on over 75 per cent of the proposals that were tabled for modifications of the rules to make them more responsive to the needs of the developing countries. Negotiations to find solutions to the remaining proposals on implementation issues are continuing.

Adopting an approach on proposals for launching a new Round

The assistance provided for this purpose aimed to explain the techniques and modalities that could be adopted for negotiations on trade in agricultural and non-agricultural products and trade in services to ensure the development needs of developing

countries are fully taken into account. For this purpose detailed papers were prepared explaining the procedures that were adopted in the nine rounds of negotiations held since the establishment of GATT.

At the request of some members of the Group, papers were also prepared examining whether it would be desirable for developing countries to commence negotiations for liberalisation of trade among developing countries on a preferential basis, as a part of the negotiations to be held under the auspices of WTO. The framework for development of such trade among developing countries existed under the UNCTAD Generalised System of Trade Preferences (GSTP). The papers examined whether it would be in the interest of developing countries to negotiate in WTO for expansion of the country coverage of the GSTP and of the preferential concessions already exchanged as an integral part of a new round, in order to provide a more binding basis for the preferential concessions. These papers also examined whether negotiations for exchange of concessions on a preferential basis, on a multilateral basis among developing countries as a group, would help to mitigate the disadvantages some of them are likely to face as a result of the growing trend among developing countries towards forming regional economic groupings and providing for trade on a preferential basis among their members (Rege 1998b).

However, in the discussions that took place in the Group on the basis of the papers, some of the members considered that it would be desirable and appropriate to continue with such negotiations in UNCTAD. These members also considered that bringing the negotiations under the umbrella of WTO would not be viewed favourably by some of the developed countries.

Workshops

The work done on briefing delegations, through the preparation of papers and subsequent discussions in the Expert- and Ambassador-level meetings was complemented by workshops organised in two subject areas, Pre-shipment Inspection and Transparency in Government Procurement.

The main objective of the Workshop on Pre-shipment Inspection was to have free and open exchange of views on the effectiveness of the role played by the companies providing such services in achieving the objectives of increasing customs revenue and reducing corruption in the countries using them. The workshop also examined whether it may be possible for these countries to gradually reduce their dependence on such services by improving the capacities of their customs officials through computerisation of customs services and training of officials. The Commonwealth Secretariat published the report on the workshop as a book (Rege 2000).

The objective of the Workshop on Transparency in Government Procurement, held in July 2001, was to assist member countries of the Group to examine whether it would be possible for them to accept a discipline that would require the procurement

authorities in their countries to do away with the practice of purchasing goods locally, even though they were available at lower prices from foreign suppliers, in order to promote development of domestic industries. The Commonwealth Secretariat published the report on the workshop as a working paper (Rege 2001).

One of the special features of these two workshops was that the officials who had experience of work at national level in the subject area of concern were invited to present papers giving their views. The discussions were based on these presentations by the national experts and the keynote papers identifying the issues prepared by the Adviser. The invitees to the workshops included in addition to national experts and Ambassadors and officials from the Missions, representatives of WTO and other international organisations (e.g. WCO, World Bank, IMF, and UNCTAD) and of non-governmental organisations like South Centre and Third World Network. In the case of the Pre-shipment Inspection workshop, representatives of the Federation of Pre-shipment Inspection Companies were also invited to attend.

Identifying problems in implementing the rules at national level

To assist developing countries to deal with the problems they faced in implementing the rules a two-pronged approach was adopted. One approach was to arrange, where possible, training programmes on the new rules for officials. The second was to help them in securing changes in the rules that presented problems of implementation.

Training programmes

Two types of training programmes were arranged during the period of the project. The first aimed at providing training of officials from developing countries in practical application of the rules. The second aimed at improving the understanding of the trade policy officials of the rules of the WTO system, in areas selected by them.

Training customs officials in the practical application of the rules of the Agreement on Customs Valuation

In arranging these training programmes priority was given to training of customs officials in applying the rules of the Agreement on Customs Valuation. The subject of customs valuation was chosen in light of complaints by the customs administrations in a number of developing countries that the rules of the Agreement were suitable for application only by developed countries where, as a result of the low rates of duties, the practice of undervaluation of imported goods by traders was not prevalent. The application of the rules in their countries, however, presented serious problems to them as traders resorted to the practice of undervaluation of goods and other customs-related malpractices in order to reduce the duties on imported goods.

