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This issue focuses on the report of the Commission on Intellectual Property Rights (CIPR).

RESPECTING THE IPR COMMISSION'S FINDINGS

In line with her much publicised vision of a "Development Round", Clare Short, the UK Secretary of State for International Development, established the Commission on Intellectual Property Rights (CIPR) in May 2001. The Commission has delivered its report which is about integrating intellectual property rights and development policy. But now the onus of following up on the recommendations rests largely with the two Geneva-based multilateral fora - the World Trade Organisation and the World Intellectual Property Organisation. The presence and participation of the director generals of the two organisations at the Geneva launch of the report signifies the importance they both attach to the opinions expressed by the Commissioners.

For a number of non-governmental organisations concerned with the worldwide tightening of intellectual property regimes and their impacts on peoples' lives and economic development, the findings of the Commission come as great relief. This is because in many ways the Commission has mirrored their concerns as well, just as it has recognised the positions a number of developing countries have maintained over the years. The most notable discordant note was struck by a senior representative of the 'research-based' pharmaceutical companies. He said the CIPR "failed completely in its Report to address how TRIPS relates to addressing a growing threat to developing country consumers and to consumers around the world - the deadly trade in counterfeit medicines." The representative also reminded the audience at the Geneva launch of the report that one of the driving forces for establishing the TRIPS Agreement in the first place was this concern of the pharmaceutical companies over 'counterfeit drugs'! Indeed, had the TRIPS Agreement

been just about checking trade in counterfeit goods, many of the tensions it has generated would not have existed. A majority of the WTO negotiators from the South could have concentrated their energy on more constructive, development-oriented trade regimes.

In fact, only last month (22 August), along with the secretariat of the World Health Organization, the WTO brought out a thick glossy publication "WTO Agreements & Public Health." This attempt to show that the two are compatible, while in the TRIPS Council the issue proves painfully difficult to resolve, was taken at the instance of the WTO secretariat itself, not its membership. And while the WHO still awaits 'evidence' to show that patents will lead to a rise in prices of essential drugs, the renowned experts of the CIPR say "the evidence also suggests that patent protection has an effect on the prices charged for medicines."

The real worth of the Commission's recommendations depends on the whether the WTO and the WIPO will actually heed the Commission's advice. If they are sensitive to the recommendations contained in the report, the Commission will have served to advance the objectives and principles of WTO's TRIPS Agreement and correcting the direction of the expanding Patent Agenda of the WIPO. That you cannot just do whatever needed to save human lives by way of industrial and trade policy says as much about these restrictive policies as about the priority now given to saving people. The harsh truth may be that the health of hi-tech industries has assumed greater importance than the health and well-being of billions of human beings.

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THE CIPR REPORT : DIRECTIONS FOR WTO & WIPO

After 15 months of investigating how intellectual property rights (IPRs) can work better for developing countries and for poor people, the Commission on Intellectual Property Rights (CIPR) published its final report on 12 September, 2002. The Geneva launch of the report on 16 September brought together the Commissioners of the Report and the British Secretary of State Clare Short, who had established the Commission, and the Director Generals of the World Trade Organisation (WTO) and the World Intellectual Property Organisation (WIPO). The Commission was tasked with considering whether and how IPRs could play a role in helping poor communities reduce poverty, combat disease, improve health, enhance access to education and information and contribute to sustainable development. The following reaction to the report has been prepared by **Sisule F. Musungu, South Centre Consultant** on Intellectual Property.

The report identifies critical areas of intersection between IP policy on patents, copyright, TK and access to genetic resources on the one hand, and the overall development policies of developing countries on the other. Most of the concerns identified have been voiced by developing countries over the last three or so decades starting in the 60s at the time WIPO was being established and later in WIPO and then in the WTO and other international fora such as at the UN Food and Agriculture Organisation (FAO). The underlying concern has been that while business interests in developed countries have pushed for harmonisation and wider coverage of IP, the resultant erosion of the concept of territoriality in IPRs has not been matched by the expansion of the concept of societal benefits arising out of IPRs. The latter has remained territorial with the result that while developing countries have to share in the cost of protection, their share of benefits is dismal. The Commission characterises this as the unequal sharing of benefits and costs of the IPR system. Hence, while developing countries have to pay for the cost of protecting developed country right holders; there are no corresponding obligations on these right holders or their countries to spread the social benefits to developing countries.

While the report has been hailed by many in the development community, in typical fashion, it has been characterised as "dangerous

for economic development" by the International Federation of Pharmaceutical Manufacturers Association (IFPMA). In assessing the contribution of the report to the current debate about the role of IP in developing countries, it is important to remember, however, that the Commission did not just legitimise the arguments of one side. The conclusions reached were based on empirical evidence or where there was no data the conclusions were based on a balance of probability. Hence, to ignore the compelling evidence presented by the Commission as the IFPMA does, will not change the evidence. For developing countries the report is not necessarily radical in shooting down the orthodoxy that more and more IPRs are better and better for all countries. Radical or not, the report's main contribution is that it moves the debate on IP and development to a new level.

In the foreword to the report, Sir Hugh Laddie points out that "*there are few concerned with IP who will find that this report makes entirely comfortable reading.*" Many of us should indeed feel uncomfortable reading the report. It is not only those adhering, rather blindly, to the current IP dogma who should feel uncomfortable but also those whose views may be fully in concert with the Commission's findings. For those seeing the report as just repeating what they have been saying all along, they should feel uncomfortable too. The value of the report lies in the focus and

clarity it brings to the debate. What the report tells developing countries is that the evidence is on their side. An increasing number of other analyses including such seminal works as Dr. Ha-Joon Chang's "*Kicking Away the Ladder*" give the same message. The report moves the debate from the stage of arguing whether or not developing countries and LDCs need the same type of IP incentive system as the US (the one size-fits-all approach) to a stage where we have to focus discussions on how to develop a system that responds to developing countries' and LDCs' specific circumstances. We no longer have to continue to argue whether or not patents have something to do with the difficulties of access to medicines in poor countries.

Development-Oriented IP System

In the current debate on the benefits and costs of IP in developing countries and LDCs, it is difficult to isolate the importance of IP as a variable of development since IPRs are just one policy tool. The Commission's evidence-based analysis, however, provides a powerful basis to conclude that it is no longer defensible to argue, as WIPO does, that "the questions as to whether patents are relevant to developing countries or whether the current patent system is incompatible with developing countries economic objectives are pernicious myths." The report arrives at a host of very

useful conclusions and makes comprehensive recommendations on a wide set of issues including the evidence on the impact of IP on development; public health; plant genetic resources; the protection of TK; copyright, software and the internet; patent reform; developing countries' institutional capacity in IP policy and regulation; and the international IP architecture.

Four basic themes underlie the findings and the conclusions of the Commission: a) the current concern about the global ratcheting up of IP standards driven by insufficiently circumscribed business interests in the North is by no means limited to developing countries. There are, for example, on-going inquiries in the US by the Department of Justice and the National Academies of Science relating to the rapid increase in the number of patent applications and the concern that many more low-quality and broad patents are being issued; b) As is the case with many other areas of international trade regulation today, developing countries are by no means homogenous and the level of IP that is good for each is very different; c) The optimal IP system in developing countries and LDCs depends on the specific circumstances and the economic and technological needs of each - in particular, how appropriately IP is situated in the overall development strategy of the country; and d) The optimal structure of IP will vary with sectors and levels of development.

Having analysed the rationale for IP protection, particularly in relation to patents and copyrights, the history of the current system and the evidence about the redistributive impact, growth and innovation, trade and direct investment and technology transfer, the Commission arrives at specific and thought provoking conclusions.

TRIPS and Public Health

The effect of IP on access to healthcare in developing countries has attracted the most debate and has elicited the most political action at the international level ranging from the WTO's Declaration on TRIPS and Public Health to the UN Economic and Social Council's (ECOSOC) resolutions on IPRs and the right to health. It is not surprising, therefore, that while the report provides a fairly thorough review of the arguments on issues such as the concentration of pharmaceutical research and development, the relevance of the prevalence of patenting in poor countries particularly in Africa and the correlation between patents and prices, to a large extent, the report does not say much that is new. One issue that the commission covers under this Chapter is, however, worth some discussion: the search for a solution to the problems faced by countries with insufficient or no manufacturing capacity in the pharmaceutical sector making effective use of compulsory licensing as a public health policy tool.

