

WTO NEEDS RE-ORIENTATION - VAJPAYEE

Developed nations cannot sustain their levels of prosperity without making the developing countries their partners in collective progress, said India's Prime Minister, Atal Bihari Vajpayee. Addressing a meeting on "Concerns of Developing Nations in the WTO Regime" on 20 August in New Delhi, Mr. Vajpayee said the "partnership" had to be defined by a "non-discriminatory ethic of equitable and mutually beneficial multilateral trade and economic relations." The still unmet promises and unfulfilled obligations of the developed nations made in the Uruguay Round have cast the legitimate concerns of the developing nations into a sharper focus, Mr. Vajpayee said. Following are extracts from the Prime Minister's address to the conference organised by the Institute of Chartered Accountants of India, in collaboration with UNCTAD, Directorate General of Anti-Dumping and Allied Duties, and the Ministry of Commerce and Industry.

In less than three months from now, Doha will host the fourth Ministerial Conference of the WTO. The Governments of all the member countries of the WTO have been preparing seriously for this conference. People around the world will be keenly watching its outcome, their keenness matched by the intensity of their hope that Doha will not be a repeat of Seattle.

In particular, people in the developing countries, who constitute a majority of the world's population, would like to see that their concerns would be squarely addressed in Doha. These concerns are being voiced from numerous and diverse platforms - both governmental and non-governmental.

India's stand on the future evolution of the World Trade Organization is very clear. We have always been a votary of a well-regulated, rule-based multilateral trading system. We were a member of GATT since its inception and we are one of the founding members of the WTO.

We have always recognised that international trade can be a powerful engine of economic growth and social development around the world. However, this benign potential can be realised only if the world trading system is re-oriented

to make it just, rule-based, non-discriminatory, and dynamic.

The WTO is born into an unequal world, into a world divided among developed and developing countries. Amongst the latter, there are also the Least Developed Countries, whose combined population is significant.

Hence, the first mandate of the WTO was, and continues to be, to help bridge this developmental gap among nations of the world. The current inequalities and divisions, reflected in the poor human development indices of developing and least developed nations, are an affront to the collective dignity and ethical sensibilities of humankind.

Whatever may have been the historical causes for these inequalities, the new century can have no place for them. Therefore, India calls upon both the developed and the developing countries to collaborate to make the WTO work for the poor.

The new century has also brought another important global awareness to the fore. It is about the interdependence between the

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developed, developing and least developed nations. It has become impossible for the developed nations to sustain, leave alone increase, their levels of prosperity without making the developing countries their partners in collective progress.

It has also become apparent that this partnership cannot be defined by the old unequal rules of the game, but by the new, non-discriminatory ethic of equitable and mutually beneficial multilateral trade and economic relations.

It should be apparent to all that there cannot be equal treatment for all in a world that is essentially unequal. The principle of affirmative action justifies and demands reasonable protection for the developing nations and assistance for the least developed nations.

Six years of the existence of the WTO have not reduced the relevance of this principle in the least. On the contrary, the still unmet promises and unfulfilled obligations of the developed nations made in the Uruguay Round have cast the legitimate concerns of the developing nations into a sharper focus in the run-up to the Doha Ministerial Conference.

This is, indeed, the rationale for India's insistence that the incomplete agenda of the Uruguay Round should be first completed, before starting any new round of trade negotiations. India's position is shared by many developing nations, and also by many people in the developed nations.

At the same time, I would like to emphasise that India is prepared to engage constructively, and with an open mind, with the developed countries on all issues relating to global trade.

The chief concerns of the developing nations are well known

and have been forcefully articulated both in bilateral talks and in international forums. We are not in favour of inclusion of non-trade issues, such as labour and environmental standards, which may furnish scope for misuse as non-tariff barriers.

We are also concerned about the high tariffs imposed by developed countries on those products in which developing countries have a competitive advantage. For example, India faces unfair tariff and non-tariff barriers in steel, textiles, clothing, and leather products.

India recognises that protection of intellectual property rights is a legitimate concern of both developed and developing countries. We have recently modernised our patents legislation to make it compatible with the global trend and requirements.

However, an issue that should concern all of humanity is how advances in science and technology can affordably meet the basic needs of the poor and the deprived. I am especially referring here to two concerns in the Intellectual Property Rights regime.

First, there should be no misappropriation of the biological and genetic resources, and traditional knowledge of the developing countries. It is necessary, therefore, to mandate that patent applications should reveal the country of origin of biological and genetic resources and traditional knowledge used in the product or process for which the Intellectual Property Right is sought, and furnish a letter of informed consent from their legitimate custodians.

Second, it must be recognised that affordable access to medicines, including latest medicines, for life-threatening

diseases for people in developing countries is a universal human right. The Governments of these countries have a duty to ensure both availability and affordability for such medicines. The TRIPS Agreement should thus enable every member country to take a broad range of measures for protecting and promoting healthcare, both preventive and clinical.

The noble objective of "Health For All" is too important to be left either to chance or to future WTO jurisprudence. This is why WTO members should collectively recognise and confirm the considerable degree of flexibility offered by the TRIPS Agreement in this regard.

It is by now well-established that the Uruguay Round did not bring about trade liberalisation in agriculture to any appreciable extent. There were no significant reductions in domestic support or export subsidies by the developed world.