A four-week training programme for senior customs officials from 18 Commonwealth countries in Africa, Asia and the Caribbean was organised in Mumbai, India, in May 2000 in co-operation with WTO and WCO and experts from the India Customs Administration. The main responsibility for training was taken up by the India Customs Administration experts. It was decided to organise the training programme in a developing country like India rather than in a developed country because the similarities in the trading environment between India and the countries from which the officials came meant they were more likely to find the practices followed in applying the rules more relevant for situations in their countries than would be the case if training was arranged in a developed country.

The senior customs officials who participated found the training programme most useful in helping them to take steps for the application of the rules in their countries. The module that was developed for practical training at customs ports was used in follow-up seminars organised by the Commonwealth Secretariat (Sathapathy 2000a, 2000b).

Intensive training at policy level

A programme was also adopted for training of trade policy officials from the Commonwealth developing countries to improve their knowledge and understanding of the WTO system. The programme focused on specific trade policy issues that participants considered were of importance to their countries.

It involved six of the 30 or so officials from Commonwealth developing countries who attended a three-month training course organised by WTO in Geneva, in 2001. The Commonwealth Secretariat provided stipends for six of the participants to stay on for an extra week in Geneva for intensive briefing and training by the Adviser. For this purpose, each of the participants was requested to choose, before coming to Geneva and in consultation with their government, a WTO-related subject on which he/she would write an analytical paper. The subject chosen reflected those areas in which the country proposed to take measures for implementation of the rules or where it was facing implementation problems. The Adviser remained in touch with the participants on an informal basis during the period of the WTO course and provided them guidance and information on where and how they could obtain source material needed for the preparation of their papers. He also arranged expert-level briefings for them with the officials from the WTO Secretariat who were responsible for work on their chosen subjects. The Adviser spent the first two days of the extra week reviewing the draft papers in one-to-one discussions with the authors. Participants used the next three days to finalise their papers.

The programme was considered to be a very useful contribution, as it enabled officials attending the WTO training course to consider in more detail how to address some of the issues that might arise at national level in relation to the application of the

rules. Unfortunately, however, it had to be discontinued after two years of its operation, because of the disruption in mid-2003 that stalled the project (see Chapter 2).

Work under the Commonwealth/International Trade Centre joint project

At the time the Commonwealth Geneva project was established the Adviser was working on the WTO-related project jointly organised by the Commonwealth Secretariat and the International Trade Centre. It was decided that he should continue to work on these projects. The two organisations have published two books from the work done under this project.

The *Business Guide to the World Trading System* (Rege 1999a) explains in simple user-friendly language the rules of GATT and its associate agreements, GATS and the Agreement on TRIPS. While the rules are explained in a manner that is easy to understand, care has been taken to ensure that they correctly reflect the legal situation. Each of the chapters has a section that explains the implications of the rules for the business of trade. In addition to explaining the rules of the Agreement and the developments since WTO came into existence, the book provides an overview of the discussions that were taking place in the new subject areas that were included in the work programme of WTO for study and analysis: trade and investment, trade and competition policy, transparency in government procurement and trade facilitation. This part of the Guide was largely based on the briefing papers the Adviser prepared for briefing the Group.

The Rt Honourable Clare Short, UK Minister of Trade at the time, formally launched the book at a ceremony arranged in London by the Commonwealth Secretariat and the International Trade Centre. It has been well received not only by the trade officials and negotiators but also by the business community. The officials from the Geneva-based missions to WTO still find it a useful reference on issues under discussions and negotiations in the organisation. It has been translated into several languages including French, Spanish and Chinese.

Influencing and Meeting International Standards: Challenges for Developing Countries (Rege, Gujadhur and Fraz 2003) is the other book published under the joint Commonwealth–International Trade Centre project. The experience has shown it is not possible for a large number of developing countries to participate in the activities of international standardisation organisations because of the lack of financial resources and the required knowledge and technical capacities. As a result the standards and specifications they apply to their products are not fully reflected in the standards adopted by international standardisation organisations. This creates difficulties for in exporting to countries with technical regulations and SPS measures based on international standards.

In order to get further insight into the nature of the problems developing countries face in participating in international standardisation activities and in meeting international standards, the Commonwealth Secretariat and the International Trade Centre decided to undertake case studies in six countries. These case studies were undertaken separately by experts in the field of technical regulations and by those who had expertise in SPS measures. The Adviser in collaboration with ITC's Senior Adviser on Standards and Quality Management, Mr Shyam Gujadhur, prepared a report summarising the findings and conclusions of the case studies (Rege, Gujadhur and Fraz 2003). The report also identified the technical assistance that may have to be provided to developing countries to improve their participation in international standardisation activities and their capacities to meet technical regulations and SPS measures applied by countries to which they export. The report was reviewed and finalised at a meeting held in Geneva in which experts responsible for the preparation of case studies participated.

