

# WTO News & Views



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## FROM THE DIRECTOR

This issue of ICRIER's WTO Newsletter focuses on the WTO Conference on *WTO and the Doha Round: The Way Forward*, which brought together leading academicians, policy analysts, policy makers, experts and trade-negotiators to interact and brainstorm to find a way forward to consolidate the gains of Hong Kong Ministerial meeting and forge a successful conclusion of the ongoing Doha Round. The Conference was sponsored by the Sir Ratan Tata Trust (SRTT) and supported by the Ministry of Commerce. The Newsletter carries a report of the Conference. Also, the Newsletter brings to its readers articles on current issues and debates in the WTO, recent developments in Negotiations and their policy implications for India and other developing countries. Your feedback will be greatly appreciated.

Rajiv Kumar  
Director & Chief Executive, ICRIER

## LEAD ARTICLE

### WTO DG Pascal Lamy delivered a special address at the ICRIER Conference on *WTO and the Doha Round: The Way Forward*

ICRIER organised a one-and-half day International Conference on *WTO and the Doha Round: The Way Forward*, on April 6 and 7, 2006 at the ITPO Conference Hall, New Delhi. The Hon'ble Commerce and Industry Minister of India, Mr. Kamal Nath inaugurated the Conference, and also delivered the Valedictory address. Mr Pascal Lamy, Director General of the WTO, gave a special address at the inaugural session...

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## SCHOOL BRIEF

### Biotechnological Patents, Traditional Knowledge and the TRIPS Council

India is one of the most biologically diverse countries of the world. Indians are aware of the therapeutic and chemical properties of various biological resources available in the country. Furthermore, Indians have been applying this knowledge for generations (traditional knowledge) in their daily activities, especially to treat ailments. However biotechnological patents have been claimed on the well known fungicidal and hypoglycemic properties of neem and bitter gourd and the wound healing properties of turmeric....

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International Seminar on  
**Developing Countries and Services Negotiations**  
June 6–7, 2006  
Gulmohar Hall, IHC, New Delhi

International pressure to conclude the DDA at the very earliest has mounted to a peak. Nevertheless, Negotiations at Geneva seem to be making little headway towards sustainable solutions. There seem to have emerged clear, even hardened, positions of developed versus developing countries on several issues.

Deeper Services liberalization is being strongly promoted by developed countries that stand to gain from improved access to developing country markets. In the GATS Negotiations, the developing country positions are however fractured. While some developing countries such as India, Mexico and China have a strong interest in pushing forward the services negotiations, other WTO members have taken defensive postures. Consequently, services negotiations under the Doha Round are progressing slowly. However, in accordance with the Hong Kong Ministerial Declaration, Members have submitted plurilateral requests to their trading partners.

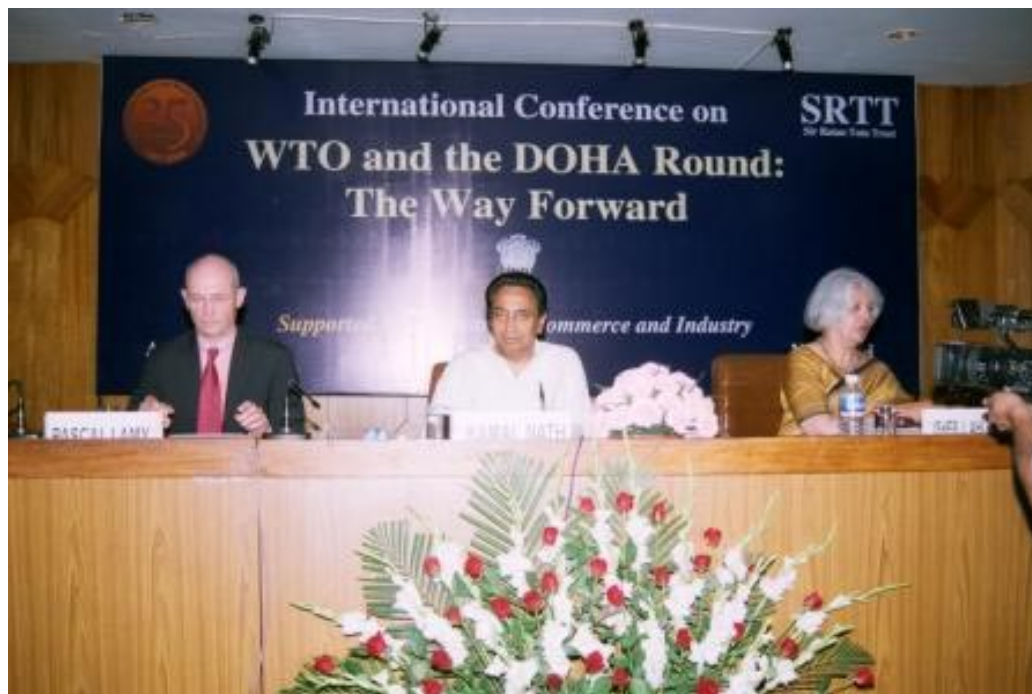
Plurilateral requests have been submitted in 16 sectors, in all four modes and in MFN (most favoured nation) exemptions. At this stage, countries are in the process of determining their negotiating strategies. Many developing countries such as India have unilaterally liberalized most of their service sectors and are now facing various market access and domestic regulation related barriers in developed country markets. It is, therefore, in their interest to push ahead the services negotiations. The lack of interest among certain developing countries to actively participate in services negotiations however undermines the Development objective of this Round.