Although the Agreement on Agriculture gave detailed rules for international trade, it has had a limited success in opening the markets of the developed world to farm produce from developing countries. The expectations that the trade-distorting subsidies in agriculture given by developed countries would be reduced, have been belied.

Ours is primarily an agricultural society. Our farmers have two concerns, which also reflect the concerns of their counterparts in other developing countries. They, especially small and marginal farmers, would not like the WTO to expose them to unfair competition from subsidised exports and thereby undermine their livelihood security. At the same time, they would like to see all unfair barriers to their own farm exports removed.

The same is also true about our small-scale and cottage industries.

The first-ever Conference of the Chief Ministers on WTO and Agriculture, which was held in May this year, was a very useful exercise. It has resulted in the creation of a standing committee to create awareness about both the challenges and opportunities of the WTO for our farmers.

We have recently removed quantitative restrictions on a large

number of products and there has so far not been any significant surge in imports of these products. We hope that the opening up of the economy will result in greater choice for the consumer as well as encourage the domestic industry to increase efficiency and enhance its productivity for remaining competitive in the market place. We will not hesitate to take necessary steps to curb import surges, or dumping by foreign suppliers, which hurt our own producers.

The mandated negotiations on the Agreement on Services have already started in the WTO. It is crucial that in respect of each sector, our national position is determined after a wide consultation with the concerned domestic stakeholders. India has filed a proposal on the strategy for liberalisation of movement of professionals. We have also sought development of multilateral norms on recognition of professional qualifications.

HEALTH, INTELLECTUAL PROPERTY & HUMAN RIGHTS

The protection of IPRs under TRIPS presents a paradox for international economic law in that it runs against the basic tenets of liberalization and favours monopoly restriction and control, say human rights experts. In a progress report on 'Globalization and its impact on the full enjoyment of human rights,' submitted to the just-ended session of UN Sub-Commission on Human Rights, Special Rapporteurs J. Oloka-Onyango and Deepika Udagama maintain that the argument for stringent patent protection as essential to the promotion of innovation and invention is one that over-privileges the owners of capital. They also point out that TRIPS is as much about legal regimes as it is about political and economic power. Following are extracts from their report.

IPRs in general, and the TRIPS Agreement in particular, have significant implications for the full observation and protection of international human rights. Specifically, questions arise as to whether, in the first instance, TRIPS adequately balances the competing private and human interests involved in the IPR debate. Secondly, concern has been expressed as to whether the Agreement achieved the necessary balance between notions of individual versus group/community rights, and environmental conservation within the context of the sustainable use of biological diversity and the recognition of non-Western forms of knowledge generation, exploitation and protection. In the broadest sense, these issues are linked to discussions on the right to development. More specifically,

numerous other human rights, such as those to health, food, culture, adequate living standards and a healthy and sustainable environment, are also implicated in the debate.

TRIPS largely consolidates and strengthens previous international agreements on IPRs. In this respect, TRIPS is not substantially new. However, the most important implications for globalisation and the full observation of human rights of the Agreement lie in the universalisation, harmonisation and minimum-standards application of IPR protection and the method of enforceability through WTO dispute settlement mechanisms. In contrast to the rest of the agenda in the Uruguay Round, the negotiations over TRIPS were not about freeing trade. Rather, they were about more protection and tighter control.

What does this imply? Given the fact that TNCs are the holders of the largest percentage of IPRs, it is quite clear that the main thrust of the negotiations favoured the enhancement of monopoly corporate power. Concerns expressed about TRIPS promoting the concentration of ownership of IPRs in developed countries and powerful non-State actors are thus quite understandable. This is particularly the case because prevailing definitions of IPR take more account of the interests of the producers (or owners) of knowledge than they do the users.

A Paradox

In short, the protection of IPRs under TRIPS presents a paradox for international economic law in that it runs against the basic tenets

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of liberalisation and favours monopoly restriction and control. In respect of international human rights, since a patent holder can utilise the period of monopoly restriction to prevent competition, create dependencies, or to simply make windfall profits at the appropriate moment, such protection can have serious consequences for basic human existence. The danger is that such monopoly control can be given higher priority than ensuring the progressive realisation of the rights to health, food, access to information, and even the right to education. Such monopoly control can lead to the development of monocultures and the loss of biodiversity - thereby affecting the right to a livelihood for ordinary farmers and engendering conditions of dependency and unequal control that do nothing to aid the development of under-developed societies.

Because the standards adopted in the Agreement are derived, in the main, from developed country contexts and notions, TRIPS considerably increased the burden shouldered by developing and the least developed countries in respect of enforcing IPRs, despite the fact that the agreement contains several provisions, designed to allow countries to take measures shielding them from the adverse consequences of full IPR protection. But questions have been raised about whether these measures of protection are adequate, and whether the room for manoeuvre does not leave some ambiguity that could have negative repercussions for human rights. Coupled with these concerns is the fact that subtle and overt pressures exerted for conformity may override any attempt at restriction or regulation. Indeed, the hope that TRIPS would end (or outlaw) unilateral pressures on countries

to establish high levels of IPR protection has largely proven ill-founded. In other words, TRIPS is as much about legal regimes as it is about political and economic power. While it is quite obvious that the interpretation and implementation of the Agreement is in the hands of the States members of the WTO, differentials in power, influence and resources clearly place a limitation on the room for manoeuvre actually stipulated within the Agreement.