The report was published in two volumes. The first volume contains background information on WTO rules applicable in the area of technical regulations and sanitary and phytosanitary measures, findings from the case studies and recommendations on technical assistance needs. The second volume provides information on the constitution of the international standardisation organisations and on the procedures followed by them in formulating standards. The volume also contains reports of the case studies undertaken by the experts. The publication has been well received particularly by persons involved in standardisation activities and by trade officials and WTO negotiators associated with the work on technical regulations and SPS measures.

One of the important recommendations in the report is for the Commonwealth Secretariat and the International Trade Centre to establish 'mentoring and twining' arrangements to facilitate delivery of technical assistance by countries that have the capacity to provide it, to the countries needing such assistance. The role of the two organisations would be confined to bringing together the mentor country and the country or countries that are interested in twining with it. The countries involved would be left to negotiate the actual areas of assistance and the terms and conditions on which it would be provided. Developing countries could use the framework to obtain assistance to participate in the technical level discussions in international standardisation organisations on the formulation of standards as well as in other areas, such as adopting at national level technical regulations or sanitary and phytosanitary measures.

After the publication of the report, a workshop to examine how the recommendations contained in the report could be implemented and to decide on the programme for technical assistance was arranged in Geneva (22–24 June 2005). The workshop was attended by experts in the areas of technical regulations and sanitary and phytosanitary measures. The participants recommended early implementation of the recommendations in the report, particularly those relating to 'twining and mentoring'.

They noted that the arrangement could facilitate South–South co-operation as in most cases there was a considerable degree of similarity among developing countries in the standards and specification they applied to products produced and exported by them (ITC 2005).

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Glossary

Amber box: Category of domestic support considered to distort trade and therefore subject to reduction commitments.

anti-dumping duties: Article VI of the GATT 1994 permits the imposition of anti-dumping duties against dumped goods, equal to the difference between their export price and their normal value, if dumping causes injury to producers of competing products in the importing country.

Appellate Body: An independent seven-person body that, upon request by one or more parties to the dispute, reviews findings in panel reports.

binding, bound: See 'tariff binding'

Blue box: Category of permitted domestic support linked to production, but subject to production limits and therefore minimally trade-distorting.

Codex Alimentarius: FAO/WHO Commission that deals with international standards on food safety.

commercial presence: Having an office, branch, or subsidiary in a foreign country.

counterfeit: Unauthorised representation of a registered trademark carried on goods identical or similar to goods for which the trademark is registered, with a view to deceiving the purchaser into believing that he/she is buying the original goods.

countervailing measures: Action taken by the importing country, usually in the form of increased duties to offset subsidies given to producers or exporters in the exporting country.

Dispute Settlement Body: When the WTO General Council meets to settle trade disputes.

distortion: When prices and production are higher or lower than levels that would usually exist in a competitive market.

dumping: Occurs when goods are exported at a price less than their normal value, generally meaning they are exported for less than they are sold in the domestic market or third-country markets, or at less than production cost.

Enabling Clause: The legal basis for the extension of non-reciprocal trade preferences to and among developing countries.

food security: Concept that discourages opening the domestic market to foreign agricultural products on the principle that a country must be as self-sufficient as possible for its basic dietary needs.

Generalised System of Preferences: Programmes in which developed countries grant preferential tariffs to imports from developing countries.

geographical indications: Place names (or words associated with a place) used to identify products (e.g. 'Champagne', 'Tequila', 'Roquefort') that have a particular quality, reputation or other characteristic because they come from that place.

Green box: Category of domestic support considered not to distort trade and therefore permitted with no limits.

intellectual property rights: Ownership of ideas, including literary and artistic works (protected by copyright), inventions (protected by patents), signs for distinguishing goods of an enterprise (protected by trademarks) and other elements of industrial property.

least-developed countries: The 50 poorest developing countries, which have particularly weak economies, major institutional and human resource handicaps and often geographical disadvantages.

most-favoured-nation treatment: Principle of not discriminating between one's trading partners (GATT Article I, GATS Article II and TRIPS Article 4).

national treatment: Principle of giving others the same treatment as one's own nationals.

natural persons: People as distinct from 'juridical persons' such as companies and organisations.

non-paper: A paper or proposal prepared for consultation purposes without imposing a commitment on any of the parties involved. Non-papers in the WTO bear no regular document symbol but usually have a 'JOB Number'.