After analysing the various proposals that the TRIPS Council has been considering since March this year, the Commission was careful not to recommend a particular approach. While it should be left to everyone to judge the wisdom of this approach, the Commission places the emphasis where it should be. A lot of the arguments about articles, interpretation, amendment, moratorium etc. have been largely legalistic and have probably been overblown. The usefulness or otherwise of whatever solution is found will be measured in terms of its economic viability and not its legal finesse. The proposal by the Commission that small markets are grouped together to allow for economies of scale and a degree of competition, should be

taken seriously. The solution arrived at will have to provide those countries with insufficient or no manufacturing capacity both short-term and long-term policy leverage.

TK, Genetic Resources and Benefit Sharing

The report recommends that in respect of TK there is a lot to gain by considering the issues that have arisen in a number of international fora, while ensuring that coherent approaches are developed and efforts are not duplicated. In large part, this addresses the debate as to whether WIPO or WTO is best suited to deal with TK. Developing countries have already taken the dual approach with the efforts at WTO mainly being aimed at measures to prevent misappropriation of TK while the efforts at WIPO are more geared towards developing a *sui generis* system of positive TK protection. However, to fully pursue their agenda in multiple forums will require increased efforts by developing countries to coordinate their positions to ensure best results in each forum, deal with forum shifting and avoid burdensome negotiations. It will be critical, therefore, that developing countries identify and define the issues to be addressed and the fora in which each of the issues needs to be addressed.

Restricting its investigation to how the current IP system can be used to ensure the protection of TK, the Commission also recommends that with the wide range of materials and diverse reasons and values for protecting TK, a single all encompassing system of protection may be too specific and not flexible enough to accommodate local needs. While agreeing that digital libraries of TK should form part of the minimum search documentation for prior art under the Patent Cooperation Treaty (PCT) system

and for national patent offices, the Commission rightly cautions that TK holders should have the final say as to whether their knowledge should be included in databases. With regard to benefit sharing, the Commission agrees with the longstanding contention by developing countries that the first step in preventing misappropriation and ensuring equitable benefit sharing is to require that patent applicants disclose the geographical origin of genetic materials and associated TK and provide evidence of prior informed consent for use of the material and equitable sharing of benefits. However, the concern still remains that even in the face of this overwhelming evidence these areas of interest to developing countries may continue to be characterised by high levels of dialogue with few concrete outcomes.

Copyright, Software and the Internet

Unlike patents and TK, the impact of the TRIPS rules on copyright and the WIPO internet treaties in developing countries has been largely missing in the international debate on IP and development. This has been most noticeable at the WTO where the discussions in the TRIPS Council have almost exclusively been on patents, TK and genetic resources and geographical indications. At the 1967 Stockholm Conference of the Berne Convention, recognising the impact of copyright especially on education, developing countries had strongly argued for further flexibilities including reduced terms of protection, compulsory licensing for translation in local languages and for use for educational, scientific or research purposes. While the challenges remain with respect to mass education, even greater challenges have arisen in balancing copyright rules with the needs in developing countries for computer software and access to the

internet. The fact that this debate does not even feature on the TRIPS Council's agenda is not easy to understand. The Commission does well to highlight the serious implications that the current developments in the copyright area particularly in relation to software and the internet may have on development. The main question addressed is whether the current copyright rules will enable developing countries close the knowledge gap between them and the developed nations. The enormity of the problem and challenges identified by the Commission calls for developing country policy makers and negotiators to reflect seriously on the impact of ratcheting up copyright rules in areas of high technology in core development spheres.

Patent Reform & Harmonization

With regard to the ongoing processes to reform the patent system and the push through WIPO towards harmonization, the message of the Commission to developing countries and LDCs is that with so much uncertainty and controversy about the global impact of IPRs, policy makers should think twice and consider the evidence before agreeing to extend the scope and territorial coverage of patents. In a process such as the WIPO Patent Agenda, developing countries will be well served to ensure that the patent reform does not remove the space available to them to limit the scope of patentable subject matter, put in place policies that facilitate competition, provide for extensive safeguards to prevent abuse and to foster the development of vital sectors of the economy. Consequently, developing countries need to develop strategies to ensure that the WIPO Patent Agenda takes into account their development concerns.

A major problem which the Commission does not discuss directly but is probably self-evident throughout the report is the effect of the minimum standards principle established under the TRIPS Agreement. While some form of IP may be beneficial to different developing countries and LDCs, what the TRIPS minimum standards principle does is to raise the least common denominator too high to the levels of IP in developed countries. The minimum standards principle, therefore, does not reflect the least common denominator among the 144 Members of the WTO. The net effect of the minimum standards principle is that each subsequent bilateral, regional or multilateral IP agreement can only create higher standards. The question then is; if the least common denominator remains unrealistically high, can developing countries hope for any good outcome from the Patent Agenda process? The situation is progressively worsening with the continued threat of dispute settlement and the use of bilaterals inducing restraint in developing countries which will in future be taken as state practice for purposes of treaty interpretation and standards harmonisation.

Technical Assistance and Capacity Building in IP

The challenges faced by developing countries have long been recognised and, over the years, multilateral agencies including WIPO and WTO, bilateral donors and NGOs have mobilised resources towards technical assistance and capacity building in IP. But what have been the results? While a lot of countries including LDCs can boast of having implemented the TRIPS Agreement, few can claim having aligned such implementa-

tion with their development needs and priorities. The emerging evidence of serious flaws in the design and delivery of technical assistance which is corroborated by the Commission's finding has raised major questions about the kind of technical assistance that is being provided. The Commission appropriately focuses on WIPO, the biggest provider of IP-related technical assistance, particularly in the context of its 1995 cooperation agreement with the WTO.

To a large extent, there is no evidence that WIPO has contextualised its technical assistance in the wider framework of the development strategies of the different countries. Probably this is because, as Drahos points out in the Commission's study paper 8 *"The inclination on the part of the [WIPO] International Bureau was to provide laws and advice to a developing country that would avoid any danger of that country becoming involved in dispute resolution."* Because WIPO does not want developing countries to get into trouble with WTO, the obvious way to guarantee this has been to provide TRIPS-plus laws. The Commission's call for improvements in the design and delivery of IP-related technical assistance should therefore be taken seriously by all concerned. But more importantly, its call for an evaluation of WIPO's technical assistance programme is very timely. If WIPO is to maintain the trust of developing countries it should heed this call. WIPO should give serious consideration to integrating development objectives into its approach to the promotion of IP protection in developing countries. However, judging from the statement of the Director General of WIPO at the launch of the Commission's report, it may be

that developing countries will have to exert more pressure and raise these questions within WIPO.

In the light of the conclusions of the CIPR report, the optimum designing and targeting of the technical assistance and capacity building programmes is going to be a key element in the overall efforts to ensure that developing countries effectively pursue their development needs in IP policy making and negotiations. WIPO's capacity building programmes will have to be evaluated from three main dimensions, namely, their technical utility; their contribution to institutional capacity; and specific political considerations by the countries WIPO advises. WIPO has been quick to point out that there have been no complaints from developing countries about its technical assistance and there is no reason to claim that there are problems. The lack of complaints may only relate to specific political consideration but not technical utility and capacity enhancement. Perhaps it may also have to do with the fact that developing countries have faith in the 'sound' advice WIPO gives.

Where do we go from here?

The British government has instituted an inter-departmental working party to study how to implement the report. But as of now, the Commission's findings do not reflect the official position of the UK government. One expects that new and on going efforts in technical assistance and capacity building for developing countries and LDCs will take the recommendations of the report seriously and reorient their programmes accordingly. But a change for the better will require

developing countries to be in the driving seat in the reform discussions. Major existing initiatives can play a role in providing space and support for developing countries to take the Commission's recommendations forward.

One such initiative that is already underway is the South Centre's ongoing programme of support for developing country governments on IP issues that emerge in trade negotiations. A range of development-oriented intergovernmental organisations as well as NGOs - including UNCTAD, Third World Network, Action Aid, ICTSD, MSF, CIEL and Oxfam, amongst many others working at the national level, will hopefully continue to play leading roles in supporting the call for development-friendly IP policy options. Also worthy of note is the Rockefeller Foundation's plan to host a 3-year series of Global Dialogues on intellectual property at its Bellagio Conference and Study Centre in Italy to provide experts from developing countries—including policymakers, academics, civil society groups and indigenous peoples—an immediate opportunity and space for policy discussion. This year's events, to be held over a month-long period, will include meetings to: support an emerging network of IP policy leaders from developing countries; stimulate discussion of a development-oriented IP agenda for developing countries; facilitate a dialogue among indigenous peoples on IP policy issues; and draw together experts on the potential for the collective approaches to the management of IP. More initiatives are needed for the system of international intellectual property to respond adequately to the specific needs of developing countries and LDCs.