To facilitate dialogue and to improve cooperation among developing countries, ICRIER is organizing a one-and-half day International Seminar on the Doha Round: Developing Countries and Services Negotiations on June 6-7, 2006. The seminar has the full support of the Indian Ministry of Commerce and Industry and the WTO Secretariat. Key speakers who have confirmed their participation are: *Dr. Harsha Vardhana Singh*, Deputy Director General, WTO, *Mr. S. N. Menon*, Secretary, Ministry of Commerce & Industry, *Dr. Abdel Hamid Mamdouh*, Director, Trade in Services Division, WTO, *Mr. Nripendra Misra*, Chairman, TRAI, *Dr. Mina Mashayekhi*, Head, Trade Negotiation and Commercial Diplomacy Branch, UNCTAD, *Dr. Rupa Chanda*, Professor, IIM Bangalore, *Ms. Vini Qalo*, Economic Adviser, Economic Affairs Division, Commonwealth Secretariat, *Mr. Sumanta Chaudhuri*, Counselor, Permanent Mission of India to the WTO, *Mr. Uday S Kotak*, Vice Chairman and Managing Director, Kotak Mahindra Bank Limited, *Jean-Pierre Lehmann*, Professor of International Political Economy, IMD, among others.

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## WTO DG Pascal Lamy delivered a special address at the ICRIER Conference on *WTO and the Doha Round: The Way Forward*

Indian Council for Research on International Economic Relations (ICRIER) organized an International Conference on **WTO and the Doha Round: The Way Forward**, on April 6 and 7, 2006 at the ITPO Conference Hall, New Delhi. The Honourable Commerce and Industry Minister of India, **Mr. Kamal Nath** inaugurated the Conference, and also delivered the **Valedictory Address**. **Mr Pascal Lamy**, Director General of the WTO, delivered a special address at the inaugural session. The Conference was aimed at providing a platform to key trade representatives and other stakeholders to informally discuss and brainstorm towards identifying new methods of attaining the elusive convergence.



**L to R :** Mr. Pascal Lamy, DG-WTO; Mr. Kamal Nath, Hon'ble Minister of Commerce & Industry; Dr. Isher Judge Ahluwalia, Chairperson, ICRIER.

Inaugurating the conference, Mr Kamal Nath said, "it is important to acknowledge the achievements that were made in the Doha round as there is no time left". He added that "the way to move forward was by looking at things from a future perspective and simulating the economic architecture accordingly". He stressed that the results must be achieved in accordance to the ambitions but it should not be limited to the development concerns only. Mr. Nath added that "In spite of having lot of responsibilities, Mr. Lamy has shown a great persuasive power in the whole process of negotiations". He lauded Director General for his personal involvement for ensuring that the Hong Kong Ministerial was not a failure. He was hopeful that Mr Lamy would be able to give direction and meaning to a successful conclusion of the Doha Round.

Addressing the Conference Mr Lamy said, "India is a key member of the WTO and has benefited from a more open global trading environment. It has always played an active role in almost all negotiating areas". Mr Lamy added, "In the agriculture sector India has both defensive and offensive interests". He was confident "India would be able to cleverly balance both the interests by insisting on an ambitious tariff reduction formula as well as forcefully make the case of protectionism needed in certain sectors like textiles". He

also said, "It was in India's interests to see a drastic reduction in industrial tariff peaks applied by the EU and the US as India also has an important role to play in negotiations on services, trade facilitation and anti-dumping".

Mr Lamy highlighted the fact that the DDA was aimed at focusing on development and correcting the imbalances in the trading system. He stressed that the end of the Doha Round was fast approaching and it will require hard work, determination and nerves to focus on the final goal for strengthening the multilateral trading system. He mentioned that currently only 60% of the package had been achieved. He said the focus of negotiations today was on reaching an agreement by the end of April on three key areas relating to quantum of reduction in agricultural subsidies, agricultural tariffs and industrial tariffs.

Mr Lamy warned that there will be many losers in the Round from developing countries especially, the smallest and weakest countries and the WTO itself. He hoped that given what is at stake, India would contribute its best to help achieve a win-win situation and a successful conclusion of the Round.