One of the most contentious human rights issues in TRIPS is the extension of the protection of patents to both products and processes, specified in article 27.1. Before TRIPS came into force, many developing countries allowed pharmaceutical processes to be patented, but not the final product. Others simply excluded medicines from the ambit of patents law. This made it possible to produce generic versions of patented drugs locally. In this way, not only could the cost of drugs be brought down, but the development of local capacity in technological innovation was also enhanced. Because of the TRIPS stipulation that patent protection should cover both imported products as well as those manufactured locally, some observers have argued that there is no need to work the patent on a product within the country granting the right. According to this argument, the company that controls the patent can supply global markets under the patent monopoly, exporting the finished product instead of transferring technology or making foreign direct investments (FDIs) in that country - a position that can have serious implications for the development of local technology, and several other areas of human livelihood. It also raises the issue of access to new, expensive technologies which may substantially improve the living conditions of the people. This issue

was at the heart of the recently withdrawn WTO dispute between the United States and Brazil. There, Brazil sought to impose a requirement in its national legislation that a product had to be produced locally (the so-called "local working" clause) as a precondition to granting a patent in Brazil. The issue remains a gray area because the suspension of the proceedings has meant that there is no authoritative interpretation of the provision. Needless to say, the fact that the United States could seek recourse to the WTO for the enforcement of a measure that could have serious consequences for the progressive realisation of human rights illustrates that, at a minimum, the protections in TRIPS are not watertight. Moreover, the settlement does not represent a shift in the United States position on the issue.

The specific debate about IPRs and health needs to be connected to the several challenges globalization in general presents to the realisation of the right to health. The World Health Organisation (WHO) notes that it is important to guard against the potentially grave consequences that could occur in a health market that is not appropriately managed, or, we may add, a market in which the motive of profit is paramount. In a context where health policy in many developing countries has been increasingly forced to respond to the demands of globalisation, the consequences are several, including the increased cost of hospital and other forms of health care, ambulatory services, and the privatisation of the care of aged persons. Furthermore, the payment of user fees for health care as well as medicine is related to the imposition of structural adjustment programmes (SAPs) in which government spending has been slashed or wholly eliminated.

All of these measures of economic reform have substantially (and mostly negatively) impacted on the progressive realisation of the enjoyment of the highest attainable standards of health as a fundamental human right, as stipulated in article 25.1 of the Universal Declaration and article 12 of the ICESCR (International Covenant on Economic, Social and Cultural Rights). The latter in particular stipulates that among the steps to be taken by States parties to achieve the full realisation of this right shall include those necessary for the "prevention, treatment and control of epidemic, endemic, occupational and other diseases" and the "creation of conditions which would assure to all medical service and medical attention in the event of sickness". Against such a background, IPRs have a particular relevance especially in developing and underdeveloped contexts. Increasing the standards of IPR protection may not necessarily improve the observance of human rights, especially if one considers the fact that only one per cent of the new chemical entities marketed between 1975 and 1997 related to tropical diseases. A strict regime of patent protection could mean that effective medicines are patent protected and thereby rendered prohibitively expensive. Finally, if the primary objective of protection becomes playing to the interests of those who control the market (rather than broader social goals), then the incentives for pharmaceutical companies to develop new drugs targeting so-called "unprofitable diseases" will be even more reduced.

TRIPS-Plus

The situation is compounded outside the arena of TRIPS because pressure is being exerted on countries to confer IPR protections that are more extensive

than those stipulated in the Agreement. This is within the framework of so-called "TRIPS-plus" contexts. Described by WHO as attempts to enact national legislation that extends the life of a patent beyond the TRIPS minimum of 20 years, limiting compulsory licensing in manners not necessarily mandated under TRIPS and imposing exceptions that may facilitate the prompt introduction of generics, such measures may result in an intensification of the overall struggle to promote and protect human rights. The application of extensive IPRs to emerging sectors of the global economy, such as e-commerce, is another such measure. The additional problem with these types of pressures is that they are mostly exerted in bilateral contexts where the room for flexibility is even more limited. Such concerns have been raised, for example, within the context of AGOA where, lured by the possibility of market access to the United States economy, African States may be forced to make concessions on the recognition and protection of IPRs that are higher than those stipulated in TRIPS.

Given the challenges presented above, numerous countries have designed legislation that may be considered more restrictive than the TRIPS Agreement permits. Many developing countries and LDCs are using mechanisms such as compulsory licensing and parallel (or "gray") market importation - the former involving a grant of a compulsory license before a patent expires, while the latter involves the importation of products from one country to another without the approval of the patent holder. Although not prohibited under the TRIPS Agreement, such measures have nevertheless resulted in contention between developing country Governments and multinational

pharmaceutical companies. Most contention has focused on the new lifesaving drugs intended for the treatment of HIV/AIDS. The most prominent of these pharma-battles have involved Kenya, India, Brazil, Ghana and South Africa, but they are not the only ones. In South Africa, the contention arose over the Medicine and Related Substances Control (Amendment) Act. From the perspective of the pharmaceutical companies, the most controversial provision was new section 15C, entitled "Measures to ensure supply of more affordable medicines". The pharmaceutical companies were of the view that the provision sought to give the Minister for Health powers to override patent and trademark rights at any time by mere administrative action.