EUROPEAN UNION URGED TO REFORM TRIPS

A 'Political Report' by **Max van den Berg, Vice-President for Foreign Affairs and International Trade, PES Group**, comprising Socialist members of the European Parliament, has found that TRIPS has imposed substantial costs on developing countries with little evidence of benefits. The following report, released on 23 September, proposes a number of conclusions, based on written and oral evidence presented to a PES Group Seminar "Intellectual Property: A New North-South Divide?" held on 6th June 2002. It is not a formal PES Group position.

Background

In 2001, fierce legal and political battles were fought over pharmaceutical patents and their impact on affordable access to lifesaving medicines. World opinion was mobilised by the scandal of people in poor countries dying in their tens of thousands from treatable diseases, while patents held by multinational pharmaceutical companies blocked their access to cheap drugs.

Those battles made access to medicines one of the key issues at the WTO Ministerial Conference in Doha, in November 2001, which launched a new round of multilateral trade negotiations. And by focussing unprecedented attention on the WTO's TRIPs agreement, which lays down global minimum standards of intellectual property protection, they raised wider questions about the balance struck in that agreement between the rights of intellectual property (IP) holders and the wider public interest, particularly as it affects developing countries.

The purpose of the PES Group's public seminar on June 6, 2002 was to discuss with representatives of developing countries, NGOs and the European Commission the case for reform of the TRIPS agreement, and what should be the agenda of the two reviews of TRIPS now underway, particularly with regard to its North-South dimension, and its impact on the transfer of technology. This politi-

cal report proposes a number of conclusions, based on written and oral evidence presented to the seminar. It is intended as a contribution to discussion and does not constitute a formal PES Group position.

Developing Countries and the Review of TRIPS

Access to technology and scientific knowledge is an increasingly important determinant of development, but ownership and control of intellectual property is marked by profound North-South inequalities. The TRIPS agreement, which has been part of this problem, must become part of the solution – in keeping with its own stated objectives.

The Doha Ministerial produced a landmark agreement on *TRIPS & Public Health*, which asserted the primacy of public health needs over intellectual property rights. But the TRIPS agreement is still under the microscope. The WTO is in the midst of two potentially wide-ranging reviews:

- A general review of the implementation of the agreement as a whole.
- A review of the agreement's provisions on biological and microbiological patents.

The scope of these reviews is itself a subject of dispute, but many developing countries, consumer

groups, trade union bodies and development and environmental NGOs see the reviews as an opportunity to tackle imbalances and dangers in the TRIPS agreement.

Conclusion 1: The evidence presented to the seminar shows clearly that Article 71.1 of TRIPS requires an assessment of the experience of implementing the Agreement as a whole. The review must evaluate that experience against the principles and objectives set out in Articles 7 & 8, and in the Preamble to the WTO Agreement.

TRIPS: Costs & Benefits for the South

The central mission of the WTO is to promote international competition. The TRIPS agreement alone is designed to protect monopoly: in order to ensure incentives for research, creativity and innovation, TRIPS gives the owners of intellectual property a period of monopoly over its exploitation. The intellectual and moral underpinning of the TRIPS agreement is the implicit bargain that, in return for granting global protection to intellectual property, WTO Members will in turn benefit from the boost it gives to research and innovation. The evidence presented to the seminar, however, casts doubt on whether this bargain has served the interests of developing countries, drawing attention to the substantial costs TRIPS imposes on them and finding little evidence of benefits.

The 6th June seminar heard evidence from several participants of the heavy costs which the TRIPS agreement will impose on developing countries, as its provisions take effect:

- Creating the administrative and legal structures necessary to implement TRIPS will cost developing countries on average around \$100 million.
- International patents – more than 90 per cent of which are Northern owned – generate billions of dollars each year in net income flows from South to North.
- Subsistence agriculture, dependent on the traditional saving, use and exchange of seeds, is threatened by the patenting by Northern corporations of plant and seed varieties; seed patents could also promote the spread of environmentally damaging monocultures.
- In the health sector, TRIPS restricts access to technology, raising drug prices and distorting markets.

Participants also questioned whether developing countries benefited from the incentive effect which was the rationale for TRIPS. Evidence presented to the seminar suggested:

- TRIPS had not led to the hoped-for investment and technology transfer to developing countries.
- The R&D spending of pharmaceutical companies has largely neglected the diseases most prevalent in developing countries.

- IP protection cannot stimulate development of drugs for which there is no economic market because of lack of purchasing power in the South.

In view of this picture of the substantial and tangible costs which TRIPS imposes on the South, measured against elusive and questionable benefits, the evidence presented to the seminar suggests that the TRIPS agreement in its current form presents a strongly negative balance sheet from the standpoint of developing countries.

Conclusion 2: Developing countries certainly need an appropriate system of intellectual property protection but the TRIPS agreement does not seem to have been designed as a serious attempt to meet their needs. An international agreement that locks in a patent term of 20 years for all inventions in all fields of technology seems difficult to justify on theoretical or practical grounds. While other WTO Agreements leave significant discretion to sovereign nations to define their own policies, the TRIPS Agreement establishes minimum standards, based on the experience of developed countries, that must be adhered to by all WTO Members. Choices such as the minimum term of a patent right are better left to national governments, both on grounds of subsidiarity and to allow flexibility to respond to rapidly changing circumstances - including the desire in many countries to review the balance of rights and obligations embodied in existing intellectual property systems.

Conclusion 3: The TRIPS Council should consider recommending significant changes to the TRIPS Agreement:

- To ease the obligations imposed on developing countries – including lengthening of transitional periods and the introduction of additional special and differential provisions.
- To strengthen those provisions designed to promote the transfer and dissemination of knowledge and to achieve a balance between the rights of patent holders and the wider public interest.

Rebalancing TRIPS

The seminar heard from several speakers that the TRIPS agreement left considerable room for interpretation, particularly as regards the balance to be struck between the interests of producers and users of intellectual property. Insufficient weight had been given by many commentators – and even by WTO disputes panels – to TRIPS' public interest provisions, notably Articles 7 and 8. There was general agreement that the Doha Ministerial declaration on "TRIPS and Public Health" represented a breakthrough in this regard, as an affirmation by the WTO's highest authority of the balance that must be struck between rights of patent-holders and the wider public interest.

There was broad agreement among participants that the "TRIPS and Public Health" Declaration would and should change the interpretation of the TRIPS agreement as a whole. The assertion in that Declaration that "in applying the customary rules of interpretation of public international law, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in

its objectives and principles” should apply to all interpretation and application of the Agreement.

The seminar’s attention was drawn to difficulties in interpreting and applying Articles 7 and 8, because of vagueness and ambiguities in their drafting – for example, Article 8.1, which allows Governments to adopt measures in the public interest “provided that they are consistent with the provisions of this Agreement”, seems to give with one hand and take away with the other.

The seminar heard that while the TRIPS agreement’s flexibility could be a strength, not all WTO Members were equally able to take advantage of such flexibility. For smaller and less economically powerful WTO Members, clearer rules could be a defence against abuses and bilateral pressures from more powerful Members.

Conclusion 4: The TRIPS Council should ensure that implementation of TRIPS gives due weight to the balance between the rights of IP holders and the wider public interest, in particular as expressed in Articles 7 and 8. To this end, the Council should, *inter alia*, propose a Ministerial Declaration:

- emphasising that Articles 7 and 8 of TRIPS, together with the preamble to the WTO Agreement, help to establish the object and purpose of the other provisions of the agreement, which should be interpreted and applied by all WTO Members in a way that promotes and does not undermine these goals;
- clarifying the interpretation of Articles 7&8;
- setting out measures to promote their implementation; and

- creating procedures to monitor and review progress in that regard.

A General Exception should be introduced into the TRIPS agreement, as already exists in the GATS and GATT, recognising the principle that in the event of an irreconcilable conflict between measures to protect fundamental policy considerations (such as protecting human health) and the rules of the multilateral trading system, the former should prevail.

Technology Transfer

Transfer and dissemination of technology are the central focus of the TRIPS Agreement’s objectives as articulated in Article 7. In some cases, however, as TRIPS Article 8.2 acknowledges, strengthened intellectual property rights may inhibit technology transfer. The Doha “Implementation Declaration” introduced reporting procedures to ensure that developed Members meet their obligations to encourage technology transfer to LDC’s. This is welcome, but a more thoroughgoing review of the impact of TRIPS on technology transfer is needed.

Conclusion 5 : The review of TRIPS under Article 71.1 must examine the impact of implementing the TRIPS Agreement on the transfer and dissemination of technology and the related trade and development prospects of developing countries. It should examine ways to increase the effective implementation of the Agreement’s objectives, principles and other provisions relating to the transfer and dissemination of technology. The existing technology transfer obligations of developed countries, under Article 66.2, should be extended to developing as well as least developed countries.