Key issues deliberated at the four substantive sessions: Agriculture, Non-agricultural market access, Services, and Rules

## 1. Agriculture

Doha Round is a Development Round and its main agenda is to ensure a level playing field for all countries. This round was intended to reach a convergence over three major issues by 30 April, 2006: agricultural domestic subsidies, agricultural market access, and NAMA. The main issues under the three pillars of agriculture and the suggestions on them are as follows:

### • Domestic Support

- o Tiered formula for cuts in overall Trade Distorting Support (to say 5% of value of production).
- o Additional effort in AMS reduction by developed country members in the bottom band.
- o Reduction in *de minimis* for developed countries.
- o Strengthening criteria on blue and green box to prevent box shifting.
- o Proposal for limiting direct payments to small farmers in the Green Box criteria.
- o Assessment of the developed countries' proposal for cuts in domestic support for effectiveness and creation of real commercial opportunities.

### • Market access

- o Progressive reduction, through a tiered formula.
- o Formula to address tariff escalation.
- o Capping
- o Assessment of credibility of self selection of Special and Sensitive Products (need to keep these to a minimum)
- o Reliance on Special Safeguard Mechanism (SSM).
- o Determining basis for the quantity based and price based SSM

### • Export Competition

- o Maintenance of suggested period of 5 years for elimination of direct export subsidies
- o Strict adherence to discipline on export credit for under 180 days
- o Fundamental changes in food aid with clarity on type of food aid to be permitted in non emergency situations.
- o Limiting monopoly powers of exporting State Trading Enterprises (STEs) while acknowledging that these were an important development instrument for the present day developed countries and hence have a key role to play in developing countries as well.



L to R : Mrs. Anjali Prasad, Joint Secretary, MoA; Mr. Christopher Longman, Former Negotiator, DFA, Australia; Dr. Biswajit Dhar, Head, Centre for WTO Studies; Mr. Gopal K. Pillai, Sp. Secy., GoI, Mr. R. Gopalan, Joint Secy., MoC; Dr. Abhijit Sen, Member, Planning Commission; Dr. Ashok Gulati, S. Asia Head, IFPRI

### Strategies and Options Ahead

- Developing Countries' offer of tariff cuts must be conditional on steep cuts in domestic support by the US and EU.
- Domestic support disciplines must be simplified. The current structure based on the three boxes is complex and ambiguous.
- US need to move forward on domestic support, EU on market access and India, Brazil and other big developing countries need to show greater flexibility on industrial goods.

Within the framework of WTO, India has enough instruments to cater to her interests. Much of the problems like farmer suicides are very much internal and to correct these we must set our own house in order.

Time has almost run out but whatever is agreed upon must be carefully implemented so that mistakes from the Uruguay Round are not repeated.

Offensive and defensive steps of various countries and groups must be in balance to pave the way forward. It would be a collective mistake to postpone the negotiations. Even though developing and developed countries differ in many ways and cannot be directly compared on several counts, if the negotiation is disciplined, it could ensure that all countries gain.

## 2. Non-Agricultural Market Access

- Outstanding Issues
  - o Co-efficient of the Swiss formula
  - o Unbound tariffs
  - o S & DT
  - o Social harmonization
  - o Preference erosion
  - o Issue of newly acceding countries
  - o LDC vulnerability, especially of small island states

### The Way Forward: Issues and Concerns

- o Choice of coefficient is important. If tariff cuts are applied on the lines of the Swiss formula, the maximum tariff will fall below the coefficient agreed upon. Further, choice of coefficient should be such that peak tariffs on products of developing country export interest reduce to accord real access to developed country markets
- o There is a need to resist any move by trade partners (insisting on this change so as to ensure improvements in 'real' market access) to change the basic mandate of WTO by which commitments are to be taken from bound levels. Use of applied rate as base for tariff cuts would mean that developing countries would in future hesitate to introduce unilateral liberalization measures; WTO encourages Members to go beyond MFN commitments. India should therefore resist, and take the stance that cuts will be made from bound rates, though choice of coefficient may lead to cuts that go below the applied rates.
- o Credit for unilateral liberalization undertaken since the conclusion of the Uruguay Round is due to India. During the Uruguay Round, the concessions negotiated by India were within TRIPs, with voluntary commitments made in tariff reduction. Now, India cannot be denied credit for autonomous liberalisation undertaken by bringing up the fact that India did not have to negotiate any tariff liberalisation in the previous Round; on the contrary we need to ensure that we get reciprocal concessions on the unilateral liberalization already undertaken.
- o Paragraph 24 Issues: Given the clear mandate in the Hong Kong Declaration for harmonizing levels of ambition in Agriculture & NAMA, identifying this level of ambition appropriately is important.