The withdrawal of the case represented a significant success on the part of those seeking greater accessibility to drugs, particularly drugs for the treatment of HIV/AIDS which, until recently, were prohibitively priced. In short, it represents a victory for the progressive realisation of the right to health. However, these recent developments may be only a pyrrhic victory. Many observers have pointed to the fact that the withdrawal represents only a temporary respite: according to Samanta Sen, "the decision to withdraw was a tactical move, rather than a sudden and joint discovery of social responsibilities. There were indications enough from the court already that the verdict would go against the drug companies." While a number of European Union countries voiced their support for the South African legislation, the United States and the United Kingdom were notably silent. The United States even gave tacit support to the companies - illustrating in bold relief the nexus between corporate and State interests in the arena of

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international trade. That support is not likely to taper off, given the overall influence of corporate actors on these Governments, and the fact that prior to the case, the United States government attempted to exert bilateral pressure on the South African Government until the issue threatened to become a public relations disaster. The same issue was at stake with respect to the action by the United States against Brazil, which itself was preceded by similar action against India. In the case of Brazil in January this year, the United States initiated a formal complaint at the WTO against Brazil's Industrial Property Law of 1996, arguing, inter alia, that the law discriminated against imported products and that that violated TRIPS. Pending hearing of the dispute, pressure was stepped up in bilateral forums (as was the case with both India and South Africa), with Brazil being placed on the Special 301 "watch list" that permits unilateral trade sanctions. Even as the United States announced a halt to the WTO action it reserved the right to revisit the matter, even in bilateral forums. In the wake of these developments and severe criticism from all quarters, the pharmaceutical companies have gone on a public relations offensive - announcing several initiatives in HIV/AIDS prevention, research and treatment, and even offering their previously highly priced drugs at prices that match the generics, especially in several African countries.

The Differential Pricing debate

According to the WTO Secretariat, informing these discussions (differential pricing and in the TRIPS Council) is the search for a "balance" between the broader social and humanitarian goals of saving life (enshrined in article 7 of TRIPS) and the need to ensure that pharmaceutical companies are

not discouraged from invention and innovation. Although the need for balance is quite apparent, one cannot help but notice that there is a degree to which the issue of cost recovery and the protection of innovation and invention are given much greater prominence than is otherwise warranted; the scale appears tilted to one side. The profit motive (or indeed even the simple quest for recovery on investment) has never been the sole factor behind the drive for new inventions - whether in the field of pharmaceuticals or in any other area of technological invention. The near-exclusive focus on seeking a price reduction or market differentials in the cost of anti-retrovirals does nothing to address two major issues that relate to human rights. The first is the fact that even the reduced cost of the drugs may still be prohibitive to most HIV/AIDS sufferers, who are invariably poor and marginalised. This implies that the problem of access and (to borrow the phraseology of article 12 of the ICESCR) the attainment of "... the highest standard of health ..." has yet to be adequately addressed. Secondly, it continues the unequal reliance of developing countries on TNCs, without the accompanying transfer of technology and socio-economic and technological development mandated in articles 7 and 8 of TRIPS, and several articles of the ICESCR and the Declaration on the Right to Development. Such dependence further impedes efforts to find local or indigenous alternatives that may be less caustic, or without the negative side effects that are well known to accompany many of the anti-AIDS drugs currently available on the market. Taken as a package deal, the implications for the right to health are fairly clear.

There are additional human rights dimensions to the incentives/price differentials debate. First of all, a good number of the tests and

clinical trials for life-saving drugs are carried out on people who come from developing countries and LDCs, or from among the less-privileged in developed countries. Such input in the R & D process is seldom recognised. Ironically, it is the very same sort of people who offered themselves for the testing trials who are then eliminated from benefiting from the final drug on account of prohibitive costs and an iniquitous patents system. Secondly, the emphasis on R & D investment conveniently omits mention of the fact that some of the financing for this research comes from public sources; how then can it be justifiably argued that the benefits that derive from such investment should accrue primarily to private interests? Lastly, the focus on differential pricing between (rich and poor) countries omits consideration of the fact that there are many people within developed countries who are also unable to afford the same drugs. This may be on account of an inaccessible or inhospitable health care system (in terms of cost or an absence of adequate social welfare mechanisms), or because of racial, gender, sexual orientation or other forms of discrimination. Because the debate has been skewed mainly towards guaranteeing the protection of innovation and invention, it has yet to approach the issue in a holistic and human rights-sensitive manner.

Given all the above, it is the considered opinion of the Special Rapporteurs that the argument for stringent patent protection as *essential* to the promotion of innovation and invention is one that over-privileges the owners of capital. As we have already pointed out, these invariably happen to be multinationals. Other incentives can be put in place to encourage the development of effective drugs for illnesses like HIV/AIDS that could be considered to negatively impact on global human security.