The EU should make intensive use of its research programmes to

promote technology transfer and should also use fiscal and other incentives.

TRIPS & the Convention on Biodiversity

The seminar heard concern expressed over potential conflicts between TRIPS and the Convention on Biodiversity. TRIPS allows, for instance, the grant of patent rights over genetic resources which in the CBD are subject to public rights. It allows patents to be granted regardless of whether an invention incorporates or uses illegally accessed genetic material or traditional knowledge. TRIPS has also been used to file patents on naturally occurring genetic resources, raising issues concerning the equitable sharing of benefits from the exploitation of biological resources. Perhaps the most notorious example is the neem tree, native of India, on whose derivatives US firms have taken out over 70 patents. Among many other cases of alleged “biopiracy”, genes from nutmeg and camphor have also been patented with the aim of producing their oils artificially - a move which would hit producers in developing countries.

The Doha Ministerial Declaration instructed the WTO’s TRIPS Council “to examine the relationship between TRIPS and the CBD, the protection of traditional knowledge and folklore and other relevant new developments raised by Members...in this work the TRIPS Council shall be guided by Articles 7 & 8 and shall take fully into account the development dimension.”

In July 2002, the European Commission presented to the TRIPS Council a “concept paper” dealing with these and other issues, and containing a number of positive proposals, some of which are taken up in the following Conclusion.

Conclusion 6 :

- The TRIPS agreement should explicitly recognise the international law principle of state sovereignty over natural resources, as recognised in the UN Charter.
- Article 27.3(b) of TRIPS should be amended to ensure that patent applications using or incorporating genetic material or traditional knowledge have been the subject of prior informed consent and fair and equitable benefit sharing agreements, and to make this a condition for the grant of such patents.
- The TRIPS Council should recommend the creation of multilateral systems for disclosing and sharing information on the origin of biological material and traditional knowledge used in inventions, and for creating databases of traditional knowledge.
- The TRIPS Council should give its full support and co-operation to the development of an international model to extend intellectual property protection to traditional knowledge and article 27.3(b) should be amended to require WTO Members to provide effective protection to traditional knowledge and folklore.
- The Convention on Biological Diversity should be given observer status in the TRIPS Council.
- The TRIPS Council should look again at the patentability criteria, particularly as they affect biological and microbiological patents, to

clarify the distinction between discoveries and inventions and to preclude patenting of naturally occurring genetic resources.

Farmers' Rights

The seminar heard of the adverse impact of TRIPS on traditional agricultural practices, particularly in the subsistence sector in developing countries, which is dependent on the saving, using and exchanging of seeds.

Conclusion 7 : The WTO should clarify and confirm the right of small farmers in developing countries to save, replant, exchange, share and resell seed, provided they do not use the brand name of the variety, in line with the proposal made in the European Commission's July 2002 concept paper.

TRIPs & Public Health

The follow-up of the Doha Declaration on TRIPs and Public Health lies outside the main focus of the June seminar, which concerned the scope and agenda of the two reviews of TRIPs now underway. It is nevertheless important to record the strong consensus among seminar participants on the need to ensure the full implementation of that Declaration, including the commitment to find a solution to the problems of access to affordable medicines in countries which have little or no domestic pharmaceutical manufacturing capacity.

The seminar heard arguments from the European Commission in favour of addressing these problems by amending the TRIPS provisions on compulsory licensing (Article 31). Counter-arguments were advanced by *Medecins sans Frontières*, representatives of the Indian Embassy and others that the export of generic drugs to de-

veloping countries to meet urgent health needs should be recognised as an exception to the rights of patent holders, under Article 30 of the TRIPS agreement.

Conclusion 8: The solution to the problems of countries with little or no pharmaceutical manufacturing capacity must fully respect the spirit of the Doha Declaration, by ensuring that the decisions needed to tackle public health problems should as far as possible be in the hands of the public authorities of the country concerned. The solution must also minimise the risk of bureaucratic delays which could put at risk a timely response to public health crises. The solution which best meets these criteria is an authoritative interpretation of Article 30 of TRIPS, making clear that production for export in response to public health problems such as are covered by the Doha declaration is permitted as an exception to patent holders' rights. While there are differing views among international patent lawyers on the legal arguments involved, there would seem to be no fundamental legal obstacles to an Article 30 solution. While the European Commission, on a number of grounds, favours Article 31, it should be prepared to respond helpfully to arguments from developing countries for Article 30.

Concluding Remarks

In the 21st century, prosperity will depend increasingly on access to knowledge. In its present form, the TRIPS agreement risks widening the North-South knowledge divide and raising a new and formidable barrier to development. The proposals in this paper are designed to find a better balance between the need for incentives to research and development and the imperative of sharing its benefits more widely.

TRIPS CAPABLE OF EVOLUTION - DR. SUPACHAI

"The TRIPS Agreement, like other WTO agreements, is a living instrument, capable of evolution and adaptation in the light of the needs and priorities of Members," said the WTO Director-General Supachai Panitchpakdi on 16 September. He was participating in the Geneva launch of the report by the UK Commission on Intellectual Property Rights. The following text is based on Dr. Supachai's address, which focused on promoting the development dimension through TRIPS as well as the international framework on intellectual property.

The Commission has been asked to tackle a difficult subject. It is difficult at the national level to establish in the field of intellectual property a proper balance conducive to public welfare and development and even more difficult at the multilateral level. I am not one of those who thinks that intellectual property protection is a zero-sum game, but it would be foolish not to recognise that any set of rules that establishes a multilateral rule of law in this area will involve finding a balance which takes account of all legitimate interests involved. Of course, the Commission has been tasked with looking at this question from the angle of development policy and this, as you know, is also very much the focus of the WTO in the light of the Doha Development Agenda.

We have had a very brief opportunity to look at the report and, viewed from a WTO and TRIPS (trade-related aspects of intellectual property rights) angle, it certainly seems to make an important contribution to the ongoing debate on two issues:

One is the question of how the TRIPS Agreement, and in particular the flexibility and options available in it, can be best applied by developing countries in the light of their own development needs. As you know, this has been a particularly important issue in the context of access to medicines, where it led to the adoption at Doha of the Declaration on the TRIPS Agreement and Public Health, but it is of course a broader issue.

The second ongoing debate is that on how the TRIPS Agreement in particular and the international framework in the area of intellectual property more generally can be improved, especially in the light of the development dimension.

The TRIPS Agreement, like other WTO agreements, is a living instrument, capable of evolution and adaptation in the light of the needs and priorities of Members. In fact, the WTO has an ambitious and active work programme in this area. This is based, in part on the built-in agenda under the TRIPS Agreement itself, in part on requirements in the Doha Declaration to address or act upon implementation issues raised in the TRIPS area and in part on other decisions in the Doha Declaration establishing negotiations or other work on TRIPS matters. Let me just mention three of these areas which are particularly active at the moment:

The problem identified in paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health of how WTO Members with limited manufacturing capacity in the pharmaceutical sector can make effective use of compulsory licensing. The TRIPS Council has to find a solution and report to the General Council before the end of this year.

The nexus of issues relating to the protection of biotechnological inventions, biodiversity and traditional knowledge and folklore. These cover matters on which the TRIPS Council has to report to the TNC (Trade Negotiations Committee) by the end of this year.

The protection of geographical indications. This includes, in particular, the negotiation of a notification and registration system for geographical indications for wines and spirits by the next Ministerial Conference and the work on issues related to the extension of the protection provided for in Article 23 to products other than wines and

spirits, on which the TRIPS Council has to again report to the TNC by the end of this year. The report, quite rightly, sets the issue of integrating intellectual property rights and development policy in its full context which goes far beyond WTO matters, but let me just mention two other important areas of WTO work on which the report contains interesting analysis and ideas. One (relates to) the new Working Group on Trade and Transfer of Technology. The other is the role that an effective competition policy and law can play in balancing and complementing intellectual property regimes. The WTO Working Group on the Interaction between Trade and Competition Policy provides a forum in which this question can be further explored.

Before concluding, let me mention one other point which is also addressed in the report, namely the importance of developing the internal capacity within developing countries to be able to provide training and undertake research in the area of intellectual property. This is something to which I attach considerable importance in this area of the WTO, as in others. In this regard, I hope that the WTO, perhaps in cooperation with other inter-governmental organisations, will be able to organise, annually, a briefing session for university teachers from developing countries in the area of intellectual property so as to help them to be as well informed as possible about international issues facing their countries.