- o India is well ahead on the path of unilateral liberalization which is good for the domestic industry. Introspection suggests that India can make still more aggressive offers in NAMA, but without a viable quid pro quo, it would make little sense to take such deep commitments.
- o 'Less than full reciprocity' in cuts is a basic pillar of WTO which cannot be ignored or negotiated. New proposals are being made to evaluate the perpetuation of protectionist tendencies in the developed world aimed at shielding, in Prof Debroy's words, "newly declining (developed) countries" and the "refusing to develop countries". India belongs to neither group, and should not compromise on the principle of less than full reciprocity.
- o Unbound products: flexibility allowed in the NAMA framework is needed to address domestic sensitivities. While there seems to be a convergence on use of a constant mark up on applied rates and use of a nonlinear formula, the degree to which this is allowed is yet to be finalised. A minimum 5% of product lines need to be kept out of reduction commitments; however, the panel felt that India could concede to give up the demand of applying less-than-formula-cuts for certain items.
- o The definition of 'new goods' is unclear even in the Indian context and the categorization of certain refurbished/remanufactured goods is still ambiguous. The government needs to make necessary changes in domestic Foreign Trade Policy to address of the issue.
- o Discussion on Sectorals being non-mandatory as per the Hong Kong mandate is on the back-burner, even though several position papers have been submitted on the subject. However, in certain sectors it may suit India to push for sectoral tariff elimination/harmonization.
- o In the final outcome, it was agreed that countries (in particular developing ones like India) are better off with the WTO. Multilateral processes such as FTAs and RTAs create more distortion and trade diversion, and only complicate the process of doing business.

## 3. Services

- The negotiations in services started in January 2000 and became an integral part of the Doha Round. Although the services negotiations started much ahead of the negotiations in agriculture and NAMA, progress has been slow. Moreover, negotiations in

services are more complex than NAMA and agriculture, wherein once the formula is decided upon the rest of the negotiations fall in place. However, in services intense negotiations on cross-cutting issues across different sectors are required to arrive at a consensus. Services negotiations in the Doha Round are significantly behind schedule.

- India is a proactive player in the services negotiations and its stake in the multilateral negotiations is high since it is not a member of any major trading bloc.
- Since the beginning of the current Round, India is pushing for greater market access in Modes 1 and 4.
- In Hong Kong it was agreed that members would explore all negotiating methods available within the GATS parameters and accordingly members decided to undertake plurilateral negotiations in addition to the bilateral request-offer negotiations. As per the deadline set in Hong Kong (of 28 February 2006), members have submitted the plurilateral requests and first services cluster was held between 27 March and 7 April. Around 35 countries participated in plurilateral negotiations. Plurilateral requests have been made in 16 sectors, in Modes 1 or 2, 3 and 4 and in MFN (both general MFN exemption and for exemption of MFN in audio-visual and financial services). Developed countries have made most of the requests (Japan in 13 sectors and US and EU in 12 sectors each) and target countries are mostly developing countries. India, Brazil, Philippines, Malaysia, South Africa are receiving the largest number of requests. Some developing countries such as Mexico, India and Chile also made requests.
- India received requests in 14 sectors and for removal of MFN exemption in audio-visual services. India made requests in Modes 1/2 and Mode 4 and computer related services.
- During the March-April services cluster, Members sought detailed clarifications on what the requests entailed, described their current policy regime and indicated the extent to which the requests could be met.
- India identified sectors in which it could meet the demands listed in plurilateral requests. In certain sectors India has met the request substantially. These include construction and related engineering, logistic services, maritime transport, etc. In some sectors it would be difficult for India to meet the requests. These include retail services, legal services, etc.
- The requests are dominated by developed countries and many developing countries are defensive about participating in the negotiations. The seminar called for greater participation from

developing countries in the services negotiations. It also called for greater cooperation among developing countries and technical assistance from large developing countries to others.

- It highlighted the need to address domestic regulations. Many barriers faced by professionals in developed country markets are related to domestic regulation such as qualification and licensing requirements. On their part, even proactive developing countries such as India are not able to make commitments in certain sectors since the regulatory regime is still evolving.
- It was pointed out that the coverage of Mode 4 needs to be widened to accommodate interests of other developing countries. There should be greater cooperation between sending and receiving economies so that ambiguity regarding the quality of workforce, security issues, etc. can be resolved.
- Along with market access commitments, the focus should be on securing national treatment commitments.

#### 4. Rules

Doha Round has a limited mandate to clarify and improve existing articles in the agreements on anti-dumping, subsidies and safeguards, and rules on RTAs. The discussions were however focussed on AD, ASCM & fisheries subsidies.

Way forward suggested:

- o **AD needs to balance interests:** There is a need for a pro-exporter bias to redress the damage caused by the abuse of these provisions by India's trade partners
- o **Anti circumvention** (the sweeping proposal by US): Ambiguity of wording raises the possibility of misuse and abuse. Hence there is a need to ensure predictability and put in place fair rules that clearly define the balance of rights and obligations, and call for circumspection and care.
- o **New Shipper Review:** It is important to retain the requirement of accelerated review, and if possible, refine the requirement of *bona fide commercial sales*. Flexibilities are needed to prevent abuse and improve transparency. India could then be open to further disciplines.
- o **Sunset Reviews:** There is a need to limit subjectivity and improve transparency of 'likelihood tests' and provide clear definitions of methods of calculation etc. Automatic termination of sunset review duty needs to be pushed for, ideally after 5 years, but

definitely after say 7-10 years. One view was that if duty is allowed to continue, new duty from date of expiry should be imposed, and imposition of retrospective duties should not be allowed.

