

# THE WTO REGIME: A HUMAN RIGHTS PERSPECTIVE

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*Submitted by*

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## CERTIFICATE

This is to certify that the dissertation entitled THE WTO REGIME: A HUMAN RIGHTS PERSPECTIVE submitted by MOHAMMED HUSSAIN K.S. is in partial fulfillment of the requirement for the degree of Master of Philosophy (M.Phil.) of this University. It is his original work and may be placed before the examiners for evaluation. This dissertation has not been submitted for the award of any other degree of this University or of any other university.

Prof. Alokesh Barua  
(Chairperson)

Prof. Yogesh .K. Tyagi  
(Supervisor)

*Dedicated to my*

*beloved*

*Amma and Atta*

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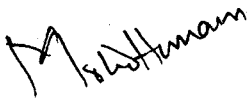
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## CHAPTER-I

### INTRODUCTION

The Uruguay Round of trade negotiations culminated in the adoption of the final text of the agreement establishing the World Trade Organization (WTO). The principal aim of the WTO is not only the liberalization of international trade in goods and services but also the protection of intellectual property rights. The Marrakesh Declaration of 15 April 1994 affirms that the WTO ushers in a new era of global economic cooperation, reflecting the widespread desire to operate in a fairer and more open multilateral trading system for the benefit and welfare of peoples. It is believed that the trade liberalization and strengthened rules achieved in the Uruguay Round will lead to a progressively more open world trading environment.

Together with the development of international trade law, there has been a systematic development in international human rights law under the auspices of the United Nations. The adoption of the Universal Declaration of Human Rights (UDHR) in 1948 by the UN General Assembly was an important milestone in the development of an international human rights regime. In 1966 the General Assembly adopted two enforceable human right covenants: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). There is a growing demand that the international trade law regime and the international human rights regime should complement each other.<sup>1</sup>

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<sup>1</sup> See Ernst-Ulrich Petersmann, "Human Rights and International Economic Law in the 21<sup>st</sup> Century: The Need to Clarify their Interrelationships", *Journal of International Economic Law*, vol. 4, no.1, March 2001, p.4. Author observes that the universalisation of human rights and of WTO law offer mutually beneficial synergies that require increased cooperation between human rights activists, the

## Free Trade and Human Rights

No area of human existence today is free from the varied consequences of globalization. The process of globalization is closely associated with the notion of free trade. Globalization is not simply a question of free trade, increased investments, and liberalized regimes of finance. Rather, the effects of globalization are manifest in a wide array of contexts—from social and cultural, to economic, environmental and political.<sup>2</sup>

WTO has been relatively more closely associated with the phenomenon of globalization. Central to the ethos and practice of the WTO is a set of principles that have provided the basic foundation for most contemporary developments associated with globalization. Among those principles are free trade, open markets and tariff reductions.<sup>3</sup> A closer examination of the WTO will reveal that while trade and commerce are indeed its principal focus, the organization has extended its purview to encompass additional areas beyond what could justifiably be described as within its mandate. Furthermore, even its purely trade and commerce activities have serious human rights implications.<sup>4</sup> The following

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WTO, and the world trade community for the benefit of the citizens and their human rights. Also see Peter Prove, "Human Rights at the World Trade Organisation", in Malini Mehra, ed., *Human Rights and Economic Globalization: Directions for the WTO* (Global publications foundation, 1999), p.35. Author is of the view that it is all the more appropriate that within the international trade fora, and particularly the WTO, human rights principles should no longer be seen as the enemies of effective international trade policy, but rather as the guiding principles for international trade policy that actually serves the need of the world's peoples, rather than the greed of a privileged coterie.

<sup>2</sup> *Globalization and its impact on the full enjoyment of human rights*, Progress report submitted by J. Oloka-Onyango and Deepika Udagama, UNCHR, E/CN.4/Sub.2/2001/10, 2 August 2001, para.4.

<sup>3</sup> *Globalization and Its Impact on the Full Enjoyment of Human Rights*, Preliminary report submitted by J. Oloka-Onyango and Deepika Udagama, Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/2000/13, June 15, 2000,

<http://www.unhchr.ch/huridocda/huridoca.nsf/Documents?OpenFrameset>

<sup>4</sup> *ibid.*



is the WTO's position regarding its obligation to respect universal human rights norms:

... while the multilateral trading system can help to create the economic conditions which contribute towards the fulfillment of human rights, it is not within the mandate of the WTO to be a standard setter or enforcer of human rights. Unlike most human rights law, WTO Agreements generally specify rights and obligations between States and not between States and individuals. WTO Agreements do not create or articulate human rights as such, but do facilitate a climate necessary for economic prosperity [and] the rule of law and seeks to curb unilateral action and abuses of power in international trade. These are all-important elements necessary for the respect of human rights.<sup>5</sup>

However, a full reading of the Agreement makes it clear that the parties thereto did not intend to adopt a trade regime merely for its own sake. As the preamble to the Agreement declares, parties recognize that their "relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, and ensuring full employment and a large and steadily growing volume of real income and effective demand" In other words, human development and well-being is a central concern of the trade regime under the WTO.

### **Significance of the study**

WTO agreements are primarily aimed at trade liberalization. During the last seven years, 1995-2002, there is a growing demand for the inclusion of human rights provisions (social clauses) in those agreements. This demand was mainly made by developed countries and northern NGOs.<sup>6</sup> But developing countries, including India and southern NGOs<sup>7</sup> are vehemently opposed to this

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<sup>5</sup> See n.3, page 27

<sup>6</sup> International Confederation of Free Trade Unions (ICFTU) and the American Confederation of Labour - Congress of Industrial Organization (AFL-CIO).

<sup>7</sup> Third World Network, Consumer Unity & Trust Society.

idea. The Havana Declaration of the Group of 77 that followed the South Summit held from 10 to 14 April 2000 was unequivocal in this respect, stating that it rejected "all attempts to use these issues for resisting market access or aid and technology flows to developing countries".<sup>8</sup> The commitment of developed countries to a genuinely democratic and human rights-sensitive international regime is rendered suspect both by an extremely superficial rendering of the meaning of human rights and by the numerous double standards that are observed everyday in the relations between the countries of the North and those of the South.<sup>9</sup> In other words, human rights are frequently used merely as an opportunistic fulcrum to achieve the objective of liberalized markets. The Singapore Ministerial Conference 1996 made it clear that labour rights should be dealt by the ILO. The 1996 Singapore Ministerial Declaration states:

We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them.... We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration.

The 2001 Doha Ministerial Declaration reaffirms the above commitment. It states:

We reaffirm our declaration made at the Singapore Ministerial Conference regarding internationally recognized core labour standards. We take note of work under way in the International Labour Organization (ILO) on the social dimension of globalization.

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<sup>8</sup> See Havana Declaration of the G-77 South Summit, 14 April 2000, <http://www.g77.org/main/intern.htm>

<sup>9</sup> See n.3.

Does the WTO regime deal with human rights issues? An analysis of the Marrakesh agreement establishing the WTO, other agreements and implementation mechanisms, including Dispute Settlement Understanding (DSU), is required to answer this question.

### **Scope of the study**

The present study is mainly intended to test whether the WTO regime is indifferent to human rights principles. It includes an analysis of WTO agreements to find out how far the provisions of the agreements are in conformity with the international human rights regime. Finally, it attempts a close look at the implementation mechanism, including the Dispute Settlement Understanding (DSU) and its decisions to examine whether the WTO regime complies with human rights principles.

Eleven human rights are covered by the provisions of WTO agreements. These are protection of human life, health and safety (right to life, health and safety);<sup>10</sup> raising the standard of living;<sup>11</sup> protection and preservation of the

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<sup>10</sup> The GATT 1994 has a series of general exceptions. One such exception is concerning the measures taken to protect human life or health (Article XX (b)), subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade. Also, Article XIV (b) of the General Agreement on Trade in Services (GATS), preamble to the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), Article 2.1 of the SPS Agreement, Article XXIII of the Agreement on Government Procurement and preamble to the Agreement on Technical Barriers to Trade (TBT Agreement) lay down that the members have the right to take measures necessary for the protection of human life or health provided that such measures are not inconsistent with the provisions of this agreement. Article 2.2 of the TBT Agreement also provides for human safety. Article 27.2 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) provides that the members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect human life or health. Also, Article 8.1 of the TRIPS states that members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health, provided that such measures are consistent with the provisions of the agreement.

<sup>11</sup> One of the objectives of the establishment of the WTO, as articulated in the preamble to GATT 1994, is to raise standard of living. The Marrakesh agreement recognizes that the parties to the

environment (right to environment);<sup>12</sup> food security and nutrition (right to food and nutrition);<sup>13</sup> protection of the privacy of individuals (right to privacy);<sup>14</sup> protection of national treasures of artistic, historic or archaeological value;<sup>15</sup> ensuring full employment (right to employment);<sup>16</sup> maintenance of international peace and security (right to peace);<sup>17</sup> sustainable development and conservation of natural resources (right to sustainable development and natural resources);<sup>18</sup>

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agreement should conduct their relations in the field of trade and economic endeavor with a view to raising standard of living of their people.

<sup>12</sup> One of the objectives enshrined in the preamble to the Marrakesh agreement is to protect and preserve the environment while allowing the optimal use of the world's resources in accordance with the objectives of sustainable development. The preamble to the Agreement on Agriculture (AOA) states about having regard to non-trade concerns, which includes the need to protect the environment. The Agreement on TBT provides for technical regulations to fulfill legitimate objectives. Such legitimate objectives include the protection of the environment (Article 22). This provision is in addition to the recognition given in the preamble to the TBT that no country should be prevented from taking measures necessary for the protection of the environment. For the protection of the environment, Article 27 (2) of the TRIPS Agreement points out that members may exclude patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.

<sup>13</sup> The preamble to the AOA addresses non-trade concerns. It provides that commitment under the reform programme should be made in an equitable way among all members, having regard to non-trade concerns, including food security. AOA Article 12 lays emphasis on food security. Article 8.1 of the TRIPS provides that members may, in formulating and amending their law and regulations, adopt measures necessary to protect public health and nutrition, provided that such measures are consistent with the provisions of these agreements.

<sup>14</sup> Article XIV (c) (ii) of the GATS provides that subject to the requirement that such measures (general exceptions) are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail or a disguised restriction on trade in services, nothing in this agreement shall be construed to prevent the adoption or the enforcement by any member of measures for the protection of the privacy of individuals in relation to provision and dissemination of personal data and the protection of confidentiality of individual records and accounts.

<sup>15</sup> General exceptions of the GATT 1994 also provides for the measures imposed for the protection of national treasures of artistic, historic or archeological value by any contracting party. It should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

<sup>16</sup> The preamble to the Marrakesh agreement recognizes that the parties to this agreement should conduct their relations in the field of trade and economic endeavor with a view of ensuring full employment.

<sup>17</sup> Article XXI of GATT 1994 and Article XIV *bis* of GATS provide for security exceptions. The above provisions states that nothing in this agreement shall be construed to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

<sup>18</sup> The preamble to the Marrakesh Agreement recognizes the objective of sustainable development while allowing for the optimal use of the world's resources. The general exception clause of GATT 1994 also provides that nothing in this agreement shall be construed to prevent the adoption or the enforcement by any contracting party of measures relating to the conservation of exhaustible

right to freedom from forced labour (prison labour);<sup>19</sup> and protection of public morals or to maintain public order or safety.<sup>20</sup> Only two have been selected for detailed study. These are provisions relating to the right to health, and the right to food and nutrition.

### **Objectives of the Study**

The proposed study is designed

1. To examine whether the existing WTO regime has the scope for dealing with human rights questions; if yes, to identify those rights.
2. To enquire how the WTO deals with the selected human rights.
3. To analyze the scope of the human rights provisions of WTO agreements with reference to international human rights instruments.

### **Research Methodology**

The present study is based on both primary and secondary materials. While dealing with the selected human rights provisions, it examines the relevant provisions of WTO agreements and relevant case law, correlating and comparing

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natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumptions (Article XX (g)).

<sup>19</sup> General exceptions under Article XX (e) of GATT 1994 lays down that nothing in this agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures relating to the products of prison labour. It should not be a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Article XXIII of the Agreement on Government Procurement also states about the products or the services of handicap persons, of philanthropic institutions or of prison labour.

<sup>20</sup> Article XX (a) of the GATT 1994 (general exceptions) enables the parties to take measures necessary to protect public morals. GATS also provides for measures necessary to protect public morals or to maintain public order (Article XIV (a)). The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of the society. Article XXIII of the Agreement on Government Procurement also provides for the protection of public morals, order or safety. Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect public order or morality, provided that such exclusion is not made merely because the exploitation is prohibited by their law.

the selected human rights provisions with reference to international human rights instruments and Indian Constitutional law, and analyzing the scope of the human rights provisions in WTO agreements. The study involves an examination of the UN Charter, relevant resolutions of the UN General Assembly, relevant resolutions and statements of ECOSOC, the UN Commission on Human Rights, the UN Committee on Economic, Social and Cultural Rights, the Sub-Commission on the Promotion and Protection of Human rights, and the UN High Commissioner for Human Rights. It also makes use of the relevant reports of UNCTAD and UNDP, as well as the WTO ministerial declarations and decisions.