Let me conclude by expressing my appreciation to Professor Barton and the other Commissioners for the report that has been presented today and for their having come to Geneva to launch it.

PATENTS AND THE POOR

While much of the debate around TRIPS focuses on reforming the Agreement to make it more 'balanced,' there is a noticeable body of thought which espouses throwing TRIPS out of the WTO machinery lock stock and barrel. The arguments are premised on the belief that TRIPS does not really belong to the WTO. One such view is presented in the following article by Jagdish Bhagwati, professor at Columbia University and a senior fellow at the Council on Foreign Relations. The article appeared in the Financial Times of 16 September.

The provision of medicines in poor countries has become the principal focus of dispute in the wider debate on intellectual property rights and whether they should be included in World Trade Organisation rules.

Thanks to the mighty political muscle of pharmaceuticals companies and their lobby groups, intellectual property protection has formed part of WTO rules since the Uruguay round, which concluded in 1995. Drugs companies, backed by the US government, managed to include IPP in the form of the trade-related intellectual property agreement. This not only allowed sanctions to be imposed on countries deemed to be using intellectual property without paying a royalty; it also established a 20-year patent to protect companies' knowledge.

There are two problems here. First, IPP is not a "trade" issue; the WTO ought to be about lowering trade barriers and tackling market access problems. The inclusion of IPP has turned the organisation into a royalty collection agency. Second, and to the chagrin of the poor countries today, the inclusion of IPP in WTO rules has resulted in a proliferation of yet more lobby groups, such as labour unions, which have been spurred on by the success of the IPP lobby groups to push for their own agendas to be incorporated into WTO rules. It is hardly surprising that poor countries see the WTO increasingly as the target of western lobby groups determined to exploit the WTO to their own advantage, using the specious argument that their causes have to do with trade in some intrinsic way.

One of the original arguments drugs companies used in support of IPP was that the lack of protec-

tion in poor countries would handicap research and development. Yet this is deeply flawed, for the simple reason that while poor countries have plenty of need for drugs, they have no effective demand.

To understand why the drugs companies nonetheless see IPP in poor countries as a money-spinner, it is necessary to distinguish between two types of diseases: those that are primarily present in poor countries, such as malaria; and those that afflict all, such as AIDS.

In the case of diseases such as malaria, it is clear that IPP cannot ensure any decent return for drugs companies because poor countries cannot pay. Instead, there are several ways of developing and producing the necessary drugs for poor countries, in particular through the use of public and quasi-public funds.

In the old days, there were institutions such as the Institute for Tropical Medicine in England. Today there are more sophisticated variations on the use of public funds. But however elaborate these become, one thing is clear: IPP has no useful role in the provision of drugs specific to poor countries.

All that changes in the case of developing drugs to fight diseases such as Aids, which affect rich and poor nations alike. Here, drugs companies make profits in rich countries' markets; IPP there is clearly something they value. But when it comes to supplying these drugs to poor countries, the companies face weak demand. In response, their strategy is to sell to poor countries, producing at low marginal cost and charging the little that these poor markets will bear.

In addition, pharmaceuticals companies try to increase their profits by selling their drugs to health programmes operating in poor countries. By tapping into the aid money these programmes receive, the companies in effect increase demand and their returns.

IPP in the poor countries would therefore seem of little value to the drugs companies. Yet it comes into play because the companies want to prevent the more advanced poor countries competing in these markets with generic copies. These copies are, in effect, the same drugs as those sold by the big pharmaceuticals companies. However, they are sold at lower prices, which places a cap on the amount drugs companies can raise their prices in poor countries. Through the application of IPP, drugs companies can therefore stop countries such as India and Brazil from exporting to countries such as Gabon.

Many pressure groups from the industrialised countries have criticised the drugs companies for the way they use IPP - and they are right to do so. But these groups also object to "parallel imports" - the segmentation of rich and poor countries' markets in order to prevent the importation of lower-priced drugs sold by the drugs companies to poor countries.

Yet to end segmentation would be a big mistake: without this mechanism the rich and poor countries would form a single market and the prices charged to poor countries would rise. Segmentation enables poor countries to secure low prices for their drugs.

There are often paradoxical ways to help the poor - segmentation is one of them. The lobby groups that try to defend the interests of the poorest countries should take note.

THE PROMISE AND PITFALLS OF IPRs FOR THE POOR

The following reaction to the CIPR report was given by Rachel M. Cohen of the Médecins Sans Frontière, based in New York.

Intellectual-property rights (IPR), which embrace patents, copyright, trademarks and trade secrets, were once considered an esoteric, and slightly dull, bit of commercial law.

No longer. Today, IPR law is the focus of intense interest, and it is not just lawyers who are paying attention. The original purpose of patents was to encourage innovation, and thus growth, by creating an incentive for inventors to disclose the details of their inventions in exchange for a limited monopoly on exploitation. Some argue that the modern system of IPR law is having the opposite effect delaying the diffusion of new technology.

John Barton, a law professor at Stanford University, wants to see both rich and poor countries start thinking of IPR more as a development tool, and for them to reconsider the notion that strongly protecting the rights of inventors is automatically good for all. For the past year, Prof. Barton has chaired the Commission on Intellectual Property Rights, a body of lawyers, academics, a bio-ethicist and an industry executive convened by Britain's Department for International Development to look at how IPR can work to the benefit of the world's poor countries.

The commission's report, published on September 12th, sets out detailed recommendations for how developing countries should craft IPR to suit their conditions. Its central message is both clear and controversial: poor places should avoid committing themselves to rich-world systems of IPR protection unless such systems are beneficial to their needs. Nor should rich countries, which professed so much

interest in sustainable development at the recent summit in Johannesburg, push for anything stronger.

All together now

There was a time when countries could go their own way on intellectual-property rights, and introduce legal protection for creators whenever they thought it appropriate. For most of the 19th century, America provided no copyright protection for foreign authors, arguing that it needed the freedom to copy in order to educate the new nation. Similarly, parts of Europe built their industrial bases by copying the inventions of others, a model which was also followed after the second world war by both South Korea and Taiwan.

Today, however, developing countries do not have the luxury to take their time over IPR. As part of a trade deal hammered out eight years ago, countries joining the World Trade Organisation (WTO) also sign up to TRIPS (trade-related aspects of intellectual-property rights), an international agreement that sets out minimum standards for the legal protection of intellectual property.

The world's poorest countries were given until 2006 to comply in full with the requirements of the treaty.

Contrary to popular perception, TRIPS does not create a universal patent system. Rather, it lays down a list of ground rules describing the protection that a country's system must provide. These extend IPR to include computer programs, integrated circuits, plant varieties and

pharmaceuticals, all of which were unprotected in most developing countries until the agreement. Patent rights are valid no matter whether the products are imported or locally produced, and protection and enforcement must be extended equally to all patent holders, foreign and domestic.

Although many poor countries feel that TRIPS gives them a raw deal - all cost and scant benefits - few want to see the agreement dismembered or removed from the WTO, according to Rashid Kaukab, at the South Centre, a think-tank based in Geneva. That is largely for fear of what might take its place. Instead, a few developing countries, such as India and Brazil, are starting to flex their muscles when it comes to the battle between western standards of IPR protection and matters of public interest, such as health and farming. As the commission points out, the wording of TRIPS gives poor countries considerable latitude to look out for themselves when introducing new systems of IPR protection. It also suggests a few ways that they can make the most of this flexibility in a number of important areas:

Drugs

Much of the recent debate over the impact of IPR on the poor has centered on the issue of access to expensive medicines. On paper, many of the world's least-developed countries have laws which provide patent protection for pharmaceuticals. In practice, few enforce them. Spurred on by a victory in April 2001 against drug companies fighting patent reform in South Africa, developing countries man-

aged to get a WTO declaration in Doha last year. This asserted the primacy of public health over IPR. They resolved that the world's least-developed countries should be given at least until 2016 to introduce patent protection for pharmaceuticals.

The WTO council responsible for TRIPS is considering a far trickier proposition in the declaration: how to make compulsory licensing (the manufacture and marketing of a patented drug without the patent-holder's consent) work for the poorest. TRIPS already permits compulsory licensing under certain conditions, including national emergencies. This is fine for countries such as Brazil, which have domestic drug industries to copy the medicines. Brazil has, indeed, used the threat of compulsory licensing to wring price discounts out of drug companies, a ploy which the commission, somewhat controversially, supports.

The problem is what to do with countries which have no drug makers. For the moment, they can import generic copies from the likes of India, but come 2006, when those exporters are supposed to have fallen in with the TRIPS line, who will supply the drugs?