Furthermore, there is the wider issue of social responsibility, which has earlier been invoked in relation to diseases like polio and which is currently driving many of the private- and public-sector responses to diseases like HIV/AIDS. The fact that many of the pharmaceutical companies that were extremely resistant to reducing their prices are now scrambling to match (and undersell) the prices of competing generics is a telling demonstration of the fact that the argument about R&D costs might not be as weighty as previously asserted. For these reasons, the discussion of price and market differentials - as pointed out by the African Group at the TRIPS Council meeting - should be considered only as "part of a broader set of initiatives to improve access to medicines". Such broader initiatives must include human rights indices in their formulation.

Patents on life

The issue of patents on life forms, plant varieties and technology based on indigenous people's knowledge without prior informed consent are among the most contentious issues in the contemporary debate about IPRs and the protection of human rights. A number of commentators have argued that article 1 of TRIPS is sufficiently wide to encompass the protection of traditional knowledge on the grounds that omission of any mention in the Agreement should not be considered as a bar to the enactment of protective legislation. Others have taken a contrary view, and urge that a more explicit stipulation would be required for the recognition of such rights. The fact is that this issue has not been prioritised within the framework of discussions about IPRs. At a minimum, the traditional IPR regime has some difficulty in recognising the concept of group

or collective rights which does not fit into the individualistic and private property-based approach to IPRs. Further concern has been expressed over the growing process of monopolisation that is taking place in the seed and biotechnology industries, accompanied by the increased use of pesticides and other methods of capital-intensive agriculture. The processes of "gene pirating" also have serious implications for farmers in countries where technological and industrial resources are simply inadequate to prohibit such piracy. Peasant farmers around the world are under increasing threat of simply being obliterated by the practices of corporate monopolies. The main fears expressed over these practices relate to exploitation and misuse of the enormous commercial and political clout that such entities are able to bring to bear on countries that do not possess similar resources.

It is quite clear that most of these problems predate the enactment of TRIPS: biopiracy - the exploitation and private appropriation of traditional forms of knowledge - is a practice that dates back centuries. Nevertheless, within the context of globalisation and the various substantive and processual frameworks created by TRIPS, these issues have gained in magnitude. It is for these reasons, among others, that a great deal of attention has come to focus on article 27.3 (b) of the TRIPS Agreement, which is basically concerned with the exclusion from patentability of plants and animals and the protection of plant varieties, either by patents, or through a sui generis system. A host of questions relating to biodiversity, the rights of farmers and farming communities, public health and the recognition of the processes of knowledge generation among traditional communities are

implicated in the debate on these issues. With respect to the introduction of either a system of patents for plant varieties or the design of a sui generis system, a major challenge faces countries (especially developing countries and LDCs) at two levels. The first is one of conception, wherein issues of food security, sustainable agricultural management and the development of environmentally sustainable crops are duly taken into account, and the matter is not reduced to the protection of the rights of commercial breeders. The second challenge relates to the political pressures being brought to bear on such countries to adopt regimes of protection that do not substantially differ from that of patents. Thus, many such countries are being urged to adopt the regime created under the International Convention for the Protection of New Varieties of Plants (UPOV) which favours plant breeders' rights. Such pressures could lead to the creation of monopoly rights in an area that will be of substantive importance to human well-being. Comparing IPRs to land rights, Prof. Cullet has stated: "The introduction of intellectual property rights in the management of biodiversity will have exactly the same drawbacks if the allocation of property rights is not undertaken specifically with a view to fostering the realisation of everyone's basic food needs". It is thus incumbent on such countries, as well as upon the TRIPS Council in its continuing review of the provisions of article 27.3 (b), consistently to retain a human rights-sensitive approach to this issue.

Discussions on this issue are taking place in numerous forums. For example, the African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources proposed by the

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Organisation of African Unity (OAU) seeks to strike a balance between protecting local communities, farmers and breeders and the regulation of access to biological resources, in line with the Convention on Biological Diversity (CBD). The issue of protecting plant varieties and the numerous ethical, political and human rights questions

related to it has attracted nearly as much attention and controversy as the contention over pharmaceuticals. There is no doubt that from a rights perspective, it is of equal importance and vitality to the overall discussion of the link between IPRs and human rights. In this respect, it will certainly be a major discussion-point at the

fourth WTO Ministerial Conference, scheduled to be held in November this year in Doha, Qatar. It is thus incumbent upon the international community to actively monitor and contribute to the discussions on this issue in order to ensure that the human rights perspective is kept in sight.

SOME BASIC INCONSISTENCIES OF TRIPS

*On 20 September 2001, the WTO Council for TRIPS will hold its second major discussion on the issue of public health and access to medicines. There was an overwhelming response from developing country members to the first such meeting held on 20 June. While many countries expressed their views and interpretations of the various provisions of the TRIPS Agreement, the **Indian delegation** pointed out some of the inherent inconsistencies in provisions that constitute the building blocks of TRIPS. Rectifying those anomalies should form part of the mandate of the special discussions being conducted by the TRIPS Council, it was pointed out. Following are the areas highlighted.*

Circular Reasoning

Protection of public health and nutrition is a fundamental principle governing the TRIPS Agreement and is reflected in Article 8. The TRIPS Agreement grants WTO Members the right to adopt measures necessary to protect public health and nutrition. But it does add that such measures would have to be consistent with the provisions of the TRIPS Agreement.