- o **Dumping Margin:** Currently, de minimis rates are at 2% which need to be raised to 5%. Further, whereas now the rate is applied on percentage of total imports, it should be calculated on percentage of total domestic consumption. To discourage small margin initiation misuse, cumulation of markets for the purpose of initiation should not be allowed.
- o **Lesser Duty Rule:** India applies the LDR and is a demandeur of mandatory application. However, we could be persuaded to accept a limited mandatory application of LDR to original investigation and thus provide some flexibility to countries.
- o **ASCM:** The export competitiveness issue is of pre-eminent importance. A clarification of what is a 'reasonable and effective verification system' needs to be evoked in our favour.
- o **'Prohibited Subsidies':** A clearer definition is needed on what is prohibited. This new development is a cause for concern as further erosion of policy space is being envisaged. Also, application of Prohibition Rules should not apply to developing countries, especially the Annex 7 countries as in the case of

export subsidies.

- o **Fisheries Subsidies:** These are important for overall balance in rules negotiation. However, there is a need to ensure that we:
  - protect interests of small fishermen;
  - protect support for deep sea fishing;
  - exclude disciplining of inland fishing.

**While Summing-up** the Conference, Session Chairman, Mr Gopal K Pillai highlighted the urgency of remaining engaged in the multilateral negotiations. He stressed that though many issues remain unresolved, a negotiated deal is still possible. This would however require all Members to move away from their extreme positions and make adjustments albeit without compromising on the core issues of concern.

He stressed that of the two main areas of focus, viz. agriculture and NAMA, agricultural negotiations in DDA are only in their second round; consequently, one can't expect miracles. However, WTO Members could use this opportunity to discipline domestic agricultural policies, especially vis-à-vis the different boxes of subsidies and direct payment issues; sensitive products and SSM; tariff caps and tariff peaks in items of export interest to developing countries. Domestic sensitivities in agriculture vis-à-vis livelihood issues need to be respected. In comparison, for countries like India, coming to a convergence in NAMA is a much easier proposition, and flexibilities could be attained relatively painlessly.

## School Brief

### *Biotechnological Patents, Traditional Knowledge and the TRIPS Council*

by Adithya Krishna Chintapanti

India is one of the most biologically diverse countries of the world. Indians are aware of the therapeutic and medicinal properties of various biological resources available in the country. Furthermore, Indians have been applying this knowledge for generations (traditional knowledge, henceforth TK) in their daily activities, especially to treat ailments. However, in recent times, biotechnological patents have been claimed on the well known fungicidal and hypoglycemic properties of some of the well known natural resources, viz. neem and bitter gourd, and the wound healing properties of turmeric. This has raised apprehensions about misappropriation of biological resources and traditional knowledge of communities (biopiracy) and commercial concerns associated therewith.

Such instances of biopiracy point to the significance of traditional knowledge in guiding ongoing research in biotechnology and drug development by reducing the time and investment in prospecting and identification of active ingredients. However, those who obtain patents on properties of biological resources which are common knowledge in the country of origin of the said resources do not share the benefits (pecuniary) arising out of the patent's commercial exploitation. In certain cases the biological resources are even smuggled from the source country without the prior authorization of the concerned community/government.

Activism on biotechnological patents is gradually picking up pace. So far, most patents on misappropriated biological



resources and traditional knowledge of the biologically diverse developing countries have been granted in the technologically advanced and IPR-savvy developed countries. Though many such patents have been successfully contested and revoked, individually challenging each patent application is time-consuming and financially prohibitive. Hence, developing countries like India, Brazil, Thailand etc. are advocating a systemic solution by providing for appropriate legal and institutional means for recognizing the rights of communities on their TK.

## A Way Forward

Mandatory disclosure of the source of the biological resource and TK associated therewith as a pre-condition for grant of a patent under the TRIPS Agreement (criteria for patentability) is one of the proposals submitted by WTO Members to pre-empt grant of patents on misappropriated biological resources and TK. The proposal has its roots in Article 15 of the Convention on Biological Diversity (CVD) 1992, which affirms the sovereign rights of States over their biological resources. The article makes access to genetic resources conditional upon obtaining prior informed consent (PIC) of the state providing genetic resources. It also requires members who have been granted access, to share the benefits arising out of the commercial exploitation of the said natural resources in a fair and equitable manner, with the member country providing access (Access and Benefit Sharing requirement (ABS)).

The Hong Kong Ministerial Declaration of November 2005 reiterates the commitment of the WTO Members to the Doha Mandate urging them to explore the relationship between the TRIPS Agreement and the Convention on Biological Diversity with regard to protection of traditional knowledge and folklore. The ongoing negotiations in the Council on TRIPS are in pursuance of the above.