## CHAPTER-II

### WTO AND THE RIGHT TO HEALTH

This chapter analyzes the linkages between the WTO and the right to health. How does the WTO deal with the right to health and its possible implications are also examined here. The chapter examines the definition of the right to health and the nature of obligation provided by the applicable international human rights instruments, World Health Organization (WHO), and other relevant documents. The agreements selected for the study are: GATT 1994; Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS); Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement); and Agreement on Technical Barriers to Trade (TBT Agreement).

#### **1. Linkages between health and human rights**

Since the creation of the United Nations international responsibility for health and for human rights has been increasingly acknowledged. Yet the actual linkages between health and human rights had not been recognized even a decade ago.<sup>1</sup> Generally thought to be fundamentally antagonistic, these two worlds had evolved along parallel but distinctly separate tracks until a number of recent events helped to bring them together. Conceptually one can point to the HIV/AIDS pandemic; to women's health issues, including violence; and to the blatant violations of human rights that occurred in such places as the Balkans

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<sup>1</sup> See Sofia Gruskin and Daniel Tarantola, "Health and Human Rights", in Roger Detels, James McEwan, Robert Beaglehole, and Heizo Tanaka, eds., *The Oxford Textbook of Public Health*, (Oxford University Press, 2002), edn. 4, <http://www.oup.co.uk/isbn/0-19-263041-5>

and the Great Lakes region in Africa as having brought attention to the intrinsic connections that exist between health and human rights.<sup>2</sup>

The first major milestone in linking health and human rights was WHO's Global Strategy for the Prevention and Control of AIDS, which was adopted in 1987.<sup>3</sup> It calls for human rights and for compassion and solidarity with people living with HIV/AIDS. This resolution was path breaking as it made governments and intergovernmental organizations publicly accountable for their actions toward people living with HIV/AIDS. The groundbreaking contribution of this era lies in the recognition of the applicability of international law to HIV/AIDS issues and in the attention this approach then generated to the linkages between other health issues and human rights—and therefore to the ultimate responsibility and accountability of the state under international law for issues relating to health and well-being.<sup>4</sup> Other major international instruments which made significant contribution for the linkages between health and human rights are the 1994 International Conference on Population and Development;<sup>5</sup> the 1995 Fourth World Conference on Women;<sup>6</sup> the 1993 World Conference on Human Rights;<sup>7</sup> and the 1995 World Summit for Social Development.<sup>8</sup> It is to be noted that in 1997, UN Secretary-General Kofi Annan made public the Program

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<sup>2</sup>       ibid.

<sup>3</sup>       See WHO, WHA 40.26, Geneva, May, 1987: *Global Strategy for the Prevention and Control of AIDS*, World Health Assembly Resolution.

<sup>4</sup>       Sofia Gruskin and Daniel Tarantola, n.l.

<sup>5</sup>       UN Doc. A/CONF.171/13, September, 1994: *Programme of Action of the International Conference on Population and Development, Report of the International Conference on Population and Development*, International Conference on Population and Development.

<sup>6</sup>       UN Doc. A/CONF.177/20/Rev.1 (96.IV.13), Beijing, September 1995: *Action for Equality, Development and Peace*, Fourth World Conference on Women. See, in particular, Chapters IV through VII of the Report of the International Conference on Population and Development, and chapter IV (C) Women and Health, and (I) Human Rights of Women of the Fourth World Conference on Women.

<sup>7</sup>       UNGA, UN Doc. A/CONF.157/23, Vienna, June 1993: *Vienna Declaration and Programme of Action*, World Conference on Human Rights.

<sup>8</sup>       UN Doc. A/CONF.166/9 (96.IV.8), Copenhagen, March 1995: *Programme of Action*, United Nations World Summit for Social Development.



for Reform,<sup>9</sup> which designates human rights as among the core activities of the United Nations system.

The United Nations agencies related with health such as United Nations Children's Fund (UNICEF), Joint United Nations Programme on HIV/AIDS, United Nations Development Program (UNDP), are also in the forefront in linking health and human rights.<sup>10</sup> Likewise, the bodies of the United Nations system with responsibility for human rights are also paying increasing attention to health-related concerns.<sup>11</sup> This is most easily seen in the recent attention given to HIV/AIDS and reproductive health by the human rights treaty monitoring bodies.

## **2. Defining the right to health**

### **(a) International human rights law**

The Universal Declaration on Human Rights (UDHR) provides that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family.<sup>12</sup> The International Covenant on Economic,

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<sup>9</sup> UNGA, UN Doc. A/RE/52/12, July 14, 1997: *Renewing the United Nations: A Program for Reform*. The document states that human rights are to be understood to cut across the four substantive fields of the United Nations' work: peace and security, economic and social affairs, development cooperation and humanitarian affairs.

<sup>10</sup> United Nations Children's Fund (UNICEF) has restructured its policy and programmatic framework around the Convention on the Rights of the Child (Mission Statement available from UNICEF at <http://www.unicef.org.htm>, March, 2000); a Memorandum of Understanding now exists between the United Nations Development Program (UNDP) and the Office of the High Commissioner for Human Rights. *Memorandum of understanding between the United Nations Development Programme and Office of the High Commissioner for Human Rights*. Survey of UNDP Activities in Human Rights, New York.(UNDP 1999); the UNDP Human Development Report for the year 2000 has an explicit focus on human rights, and the World Health Organization (WHO) is currently preparing its first-ever strategy on health and human rights (*Removing obstacles to healthy development. WHO Report on Infectious Diseases, WHO/CDS/99.1.*) 1998)

<sup>11</sup> UN Doc. A/53/432, 1998: *Report of the Tenth Meeting of Persons Chairing the Human Rights Treaty Bodies*; UN Doc. A/53/125, 1998: *Report of the Ninth Meeting of the Treaty Bodies*; UNHCHR, UN Doc. A/52/507, 1997: *Report of the Eighth Meeting of the Treaty Bodies*; UN Doc.A/51/482/, 1996: *Report of the Seventh Meeting of the Treaty Bodies*.

<sup>12</sup> Article 25 (1), UDHR.

Social and Cultural Rights (ICESCR) lays down that the States Parties to the Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.<sup>13</sup> The steps to be taken by the States Parties to the Covenant to achieve the full realization of this right shall include those necessary for the provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;<sup>14</sup> the improvement of all aspects of environmental and industrial hygiene;<sup>15</sup> the prevention, treatment and control of epidemic, endemic, occupational and other diseases;<sup>16</sup> the creation of conditions which would assure to all people medical service and medical attention in the event of sickness.<sup>17</sup>

The ICESCR states “the right to the highest attainable standard of physical and mental health,” with obligations understood to encompass both the underlying preconditions necessary for health and the provision of medical care.

**(b) WHO definition**

WHO envisages a broader definition for the right to health. It defines health as a “state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity”.<sup>18</sup> The term “social well-being” is of particular significance. It gives room for wider interpretation and can accommodate every important human right. The WHO definition projects a vision of the ideal state of health as an eternal and universal goal to constantly strive towards, and has as its main purpose defining directions for the work of

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<sup>13</sup> Article 12 (1), ICESCR.

<sup>14</sup> *ibid*, 12(2) (a).

<sup>15</sup> *ibid*, 12(2) (b).

<sup>16</sup> *ibid*, 12(2) (c).

<sup>17</sup> *ibid*, 12(2) (d).

<sup>18</sup> WHO, New York, 1946: *Constitution of the World Health Organization*, adopted by the International Health Conference.

the Organization and its member states.<sup>19</sup> The World Health Assembly reaffirmed the commitment of nations to strive towards the goals in a World Health Declaration that stressed the "will to promote health by addressing the basic determinants and prerequisites for health" and the urgent priority "to pay the greatest attention to those most in need, burdened by ill health, receiving inadequate services for health or affected by poverty".<sup>20</sup>

It is worth noting here that the perceptible tension between the broad definition of health proposed by WHO, which includes the notion of social well-being, and the more restrictive definition set out in the ICESCR reflects the very different purposes of these two documents. The WHO definition projects a vision of the ideal state of health as an eternal and universal goal to constantly strive towards, and has as its main purpose defining directions for the work of the Organization and its member states. The ICESCR definition differentiates the two attributes of health—physical and mental well-being—and is specifically concerned with assigning particular responsibilities to the governmental health sector; it assigns obligations relevant to social well-being to the same governments under other articles of the treaty.

**(c) Other relevant instruments**

The societal dimensions of this effort were emphasized in both the Declaration of Alma-Ata (1978) and the Ottawa Charter for Health Promotion (1986). The Alma-Ata Declaration<sup>21</sup> describes health as a state of complete

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<sup>19</sup> Sofia Gruskin and Daniel Tarantola, n.l.

<sup>20</sup> WHA51/5, Geneva, 1998: *Resolution on the World Health Declaration*, adopted by the World Health Assembly.

<sup>21</sup> WHA 32.30, Geneva, September 1978, International conference on primary health care, World Health Assembly.

physical and social wellbeing, and not merely the absence of disease or infirmity, is a fundamental human right and the attainment of the highest possible level of health is an important world-wide social goal whose realization requires the action of many social and economic sectors in addition to the health sector.

The Ottawa Charter<sup>22</sup> declares that health promotion is the process of enabling people to increase control over, and to improve, their health. To reach a state of complete physical, mental and social well-being, an individual or group must be able to identify and to realize aspirations, to satisfy needs, and to change or cope with the environment. The Charter emphasizes that promoting health is more than just providing health services. Peace, housing, education, food, income, a sustainable environment, social justice and equity are all necessary for the achievement of health. The Beijing Declaration on Women<sup>23</sup> gives a wider dimension to the right to health. It states:

Women have the right to the enjoyment of the highest attainable standard of physical and mental health. The enjoyment of this right is vital to their life and well-being and their ability to participate in all areas of public and private life. Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity. Women's health involves their emotional, social and physical well-being and is determined by the social, political and economic context of their lives, as well as by biology.<sup>24</sup>

**(d) Indian Constitutional law**

The right to health is not defined in the Indian Constitution. Article 47 of the Constitution imposes upon the State a duty "to raise the level of nutrition and the improvement of public health". This provision is non-justiciable since it is

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<sup>22</sup> Ottawa Charter on Health Promotion, issued by the conference on Health Promotion, Ottawa, Canada, 1986.

<sup>23</sup> A/CONF.177/20 (1995) & A/CONF.177/20/Add.1 (1995), Beijing, September 1995: *Beijing Declaration and Platform for Action*, Fourth World Conference on Women

<sup>24</sup> *ibid*, para.91.

part of the Directive Principles of State Policy. But the Indian Supreme Court has widened the scope of Article 21 by including the right to health and medical assistance. Supreme Court in a significant decision<sup>25</sup> held that preservation of human life is of paramount importance. Article 21 of the Constitution casts obligation on the State to preserve life. A doctor at the Government hospital positioned to meet the State obligation is, therefore, duty bound to extend medical assistance for preserving life.<sup>26</sup> The Court held that obligation is total, absolute and paramount.<sup>27</sup> In *Paschim Bang Khet Mazdoor Samiti v. State of W.B.*<sup>28</sup> Supreme Court observed that providing adequate medical assistance for the people is an essential part of the obligations undertaken by the Government in a welfare State.<sup>29</sup> Failure on the part of a Government hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed under Article 21.<sup>30</sup> Supreme Court enhanced the scope of the right when it held that social security, just and human conditions of work and leisure to workman are part of this meaningful right to life and to achieve self-expression of his personality and to enjoy the life with dignity, the State should provide facilities and opportunities to them to reach at least minimum standard of health, economic security and civilized living.<sup>31</sup> Right to health, medical aid to protect the health and vigour of a worker while in service or post retirement is a fundamental right under Article 21, read with 39(e), 41, 43, 48 A and all related Articles and fundamental rights to make the

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<sup>25</sup> *Paramananda Katara v. Union of India*, AIR 1989 SC 2039.

<sup>26</sup> *ibid*, p.2043.

<sup>27</sup> *ibid*.

<sup>28</sup> AIR 1996 SC 2426.

<sup>29</sup> *ibid*, p.2429.

<sup>30</sup> *ibid*.