This is a rather curious formulation. There is no need for a provision in an Agreement to say that you are "OK" as long as you are consistent with the Agreement. Besides, a principle which, *inter alia*, incorporates an element of exception as well, cannot be tested against the yardstick of consistency with other provisions of the Agreement.

Environment above human life?

Moreover, in areas like protection of environment (protection of plant and animal life), Article XX of the GATT gives Members the right to deviate from fundamental principles such as MFN and national treatment,

provided the requirements in the Chapeau of Article XX which relate to avoidance of arbitrary or unjustifiable discrimination or disguised restriction on international trade are met by the Member.

If this is so in the case of environment, it seems strange that for protection of human life which is perhaps equally, if not more, important, the TRIPS Agreement appears to suggest that Members can protect public health only if the measures taken by them are consistent with the TRIPS Agreement. The implication is that, if by any chance the measures taken by a Member are deemed inconsistent with the TRIPS Agreement, then it would not be possible for that Member to have to resort to those measures to protect public health.

One of the most vehement criticisms against the TRIPS Agreement is by those who perceive it to be placing protection of public health on a lower level of priority and giving utmost pre-eminence to protection of the rights

of the right holders. This needs to be remedied. Both protection of the rights of the right holders and protection of public health are important objectives in themselves and one cannot be espoused at the expense of the other.

Differentiated treatment to human health

In Article XX of the GATT, protection of human health is considered an exception and hence entitles the Members to be exempt, under some carefully defined circumstances, from the disciplines and obligations of GATT. If this is so in the case of GATT 1994, it seems odd that in the case of the TRIPS Agreement there is a requirement that in all circumstances the measures that a Member takes to protect human health have to be consistent with the TRIPS Agreement. It would appear that in the very same organisation, that is WTO, the way in which protection of human health is dealt with in the two Agreements, namely GATT and TRIPS, are different.

Defining consistency

Finally, is there a common understanding among all WTO Members as to what constitutes "consistency" with the TRIPS Agreement? Is it possible or conceivable that a measure taken by a WTO Member in good faith to protect public health within its

territory is considered "not consistent" with the provisions of the TRIPS Agreement by either another Member or indeed by a dispute settlement panel? It is important that this meeting be considered the beginning of a process which will eventually come up with a clear common understanding among WTO

Members as to what constitutes consistency with the TRIPS Agreement. In other words, the TRIPS Agreement should offer every Member a wide and broad range of measures for protecting public health. This issue is too important to be left either to chance or to future panels.

BRAZIL TO ABROGATE PATENT TO CUT COST OF AIDS FIGHT

*Hailed around the world as having one of the most successful AIDS-control programmes - treating patients for free - Brazil's fight to sustain its success has not been easy. The bulwark of this fight has been the country's ability to produce drugs locally and negotiations to reduce prices of imported drugs. On both these fronts, Brazil is under pressure. The United States has challenged the Brazilian Intellectual Property Law which calls for 'local working' of patents. And last week, on 22 August, following six months of negotiations, Brazil announced it would make its own version of drug Nelfinavir, held under patent by the Swiss pharmaceutical giant Roche. Of course, Roche will continue to supply the drug until December 2001, when the current contract ends. The generic version of Nelfinavir will be manufactured by the Brazilian government laboratory Far-Manguinhos, effectively saving 40 per cent in costs, and it will begin to be distributed in February 2002. The threat of using 'compulsory license' apparently worked with the U.S. drug company Merck, as the following article, drawn from a recent report on impact of TRIPS by **Mary Robinson, the UN High Commissioner for Human Rights**, shows.*

There are currently 536,000 people with HIV in Brazil, according to the Ministry of Health. There have been 196,000 notified cases of AIDS and 95,000 deaths, while 85,000 people are currently receiving approved combination therapies for HIV under the Brazilian Free Distribution of AIDS Drugs for All programme.

Currently, the government provides 12 different pharmaceuticals as the basis of the combination therapy, 7 of which are produced in Brazil - the other 5 are imported. The advantages of local production are significant. Today, the Government spends \$319 million on purchasing local and imported drugs to supply its HIV programme. The Ministry of Health estimates that if all those drugs had been imported, the cost to the Government would be in the range of \$530 million which, according to the Ministry, would make the programme unviable. It should be noted that Brazil already

spends 56 per cent of its annual expenditure on its HIV programme on the 5 imported drugs included in the 12 drugs comprising the "cocktail".

Of the 12 therapies, 2 are protected by patents in Brazil (Efivirenz and Nelfinavir, held by Merck Sharp & Kohme and Roche, respectively). While some of the seven drugs produced locally are protected by off-shore patents, production began before 1997 (the year in which the Brazilian patents law entered into force) so the local production does not infringe the rights of overseas patent holders. However, significant expenditures are incurred in relation to the purchase of the two patented drugs. The Ministry of Health indicates that purchase of the two patented drugs through importation has alone consumed 36 per cent of the resources of the HIV treatment budget. With the appearance of new and more effective drugs for combating AIDS, the Ministry of

Health estimates that more expensive drugs protected by patent will slowly begin to comprise the combination therapy. This development, according to the Ministry of Health, could place their HIV treatment programme at risk.