## Submissions by India and Other Developing Countries

The basic thrust of these proposals is in urging the TRIPS Council to recommend certain amendments to the TRIPS Agreement, requiring the applicant of a biotechnological patent to furnish as a prerequisite for grant of patent: '(i) a disclosure of the **source and country of origin** of the biological resource and of the traditional knowledge used in the invention; (ii) **evidence of prior informed consent** (PIC) through approval of authorities under relevant national regimes; (iii) furnish proof of **fair and equitable benefit sharing** under relevant national regimes (ABS)'.<sup>1</sup>

In a recent submission to the TRIPS Council dated 21<sup>st</sup> March 2006, India and other interested developing countries provided details on the substantive and procedural content of the aforementioned criteria for patentability.<sup>2</sup> They define the *source and country of origin* of the biological resource involved in patenting as, either the country which is the original repository of the said resource (country of origin) or a country other than the country of origin from which the resource is obtained. In case of the latter, the applicant is required to disclose the details of both the countries which would help determine novelty and inventive step by facilitating ascertaining the TK associated therewith.

In the opinion of India and other developing country members, furnishing a document indicating PIC by the concerned national authority or community would satisfy the *evidentiary requirements of PIC*. As regards the proof of *fair and equitable benefit sharing (ABS)*, the applicant needs to either annex the contract of benefit sharing and/or a certificate issued by the concerned authority established by domestic legislation.

The Indian submissions also recommend a range of sanctions for non-disclosure and non-adherence to PIC and ABS, from revocation of the patent to a partial transfer of rights on the country which was the repository of the genetic material or the community which was the custodian of the TK.

## Counter Submissions

This proposal of making disclosure a prerequisite for patenting within the TRIPS regime is however not acceptable to the developed countries. The three alternatives suggested by the latter include:

- (i) the European Unions' proposal for an international disclosure regime outside the TRIPS Agreement. The EU also believes that the same should not contain access and benefit sharing requirements especially in light of the fact that many countries do not have appropriate domestic regulatory mechanisms to issue 'certificates of evidence' to that effect<sup>3</sup>;
- (ii) the Swiss proposal for a system whereby national legislation would deal with the disclosure requirement with regards to biological resources and traditional knowledge associated with the patent applications<sup>4</sup>; and
- (iii) the American submission on the need for having strong national laws outside the patent system so as to ensure



equitable benefit sharing (ABS) and prior informed consent (PIC) and propose a contract based model to implement the same.<sup>5</sup> They are of the view that a mere disclosure of source of origin in the absence of a strong PIC and ABS is an exercise in futility, as there would be no mechanism to ensure that adequate compensation has been paid even if a transgression of the duty to disclose has been identified.<sup>6</sup>

### Some Observations

The current negotiations are encouraging in two respects, viz, developed countries are being forced to react to

alternate models of IP regulations put forth by the developing countries, and India along with Brazil and Peru is playing an active role in molding the terms of the debate. However, there has been no breakthrough in the negotiations so far, as the different players are reluctant to change their stance. India and other developing countries may need to rethink their strategy, and if need be, call for a reevaluation of the terms of negotiations so as to quickly arrive at some mutually accepted middle-ground. The potential loss from a larger number of such frivolous patents granted on misappropriated traditional knowledge and biological resources would continue to mount with time.

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- <sup>1</sup> Submissions to the Council for TRIPS by India, Brazil and Others, (IP/C/W/356) – 24 June 2002, <http://docsonline.wto.org/DDFDocuments/t/IP/C/W356.doc>
- <sup>2</sup> Submissions to the Council for TRIPS by India, Thailand and Others, (IP/C/W/470), <http://docsonline.wto.org/DDFDocuments/t/ip/c/w470.doc> . This submission also clarifies certain concerns of the developed countries with regard to the terminology used in the developing country submissions and especially with regard to the Swiss submission (IP/C/W/446) dated 30 May 2005.
- <sup>3</sup> Submissions to the Council for TRIPS by the European Union and its member States, (IP/C/W/383) – 17<sup>th</sup> October 2002, <http://docsonline.wto.org/DDFDocuments/t/IP/C/W383.doc> .
- <sup>4</sup> Submissions to the Council for TRIPS by Switzerland, (IP/C/W/400/Rev.1)-18 June 2003, <http://docsonline.wto.org/DDFDocuments/t/IP/C/W400R1.doc>.
- <sup>5</sup> Submissions to the Council for TRIPS by the United States of America, (IP/C/W/434) - 26 Nov 2004, <http://docsonline.wto.org/DDFDocuments/t/IP/C/W434.doc>
- <sup>6</sup> Submissions to the Council for TRIPS by the United States of America, (IP/C/W/469), <http://docsonline.wto.org/DDFDocuments/t/ip/c/w469.doc>.

## GATS Negotiations *Developments since the Hong Kong Ministerial*

by Suparna Karmakar

### Net Gains in Services – A Status Report

Arguably, the current deadlock in the WTO stems from a lack of convergence on the agriculture modalities pertaining to the phase-out of domestic farm subsidies (including export subsidies) in developed countries. However, the main stumbling block in the ongoing negotiations under GATS is arising from the lack of satisfactory quality of offers from Members vis-à-vis intra-modal asymmetries as well as continuance of MFN exemptions. While initial expectations from negotiations (the so called 'ambition') were high, in view of the lukewarm nature of the offers made by Members, narrowing down on any viable and generally acceptable deal is becoming impossible. Despite contributing a share of world GDP, the fact that services are not as actively traded

as goods is a clear indicator of the extent of protection that countries accord to the domestic stakeholders in the sector; internationally, services is the second most protected sector after agriculture. The reflection of the above is in the weak offers that Members have made in GATS. Progress of liberalization under the bilateral request-offer approach, as experienced so far, has been rather slow. Members are of the view that the two rounds of request offers has not resulted in satisfactory quality of offers, and merely having another round of the same without more specificity and direction will not bring desired results.