<sup>31</sup> *Consumer Education and Research Centre v. Union of India*, AIR 1995 SC 938.

life of the workman meaningful and purposeful with dignity of person.<sup>32</sup> The health and strength of the worker is an integral facet of right to life.<sup>33</sup>

**(e) WTO agreements**

The GATT 1994 has a series of general exceptions, including one on the measures taken to protect human life or health (Article XX (b)); subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade. Article XIV (b) of the General Agreement on Trade in Services (GATS) authorizes the members to take measures necessary to protect human life or health. Preamble to the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) also provides that no member should be prevented from adopting or enforcing measures necessary to protect human life or health. Article 2.1 of the SPS Agreement lays down that the members have the right to take sanitary and phytosanitary measures necessary for the protection of human life or health provided that such measures are not inconsistent with the provisions of this agreement. Article XXIII of the Agreement on Government Procurement and the preamble to the Agreement on Technical Barriers to Trade (TBT Agreement) provide for the protection of human health and life. Article 2.2 of the TBT Agreement also provides for human safety. Article 27.2 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) provides that the members may exclude from patentability inventions, the prevention within their territory of the

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<sup>32</sup>        *ibid*, p. 940  
<sup>33</sup>        *ibid*.

commercial exploitation of which is necessary to protect human life or health. Also, Article 8.1 of TRIPS states that members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health, provided that such measures are consistent with the provisions of the agreement. None of the above provisions define the right to health.

W.T.O. agreements have many provisions with health rights dimensions, which include raising the standard of living,<sup>34</sup> protection and preservation of the environment,<sup>35</sup> food security and nutrition,<sup>36</sup> protection of public morals or to maintain public order or safety,<sup>37</sup> right to freedom from forced labor (prison labor),<sup>38</sup> sustainable development and conservation of natural resources,<sup>39</sup>

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<sup>34</sup> One of the objectives of the establishment of the WTO, as articulated in the preamble to GATT 1994, is to raise the standard of living. The Marrakesh agreement recognizes that parties to the agreement should conduct their relations in the field of trade and economic endeavor with a view to raising the standard of living of their people.

<sup>35</sup> One of the objectives enshrined in the preamble to the Marrakesh agreement is to protect and preserve the environment while allowing the optimal use of the world's resources in accordance with the objectives of sustainable development. The preamble to the Agreement on Agriculture (AOA) is related to non-trade concerns, which includes the need to protect the environment. The Agreement on TBT provides for technical regulations to fulfill legitimate objectives. Such legitimate objectives include the protection of the environment. This provision is in addition to the recognition given in the preamble to the TBT that no country should be prevented from taking measures necessary for the protection of the environment. For the protection of the environment, the TRIPS Agreement points out that, members may exclude patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.

<sup>36</sup> The preamble to the AOA addresses non-trade concerns. It provides that commitment under the reform programme should be made in an equitable way among all members, having regard to non-trade concerns, including food security. AOA Article 12 lays emphasis on food security. The TRIPS provides that members may, in formulating and amending their law and regulations, adopt measures necessary to protect public health and nutrition, provided that such measures are consistent with the provisions of these agreements.

<sup>37</sup> The GATT 1994 (general exceptions) enables the parties to take measures necessary to protect public morals. GATS also provides for measures necessary to protect public morals or to maintain public order. The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of the society. The Agreement on Government Procurement also provides for the protection of public morals, order or safety. Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect public order or morality, provided that such exclusion is not made merely because the exploitation is prohibited by their law.

<sup>38</sup> General exceptions under GATT 1994 lays down that nothing in this agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures relating to the products of prison labour. It should not be a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. The Agreement on Government Procurement also takes into

maintenance of international peace and security,<sup>40</sup> and ensuring full employment.<sup>41</sup>

### 3. Nature of State obligation

The principal framework for understanding governmental obligations under the right to health is given in Article 2(1) of ICESCR. It states:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Governments are responsible not only for not directly violating rights but also for ensuring the conditions which enable individuals to realize their rights as fully as possible. This is understood as an obligation to respect, protect and fulfill rights, and governments are legally responsible for complying with this range of obligations for every right in all the human rights documents they have ratified. Respecting the right means a State cannot violate the right directly; protecting the right means a State has to prevent violations of rights by non-state actors and offer some sort of redress that people know about and can access, if a

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consideration the products or the services of handicapped persons, of philanthropic institutions or of prison labour.

<sup>39</sup> The preamble to the Marrakesh Agreement recognizes the objective of sustainable development while allowing for the optimal use of the world's resources. The general exception clause of GATT 1994 also provides that nothing in this agreement shall be construed to prevent the adoption or the enforcement by any contracting party, of measures relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

<sup>40</sup> Article XXI of GATT 1994 and Article XIV *bis* of GATS provide for security exceptions. The above provisions state that nothing in this agreement shall be construed to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

<sup>41</sup> The preamble to the Marrakesh agreement recognizes that the parties to this agreement should conduct their relations in the field of trade and economic endeavor with a view of ensuring full employment.



violation does occur; fulfilling the right means a state has to take all appropriate measures—including but not limited to legislative, administrative, budgetary and judicial—towards fulfillment of the right, including the obligation to promote the right in question.

The Beijing Declaration on Women, adopted in the Fourth World Conference on Women places the primary responsibility on the national governments. National governments have to carry out obligation in collaboration with international organizations, non-governmental organizations, the private sector, mass media, women and youth organizations etc.<sup>42</sup> It has fixed the government's responsibility on every minute matter.<sup>43</sup>

#### **4. An analysis of WTO provisions relating to health**

##### **(1) Article XX (b), GATT 1994**

Article XX (b) of GATT 1994 states:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

...

(b) necessary to protect human, animal or plant life or health.

The above article does not define the right to health. The Dispute Settlement Mechanism of the WTO, however, sheds some light on this provision.

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<sup>42</sup> See n.23, para.107-112.

<sup>43</sup> *ibid.*

Before the WTO came into existence the GATT Panel got an opportunity to deal with this provision in the *Thai Cigarette* case.<sup>44</sup> The Panel examined the application of Article XX (b) to an import ban of cigarettes imposed by the government of Thailand, grounded on public health considerations. The Panel dismissed the justification of the Thai government on the basis of Article XX (b) as a measure “necessary to protect human ...life or health”. The Panel held that:

There were various measures consistent with the General Agreement which were reasonably available to Thailand to control the quality and quantity of cigarettes smoked and which, taken together, could achieved the health policy goals that the Thai government pursues by restricting the importation. The panel found therefore the Thailand’s practice of permitting the sale of domestic cigarettes while not permitting the importation of foreign cigarettes was an inconsistency with the General Agreement and ‘necessary’ within the meaning of Article XX (b).<sup>45</sup>

In this case the Panel did not examine whether the less trade-restrictive measures were also *reasonably available* to Thailand, as a developing country and given the particular problems faced by the government.<sup>46</sup>

The *United States – Standards for Reformulated and Conventional Gasoline* case, *Complaints by Venezuela*,<sup>47</sup> was the first case to be considered by the AB under the WTO rules, in which the application of the exception under Article XX(g) of GATT was considered. Article XX(g) may justify measures “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restriction on domestic production and consumption”.

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<sup>44</sup> (1990) BISD, 37<sup>th</sup>, Supp.200.

<sup>45</sup> *ibid.*

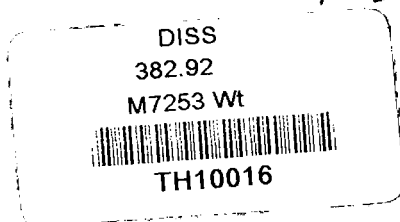
<sup>46</sup> Carlos M. Correa, “Implementing National Public Health Policies in the Framework of WTO Agreements”, *Journal of World Trade*, 34(5), 2000, p.94.

<sup>47</sup> WT/DS2/AB/R, 29 April 1996

The Panel had been established to consider a dispute between the United States, on the one hand, and Venezuela, later joined by Brazil, on the other. The dispute related to the implementation by the United States of its domestic legislation known as the Clean Air Act of 1990 ("CAA") and more specifically, to the regulation enacted by the United States' Environmental Protection Agency ("EPA") pursuant to that Act, to control toxic and other pollution caused by the combustion of gasoline manufactured in or imported into the United States. This regulation is formally entitled "*Regulation of Fuels and Fuel Additives – Standards for Reformulated and Conventional Gasoline*", Part 80 of Title 40 of the Code of Federal Regulations, and is commonly referred to as the Gasoline Rule.

The CAA established two gasoline programmes to ensure that pollution from gasoline combustion does not exceed 1990 levels and those pollutants in major population centers are reduced. The first program concerns ozone "nonattainment areas", consisting of nine large metropolitan areas that have experienced the worst summertime ozone pollution. All gasoline sold to consumers in these "nonattainment areas" must be "reformulated". The sale of conventional gasoline in nonattainment areas is prohibited. The second program concerns "conventional" gasoline, which may be sold in the rest of the United States. The implementation of both programs, which apply to gasoline sold by domestic refiners, blenders and importers, was entrusted to the EPA. As a result, the EPA adopted the Gasoline Rule, which relies heavily on the use of 1990 baselines as a means of determining compliance with the CAA requirements. The

Panel concluded:



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1. The baseline establishment methods contained in Part 80 of Title 40 of the Code of Federal Regulations are not consistent with Article 111:4 of the General Agreement, and cannot be justified under paragraphs (b), (d) and (g) of Article XX of the General Agreement.

2. Imported and domestic gasolines were "like products" and since, under the baseline establishment rules of the Gasoline Rule, imported was treated "less favorably" than domestic gasoline. The baseline establishment rules of the Gasoline Rule were accordingly inconsistent with Article III: 4 of the General Agreement.

3. The "aspect of the baseline establishment methods" found inconsistent with Article III; 4 was not justified under Article XX (b) of the General Agreement as "necessary to protect human, animal or plant life or health".

4. The "maintenance of discrimination between imported and domestic gasoline" contrary to Article III:4 was not justified under article XX(d) as "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of the agreement".

5. Clean air was an exhaustible natural resource within the meaning of Article XX(g) of the General Agreement.

6. The baseline rules found to be inconsistent with Article III:4 could not be justified under Article XX(g) as a measure "relating to" the conservation of exhaustible natural resources.

The Panel accepted that a policy to reduce air pollution was consistent with measures for the protection of human, animal or plant life or health. It did not accept that the measures in question were "necessary", because there were measures which were consistent or less inconsistent with GATT, which were available to the US and which would have achieved the same objectives.

The United States appealed from certain conclusions on issues of law and certain legal interpretations contained in the Panel report.<sup>48</sup> The Appellate Body (AB) stated that the GATT should not be read in clinical isolation from public international law. A reasonable inference can be drawn from this statement that GATT should not be read in clinical isolation from international human rights law.

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<sup>48</sup> *United States - Standards for Reformulated and Conventional gasoline*, WT/DS2/R, 29 January 1996

The AB stated that:

...the purpose and object of the introductory clauses of Article XX is generally the prevention of “abuse of the exceptions...of Article [XX].” This insight drawn from the drafting history of Article XX is a valuable one. The chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the *General Agreement*.<sup>49</sup>

The AB considered the way in which US standards were set and affected exports of gasoline from Venezuela and Brazil to the US in a discriminatory manner, thus violating the right of national treatment under Article III of GATT 1994. It therefore recommended that the DSB request the US to bring its gasoline regulations in conformity with its obligations under the GATT. The AB stated that:

It does not mean, or imply, that the ability of any WTO Member to take measures to control air pollution or, more generally, to protect the environment, is at issue. That would be to ignore the fact that Article XX of the *General Agreement* contains provisions designed to permit important state interests—including the protection of human health, as well as the conservation of exhaustible natural resources—to find expression...Indeed, in the preamble to the *WTO Agreement* and in the *Decision on Trade and Environment*, there is specific acknowledgement to be found about the importance of coordinating policies on trade and the environment. WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislations they enact and implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the *General Agreement* and the other covered agreements.<sup>50</sup>

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<sup>49</sup> *ibid*, the AB having concluded that the baseline establishment rules of the Gasoline Rule fall within the terms of Article XX(g), it come to the question of whether those rules also meet the requirements of the chapeau of Article XX. In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions – paragraphs (a) to (j) – listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX.

<sup>50</sup> See n. 48, this paragraph was included in the decision as the last paragraph to point out what the AB doesn't mean.

In the *Gasoline* case, the exception under Article XX(g) was interpreted more broadly than the exception under Article XX(b) (relating to public health).

As Carlos M. Correa rightly points out:

In sum, the exception under Article XX (b) of the GATT, as interpreted, has in practice left States with little room to design and implement public health measures. The main objective of the GATT/WTO jurisprudence has been to avoid possible abuses of the exceptions provided for in that Article, in the form of an “unjustifiable discrimination” or a “disguised restriction” on international trade. Consequently, though there is room for national autonomy in determining what the adequate public health measures are, the application of the “necessary” test limits the options available to the States. This may set a very high hurdle for public health policies, because measures that intrude less on trade are almost always conceivable and therefore in some sense “available”.<sup>51</sup>

He further point out:

... “necessary” has been interpreted in the GATT/WTO system as “least GATT-inconsistent”. Therefore, in order to determine whether a measure is “necessary” and whether other less trade-restrictive measures could have been adopted...panels and the AB have been required, in fact, to put themselves in the position of policy-makers. They had to second-guess domestic regulators without necessarily possessing the expertise and an adequate knowledge of the particular circumstances in which a measure has been adopted. In addition, the application of the “necessity” test has not involved a consideration of whether the alternative less restrictive measures were reasonably available.<sup>52</sup>

In *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*<sup>53</sup> Canada filed a case against France arguing that the French ban on asbestos was violative of the WTO’s rules. The French decree 96-1133 prohibited import and use of white asbestos containing products as of January 1, 1997. Prior to this, nine European countries had placed restrictions/bans on white

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<sup>51</sup> Correa, n.46, p.96.