Education and research Alan Story, a specialist in IPR at the University of Kent, in Britain, reckons that copyright, particularly as it pertains to education and research, will be the next big battleground. Those countries that have signed up to TRIPS have also accepted international copyright rules. Although these allow some unauthorised copying for fair use or personal consumption for education or research, the commission worries that these exceptions are too limited, and that copyright may hamper access to textbooks, journals and other educational material in poor countries, by requiring

the consent of, and likely payment to, the publisher prior to copying.

The commission is even more worried about the Internet, which has great potential for broadening access to education in poor countries, but in which encryption technologies can override the principle of fair use. Some publications, such as the British Medical Journal, allow free online access for people in poor countries. The commission would like to see more of this. In the meantime, it recommends that developing countries allow users to sneak round technical barriers such as encryption, to gain access for fair use. Not surprisingly, software makers are unenthusiastic.

Traditional knowledge

The most glaring conflict between rich and poor over intellectual property comes from the misappropriation of traditional knowledge such as ancient herbal remedies that find their way into high-priced western pharmaceuticals without the consent of, or compensation to, the people who have used them for generations. Often, patent examiners are simply unaware that the plant variety which an enterprising businessman is trying to patent has been used for centuries by a tribal community half a world away. The commission recommends that countries create databases to catalogue such traditional knowledge (India is already doing so), and urges that consulting such databases should be made a mandatory part of patent examinations the world over.

More than this, however, Kamal Puri, a lawyer at the University of Queensland, Australia, argues that new systems of IPR protection are needed for traditional knowledge. That is because its communal own-

ership, uncertain date of creation and unwritten form does not fit the requirements of western systems of IPR. On September 17th, a model law, drafted by Dr. Puri and co-sponsored by UNESCO, will be unveiled at a meeting of Pacific island states in New Caledonia. The law gives traditional users jurisdiction over native knowledge, and requires that those who wish to commercialise it must seek the users' consent. All transactions must be registered with a tribal authority, which will deal with subsequent disputes.

Even when armed with these weapons, poor countries will have a hard time deploying them. Drafting IPR legislation and setting up a patent office that has modern information-technology systems and trained examiners does not come cheap or easy. Neither does establishing judicial, customs and competition authorities, and police services to enforce IPR rules. The World Bank reckons that it costs at least \$1.5m to create a working system, plus recurrent costs.

Moreover, inventors in poor countries find it tough to use patent systems in the rich world. Merely securing a patent from America's patent office costs at least \$4,000. Defending it in court can cost millions. The commission identifies several ways in which rich countries could open their domestic IPR systems, including discounted fees and subsidised technical assistance. It also suggests they should help poor countries to set up their own systems without saddling them with rich-world standards until they are ready to benefit from them.

Inventing a way to do that might be worth a patent in its own right. Those who heed the commission's report, however, might well resist the claim.

RELIGIOUS LEADERS APPEAL TO USTR

*The TRIPS-related debate in the WTO has now moved the religious leaders. They too have felt compelled to intervene on behalf of those who can ill afford to pay the already high costs of essential drugs, whose prices are becoming more out of reach thanks to the dictates of the 'trade-related' intellectual property regimes. The following is the text of a letter sent by 20 religious leaders, on behalf of the **National Council of Churches/Church World Service**, to Ambassador Robert B. Zoellick, the United States Trade Representative on the production of medicines for export issue. The letter, released on 24 September by the US-based NGOs **ACT UP Philadelphia and Health GAP**, has also been copied to Ambassador Eduardo Perez Motta, Chair, WTO Council on TRIPS.*

As religious leaders responding to the moral and ethical questions of our day, we are called to speak out on issues affecting the most vulnerable in society. Today, we speak in solidarity with the 40 million people around the world who are living with HIV/AIDS, and who are looking to their national governments and local communities to halt the human death toll unfolding around them. We know that life-saving anti-retroviral therapy, now available in wealthy countries like the United States, can be successfully administered in resource-poor settings. Medicines to treat AIDS are an integral part of a comprehensive response to the AIDS pandemic in developing countries. Ironically, we also know that WTO trade rules, as currently interpreted, will further restrict access to essential medicines, including antiretrovirals.

We call on the U.S. to implement the Doha Declaration on the TRIPS Agreement and Public Health in a manner that prioritises protecting the public health.

The issue of how compulsory licenses will be used by countries that cannot find an efficient, affordable, and reliable source of medicines—either because of lack of domestic capacity or insufficient

economies of scale—will continue to feature prominently on the agenda of the TRIPS Council.

This matter was left unfinished by negotiators at Doha; its resolution will be the first test of whether the U.S. will choose to respect the spirit of the Doha Declaration and support a solution which abides by WTO Members' right to protect public health and promote access to medicines for all.

We believe that the value for human life must be the cornerstone for any trade policy decisions regarding access to sustainable supplies of lowest-cost medicines for millions living with HIV/AIDS.

Current interpretation of TRIPS rules are a forecast for human-made disaster, a disaster that will further cripple affected countries' ability to care for their own citizens. The U.S. and other governments at the TRIPS Council have the power to ensure that the interpretation of these trade rules fully guarantees that even "no-capacity" countries without efficient, affordable, and reliable domestic supplies of medicines will be able to gain access to affordable, low-cost generic medicines produced and

exported from other countries. It is our view that an interpretation of Article 30 of TRIPS that permits a limited exception to the rights of a patent holder for production of medicines for export is the only sustainable, workable solution for countries in need of low-cost medicines. The USTR should embrace this solution at the TRIPS Council.

In our daily work with partners in affected countries we are reminded that international law is a guiding force in determining whether people living with HIV/AIDS have access to life-saving antiretroviral treatment.

Our partners who run mission hospitals and clinics strive to give the highest quality of care for people who are sick, including people living with AIDS, but without the combined efforts of national governments and the international community, we cannot take the necessary steps to provide truly comprehensive HIV/AIDS care and treatment.

We must all do our part. We urge you, Ambassador Zoellick, to ensure that the U.S. does its part to support access to sustainable low-cost AIDS medicines at the upcoming TRIPS Council.

COMPETITION POLICY AND DEVELOPING COUNTRIES

The tables have turned. In the 1980's, it was the developing countries pushing for legally binding international restrictions on business practices. This, however, was not acceptable to developed countries. Today the position is the other way round with advanced countries seeking a binding multilateral agreement through the WTO and developing countries opposing it. In a paper just published, "Competition And Competition Policy In Emerging Markets: International And Developmental Dimensions" Ajit Singh, Professor of Economics, University of Cambridge, suggests how to incorporate the development dimension into competition policy questions. To do that properly, he says it is essential to have new definitions and fresh concepts rather than to conduct the exercise in terms of the WTO terminology. Following are extracts from the paper - no.18 under G-24 Discussion Paper Series, published jointly by UNCTAD and the Center for International Development at Harvard University.

The International Context

Developing countries are today faced with a range of new issues related to the microeconomic behaviour of economic agents – individuals, households and corporations – in these societies. In the past such behaviour, and a country's institutional arrangements which supported it, have been the prerogatives of sovereign nation states. However, with liberalisation and globalisation these matters are today regarded as legitimate objects of attention by the international community. Hence, under the new International Financial Architecture which is being constructed following the Asian crisis, emerging countries are being asked to reform their systems of corporate governance, labour laws, competition policy and other similar institutional structures. With respect to competition policy, which is the subject of this paper, it is suggested by many policy makers that not only do developing countries require a competition policy, but a multilateral one would be greatly to their advantage.

Contrary to the wishes of developing countries, the so-called "Singapore issues" were included in the WTO's November 2001 Doha Declaration of Ministers: these are investment, competition policy, trade facilitation and government procurement. Competition policy was put on the agenda at the Singapore Ministerial meeting in

1996 as part of a review of the relationship between trade and investment. As this topic was being included in the WTO's work program – even at that time over the objections of developing countries – it was agreed that the matter should be studied by a working group with a remit to pay particular attention to the development dimension of competition policy.

This was to be without prejudice to the question of any prospective negotiations on the subject. However, five years later at Doha, in one of the more confusing paragraphs of the Declaration, Ministers *"agreed that negotiations will take place after the fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations."* Many, but by no means all, developed countries consider this as a mandate to launch negotiations at the fifth Ministerial in 2003 or shortly thereafter, whereas most developing countries maintain that the negotiations may be years off, as a decision to launch them must be taken by 'explicit consensus.' Much of this divergence arises from the undefined word 'modalities', which countries choose to interpret in different ways.