Also, the asymmetries between different modes and sectors

had not been addressed in the revised offers. Recognizing that gaps still exist between the offers and levels of autonomous liberalization in Member countries, that there have been very limited offers of new market openings, and large numbers of MFN exemptions still remain, the Draft Declaration has set out guidelines and objectives for scheduling of commitments. The main text and the Annex C on Services in the final Draft Ministerial Declaration reaffirms that while the objectives and principles stipulated in GATS and in the Doha Declaration will be followed, in order to achieve a progressively higher level of liberalization of trade in services, Members should make commitments in modes 1 & 2 to bind 'existing' levels of market access, de-linked from the commercial presence requirements, and under mode 3 for Members to make commitments on 'enhanced levels of foreign equity participation', allowing greater flexibility on the types of legal entity permitted and removal or substantial reduction of economic needs tests. In mode 4, in paragraph 1, the objectives and scheduling guidelines indicate that 'new or improved' commitments are to be made in select categories of temporary service suppliers de-linked from commercial presence, to reflect *inter alia* removal or substantial reduction of economic needs tests and indication of prescribed duration of stay and possibility of renewal, if any.

However, how far these will contribute towards actual improvement of offers by Members remains to be seen, especially in view of the fact that Members are cautious even to take commitments that match their domestic levels of liberalization, or lock-in existing domestic regimes. Developing countries are in a peculiar quandary; while services liberalization offer larger gains than in any other pillar of market access, given that domestic regulatory regimes are rather weak in most economies, it becomes difficult for them to open up aggressively for fear of being unable to rise to the regulatory challenges that such an action would entail. India herself is not in a position to do that for a large number of sectors where unilateral domestic reforms have taken place. It is even more difficult for those developed countries that have already opened a large number of sectors, and are not able to make significant improvements to existing offers because of domestic sensitivities, most critically pertaining to rising unemployment in a scenario of weak growth prospects.

But, to address the concerns of Members as regards the weak 'quality of offers' and 'slow progress' of multilateral negotiations under the bilateral request-offer approach, the Draft Declaration retained the possibility of engaging in the 'plurilateral' request-offer negotiations, the results of which however 'shall' be extended on a MFN basis. In the run-up to

the Hong Kong Ministerial, India along with some other like-minded Members had formed a 'Friends' group on Services, which supported the usefulness and need for such complementary approaches in an effort to increase the 'modal coverage' and gather the 'critical mass' required to achieve a more comprehensive liberalization of the services sector under the DDA. This complements India's offensive interests in the sector, and India has been one of the major demandeurs in the GATS negotiations.

### **The Way Forward**

In the months leading up to the WTO Ministerial Meeting in Hong Kong, several proposals had been made by WTO Members suggesting ways in which the existing request-offer approach can be supplemented. Some of these proposals called for embarking on a negotiations strategy with 'common baseline' for services or a 'benchmark' which would require WTO Members to make a minimum commitment to liberalize trade in certain services. India was actively engaged in these deliberations and has been an integral part of the group 'Friends of Mode 4'.

Recognising that bilateral negotiations through requests and offers tends to slow down the pace of liberalisation in the services sectors, it was decided at the Hong Kong Ministerial meet that voluntary plurilateral negotiations would also be carried out simultaneously. And as expected this is an area where one has seen traction. For India in particular, though a second-best solution, plurilateral deals would still be an incremental step forward, given that the majority of our larger trade partners in the services sector belong to the said Friends Groups and would address to a large extent our immediate market access concerns. In view of the country's offensive interests, India continues to support the usefulness and need for complementary approaches, and is an active Member of four of the seventeen plurilateral sectoral groups that have put forward their requests.

The other area of focus and push would need to be in Services Rules. Members have been deliberating on different elements of Rules under GATS since the beginning of the Doha Round, but progress so far has been rather slow. Even in areas like Domestic Regulation (DR) where convergence had been largely achieved at Geneva during the Council for Trade in Services (CTS - Special Session) meetings prior to the Hong Kong Ministerial, the draft failed to come up with concrete modalities. It is commonly accepted that for developing countries to realize the Round's development potential, a

focus on movement of natural people (mode 4) as well as cross border supply of services under modes 1 and 2 is a must. Developed countries have not been very accommodating on this account. The fact remains that given that DRs are used as *de facto* market access barriers by importing countries, unless there is any agreement on disciplines on their indiscriminate use, no amount of market access in mode 4 would ensure gains for developing countries from the services liberalization, thereby defeating the development agenda of the Round.