<sup>52</sup> *ibid.*

<sup>53</sup> WT/DS135/AB/R, March 12,2001

asbestos. Canada argued that by this ban France had violated the most favored nations provisions and provisions on applying international standards. It argued that the ban was against the provision to use the least restrictive trade measures for meeting health or other objectives. On the other hand the European Communities (EC) argued that the ban was valid and relied on the exception article in Article XX of GATT (Article XX (b) of GATT, under which the countries are permitted to impose trade restrictions for protecting human life or health).

The AB in its decision to uphold the ban had concluded that it was upto each member country to decide on the level of protection that should be made available to its people. It also clarified that the member states are not obliged to follow the majority scientific opinion when it comes to health policy. By affirming that health risks are relevant in examining the likeness of one product vis-à-vis another product or group of products, the AB has indicated that countries are well within their rights to look into health and safety aspects when they decide to restrict or ban trade in products and in considering on use, import or export. GATT rules do not permit discrimination that provides a less favorable treatment of 'like products' imported from elsewhere vis-à-vis domestic products (Article III). Member states can provide differential treatment between two 'like products' for protecting human health, life, plant and animal life under Article XX(b) and for the conservation of natural resources under Article XX(g).

Many international NGOs welcomed the Appellate Body's decision in the *Asbestos* case. An NGO coalition comprising Greenpeace International, World Wide Fund for Nature International, Ban Asbestos Network, International Ban

Asbestos Secretariat and the Foundation for International Environmental Law and Development (FIELD) hailed the Appellate Body's finding that toxic asbestos is not the same as safer materials.<sup>54</sup> The Appellate Body's finding is consistent with arguments made by the NGOs in an amicus curiae - or friend of the court - submission made to the WTO in this case.

In this case, the scientific evidence supporting the French ban on asbestos was overwhelming.<sup>55</sup> However, the Appellate Body's guidance on the relevance of scientific opinion confirms that all Member governments may be entitled to opt for maximum protection for humans, animals and plants even where scientists disagree as to the risks justifying protection.<sup>56</sup> This is an important step because it represents a validation of the precautionary principle in trade related disputes.<sup>57</sup>

Two factors are unique to the *Asbestos* case. One, the evidence on the health effects of asbestos and white asbestos is too overwhelming to be ignored. Secondly, Canada was virtually isolated with the US supporting the EC's view on the ban. So overturning a ban on a known carcinogen which kills hundreds of thousands of people worldwide each year would have put the WTO massively in the dock of public opinion.<sup>58</sup> WTO watchers suspect the decision in this case was influenced by the 1999 Seattle protests against the trade organization. A ruling against a ban on asbestos would have further weakened the WTO's political

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<sup>54</sup> "NGOs welcome WTO green light to French ban on asbestos but remain skeptical about the WTO dispute settlement process", 14 March 2001, <http://archive.greenpeace.org/pressreleases/toxics/2001mar14.html>

<sup>55</sup> *ibid*, observation of Aimee Gonzales, WWF International Senior Policy Advisor.

<sup>56</sup> *ibid*, comment by Remi Parmentier, Political Director of Greenpeace International.

<sup>57</sup> *ibid*

<sup>58</sup> Ravi Srinivas, "WTO and Asbestos Dispute Settlement at work", *EPW*, 8, September, 2001, p. 3445.

<sup>59</sup> Laurie Kazan-Allen, "A Breath of Fresh Air - WTO Ruling Upholds France's Asbestos Ban, Rejects Canadian Challenge", <http://www.essential.org/monitor/mm2000/00september/corp3.html>



support.<sup>59</sup> For decades, governments chose to ignore the mounting death toll and the impartial advice of independent doctors and scientists. Such a posture is increasingly untenable. The WTO challenge may have been the last ploy in the depleted repertoire of a discredited and dying industry.<sup>60</sup>

Whether this decision is a one-time gesture or marks a more fundamental change in WTO jurisprudence remains to be seen. In either case, it is clear that the ruling strengthens the position of campaigners who have long contested the concept of "controlled use" for any form of asbestos.<sup>61</sup>

Despite this ruling, one in a long line of anti-chrysotile decisions by international agencies including the World Health Organization, the industry is not ready to accept an asbestos-free future. Still peddling the party line, the Asbestos Information Center (India), Asbestos Cement Products Manufacturer's Association (India), Asbestos International Association (USA) and the Asbestos Institute of Canada argue that chrysotile cement products have "relevance ... for developing countries of strained economies."<sup>62</sup>

The above discussion raises some pertinent questions. Whether the WTO is the right forum to decide on issues relating to health risks, protection of environment, safety and public health and should trade liberalization be an important factor to decide on the legitimacy of the measures. In cases where health risks are not as evident as in the case of asbestos what would have been the decision under WTO/GATT rules is an important question.<sup>63</sup>

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ibid.

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ibid.

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ibid.

<sup>62</sup>

ibid.

<sup>63</sup>

Ravi Srinivas, n.58 ,p.3445.

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

There are provisions in the TRIPS Agreement which expressly enable State parties to adopt measures necessary to protect health. According to Article 8(1), “Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.” Under Article 27(2), “Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary...to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.”

Access to drugs is an essential part of the realization of the right to health. State policies should be framed in such a way, so that all sections of society have access to drugs. In this context it is appropriate to examine selected provisions of the TRIPS.

The preamble conveys the desire to reduce distortions and impediments to international trade. Enforcement of intellectual property rights do not themselves become barriers to international trade.<sup>64</sup> The preamble also recognizes the public policy objectives of national systems for the protection of intellectual property, which includes developmental objectives.<sup>65</sup>

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<sup>64</sup> Preamble, TRIPS, “Members, *desiring* to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade;”

<sup>65</sup> *ibid*, “*Recognizing* the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives;”

It is also important to examine the general provisions and basic principles of TRIPS. Member States are not obliged to implement in their law more extensive protection than is required by the Agreement. Members are free to determine the appropriate method of implementing the provisions of the TRIPS.<sup>66</sup> The protection and enforcement of intellectual property should promote social and economic welfare.<sup>67</sup> Members can adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic development. Such measures should be consistent with the provisions of the TRIPS.<sup>68</sup> Further, article 27 has two health-related exceptions to patentability.<sup>69</sup> Member States can take appropriate measures needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.<sup>70</sup>

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<sup>66</sup> *ibid*, Article 1, "...Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice."

<sup>67</sup> *ibid*, Article 7, "The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."

<sup>68</sup> *ibid*, Article 8(1), "Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement."

<sup>69</sup> *ibid*, Article 27(2), "Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary ...to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited bylaw."

Article 27(3), TRIPS, "Members may exclude from patentability: (a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals."

<sup>70</sup> Article 8(2), TRIPS, "Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology."

From a social and health policy perspective, the provisions open up the possibility of establishing national regulations, taking into account the imperative of guaranteeing the best possible access to drugs.<sup>71</sup> The general paragraphs in the TRIPS Agreement (Preamble and general provisions) stress the need to promote adequate and effective protection of intellectual property rights, but do so as part of a series of broader economic objectives.<sup>72</sup> These general provisions were included in the Agreement to make for a balance between the rights of patent holders and their obligations *vis-à-vis* society.<sup>73</sup>

But the actual implication of the TRIPS on the right to health in the developing and least developing countries is to be ascertained.

According to Gro Harlem Brundtland, Director-General of the WHO, “There are important trade issues which require a public health perspective. WTO does not have that expertise. WHO and WTO need to work together within the international system... We need to analyze and monitor how new international agreements can support public health.”<sup>74</sup>

Human rights groups were always of the view that the TRIPS agreement violates human rights. This view was endorsed by the UN Sub-Commission on the Promotion and Protection of Human Rights. The Sub-Commission<sup>75</sup> brings to

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<sup>71</sup> German Velasquez & Pascale Boulet, *Globalization and access to drugs*, (WHO,1999), p.19

<sup>72</sup> *ibid.*

<sup>73</sup> *ibid.*

<sup>74</sup> Gro Harlem Brundtland, *Globalization and access to drugs*, (WHO,1999), p.69

<sup>75</sup> E/CN.4/Sub.2/2000/L.20, The resolution calls on the UN High Commissioner for Human Rights to undertake an analysis, and asks the UN Secretary General to prepare a report on the implications of the TRIPS Agreement and options for further action by the Sub-Commission. The resolution has also recommended to the World Intellectual Property Organization (WIPO), the World Health Organization (WHO), the United Nations Development Programme (UNDP), the United Nations Conference on Trade and Development (UNCTAD), the United Nations Environment Programme (UNEP) and other relevant United Nations agencies that they continue and deepen their

the limelight the human rights impact of the TRIPS agreement. It recognizes that there is a conflict between the 'private' interests of intellectual property rights (IPR) holders, championed by TRIPS, and the 'social' or 'public' concerns embodied in international human rights law. The resolution affirms that the right to protection of the moral and material interests resulting from any scientific, literary or artistic production of which one is the author is, in accordance with article 27, paragraph 2, of the Universal Declaration of Human Rights and article 15, paragraph 1(c) of the International Covenant on Economic, Social and Cultural Rights, a human right, subject to limitations in the public interest. It declares that since the implementation of the TRIPS Agreement does not adequately reflect the fundamental nature and indivisibility of all human rights, including the right of everyone to enjoy the benefits of scientific progress and its applications, the right to health, the right to food, and the right to self-determination, there are apparent conflicts between the intellectual property rights regime embodied in the TRIPS Agreement, on the one hand, and international human rights law, on the other.

The Sub- Commission notes that the Human Development Reports of 1999 and 2000 identify circumstances "attributable to the implementation of the TRIPS Agreement that constitute contraventions of international human rights law." It requests Governments to integrate into their national and local legislation and policies, provisions, in accordance with international human

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analysis of the impacts of the TRIPS Agreement, including a consideration of its human rights implications. The resolution requests the World Trade Organization, in general, and the Council on TRIPS during its ongoing review of the TRIPS Agreement, in particular, "to take fully into account the existing State obligations under international human rights instruments."

rights obligations and principles that protect the social function of intellectual property.

The UN Sub-Commission's resolution marks the beginning of what promises to be a closer monitoring of the impact on people of agreements promoted at the WTO by the UN human rights system as it examines the economic, social and cultural implications.<sup>76</sup> This resolution has been welcomed by many civil society groups.<sup>77</sup>

The Doha Ministerial Conference is significant in the sense that it stressed the importance attached to implementation and interpretation of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) in a manner supportive of public health, by promoting both access to existing medicines and research and development into new medicines and, in this connection, it adopted a separate Declaration.<sup>78</sup> It further instructed the Council for TRIPS, on pursuing its work programme including under the review of Article 27.3(b), the review of the implementation of the TRIPS Agreement under Article 71.1 and the work foreseen pursuant to paragraph 12 of this Declaration, to examine, *inter alia*, the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments raised by Members pursuant to

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<sup>76</sup> Someshwar Singh, "TRIPS regime at odds with human rights law, says UN body", Geneva, 28 Aug 2000, <http://www.twinside.org.sg/>

<sup>77</sup> *ibid*, "First and foremost, this timely resolution signifies the resolve of the UN human rights programme to monitor the work of the WTO. Basing itself on the provisions of both the UN Covenant on Economic, Social and Cultural Rights and the UN Convention on Biological Diversity, this historic resolution has firmly affirmed the primacy of human rights and environmental obligations over the commercial and profit-driven motives upon which agreements such as TRIPS are based." Says Miloon Kothari from the International NGO Committee on Human Rights in Trade and Investment (INCHRITI), an alliance of eight human rights coalitions that advocated action by the Sub-Commission on TRIPS.

<sup>78</sup> WTO, WT/MIN(01)/DEC/W/1, Doha, November 2001: *Ministerial Declaration*, p. 4, para.17.

Article 71.1. In undertaking this work, the TRIPS Council shall be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPS Agreement and shall take fully into account the development dimension.<sup>79</sup> It further recognized that under WTO rules no country should be prevented from taking measures for the protection of human, animal or plant life or health, or of the environment at the levels *it considers appropriate*, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the WTO Agreements.<sup>80</sup> The term “it considers appropriate” is noteworthy. It gives the necessary flexibility for the developing world to make an interpretation beneficial for them.