At India's request, Yussef Hussain Kamal, the Conference Chair at Doha, presented the following clarification: *"In my view, this would give each Member the*

right to take a position on modalities that would prevent negotiations from proceeding after the fifth Session of the Ministerial Conference until that Member is prepared to join in an explicit consensus." As the clarification seems to express only a personal view, the legal status of the Chair's statement remains unclear. It is not formally attached to the Ministerial Declaration itself, but forms part of the official Conference proceedings.

Be that as it may, it is quite clear that sooner or later developing countries will need to be ready to enter into discussions or negotiations with advanced countries with respect to competition policy at the WTO as well as other multilateral, regional or bilateral fora.⁴ International concern about the state of competition and competition policy in emerging countries precedes and goes beyond the Doha Declaration. This is because these issues also derive their international significance from some important analyses of the Asian financial crisis of 1997–98 and the subsequent proposals on the New International Financial Architecture. Competition and competition policy figure prominently in these designs for a new architecture for the global economic system. This is due to the fact that international financial institutions and orthodox economists suggest that the "deeper causes" of the recent Asian crisis were not the observed macroeconomic disequilibria but rather structural, linked to

the normal Asian way of doing business. Apart from crony capitalism and close relationships between firms, banks and governments, such analyses single out for particular attention the allegedly poor competitive environment in the crisis-affected countries (Thailand, Indonesia and the Republic of Korea). Further, in order to forestall future crises, it is argued that emerging markets need to be more open, transparent and "competitive."

New concepts for competition policy for economic development

In Singh and Dhumale (1999) (*for exact references, please look up the original paper*) we expressed serious misgivings about the WTO Working Group's analysis of competition policy for developing countries. It did not seem to us to meet one of the Group's chief objectives: to take the development dimension of competition policy fully into account. We came to the view that a discussion on competition policy and economic development in terms of the WTO concepts such as market access, reciprocity and national treatment was prejudicial to the interests of developing countries. To take the development dimension properly into account, it was essential to have new definitions and fresh concepts rather than to conduct the exercise in terms of the WTO terminology.

On the basis of the modern theory of industrial organisation, as well as the history of competition policy in developed countries, Singh and Dhumale suggested that development-friendly competition policies need to have different objectives from those normally posited for advanced economies. Further, such policies also need to be specific to the stage of a country's economic and industrial develop-

ment as well as its institutional and governance capacities. In relation to the WTO Working Group's tasks, this analysis suggested the following concepts to address the developmental dimensions of competition policy:

- the need to emphasise dynamic rather than static efficiency as the main purpose of competition policy from the perspective of economic development;
- the concept of 'optimal degree of competition' (as opposed to maximum or perfect competition) to promote long term growth of productivity;
- the related concept of 'optimal combination of competition and co-operation' to achieve fast long term economic growth;
- the critical significance of maintaining the private sector's propensity to invest at high levels and hence the need for a steady growth of profits; the latter in turn may necessitate government co-ordination of investment decisions so as to prevent over-capacity and falling profits;
- the concept of simulated competition, i.e., contests, for state support which can be as powerful as real market competition;
- the crucial importance of industrial policy to achieve the structural changes required for economic development; this in turn requires coherence between industrial and competition policies.

The development dimension is thus far from being fully taken into ac-

count by suggestions that all that developing countries need is a longer time frame to be able to implement the United States or United Kingdom type of competition policy. The special and different circumstances of developing countries and their developmental needs require a creative application of the concepts above to competition policy questions.

Multilateral Competition Policy Versus International Competition Authority

At the WTO a number of advanced countries have been pressing developing countries to negotiate to make competition policy subject to that organisation's multilateral disciplines, so as to ensure 'fair play' and 'level playing fields' between countries.

Developing countries have been opposed to such proposals. Their formal stance has been to suggest that as many of them have no experience of competition policy, they are not in a position to be able to enter into negotiations on these matters. The real reason for developing countries' opposition is that they do not wish any new disciplines to be included in the WTO agreements because of the provision of cross-sanctions: a violation in one area may be penalised in another by the complaining country (if the complaint is held to be justified). Until the Doha meeting developing countries took the view that the Uruguay Round Agreements, that established the WTO, needed to be properly reviewed for their impact on economic development before undertaking a new round of tariff cutting or starting negotiations on new subjects such as competition policy and the multilateral agreement on investment. However, after the Doha Ministerial meeting developing countries may find it difficult to maintain such a stance for long.

It may be interesting to observe that there has been an ironic reversal of roles here. In the past, developing countries were in favour of multilateral action to restrict business practices of the large multinational companies. At the insistence of developing countries the United Nations General Assembly in December 1980 adopted, by Resolution 35/63 a "Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices." The "Set" is fairly comprehensive in scope and covers a wide range of restrictive business practices by multinationals, including the abuse of their dominant positions whether achieved through mergers and acquisitions or joint ventures. At that time developing countries were in favour of making SET legally binding. This, however, was not acceptable to developed countries. Today the position is the other way around with advanced countries seeking a binding multilateral agreement through the WTO and developing countries opposing it.

Proponents of a multilateral agreement on competition policy have put forward the following arguments in its favour:

- It would be helpful to developing countries as it would enable them to restrain anti-competitive behaviour and cartelization by large, advanced country corporations.
- It may help to bring the TRIPS agreement under multilateral competition disciplines. Maskus and Lahouel (2000) suggest that the possible abuse of intellectual property rights, as well as parallel imports, could be regulated by a multilaterally agreed competition policy.

- Stiglitz (1999) suggests that if there were a new multilateral competition policy agreement this would help to blunt the potency of anti-dumping laws by bringing them into the normal framework of predation under competition laws. The predation test is much stricter than the anti-dumping measures which countries have been using under the WTO.

- A multilateral competition policy will help foster competition both nationally and internationally, from which it is suggested that developing countries would greatly benefit. Perroni and Whalley (1998) quantify the potential gains of developing countries from the introduction of disciplines on competition,

the potential gains for developing countries could be large, perhaps in the region of 5–6 per cent of national income. This would make a competition policy negotiation of potentially more significance to developing countries than the whole of the trade disciplines achieved in the Uruguay Round. (Perroni and Whalley, 1998, p. 493).

These gains would include those stemming from the replacement of anti-dumping measures by competition law, reduction of mark-ups of foreign suppliers and reduced concentration in domestic markets.

There are, however, powerful arguments against multilateral disciplines from the perspective of developing countries. The first is that a multilateral agreement on competition policy, to be

development friendly, must be highly flexible allowing each country to determine its competition policy for itself on the basis of the country's needs and circum-

stances. This implies that if the cost-benefit analysis for a particular country shows there is no gain from it, the country need not have a competition policy at all.

Critics of a multilateral competition policy also suggest that a main motivation for developed countries to seek a competition policy agreement is for reasons of market access to developing countries. Developed countries would like to have, in addition to an agreement on competition policy, an international agreement on foreign direct investment (FDI). Under the latter, large advanced country multinationals would be permitted to invest anywhere they like in any quantity and at any time without any let or hindrance from developing country governments. In addition, once established, the multinationals would have "national treatment," i.e. be treated the same as national firms. An ambitious multilateral agreement on these issues would accord multinationals equal treatment in both pre and post-establishment phases.

However, such an agreement would be seriously prejudicial to economic development. In a detailed analysis of FDI as a source of long-term finance for developing countries, Singh (2001a) has argued that unless it is adequately regulated by their governments, in the particular circumstances of these countries, where they are subject to frequent internal and external shocks, it would lead to short and long-term financial fragility. To avoid this fragility, it is necessary for developing country governments to control (a) the timing of the FDI; (b) the total amount of FDI; as well as (c) the selection of large projects by multinationals. These measures are needed to ensure that there is no mismatch of the time profile of a country's foreign exchange inflows and outflows. Such time inconsistency can

lead to a liquidity crisis, which as the experience of Asian economic crisis shows, may degenerate into solvency problems with ultimately devastating consequences for the real economy.

Multinationals often complain that there is no "level playing field" between them and the national corporations which are government supported; hence, the multinationals demand for "national treatment". However, the actual situation is quite the opposite; the playing fields are tilted heavily in favour of multinationals who have considerable market power in markets for outputs as well as inputs. The current international merger movement is making these fields more unequal even from the perspective of the *large* developing country corporations.

The mechanical application of the WTO principle of "national treatment" in these circumstances would clearly lead to perverse results that would both harm economic development in developing countries as well as lead to global economic inefficiency. The magnitude of the latter would be determined by the extent to which the multinationals financial advantage over domestic firms arises from market power rather than from genuine economies of scale.

To provide a simple illustration, it should be perfectly legitimate for a developing country competition authority to allow large domestic firms to merge so that they can go some way toward competing on more equal terms with multinationals from abroad. Even if the amalgamating national firms are on the horizontal part of the L-shaped static cost curve, bigger size may still promote dynamic efficiency for the reason that firms need to achieve a minimum threshold size to finance their own R&D activities.