For this reason, the Brazilian Government has sought ways to encourage the international pharmaceutical industry to enter negotiations for the sale of drugs, taking into account the purchasing power of particular markets. In this regard, Brazil makes specific reference to the UNDP Human Development Index as an indication of relevant purchasing strength. To do this, the Government notes that it will employ all available resources in Brazilian legislation - while observing the international undertakings entered into by Brazil - to make drugs accessible to their citizens. Part of this strategy has involved the Brazilian Intellectual Property Law which came into force in 1997.

(continued on next page)

The Brazilian IP law allows a government authority to issue a compulsory licence where a patent holder exercises patent rights in an abusive manner, or by means of an abuse of economic power proven by an administrative or court decision. There are certain other instances where compulsory licences may be issued, including under article 71, in cases of national emergency or public interest. The terms "national emergency" and "public interest" are defined in the Presidential Decree on Compulsory Licensing (1999). According to the decree, "(a) national emergency is understood to be a condition of impending danger to the public, even if existing only in a part of the national territory". Further, "(t)here are considered to be within the public interest those facts, among others, related to the public health, nutrition, protection of the environment, as well as those of primordial importance to the technological or social and economic development of this country". This links closely with provisions of the TRIPS Agreement which allow for use of a patent without the authorisation of the right holder in certain circumstances, including "in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use".

The existence of these safeguard provisions has been

helpful in improving the implementation of the Brazilian HIV treatment programme. While no compulsory licence has been issued under the Brazilian IP law (until now), the provisions have been useful in negotiations with patent holders. The use of rights over the two patent drugs Efavirenz and Nelfinavir are cases in point. In the case of Efavirenz, the Government had begun research into the drug with the aim of achieving full capability to manufacture it locally. With local manufacture in mind, a request to issue a compulsory licence for the drug had also been submitted. Since the agreement with the patent holder (to lower prices), the request for a compulsory licence has been put on hold, but research is continuing in case the Government finds it necessary to issue a compulsory licence in the future. In the case of Nelfinavir, while negotiations for a decrease in prices were continuing, the Government continued research into the production of the drug and the Ministry of Health had indicated that, if negotiations did not lead to a significant decrease in price, it would consider requesting a compulsory licence so that Nelfinavir can be produced by national laboratories.

The results of the Brazilian strategy have been significant. In terms of the enjoyment of Brazilians' right to health, there

has been a reduction in deaths due to AIDS by 50 per cent over the last four years. Further, there has been a reduction of 80 per cent in cases of hospitalisation due to opportunistic diseases with a reduction in the appearance of the most serious opportunistic diseases tuberculosis (by 60 per cent), cytomegalovirus (by 54 per cent) and Kaposi sarcoma (by 38 per cent). The programme has also made economic sense. The reduction in hospitalisations has saved the Ministry of Health \$422 million. Moreover, costs of funding the programme are coming down. In 1999, the Ministry of Health spent \$ 336 million on drugs to reach 73,000 patients. In 2000, the Ministry spent the lower amount of \$319 to meet the needs of 85,000 patients. Local production of generic drugs has led to production cost cuts of, on average, 70 per cent (the reduction in the price of Zalcitabine (ddC) has been 95 per cent) and the Government has even achieved a reduction in the price of imported drugs of an average of 10 per cent. In the longer term, the programme has improved local technological and research capacity, which could enable it in the future to assist developing countries struggling with the HIV/AIDS pandemic, in particular countries in Africa.

TECHNOLOGY TRANSFER STOPS AT PAPER PROMISES

According to the latest Human Development Report 2001 produced by the United Nations Development Programme, commitments to technology transfer, which can be found in so many international agreements including TRIPS, are hardly implemented - reducing them to mere paper promises. These promises are normally used to lure developing countries to join in new and emerging international legal instruments. Following is an extract from the report.

Commitments to technology transfer are central to many international agreements. But once the negotiations are over, many of these provisions are ignored or implemented only superficially.

The World Trade Organization's TRIPS Agreement calls for developed country members to "provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to

least-developed country members in order to enable them to create a sound and viable technological base". Yet the obligations that this entails have received inadequate attention and action.

The *Montreal Protocol on Substances that Deplete the Ozone Layer* commits industrial countries to take every practical step to ensure that the best available environmentally safe substitutes and related technologies are quickly transferred to the protocol's signatories, and that the transfers occur under fair, favourable conditions. Yet DuPont, holder of the patents on CFC substitutes, refused to license production of those substitutes to manufacturers in developing countries such as

India and the Republic of Korea, where the high cost of importing these chemicals limited the widespread diffusion of an environmentally sound technology.

The Convention on Biological Diversity seeks to conserve biodiversity, sustainably use its components and promote the fair sharing of the benefits arising from the use of genetic resources - including through appropriate funding and the appropriate transfer of relevant technologies. The

convention established a subsidiary body to identify innovative, efficient, state-of-the-art technologies and know-how relating to the conservation and sustainable use of bio-diversity and advise on ways of promoting the development and transfer of such technologies. But most of the focus has been on biosafety - important, but just one of many functions needed to make technology support the preservation of biodiversity.

LESSONS FROM THE HISTORY OF INTELLECTUAL PROPERTY RIGHTS

Technology transfer played a central role in the industrial revolution but intellectual property protection was by no means the only route, nor was it always respected.