The WTO Declaration on the TRIPS Agreement and Public Health has addressed many of the anxieties faced by the developing and least developing countries.<sup>81</sup> It recognized the gravity of the public health problems afflicting many developing and least-developed countries. The Declaration agreed that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, while reiterating their commitment to the TRIPS Agreement, the Declaration affirms that the Agreement can and should be interpreted and implemented in a manner supportive of the WTO Members' right to protect public health and, in particular, to promote access to medicines for all. In this connection, the Declaration

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<sup>79</sup> *ibid*, para.19.

<sup>80</sup> *ibid*, page.2.

<sup>81</sup> WTO, WT/MIN(01)/DEC/W/2, Doha, November 2001: *Declaration on the TRIPS Agreement and Public Health*, p.1, para.1.

reaffirms the right of WTO Members to use, in full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose.<sup>82</sup>

Accordingly, while maintaining their commitments made in the TRIPS Agreement; Members recognized that these flexibilities<sup>83</sup> include:

(a) 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.

(b) Each Member has the right to grant compulsory licenses and the freedom to determine the grounds upon which such licenses are granted.

(c) Each Member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency.

(d) The effect of the provisions in the TRIPS Agreement that are relevant to the exhaustion of intellectual property rights, is to leave each Member free to establish its own regime for such exhaustion without challenge, subject to the MFN and national treatment provisions of Articles 3 and 4.

Compulsory licensing refers to a situation where a government allows an agent to produce a patented product without the consent of the original patent-

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<sup>82</sup> *ibid*, para.4.

<sup>83</sup> *ibid*, para.5.



owner.<sup>84</sup> This is subject to certain conditions.<sup>85</sup> Compulsory licensing gives developing countries a bargaining chip that can be used to negotiate better terms with multinational and pharmaceutical companies.<sup>86</sup>

Article 31 of TRIPS permits compulsory licensing for imports. This Article does not clearly say whether it allows compulsory exports.<sup>87</sup> In Doha, developing countries asked for a liberal judicial interpretation/ amendment of this, in line with the Principles set out in Article 8 of the TRIPS Agreement. They believed that unless the provision is not followed in spirit, the compulsory licensing safeguard built into TRIPS would be of little use in promoting access to medicines in low income developing countries, particularly in those countries that have limited pharmaceutical manufacturing capabilities of their own.<sup>88</sup> Developing countries have gained on this point.

The WTO Declaration on the TRIPS Agreement and Public health recognizes that WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement. Members instructed the

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<sup>84</sup> Article 31, TRIPS.

<sup>85</sup> *ibid*, Article 31(b), "...such use may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time. This requirement may be waived by a Member in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use...."

<sup>86</sup> Veena Mishra, "TRIPS, Product Patents and Pharmaceuticals", *EPW*, Vol.XXXVI, No.48, December 1, 2001, p.4465. By threatening to authorize a compulsory license for importation of the AIDS-triple therapy from Cipla- India, South Africa was able to bring down the prices offered by the MNCs for this treatment from US\$ 10,000 per patient per year in May 2000 to approximately \$700 per patient per year by April 2001.

<sup>87</sup> See n. 84, Article 31(f), "any such use shall be authorized *predominantly* for the supply of the domestic market of the Member authorizing such use,"

<sup>88</sup> Veena Mishra, n.86.

Council for TRIPS to find an expeditious solution to this problem and to report to the General Council before the end of 2002.<sup>89</sup>

The Declaration reaffirms the commitment of developed-country Members to provide incentives to their enterprises and institutions to promote and encourage technology transfer to least-developed country Members pursuant to Article 66.2. Members agreed that the least-developed country Members will not be obliged, with respect to pharmaceutical products, to implement or apply Sections 5 and 7 of Part II of the TRIPS Agreement or to enforce rights provided for under these Sections until 1 January 2016, without prejudice to the right of least-developed country Members to seek other extensions of the transition periods as provided for in Article 66.1 of the TRIPS Agreement and instruct the Council for TRIPS to take the necessary action to give effect to this pursuant to Article 66.1 of the TRIPS Agreement.<sup>90</sup>

The Doha Declaration is drafted in soft law language. It is mainly drafted by using terms “recognize”, “agree”, “affirm”, and “reaffirm”. It raises doubts as regards the legal binding nature of the Declaration. However the Declaration has its own significance.

The declaration signifies that the WTO agreements are not cast in stone and that there is a possibility of re-moulding the agreements should the developing countries bring to bear their collective strength on issues that are significant from their point of view.<sup>91</sup> But it must be kept in mind that WTO Decisions and Declaration do not have the same legal status as WTO

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<sup>89</sup> *ibid*, p. 2,para.6.

<sup>90</sup> *ibid*, p. 2,para.7.

<sup>91</sup> Biswajit Dhar, “Doha: A Developing country Perspective”, *EPW*, Vol.XXXVI, No. 46&47, November 24,2001,p.4343

agreements.<sup>92</sup> It is not entirely clear what weight the WTO Dispute Settlement panels and the Appellate Body will give to these documents relative to the WTO agreements.<sup>93</sup> Also, a serious doubt arises that, if the provisions in the Declaration on the TRIPS Agreement and Public Health suggest an outcome different from that in the TRIPS Agreement, which document will prevail.<sup>94</sup> However, the Declaration is evidence that the TRIPS Agreement is not a static instrument laying down international minimum standards of protection exclusively for the benefit of right holders based in the developed countries, but one capable of reconciling intellectual property with national policies, such as in the area of public health, in particular in developing countries.<sup>95</sup>

As a follow-up to the Doha Conference, WTO Members approved the decision to allow least-developed countries (LDCs) to delay patent protection for pharmaceuticals until at least 2016, thereby formalising part of para.7 of the Doha Declaration on the TRIPS Agreement and public health.<sup>96</sup> WTO Members at the 25-27 June meeting of the Council for TRIPS adopted a decision to extend the period until 2016 during which LDCs do not have to provide patent protection for pharmaceutical products. They furthermore agreed on a waiver for LDCs that would exempt them from having to give exclusive marketing rights for any new drugs in the period when they do not provide patent protection.<sup>97</sup>

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<sup>92</sup> Arvind Panagariya, "India at Doha: retrospect and prospect", *EPW*, Vol.XXXVII, No.4, January 26, 2002, p.279.

<sup>93</sup> *ibid.*

<sup>94</sup> *ibid.*

<sup>95</sup> Paul Vandoren, "Clarification of the Relationship between TRIPS and Public Health resulting from the WTO Doha Ministerial Declaration", *Journal of World Intellectual Property*, vol.5, no.1, January 2002, p.5.

<sup>96</sup> "TRIPS Council Agrees on Extension for LDCs on Pharmaceutical Patents", *BRIDGES Weekly Trade News Digest* - Vol. 6, Number 25, 3 July, 2002.

<sup>97</sup> *ibid.*

The adoption of the Declaration was not an easy process. The United States and Switzerland emerged as the two hard-liners in opposing any operative decisions at the Doha Ministerial on TRIPS and Public Health or of any 'understandings' or 'interpretations' that would enable a member-country to issue compulsory licenses under Article 31 of the Agreement, except on the ground of non-use (meaning patent holder not working the patent and not agreeing to license others to produce) and abuse of patent rights. The two agree that Article 31 of TRIPS itself does not set the grounds on which compulsory licenses can be issued, but use other provisions to restrict it further. The anti-competitive abuse of patent rights is a frequently cited ground in the US for issue of compulsory licenses, and clearly the US and Switzerland (which within the industrial world, and continental Europe, denied patents for chemical and pharmaceutical sectors for a long time, until its own industry developed) want in fact to restrict the space for developing countries and insist on such a narrow view.<sup>98</sup>

The initiative for the Declaration on the TRIPS Agreement and Public Health was taken by Brazil, India and South Africa and enjoyed wide support among developing countries.<sup>99</sup> A group of 41 countries-the members of the African Group and several other developing countries from Asia and Latin America-had presented at the informal meeting a statement outlining their views and what they want to be done at Doha, and this included issues of compulsory licensing and parallel imports, the affirmation that nothing in TRIPS affects the

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<sup>98</sup> Chakravarthi Raghavan , "US, Swiss take hard-line on TRIPS, Public Health and Doha", *Third World Network*, Geneva, 26 July 2001, <http://www.twinside.org.sg>

<sup>99</sup> Arvind Panagariya, n.92, p.279. India was one of the eight WTO members which drafted the final compromise language of the document. The eight countries in the group were Brazil, India , Kenya, Zimbabwe, Canada, EU, New Zealand, US and South Africa

right of members to take actions for public health or allow parallel imports, and for a moratorium on trade disputes under TRIPS.<sup>100</sup>

The consultations would appear to have showed that in terms of the Doha Ministerial and the Declaration, and any decisions or understandings to be adopted, the US and Switzerland and a few others are unwilling to agree to anything more than a preambular language in the Declaration, while the EU is signaling that it may agree to have some operative paragraphs too.<sup>101</sup> As developing country trade diplomats and experts note, merely saying that TRIPS provides for 'flexibility' for developing countries, and such vague statements, would not avail and may be misleading in making their public and capitals believe that something has been achieved for allowing the launch of a new round. As repeatedly iterated as far as the US and Switzerland (both home countries of the major pharmaceutical transnationals) are concerned, the only TRIPS and public health issue is in relation to the AIDS pandemic, and that too as part of a wider and integrated approach.<sup>102</sup>

But trade diplomats said that there were intense discussions, with strong views on both sides expressed in some of the smaller group consultations, with the US in a 'state of denial' and insisting that they were unable to even understand the problems raised about TRIPS and public health by the developing countries. The only public health issue, as far as the US is concerned, is HIV/AIDS, and even here an integrated approach is required. The US also claimed that there was no evidence that TRIPS hampered access to drugs. At the

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<sup>100</sup>        *ibid.*

<sup>101</sup>        *ibid.*

<sup>102</sup>        *ibid.*

same time, the US said that if parallel imports were allowed, there would be 'leakage' of cheap drugs from the poor countries to the rich.<sup>103</sup>

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

The main objective of the SPS Agreement is to improve the human health, animal health and phytosanitary situation in all members. Preamble to the SPS Agreement reaffirms that no Member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade. Members have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with the provisions of this Agreement.<sup>104</sup> Members shall ensure that any sanitary and phytosanitary measures are applied only to the extent necessary to protect human, animal or plant life or health.<sup>105</sup> Such measures should be based on scientific principles and are not expected to be maintained without sufficient scientific evidence.<sup>106</sup> Sanitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the

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<sup>103</sup>

ibid.

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Article 2(1), SPS Agreement.

<sup>105</sup>

ibid, Article 2(2).

<sup>106</sup>

ibid.

relevant provisions of this Agreement and of GATT 1994.<sup>107</sup> Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is scientific justification.<sup>108</sup> Scientific justification should be on the basis of an examination and evaluation of available scientific information in conformity with the relevant provisions of this agreement and a Member determines that the relevant international standards, guidelines or recommendations are not sufficient to achieve its appropriate level of sanitary or phytosanitary protection. Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human health, taking into account risk assessment techniques developed by the relevant international organizations.<sup>109</sup>

In the *Beef-Hormone* case<sup>110</sup> the European Union's ban on the sale of hormone-fed beef based on the alleged risk for human health deriving from consumption of such a product came before the Appellate Body (AB). The US requested a decision under the DSU. The Panel upheld the US complaint in September 1997. It found that there were international standards for five of the six growth hormones in dispute, and for the sixth one, for which an international standard did not exist, the panel held that the EU ban was not based on a scientific risk assessment. The panel concluded that the EU measures in question violated the SPS Agreement.

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<sup>107</sup> *ibid*, Article 3(2).

<sup>108</sup> *ibid*, Article 3(3).

<sup>109</sup> *ibid*, Article 5(1).

<sup>110</sup> WT/ DS26/ AB/R and WT/ DS48/ AB/R, January 16, 1998.

The Appellate Body made extensive use of general principles of international law to determine the scope of the EU's discretion to apply its own health and environmental standards even though they were higher than international standards. It stated that harmonization only created a balance between the legitimate rights of states to maintain regulatory diversity and the need to reduce the trade – distorting impact of such diversity. The AB stated that:

It is essential to bear in mind that the risk that is to be evaluated in risk assessment under article 5.1 is not only risk ascertainable in a science laboratory under strictly controlled conditions, but also risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die.

The AB stated that there must be a rational relationship between the measure and the risk assessment, to be decided on a case-by-case basis. The AB further stated:

...the risk assessment must not necessarily embody only mainstream scientific opinion, but divergent opinions from qualified and respected sources may also be taken into account, especially when the risk involved is life-threatening.

The application of the SPS Agreement raises issues of interpretation similar to Article XX of GATT, as to the degree of autonomy that a Member enjoys to establish its own level of protection on health grounds. Unlike the case of said Article XX, however, an SPS measure may be considered as violation of a Member's obligations even if it equally applies to domestic and imported products, to the extent that such a measure is not grounded on scientific



evidence.<sup>111</sup> Therefore, the room for maneuver of national policies under the SPS Agreement is more restricted than under the GATT.<sup>112</sup>

Major challenges faced by many countries, particularly the developing countries and countries with economies in transition, are the follows:

1. To meet the sanitary, phytosanitary and technical requirements of importing countries;
2. To provide scientific justification for their own sanitary, phytosanitary and technical measures; and
3. To participate in a meaningful manner in the development and adoption of international standards. The gap in the technical and financial ability of countries to meet such standards is wide.