Non-tariff measures: Quotas, import licensing systems, sanitary regulations, prohibitions, etc.

offer: A country's proposal for further liberalisation.

Panel: Independent body consisting of three experts that is established by the DSB to examine and issue recommendations on a particular dispute in the light of WTO provisions.

Paris Convention: Treaty, administered by WIPO, for the protection of industrial intellectual property, i.e. patents, utility models, industrial designs, etc.

Pre-shipment inspection: Practice of employing specialised private companies to check shipment details of goods ordered overseas, e.g. price, quantity, quality, etc.

principle of exhaustion of rights: In intellectual property protection, the principle that once a product has been sold on a market, the intellectual property owner no longer has any rights over it.

request and offer: A common approach to negotiating market access on goods and services. Requests for reduced tariffs on specified products or improved access or conditions of establishment for services providers are exchanged by trading partners. These are generally followed by initial offers, after which bilateral negotiations seek to find mutually advantageous results.

rules of origin: Laws, regulations and administrative procedures that determine a product's country of origin. A decision by a customs authority on origin can determine whether a shipment falls within a quota limitation, qualifies for a tariff preference or is affected by an anti-dumping duty. These rules can vary from country to country.

safeguard measures: Action taken to protect a specific industry from an unexpected build-up of imports (governed by Article XIX of the GATT 1994).

sanitary and phytosanitary measures: Regulations to protect human, animal and plant life and health.

Schedule of Specific Commitments: WTO member's list of commitments on market access and bindings regarding national treatment.

small and vulnerable economies: This category of WTO members is undefined as the Doha Declaration called for a work programme to assist the integration into the multilateral trading system of 'small, vulnerable economies' (Para. 37) without the creation of a new sub-category of WTO members.

special and differential treatment: GATT provisions (Article XVIII) that exempt developing countries from the same strict trade rules and disciplines applied to more industrialised countries.

structural adjustment programmes: Policy reforms, such as liberalisation of the economy by reducing protectionism and state intervention, that impact and effect change in the basic framework of an economy.

subsidies: An **export subsidy** is a benefit conferred on a firm by the government that is contingent on exports. A **domestic subsidy** is a benefit not directly linked to exports.

tariffs: Customs duties on merchandise imports. Levied either on an ad valorem basis (percentage of value) or on a specific basis (e.g. $7 per 100 kegs.). Tariffs give price advantage to similar locally produced goods and raise revenues for the government.

tariff binding: Commitment not to increase a rate of duty beyond an agreed level. Once a rate of duty is bound it may not be raised without compensating the affected parties.

tariff equivalent: The level of tariff that would be the same as a given NTB, in terms of its effect (usually) on the quantity of imports.

tariff escalation: In a country's tariff schedule, the tendency for tariffs to be higher on processed goods than on the raw materials from which they are produced. This causes the effective rate of protection on these goods to be higher than the nominal rate and puts LDC producers of primary products at a disadvantage.

tariff line: A single item in a country's tariff schedule.

tariff peaks: Relatively high tariffs, usually on 'sensitive' products, amidst generally low tariff levels. For industrialised countries, tariffs of 15 per cent and above are generally recognised as 'tariff peaks'.

ratification process: Procedures relating to the agricultural market-access provision in which all non-tariff measures are converted into tariffs.

trade facilitation: Removing obstacles to the movement of goods across borders (e.g. simplification of customs procedures).

transitional economies: moving from being a controlled economy to being an open economy.

transparency: Degree to which trade policies and practices, and the process by which they are established, are open and predictable.

waiver Permission granted by WTO members allowing a WTO member not to comply with normal commitments. Waivers have time limits and extensions have to be justified.

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Deardorff's Glossary of International Economics: http://www-personal.umich.edu/~alandear/glossary/

Index

Negotiating at the World Trade Organization provides a unique insider's guide to the issues that have concerned developing country negotiators at that body since its establishment in 1995. Published in the Lessons from the Commonwealth series, it highlights the continuing issues that all delegations are grappling with, from a developing country perspective. It will be invaluable to those arriving in Geneva who need to brief themselves on the continuing story of the WTO negotiations, and those in national capitals in daily touch with their negotiating teams.

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