The competition authority may therefore quite reasonably deny national treatment to the multinationals and prohibit their merger activity (because they are already large enough to achieve either static or dynamic economies of scale in this sense). In these circumstances, a violation of the doctrine of national treatment is likely to be beneficial both to economic development and to competition.

In view of these serious limitations of multilateral competition policy it is essential to look for alternative means of international co-operation on this subject. This is because, as argued earlier, even if developing countries had development friendly national competition policies, they would still need international assistance to restrain anti-competitive conduct of dominant multinationals as well as to limit the adverse effects of mega-mergers associated with the merger movement of the 1990s. The best way, it seems to me, to provide such help would be through an International Competition Authority. The characteristics and responsibilities of this Authority would include the following:

- It would be charged with maintaining fair competition in the world economy and keeping the markets contestable by ensuring that the barriers-to-entry to late industrializers are kept at low levels.
- Analogous to the social welfare objectives of the European Commission, the proposed International Authority would be asked to pay attention to the special needs of the developing countries, to competitive opportunities for small and medium sized firms, to facilitate transfer of technology to developing

countries and to ensure fair prices and fair distribution of wealth.

- It would have the authority to scrutinise mega-mergers and to deter the mega-firms from abusing their dominant position.
- Again on the European Union model, the International Competition Authority would be concerned mainly with cross-border or international aspects of the workings of competition. Below the authority, at a national level, the member countries would have their own national competition policies.
- For good administrative and practical reasons, references to the competition authority would only be permissible in case of anti-competitive behaviour by corporations above a certain size. The size criterion would normally keep even most large developing country corporations outside the direct purview of the competition authority.
- In relation to the international merger movement, the authority would attempt to limit growth by merger by large multinationals under its purview. They would be allowed to merge provided they divest themselves of a subsidiary of equal value. This would mean that multinationals would not be able to grow by mergers, but they could expand through organic growth or green-field investment. It would not stop them from taking over other firms provided they were willing to sever a similar sized subsidiary.

- As mergers, on average, do not appear to improve economic efficiency, and the mega-mergers have the potential of increasing market dominance and reducing contestability, discouraging such mergers would therefore enhance global competition and global economic efficiency while at the same time being distributionally more equitable.
- The governance of the ICA would have proper representation of developing countries and would not be dominated by developed countries.

Although international co-operation on competition policy, in the form outlined above, would be of particular benefit to developing countries, it also has useful features to assist the large multinational corporations. The International Competition Authority would for example be able to provide multinationals under its purview with unambiguous decisions on mergers and other competition related matters. Instead of being subject to the often conflicting decisions of many different jurisdictions (e.g., the United States, the European Union, Japan, and overtime countries like India and China) International Competition Authority's rulings would prevail overall national and regional jurisdiction.

There is no illusion that an international agreement of the above kind would immediately be acceptable to advanced countries. Nevertheless, it indicates the nature of economic arrangements in this area which would best serve developmental needs of poor countries. It may, however, be helpful to proceed to the establishment of the ICA in stages. At the first stage, the authority may have no coercive

powers, but simply be able to monitor and to report on abuses of dominant market positions, on mergers, and the authority's other competition objectives. Such monitoring would itself be beneficial to developing countries as it would provide them with information on cartels and on market power abuses of multinationals. Developing countries would find it difficult to acquire such information otherwise. With the experience gained from this kind of limited international co-operation, nations can, over time, work towards greater co-operation by giving ICA the necessary powers to enforce its rules.

There is finally the question whether ICA should nevertheless be an integral part of the WTO or should it be a stand-alone authority. In addition to the reasons mentioned earlier in the discussion of the multilateral competition policy, there are also other considerations that would suggest the latter would be the better option. This is in part because questions of competition policy go much beyond those related to international trade. Further, WTO does not have the expertise to be the world's "FTC". Moreover, the primary objectives of competition policy tend to be rather different from those of the promotion of free trade through measures such as market access and national treatment. Since, as indicated above, the latter concepts are not very helpful to developing countries it would be best to keep the two institutions (the WTO and the ICA) separate.

Conclusion

The central message of this essay is to suggest that developing countries at the WTO are faced with a serious difficulty in discussions on competition policy as well as on other similar issues as long as the whole discourse is expressed in

terms of the WTO concepts and language. These are inadequate to reflect the developmental concerns of emerging countries. Developing countries need to develop the appropriate language and concepts within which their concerns can be properly articulated. Hopefully this paper has made a small contribution in that direction.

The Preamble to the WTO notes that "trade and economic endeavour should be conducted with a view to raising the standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand". It is further stated that "there is need for positive efforts designed to ensure that developing countries, and especially the least-developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development" (quoted in Rodrik, 2001). Full employment and economic development are not only the ultimate goals of the WTO; these have also been repeatedly endorsed by the international community.

In 1995, 117 Heads of State or Government attending the Copenhagen Social Summit endorsed the Copenhagen Declaration, which put primary emphasis on the promotion of full employment and poverty reduction. More recently, similar declaration have been made at the Millennium Summit at the United Nations and other fora. Indeed, the right to a decent living has virtually acquired the status of a universal human right.

If experience and analysis show that the primary goals of the WTO are being harmed rather than helped by specific measures such as TRIMS, or the equal application to all countries of a particular procedural principle such as national treatment, it is the latter which should be changed. It is the pri-

mary goals rather than the procedural rules of an international organisation that should dominate especially as the former are widely endorsed by the world community as a whole.

In this spirit the paper has put forward a proposal for a development friendly International Competition Authority in order to control anti-competitive conduct of the world's large multinational corporations (above a certain threshold of size) as well as to control their propensity to grow by take-overs and mergers. In order to maintain

contestability and efficiency of international markets it is proposed that the large multinationals should be allowed to take over another company only if they sell off a subsidiary of similar value. Thus, even the largest multinationals are not stopped from growing provided they expand their size by green-field investment. Neither are they stopped from taking over other firms provided they are able to sell off equal value subsidiaries, i.e. they cannot grow by mergers or take-overs. It is argued here that these institutional arrangements would both be more efficient as well as

more equitable compared with the present situation. It is, however, recognised that the advanced countries are not yet ready to cede sovereignty for such close international co-operation. The evolution towards the establishment of the ICA could, therefore occur in stages. As a first step the Authority could be entrusted only with fact-finding and monitoring anti-competitive behaviour and threats to the contestability of international markets. This could evolve over time into deeper North-South co-operation and the full-fledged establishment of the ICA according to the principles outlined in the paper.

SOUTH CENTRE PUBLICATION ON PROTECTION OF 'TEST DATA'

September, (DNS) - The South Centre has brought out a new publication "Protection Of Data Submitted For The Registration of Pharmaceuticals: Implementing The Standards of The TRIPS Agreement" by Prof. Carlos María Correa of the University of Buenos Aires. The book has been published in cooperation with the World Health Organization.

The WTO's TRIPS, Article 39.3, requires member countries to establish protections for submitted test data. But this requirement is in fact narrowly drawn, and countries maintain substantial flexibility in implementation. The public interest in limiting protections for data is to promote competition, and to ensure that data protections do not become the means to block the timely entrance of generic competitors to off-patent drugs. Generic competitors drive down price, thereby promoting greater accessibility of medicines.

The issue of data protection is especially relevant for off-patent products as well as for products, such as biologicals, that are often difficult to patent.

Data protection rules are of particular importance to many developing countries that until recently did not provide patent protection for pharmaceuticals (and to those under the transitional periods of the TRIPS Agreement, which still do not provide pharmaceutical patent protection). In these countries, there is a large pool of unpatented pharmaceutical products. Data protection systems could, if they provided exclusivity, become a partial substitute for patent protection in these cases and nullify, in practice, the transitional periods granted to developing countries.

The first section of this paper describes the different stages of drug development and the testing

required for marketing approval of new pharmaceutical products. The second section discusses the rationale for test data protection. The third section examines the conditions, established by Article 39.3 of TRIPS, under which protection must be given to marketing approval data. The fourth section examines the concept of "unfair commercial use" of data — the conduct proscribed by Article 39.3. The fifth section examines the legal means that States may adopt to provide protection against commercial use. The sixth section offers a brief analysis of the negotiating history of Article 39.3, which provides the backdrop for interpretation of the TRIPS Agreement's data protection obligations. A final, concluding section assesses the obligations on countries to provide marketing approval protection under the TRIPS Agreement, and reviews the flexibilities available to Member countries.



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