An additional challenge is faced by the developing countries when new standards are introduced on risk assessment grounds that are stricter than those currently in place, as the time and resources required to ensure conformity with these standards may be considerable. On the other hand, the risk assessment paradigm applied in the SPS Agreement in particular has had the effect of eliminating out-of-date, ineffective or arbitrary standards that may have provided a false sense of security. The transition to risk-based standard setting has required major changes in legislative, regulatory and administrative practices in most countries all of which have implied significant cost.

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<sup>111</sup> Correa, n.46, p.100  
<sup>112</sup> *ibid.*

Harmonization of phytosanitary measures, through the establishment of International Standards for Phytosanitary Measures (ISPMs), by the IPPC started only recently. A substantial number of concept ISPMs have been adopted but much work remains to be done, in particular on standards specific to individual pests, plants or plant products. FAO and other international and bilateral agencies have provided for phytosanitary capacity building, but much needs to be done to enable countries to participate fully in international trade and traffic.

With some exceptions, disputes under the SPS and TBT Agreements involving food and agricultural products have not involved developing countries as few of them have standards that are stricter than those established by the international standards-setting bodies and therefore have not been challenged by other WTO Members (the main exceptions have been challenged by the US, Canada and Australia against practices in the Republic of Korea over various measures).

#### **(4) Agreement on Technical Barriers to Trade (TBT Agreement)**

The TBT Agreement allows internationally recognized technical standards. Preamble to the TBT Agreement recognizes that no country should be prevented from taking measures necessary for the protection of human, animal or plant life or health, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this agreement. Members shall ensure that technical regulations

are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking into account of the risk non-fulfillment would create.<sup>113</sup> Such legitimate objectives are *inter alia*: ...include protection of human health or safety, animal or plant life or health. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information related processing technology or intended end-uses of products.<sup>114</sup> Where urgent problems of safety, health, environmental protection and national security arise or threaten to arise for a Member that Member may omit the prior publication and notification requirements enumerated under Article 2.9.of the TBT Agreement.<sup>115</sup>

The TBT Agreement provides for special and differential treatment for developing country Members. Members shall, in the preparation and application of technical regulations, standards and conformity assessment procedures, take account of the special development, financial and trade needs of developing country Members, with a view to ensuring that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members.<sup>116</sup> The Agreement provides that, although international standards or recommendations may exist, in their particular technological and socio-economic conditions, developing country Members adopt technical regulations aimed at preserving indigenous technology

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<sup>113</sup> Article 2(2), TBT Agreement.

<sup>114</sup> *ibid.*

<sup>115</sup> *ibid*, Article 2.10.

<sup>116</sup> *ibid*, Article 12.3.

and production methods and processes compatible with their development needs.<sup>117</sup> Members therefore recognize that developing country Members should not be expected to use international standards as a basis for their technical regulations or standards, which are not appropriate to their development, financial and trade needs.<sup>118</sup>

The SPS and TBT agreements contain promises of financial and technical assistance for developing countries. However, translating these promises into concrete action has not yet been achieved. Finally, the level of participation of these countries, in both number and effectiveness, in international standard-setting bodies remains an issue. Few developing countries have used the formal dispute settlement mechanism and the SPS/TBT agreements to challenge measures applied by importing countries that are believed to be arbitrary or unjustified.

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<sup>117</sup> *ibid*, Article 12.4.

<sup>118</sup> *ibid*.

## **CHAPTER-III**

### **WTO AND THE RIGHT TO FOOD**

This chapter is intended to test whether the WTO regime is indifferent to the right to food and nutrition. It includes an analysis of the definition of the right to food and nature of State obligation in international human rights instruments, international documents on food security and nutrition and other international documents. It examines the definition of the right to food in WTO agreements if any. The main focus of this chapter is on the Agreement on Agriculture (AoA). Food security policy options for State parties are analyzed. For a wider appreciation of the AoA from a human rights perspective, the actual impact of the AoA on developing countries, in particular the Indian experience, is examined.

#### **1. Defining the right to food**

##### **(a) International human rights instruments**

The right to adequate food is a fundamental human right firmly established in international law. This right flows from the Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) and has been reaffirmed in many pronouncements of the international community over the last fifty years.

UDHR provides for the right to food. It provides that “Everyone has the right to a standard of living adequate for the health and well-being of himself and

of his family, including food....”<sup>1</sup> ICESCR recognizes the “right of everyone to an adequate standard of living for himself and his family, including adequate food...”<sup>2</sup> It also recognizes the fundamental right of everyone to be free from hunger.<sup>3</sup> Normative content of article 11, paragraphs 1 and 2 is that the right to adequate food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement.<sup>4</sup> The right to adequate food shall therefore not be interpreted in a narrow sense which equates it with a minimum package of calories, proteins and other specific nutrients.<sup>5</sup> The core content of the right to adequate food<sup>6</sup> implies the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals,<sup>7</sup> free from adverse substances,<sup>8</sup> and acceptable within a given culture.<sup>9</sup> The accessibility<sup>10</sup> of such

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<sup>1</sup> Article 25(1), UDHR.

<sup>2</sup> Article 11(1), ICESCR, “The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.”

<sup>3</sup> *ibid*, Article 11(2), “The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.”

<sup>4</sup> CESCR, E/C.12/1999/5, Geneva, 26 April-14 May 1999, General Comment No.12: *The right to adequate food*, Committee on Economic, Social and Cultural Rights, Report on the twentieth session, para.6.

<sup>5</sup> *ibid*.

<sup>6</sup> *ibid*, para.8.

<sup>7</sup> *ibid*, para.9, Dietary needs implies that the diet as a whole contains a mix of nutrients for physical and mental growth, development and maintenance, and physical activities that are in compliance with human physiological needs at all stages throughout the life cycle and according to gender and occupation.

<sup>8</sup> *ibid*, para.10, Free from adverse substances sets requirements for food safety and for a range of protective measures by both public and private means to prevent contamination of foodstuffs through adulteration and/or through bad environmental hygiene or inappropriate handling at different stages throughout the food chain; care must also be taken to identify and avoid or destroy naturally occurring toxins.

food should be in ways that are sustainable and that do not interfere with the enjoyment of other human rights.

**(b) International documents on food security and nutrition**

The right to adequate food was reaffirmed in many international documents on food security and nutrition. The Rome Declaration on World Food Security and the World Food Summit Plan of Action laid the foundations for diverse paths to a common objective i.e. food security at the individual, household, national, regional and global levels. Food security exists when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life.<sup>11</sup> Poverty eradication is essential to improve access to food.<sup>12</sup> The goal is “sustainable food security”.<sup>13</sup> There are three dimensions implicit in this definition: availability, stability and access. Adequate food availability means that, on average, sufficient food supplies should be available to meet consumption needs. Stability refers to minimizing the probability that, in

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<sup>9</sup> *ibid*, para.11, Cultural or consumer acceptability implies the need also to take into account, as far as possible, perceived non nutrient-based values attached to food and food consumption and informed consumer concerns regarding the nature of accessible food supplies.

<sup>10</sup> *ibid*, para.13, Accessibility encompasses both economic and physical accessibility: Economic accessibility implies that personal or household financial costs associated with the acquisition of food for an adequate diet should be at a level such that the attainment and satisfaction of other basic needs are not threatened or compromised. Economic accessibility applies to any acquisition pattern or entitlement through which people procure their food and is a measure of the extent to which it is satisfactory for the enjoyment of the right to adequate food. Socially vulnerable groups such as landless persons and other particularly impoverished segments of the population may need attention through special programmes. Physical accessibility implies that adequate food must be accessible to everyone, including physically vulnerable individuals, such as infants and young children, elderly people, the physically disabled, the terminally ill and persons with persistent medical problems, including the mentally ill. Victims of natural disasters, people living in disaster-prone areas and other specially disadvantaged groups may need special attention and sometimes priority consideration with respect to accessibility of food. A particular vulnerability is that of many indigenous population groups whose access to their ancestral lands may be threatened.

<sup>11</sup> See Plan of Action of the World Food Summit, para.1, also see, UN action in the field of human rights, Center for Human Rights, UN, Geneva, 1994, pp.142-44.

<sup>12</sup> See *Plan of Action of the World Food Summit*, para.2.

<sup>13</sup> *ibid*, para. 3&4.

difficult years or seasons, food consumption might fall below consumption requirements. Access draws attention to the fact that, even with bountiful supplies, many people still go hungry because they are poor and unable to produce or purchase the food they need. In addition, if food needs are met through exploiting non-renewable natural resources or degrading the environment there is no guarantee of food security in the longer-term. It recognizes trade as a key element in achieving food security.<sup>14</sup> Food, agricultural trade and overall trade policies must be conducive to fostering food security for all through a fair and market-oriented world trade system.<sup>15</sup> While the right to adequate food is firmly established as a fundamental human right, it needs to be further elaborated to facilitate its implementation. The Rome Declaration and the Plan of Action adopted by the World Food Summit offer a landmark opportunity for this endeavor. Commitment 7, objective 7.4 of the Plan of Action "invites the UN High Commissioner for Human Rights, in consultation with relevant treaty

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<sup>14</sup> *ibid*, para.37, Trade is a key element in achieving world food security. Trade generates effective utilization of resources and stimulates economic growth which is critical to improving food security. Trade allows food consumption to exceed food production, helps to reduce production and consumption fluctuations and relieves part of the burden of stock holding. It has a major bearing on access to food through its positive effect on economic growth, income and employment. Appropriate domestic economic and social policies will better ensure that all, including the poor, will benefit from economic growth. Appropriate trade policies promote the objectives of sustainable growth and food security. It is essential that all members of the World Trade Organization (WTO) respect and fulfill the totality of the undertakings of the Uruguay Round. For this purpose it will be necessary to refrain from unilateral measures not in accordance with WTO obligations. Also see World Declaration on Nutrition, 1992, it states "We acknowledge the importance of further liberalization and expansion of world trade, which would increase foreign exchange earnings and employment in developing countries. Compensatory measures will continue to be needed to protect adversely affected developing countries and vulnerable groups in medium- and low-income countries from negative effects of structural adjustment programmes."

<sup>15</sup> *ibid*, Commitment four.



bodies, and in collaboration with relevant specialized agencies and programmes of the UN system and appropriate intergovernmental mechanisms, to better define the rights related to food in Article 11 of the Covenant [on Economic, Social and Cultural Rights] and to propose ways to implement and realize these rights as a means of achieving the commitments and objectives of the World Food Summit, taking into account the possibility of formulating voluntary guidelines for food security for all."

Universal Declaration on the Eradication of Hunger and Malnutrition of 1974<sup>16</sup> has affirmed "that every man, woman and child has the inalienable right to be free from hunger and malnutrition in order to develop fully and maintain their physical and mental faculties." In 1992, the International Conference on Nutrition adopted the World Declaration on Nutrition which recognizes that the "access to nutritionally adequate and safe food is a right of each individual."

**(c) Other international documents**

The right to adequate food was also reaffirmed in other major international documents.<sup>17</sup> The Declaration of the Rights of the Child of 1959 and the Convention on the Rights of the Child of 1989 recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. The Declaration of Principles and Programme of Action of the World Conference on Agrarian Reform and Rural

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<sup>16</sup> adopted on 16 November 1974 by the World Food Conference convened under General Assembly Resolution 3180(XXVIII) of 17 December 1973; and endorsed by General Assembly Resolution 3348 (XXIX) of 17 December 1974.

<sup>17</sup> Declaration on the Rights of Disabled Persons of 1975; Convention on the Elimination of all Forms of Discrimination against Women of 1979; Declaration on the Right to Development of 1986; The ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries.

Development of 1979, the World Summit on Children of 1990, the Vienna Declaration and Programme of Action of the World Conference on Human Rights of 1993, the Copenhagen Declaration and Programme of Action of the World Summit for Social Development of 1995, and the Beijing Conference on Women of 1995 have also recognized the right to food.