While it is possible that an ambitious multilateral deal in GATS may be unattainable in the current round of negotiations, it is quite feasible that the plurilateral agreement be made as comprehensive as possible. Towards that end, the fact that the present mandate on plurilateral negotiations is very narrowly focused on only market access seems counter-intuitive. WTO Members should certainly consider incorporating at least the most critical of the GATS Rules negotiations, namely the DR, as a part of the plurilateral negotiations for market access in services.

## Recent Developments in WTO

By Shravani Prakash

- **WTO Cotton Sub-Committee**
- **Novel Debate on EU's food regulation**
- **The DSB establishes panel in reference to aircraft subsidy dispute**
- **Trade Policy reviews**
- **Trade Negotiations Committee Report**

### WTO Cotton Sub-Committee

In March, the Cotton Four (the four African countries that originally proposed the Cotton Initiative - Benin, Burkina Faso, Chad and Mali) clarified their proposal for cutting and eventually eliminating trade-distorting domestic in a new paper discussed in the Cotton Sub-Committee. The new details included a formula designed to ensure that the cuts on cotton were deeper than those for agricultural as a whole. A number of members have supported the proposal. The USA, however, said that the proposal would not put the talks on the path to success.

WTO Director General Pascal Lamy meanwhile started his consultations on the development aspects of cotton as instructed by the Hong Kong Ministerial.

### Novel Debate on EU's Food Regulation

According to the Sanitary and Phytosanitary Measures Committee, a proposed revision of the EU regulation on novel foods aroused the concern of many developing countries, mainly from Latin America.

Colombia, Ecuador and Peru said the current regulation was

designed primarily to deal with new technologies, such as genetic modification, but it affected their ability to export "small exotic traditional products" based on their rich biodiversity. They said they were concerned that the proposed modifications to the regulation would not resolve these problems. Some of these products have been available in their countries for centuries and should not be lumped together with new technologies such as genetic modification, they said. They were supported by Paraguay, Costa Rica, Honduras, El Salvador, Chile, Brazil, Mexico, Argentina and Uruguay, among Latin American countries, and also Benin (which asked when a product is "new"), and India.

### Panel for Aircraft Subsidy Dispute

The DSB, on February 17, 2006, established a panel to help resolve a number of procedural matters that have risen in the Dispute US measures affecting trade in large civil aircraft brought by the EC.

The EC requested for the second time the establishment of panel to resolve a number of procedural "imbroglios" that have risen in the panel established on 20 July 2005. The EC explained at the last DSB meeting that this "limbo" needed to be resolved quickly since the EC considered that

it has been deprived of its rights to access the documents relevant, in particular regarding NASA and Departments of Defence subsidies, to the dispute.

The US expressed regret about the EC's action, as it considered that the best approach would have been a mutual agreement on this panel request. Although the panel would be established at this DSB meeting, the US asked for consultations with the EC regarding the relationship between this panel and the one established on 20 July 2005. Furthermore, the US added that it was not in position to accept EC's request to begin an information-gathering process. According to the US, the so-called Annex V procedures could not start until the parties agreed on the modalities, noting that the Annex V procedures initiated on 23 September 2005 for the civil craft dispute were inadequate.

### **Trade Policy Reviews**

The Trade Policy Review for the United States was released in March 2006. According to the WTO Secretariat report, the US has undergone rapid economic growth since its last Trade Policy Review in 2004, aided by the openness and transparency of its trade regime. The world's largest import market and a key engine of global growth continued making incremental changes to its trade regime, including liberalization on an MFN and preferential bases. The report notes, nonetheless, that market access barriers and other distorting measures, notably subsidies, persist in a few but important areas, and that addressing these distortions would benefit U.S. consumers and taxpayers and help strengthen the global economy.

Some of the other Trade Reviews released in the first quarter of 2006 were UAE, China, Djibouti, Israel and Malaysia.

### **Trade Negotiations Committee Report**

Director General Pascal Lamy, as the chair of the Trade Negotiations Committee, presented the report of its first formal meeting since the Hong Kong Ministerial to the General Council in February.

The Director General in his statement noted the "very detailed timelines" in the Hong Kong Declaration and urged negotiators "to intensify contacts with other delegations and with your capitals, to move us towards the elements we need to conclude the Doha Round at the end of this year".

Mr Lamy said that from the meeting there was a clear message that all members attached highest importance to making progress in all the areas of negotiations in keeping with the Single Undertaking. He said although Agriculture and NAMA would play the key role in leading the talks to a successful conclusion, it is important that all other areas of negotiations must be concluded at the same time as well. The Director General said that the calendar of work with firm deadlines set out in the Hong Kong Declaration governed the work that had to be carried out in this year.

Regarding the process of achieving an end to the negotiations, Mr Lamy said that the pre-Hong Kong process had served well, and therefore should be maintained and improved upon. He said that "a transparent inclusive process, based on a bottoms-up approach is clearly in the interest of us all".

The Director General underlined the fact that it was not enough to just continue talking about calendar and process but it was time to turn to substance. He stressed that the only way to make progress across the board in the Doha Round Negotiations was by focussing on two main elements, namely numbers and words, texts.