Until the mid-19th century the most important means of technology transfer was hiring skilled workers who brought needed technological knowledge. Skilled workers from industrially advanced countries were in high demand, resulting in government action. In 1719 French and Russian attempts to recruit British workers - especially those skilled in wool, metal and watch-making industries - prompted the British government to ban skilled worker migration, making it punishable by fine or even imprisonment.

Emigrant workers who failed to return home within six months of warning could lose their land, property and citizenship. As technologies became embodied in machines, the focus shifted to controlling their export. In 1750 Britain banned the export of "tools and utensils" in wool and silk industries, then in 1781 widened that to "any machine, engine, tool,

press, paper, utensil or implement whatsoever". But in response, entrepreneurs and technicians in Belgium, Denmark, France, the Netherlands, Norway, Russia and Sweden devised new ways to get the technologies, often with explicit state consent or even active encouragement, including offers of bounty for specific technologies.

By the mid-19th century key technologies were too complex to acquire by hiring workers and importing machines, and licensing patents became increasingly important. Most of today's industrial countries introduced patents by 1850, followed by copyright and trade mark laws. But there were important exceptions.

Swiss patent law was weak until 1907 - when Germany threatened trade sanctions - and did not cover chemicals and pharmaceuticals until 1978. The United States, despite being a strong proponent of patent rights, did not recognize copyrights for foreigners until 1891.

Despite the emergence of international intellectual property rights among these countries, they continued to break the rules. In the

late 19th century German manufacturers found ways of infringing on British trademark laws, producing counterfeit Sheffield cutlery with fake logos and placing the stamp of country of origin only on packaging, or hidden out of sight - as on the bottom of sewing machines.

What implications does this history have today?

First, tight and uniform intellectual property rights were not the only way technologies were transferred between today's industrial countries - despite arguments often made by these countries about the importance of the TRIPS agreement.

Second, each country crafted its own path, at its own pace, in introducing intellectual property protection - highlighting the importance of countries creating their own strategies today, even within the multilateral regime.

(Source: *Human Development Report, 2001*)

USDA LICENCES TERMINATOR TECHNOLOGY

Aug - (South Development News) -- The US Department of Agriculture decision to license the notorious Terminator technology to its seed industry partner, Delta & Pine Land (D&PL) has come in for sharp criticism from the Canada-based Rural Advancement Foundation International (RAFI).

"Terminator technology has been universally condemned by civil society; banned by international agricultural research institutes, censured by United Nations bodies, even shunned by Monsanto, and yet the US government has officially sanctioned commercialization of the technology by licensing it to one of the world's largest seed companies," said Hope Shand, Research Director of RAFI.

As a result of joint research, the USDA and D&PL are co-owners of three patents on the controversial technology that genetically modifies plants to produce sterile seeds, preventing farmers from re-using harvested seed. Although many of the Gene Giants hold patents on Terminator technology, D&PL is the only company that has publicly declared its intention to commercialize Terminator seeds.

Delta & Pine Land (Mississippi, USA) is the world's 9th largest seed corporation, with revenues of \$301 million in 2000. The company has joint ventures and/or subsidiaries in North America, Brazil, Argentina, China, Mexico, Paraguay, South Africa, Australia, and China.

TRADING IN GREENHOUSE GAS EMISSIONS

Geneva, 27 Aug (SDN) -- The Fifth Policy Forum on Trade and Climate Change will be the 'State of the Greenhouse Gas Market,' in Rio de Janeiro, Brazil, from 29 to 31 August, according to UNCTAD.

The forum will focus on the three Kyoto Protocol market mechanisms: emissions trading, joint implementation, and the clean development mechanism available to countries to meet their commitments under the Protocol.

It has been estimated that the potential for investment in emissions reduction projects in developing countries could reach \$10 billion annually in the coming years, representing 35 per cent of the future carbon market.

The actual amount invested, however, will depend largely on how well the public and private sectors in these countries are prepared for this emerging market. For GHG-exporting countries, building capacity for project formulation, certification and trading of emission credits is of the most immediate interest. Countries must also conduct regular inventories of their greenhouse gases to ensure that the credits sold become valuable and exchangeable on the world market.

There is a huge market in developing countries for energy-efficient technologies and sustainable energy sources. On the private sector side in exporting countries, a strong incentive for participation is the lure of

technology transfer, UNCTAD notes. Businesses in these countries will be the local actors implementing the offset projects where the actual emissions reductions will occur. But for this to take place, the capacity-building needs of these businesses must be addressed.

A number of developed countries, including the UK, the Netherlands, Norway, Denmark and Australia, have begun establishing domestic emissions trading systems. Such systems should motivate companies to reduce their emissions and sell the surplus allowances. Another area of increasing interest which will also be explored at the forum is importing GHG offset credits from developing countries. Early domestic experiences in this field will provide valuable lessons for setting up a future international trading system and illustrate some of the challenges ahead for integrating the various domestic programmes into an international framework.

The meetings at the Rio Forum, however, will be conducted on an 'off-the-record' basis, says UNCTAD.

NEW UNCTAD STUDIES

Geneva, 28 Aug (SDN) -- As part of its series on Issues in International Investment Agreements (IIAs), UNCTAD has just published two new studies: one on the 'environment' and the other on 'social responsibility' arising from economic and social impacts of Transnational Corporations (TNCs).



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