**(d) Position of International NGOs**

The International Code of Conduct on the Human Right to Adequate Food was first proposed in the run-up to the World Food Summit in 1996. It has widespread support among non-governmental organizations who advocate on behalf of the hungry.<sup>18</sup> Now states are being called upon by NGOs to start intergovernmental negotiations on the Code of Conduct, which would provide guidance on the implementation of the right to food. The Code would not create new rights or obligations -- these already exist under international law; it would focus instead on the actual steps countries could take to ensure that their policies and legislation respect, protect and fulfill the right to food of everyone.<sup>19</sup> An international NGO, Food First Information and Action Network (FIAN) is pushing for the adoption of a Code of Conduct on the right to adequate food, a new legal instrument, which shall be developed by states within the framework of the Food and Agriculture Organisation of the United Nations (FAO).<sup>20</sup> Since states are duty-bound to implement the right to adequate food, the Code of Conduct could be characterised as the set of rules and principles along which lines the states should organize their policies. To give guidance to this process

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<sup>18</sup> <http://www.fao.org/worldfoodsummit/english/newsroom/focus/focus6.htm>

<sup>19</sup> *ibid*

<sup>20</sup> <http://www.fian.org/english-version/wfs4.htm>

FIAN and a group of other non-governmental organizations have developed an own draft.<sup>21</sup>

International NGOs<sup>22</sup> have their own definition of the right to food and normative content of the right to adequate food. The right to adequate food means that “every man, woman and child alone and in community with others must have physical and economic access at all times to adequate food or by using a resource base appropriate for its procurement in ways consistent with human dignity. The right to adequate food is a distinct part of the right to an adequate standard of living.”<sup>23</sup> The realization of the right to adequate food requires certain concrete actions.<sup>24</sup>

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<sup>21</sup> *ibid*, elected important aspects of a Code are: Through the precise description of the state obligations, a Code should facilitate the realisation of the right to adequate food at national level; it would address the obligations of states and the responsibilities of other actors at the same time. Other actors, like the International Finance Institutions and Transnational Corporations are becoming increasingly important for the full implementation of the right to adequate food. Their actions and policies are influencing the capacities of states to comply with their obligations under international human rights law. Therefore the Code shall contain a description of their responsibilities. The Code of Conduct should put not only obligations of states under the scrutiny of a monitoring mechanism, but also the compliance of these actors with their responsibilities; It can become the guiding book of principles in order to reach the objectives of the WFS (World Food Summit). A rights approach to its implementation is still required to tackle hunger and malnutrition; The Code of Conduct should include monitoring mechanisms for the implementation of the Code itself, adding an importing instrument to the weak monitoring of World Food Summit results, so far based on a human rights analyses.

<sup>22</sup> FIAN International (Food First Information and Action Network), International Human Rights Organization for the Right to feed oneself, WANHR (World Alliance for Nutrition and Human Rights) and Institute Jacques Maritain International.

<sup>23</sup> Article 4, International Code of Conduct on the Human Right to Adequate Food, Draft endorsed by, FIAN International (Food First Information and Action Network) International Human Rights Organization for the Right to feed oneself, WANHR (World Alliance for Nutrition and Human Rights) and Institute Jacques Maritain International, September 1997

<sup>24</sup> Article 4, *ibid*, “(1) a) the availability of food, free from adverse substances and culturally acceptable, in a quantity and quality which will satisfy the nutritional and dietary needs of individuals; b) the accessibility of such food in ways that do not interfere with the enjoyment of other human rights and that is sustainable.

(2) The ultimate objective of the right to adequate food is to achieve nutritional well-being. Nutritional well-being is dependent on parallel measures in the fields of education, health and care. In this broader sense, the right to adequate food is to be understood as the right to adequate food and nutrition.

(3) The realization of the right to adequate food is inseparable from social justice, requiring the adoption of appropriate economic, environmental and social policies, both at the national and international level, oriented to the eradication of poverty and the satisfaction of basic needs.”

Ms Margret Vidar<sup>25</sup> has highlighted the significance of NGOs in the realization of right to food, "It's hard for the starving to sue, but NGOs and other bodies can use the law in order to protect the poor. So let the Covenant on Economic, Social and Cultural Rights, or its equivalent, be written into national law, whether we adopt the Code of Conduct or not. The law can be the bridge between the hungry and the food they need."<sup>26</sup>

## **2. Nature of obligation**

### **(a) Obligation of national governments**

The nature of the legal obligations of States parties is set out in article 2 of the ICESCR.<sup>27</sup> The ICESCR Committee's General Comment No. 3 (1990) elaborates the nature of obligation. The principal obligation is to take steps to achieve progressively the full realization of the right to adequate food. This imposes an obligation to move as expeditiously as possible towards that goal. Every State is obliged to ensure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure freedom from hunger.

The right to adequate food, like any other human right, entails three types or levels of obligations on States parties: the obligations to respect, to protect

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<sup>25</sup> FAO legal officer, see <http://www.fao.org/worldfoodsummit/english/newsroom/focus/focus6.htm>

<sup>26</sup> In 2001 in the Supreme Court of India, NGOs successfully forced public corporations and state governments to accept responsibility for malnutrition.

<sup>27</sup> Article 2 (1), ICESCR, "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

and to fulfill.<sup>28</sup> In turn, the obligation to fulfill incorporates both an obligation to facilitate and an obligation to provide. The obligation to respect existing access to adequate food requires States parties not to take any measures that result in preventing such access. The obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to fulfill (facilitate) means the State must proactively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security. Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to fulfill (provide) that right directly. This obligation also applies for persons who are victims of natural or other disasters.

**(b) International obligations of the State parties**

It remains the primary responsibility of States to ensure enjoyment of the right to food by all within their jurisdiction. But States have obligations also to the peoples of other states and to the international community.<sup>29</sup> In the spirit of article 56 of the Charter of the United Nations, the specific provisions contained in articles 11, 2.1, and 23 of the ICESCR and the Rome Declaration of the World Food Summit, States parties should recognize the essential role of international cooperation and comply with their commitment to take joint and separate action to achieve the full realization of the right to adequate food. In implementing this

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<sup>28</sup> See, Philip Alston & Asbjorn Eide, "Advancing the right to food in international law", in Asbjorn Eide & others, ed., *Food as a Human Right*, The United Nations University (Tokyo,1984) pp.251-256.

<sup>29</sup> *Right to adequate food as a human right*, UN (Newyork,1989) p.55

commitment, States parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required. States parties should, in international agreements whenever relevant, ensure that the right to adequate food is given due attention and consider the development of further international legal instruments to that end.

World Declaration on Nutrition recognizes the fact that each government has the prime responsibility to protect and promote food security and the nutritional well-being of its people, especially the vulnerable groups. The declaration also stress that such efforts of low-income countries should be supported by actions of the international community as a whole.

**(c) Obligation under the Indian Constitution**

The Indian Constitution did not make a binding obligation on the State to ensure right to adequate food and nutrition. However, Article 47 imposes duty upon the State to raise the level of nutrition. The article comes under part IV of the Constitution, entitled "Directive Principles of State Policy" which is not justiciable. The Indian government has adopted several programmes to raise the level of nutrition.

An important and direct intervention that takes into consideration the pregnant and nursing women in India is the Integrated Child Development

Services (ICDS) scheme.<sup>30</sup> ICDS is a centrally sponsored countrywide programme, aiming to influence the pre-natal and post-natal environment of the child. The program aims to achieve the following four objectives:

1. to improve the nutritional status of children 0-6 years via supplementary feeding to "selected" beneficiaries;
2. to encourage school enrollment via early pre-school stimulation program for children 3-6 years old;
3. to enhance the mother's awareness via health and nutrition education, and
4. to coordinate with health departments to ensure delivery of the required health inputs including immunisation to children and mothers, so that both morbidity and mortality rates decline over time. A package of six services is thus delivered through ICDS: health check-up, immunisation, referral services, supplementary nutrition, non-formal education, and nutrition and health education to mothers.<sup>31</sup>

The Public Distribution system (PDS) is another food programme of the Central Government. The rationale behind PDS is providing food grains at a lower than market price to vulnerable households especially as they have to put up with low incomes and seasonal fluctuations in incomes. In actual practice, except for the states of Kerala, AP, Tamil Nadu and Gujarat, the coverage of

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<sup>30</sup> See Satinder Bajaj, "The nutrition security system at the household level: policy implications", *Food and Nutrition Bulletin*, United Nations University, Tokyo, Volume 11, Number 4, December 1989, <http://www.unu.edu/unupress/food/8F114e/8F114E02.htm>

<sup>31</sup> See "Appropriate Nutrition: Its Role in Health, Public Policies and Programmes Towards Appropriate Nutrition", [http://www.healthlibrary.com/reading/banyan2/6policies.htm#Public%20Distribution%20system%20\(PDS\)](http://www.healthlibrary.com/reading/banyan2/6policies.htm#Public%20Distribution%20system%20(PDS))

PDS in rural areas is weak.<sup>32</sup> The coverage of rural areas is left to the initiative and resources of the state. Distribution of food supplies from the Centre to states is not sufficient. The deficit has to be met by purchases within the state, incurring additional subsidy which may or may not be forthcoming always.<sup>33</sup>

Apart from the ICDS and the PDS, a number of other programmes are intended to support family nutrition. These include the National Anaemia Prophylaxis Programme, the National Goiter Control Programme, the National Programme for Prevention of Nutritional Blindness due to Vitamin A Deficiency, the Mid-day Meal Programme, the Special Nutrition Programme, the Applied Nutrition Programme, and the Chief Minister's Noon Meal Programme. There are other programmes which have a bearing on nutritional status: the food for work programmes, the EGS (Employment Guarantee Scheme) in Maharashtra and now the latest of these: the Jawahar Rojgar Yojana and the Indira Mahila Rojgar Yojana.

Still, it would appear that the two major nutrition related interventions, ICDS and PDS, do not as yet add to an effective nutrition planning policy, although they appear to be reasonable policy responses to poverty and malnutrition.<sup>34</sup> Strait jacketed programme design for both ICDS and PDS that does not take into account socio-cultural and population differences across states and within states seems to be a public wastage of money.<sup>35</sup> The detailed, frequently updated data base that is needed for a focused implementation of

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<sup>32</sup>       ibid  
<sup>33</sup>       ibid  
<sup>34</sup>       ibid  
<sup>35</sup>       ibid



nutrition programmes seem to be lacking. Resources need to be made available for proper coverage of all needy populations. Lastly, such nutritional interventions not only require proper institutional back-up, but also proper integration with other development programmes with whole hearted political support, that does not use it as a lever for short-term gain of party politics. The current shortfall in resources in almost every state, both for ICDS and PDS do not indicate that nutrition as such is a high political priority--especially poor people's nutrition.<sup>36</sup>

### **3. WTO Law and Policy**

#### **(a) Agreement on agriculture**

The preamble to the AoA provides for food security. It states that "...commitments under the reform programme should be made in an equitable way among all Members, having regard to non-trade concerns, including food security and the need to protect environment, having regard to the agreement that special and differential treatment for developing countries is an integral element of the negotiations, and taking into account the possible negative effects of the implementation of the reform programme on least-developed and net food importing developing countries". Article 12 lays emphasis on food security.<sup>37</sup>

Article 20 is also important in this aspect. It states that:

Recognizing that the long term objective of substantial progressive reduction in support and protection resulting in fundamental reform is an ongoing process, Members agree that negotiations for continuing the

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<sup>36</sup>       ibid

<sup>37</sup>       Article 12, AoA speaks about Disciplines of Export Prohibitions and Restrictions "Where any Member institutes any new export prohibition or restriction on foodstuffs in accordance with paragraph 2(a) of Article XI of GATT 1994, the Member shall observe the following provisions:  
(a) the Member instituting the export prohibition or restriction, shall give due consideration to the effects such prohibition or restriction on importing Member's food security;"

process will be initiated one year before the end of the implementation period, taking into account:

...

(c) non-trade concerns, special and differential treatment to developing country Members, and the objective to establish a fair and market-oriented agricultural trading system, and the other objectives and concerns mentioned in the preamble to this Agreement;

...

One important point to be noted is that the focus of the WTO Agreement on Agriculture (AoA) is not food security. It does not define food security. The main objective is to establish “a fair and market-oriented agricultural trading system” through “reductions in agricultural support and protection”. The belief is that this would lead to “correcting and preventing restrictions and distortions in world agricultural markets”.

AoA provides for some food security policy options for State parties which have direct implications on the right to food.

#### **(b) Food security policy options under the WTO**

How national governments of the developing world can initiate or continue measures to protect food security is a pertinent question. This section identifies those provisions of the AoA which enable the national governments to pursue their food security policies as well as those that may limit their options.

This section discusses options in the three main areas of domestic policy intervention, namely, production, consumption and market stability, in the context of food security.

For ensuring food security, State parties have two broad policy options to support domestic production.

1) **Border measures:** This is provided through tariffs, provided that tariffs should be within the tariff ceiling bound in the WTO. Many developing countries have relatively high bound rates in basic foodstuffs. While the option of applying tariffs up to the bound levels is compatible with WTO commitments, in practice such a policy may have its limitations especially for the developing countries, most of which are food importers. Higher tariffs imply higher prices paid by domestic consumers. For many developing countries with large numbers of poor households, this may not be a feasible option.<sup>38</sup>

2) **Domestic support measures:** These measures enable a State party to provide price and non-price support to farmers, within the bounds of its WTO commitments. AoA identifies two types of domestic subsidies.<sup>39</sup> While non-product specific subsidies are subsidies given to all crops,<sup>40</sup> product specific subsidies are subsidies given to specific crops.<sup>41</sup>

State parties can support domestic producers through Green Box policies. Green Box policies include government support for research programmes, pest and disease control measures, training services, extension and advisory services, etc.<sup>42</sup> Expenditure for unspecified purposes that could be used by the sellers to reduce their selling prices or confer a direct economic benefit to the purchaser and infrastructural services are excluded.

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<sup>38</sup> P. Konandreas, "Trade and food security: options for developing countries", *Multilateral Trade Negotiations on Agriculture: A Resource Manual*, FAO, (Rome, 2000) <http://www.fao.org/docrep/003/x7353e/x7353e10.htm>

<sup>39</sup> Both of these types of support are disciplined by the AMS and are available to countries that have claimed such support in their schedules for the base period. If they have not, then the upper limit for developing countries that applies to each of these two types of support is the 10 percent *de minimis* level (i.e. such support cannot exceed 10 percent of the farm-gate value of production).

<sup>40</sup> In India, for instance, subsidies given to fertilizers, water, electricity, seeds and credit come under this category.

<sup>41</sup> In India, for instance, the minimum support price given for certain products.

<sup>42</sup> AoA, Annex-2, para-2

All measures for domestic support for which exemption from the reduction commitment shall conform to the following criteria:<sup>43</sup>

- a) the support in question shall be provided through a policy funded government programme (including government revenue foregone) not involving transfers from consumers; and
- b) the support in question shall not have the effect of providing price support to producers; plus policy-specific criteria and conditions.

Domestic support provided through direct payment to producers shall also comply with the above-mentioned criteria. Direct payments to producers include decoupled income support, government financial participation in income insurance and income safety net programmes.

Also included in the Green Box are food security stocks and domestic food aid programmes, which are discussed below. Finally, developing countries also have access to a special category of production support policies under Special and Differential Treatment (SDT), namely: generally available investment subsidies, agricultural input subsidies generally available to low-income or resource poor producers, as well as support to producers to encourage diversification from the growing of illicit narcotic crops.

In general, the AoA is relatively permissive as regards policies that are directed towards supporting consumers. This is understandable because such

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<sup>43</sup> *ibid*, Annex-2, para-1

support, although market distorting (it generally leads to higher overall food consumption than otherwise), is nevertheless trade-enhancing and thus it does not impinge on the export interests of trading partners.<sup>44</sup> Expenditure or revenue foregone in relation to the accumulation and holding of stocks of products which form an integral part of a food security programme identified in national legislation are excluded. This may include government aid to private storage of products as part of such a programme.<sup>45</sup> Such stocks shall correspond to predetermined targets related solely to food security and the process of stock accumulation and disposal shall be financially transparent. According to the Agreement, countries will be allowed to make use of public stockholding of grains for security purposes “provided that the difference between the acquisition price and external reference price (i.e. the ruling international price) is accounted for the AMS”. This raise several questions for countries like India where the acquisition price for building food stocks have been lower than the international prices for a long time before the latter registered steep decrease in the recent past.<sup>46</sup>

Exemption includes expenditures provided for domestic food aid to sections of the population in need.<sup>47</sup> Eligibility to receive the food aid shall be subject to clearly defined criteria related to nutritional objectives.<sup>48</sup> This condition implies that the criteria adopted for identifying the poor must have the approval of the WTO and that the eventual decision, as to who should receive the

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<sup>44</sup> Konandreas, n.38

<sup>45</sup> See n.42, Annex-2, para-3

<sup>46</sup> “The non –trade concerns in the WTO Agreement on Agriculture”, *CUTS Briefing Paper*,no.8/1999,p.2

<sup>47</sup> See n.42, Annex-2,para-4

<sup>48</sup> *ibid*

food aid, will be made *de facto* by the multilateral organization.<sup>49</sup> The aid shall be in the form of direct provision of food to those concerned as to allow recipients to buy food either at market or at subsidized prices. For public stockholding for food security purposes and domestic food aid, the provision of food stuffs at subsidized prices with the objective of meeting food requirements for urban and rural poor in developing countries on a regular basis at reasonable prices shall be considered to be in conformity with the provisions of the Agreement.<sup>50</sup>

Until markets adjust to the new trade regime, market instability may increase. However, there are several WTO-compatible measures that a country may use to mitigate the effects of market instability on food security. The use of food security stocks as a stabilization instrument (mentioned in the previous paragraphs) must form an integral part of a food security programme identified in national legislation and there are specific provisions for the terms under which food security stocks are procured and released. In practice these provisions have been used with some flexibility. Many countries, both developed and developing, have declared their stockholding operations under the Green Box and thus are exempt from the Aggregate Measurement Support (AMS) limitations, without serious challenge from their WTO partners so far.<sup>51</sup> The special safeguards clause (SSG) of the AoA and general WTO safeguards allow countries to levy additional tariffs under specific circumstances. However, because the SSG clause was reserved for products which were subject to tariffication, only a small

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<sup>49</sup> See n.46

<sup>50</sup> See n.42, Annex-2, paras 3 and 4, foot notes 5&6

<sup>51</sup> Konandreas, n.38

number of developing countries have resort to this provision, as only a few used the tariffication formula to bind their tariffs. Further, the use of these measures or remedies, including on a provisional basis, is subject to extensive procedural requirements. Consequently, they have been of little practical use to developing countries.<sup>52</sup> Another provision of the AoA related to domestic market stability is on export prohibitions. At times of sharply rising world prices or sharply rising demand from a neighboring country, Article 12 of the AoA allows a country to put limitations on exports providing the other (the importing) countries' food security is taken into account. Finally, countries can consider using risk management instruments that mitigate the effects of price variability. Market-based instruments such as forward and futures price contracts and options are fully compatible with the WTO.

It is evident from the above that, in general, there is considerable flexibility in the AoA. Developing countries have at their disposal a variety of options that would allow them to pursue policies in support of producers and consumers, without violating their obligations under the WTO. Yet, independently of their WTO obligations, there is always the dilemma of how to reconcile producer and consumer interests in the domestic agricultural and food policy when food security is the overriding objective. In most cases this would require a judicious combination of WTO-compatible instruments.

### **Access to food**

The most important element to guarantee the right to food is access to food. There are certain provisions in the AoA which ensure access to food.

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<sup>52</sup> ibid

Article 12 of the AoA stipulates that exporting countries should give due consideration to the food security interests of importing countries before they consider imposing any export restrictions. There are also provisions for advance notifications on export restrictions, none of which were in existence earlier. Although clearly the risk of export restrictions is not fully eliminated by these provisions, the increased transparency that has been added in the world market could help.<sup>53</sup> The difficulties that countries may face during the reform process have been recognized in the Uruguay Round, and developing countries have been given special and differential treatment, mainly in the form of longer periods to make adjustments and lower reduction commitments. The Final Act also recognizes that during the reform process food importing countries may experience negative effects in terms of the availability of adequate imported supplies of basic foodstuffs on reasonable terms and conditions. The Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries is a commitment to take action to alleviate such effects. It calls for assistance to be given to these countries if they are adversely affected by the reform process. It states:

Ministers recognize that during the reform programme leading to greater liberalization of trade in agriculture, least-developed countries and the net-food importing developing countries may experience negative effects in terms of adequate supplies of basic foodstuffs from external sources on reasonable terms and conditions, including short-term

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<sup>53</sup> Konandreas, n.38



difficulties in financing normal levels of commercial imports of basic foodstuffs.

To deal with this, the Decision provided for four response mechanisms: food aid, short-term financing of normal levels of commercial imports, favorable terms on agricultural export credits, and technical and financial assistance to improve agricultural productivity. To date, there has not been any concrete benefit stemming from the Decision.<sup>54</sup>

The Doha Declaration reconfirmed the commitment to the long-term objective referred to in the Agreement to establish a fair and market-oriented trading system through a programme of fundamental reform encompassing strengthened rules and specific commitments on support and protection in order to correct and prevent restrictions and distortions in world agricultural markets.<sup>55</sup> The Declaration further states:

We commit ourselves to comprehensive negotiations aimed at: substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support. We agree that special and differential treatment for developing countries shall be an integral part of all elements of the negotiations and shall be embodied in the Schedules of concessions and commitments and as appropriate in the rules and disciplines to be negotiated, so as to be operationally effective and to enable developing countries to effectively take account of their development needs, including food security and rural development. We take note of the non-trade concerns reflected in the negotiating proposals submitted by Members and confirm that non-trade concerns will be taken into account in the negotiations as provided for in the Agreement on Agriculture.<sup>56</sup>

Regarding special and differential treatment the Declaration commits:

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<sup>54</sup> "Measures to enhance agricultural development, trade and food security in the context of the WTO negotiations", *Agriculture, Trade, and Food Security Issues and Options in the WTO Negotiations from the Perspective of the Developing Countries: Country Case Studies*, Commodities and Trade Division, (FAO, 2000) Vol. I, <http://www.fao.org/docrep/003/X4829e/x4829e06.htm>

<sup>55</sup> WTO, WT/MIN(01)/DEC/W/ 1, Doha, November 2001: *Ministerial Declaration*, p. 3, para.13

<sup>56</sup> *ibid*, para.14.

We reaffirm that provisions for special and differential treatment are an integral part of the WTO Agreements. We note the concerns expressed regarding their operation in addressing specific constraints faced by developing countries, particularly least-developed countries. In that connection, we also note that some Members have proposed a Framework Agreement on Special and Differential Treatment (WT/GC/W/442). We therefore agree that all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational. In this connection, we endorse the work programme on special and differential treatment set out in the Decision on Implementation-Related Issues and Concerns.<sup>57</sup>

The Doha Ministerial Conference also addressed the food security concerns of the developing countries.<sup>58</sup> It also approved the recommendations contained in the report of the Committee on Agriculture regarding the implementation of the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries.<sup>59</sup>

### **(c) Impact of the Agreement on Agriculture**

Before analyzing the actual impact of the AoA, it is appropriate to have a look at the state of poverty and hunger in the developing and least developed countries. In Africa, the number of undernourished people<sup>60</sup> in 1996-98 was 146.5 million, and in Asia it was 334.3 million. The number of people living on less than \$1 a day in 1998 in South Asia and Sub-Saharan Africa were 522

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<sup>57</sup> *ibid*, p.9, para.44.

<sup>58</sup> WTO, WT/MIN (01)/W/10, Doha, November 2001: *Implementation- Related Issues and Concerns*, p.2, it urges "Members to exercise restraint in challenging measures notified under the green box by developing countries to promote rural development and adequately address food security concerns."

<sup>59</sup> *ibid*, para 2.2, "Takes note of the report of the Committee on Agriculture (G/AG/11) regarding the implementation of the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries, and approves the recommendations contained therein regarding (i) food aid; (ii) technical and financial assistance in the context of aid programmes to improve agricultural productivity and infrastructure; (iii) financing normal levels of commercial imports of basic foodstuffs; and (iv) review of follow-up."

<sup>60</sup> The term "undernourished" in the context of the World Food Summit 1996 refers to persons whose food consumption level is inadequate in terms of calories consumed relative to requirements on a continuing basis.

million and 290.9 million respectively. This is 40% and 46.3% of the total population respectively.<sup>61</sup> India had 207.6 million undernourished people in the year 1996-98. This is 21% of the total population . In 1997, people living on less than \$2 a day<sup>62</sup> is 86.2% of the total population.<sup>63</sup>

The relative importance of agriculture in selected WTO member countries is to be noted. In India, the share of agriculture in GDP (1999) is 29.3%. Agricultural population as percentage of the total population is 60.1. Food imports as a percentage of total export earnings minus debt services is 11.5%.<sup>64</sup>

The trade experiences of developing countries in the post-Uruguay Round Agreement on Agriculture (URAA) period indicate that their food import bills have risen faster than their agricultural export earnings. This is particularly true for the Least-Developed Countries (LDC) and Net Food-Importing Developing Countries (NFIDIC) categories, suggesting that more work is needed to improve the export prospects of these countries.<sup>65</sup> Between 1990-94 and 1995-98, the value of total food imports rose sharply for all major country groups, by 46 percent for developing countries and 22 percent for developed countries. Among developing countries, import bills rose particularly markedly (44 percent) for the NFIDICs (with 18 of the 19 NFIDICs experiencing higher import bills).<sup>66</sup> The study conducted by the Committee on Commodity problems in nine net food-

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<sup>61</sup> See World Bank, *World Development Report 2000/2001: Attacking Poverty*, Oxford University Press (New York: 2001) Table 1.1.

<sup>62</sup> \$2 a day refers to the upper poverty line as defined by the World Bank, *World Development Report 2000/2001*.

<sup>63</sup> See FAO, *The State of Food Insecurity in the World 2000*, (Rome: 2000) Table 1; World Bank, *World Development Report 2000/2001: Attacking Poverty*, Oxford University Press (New York: 2001) Table 4.

<sup>64</sup> FAO (2001), FAOSTAT

<sup>65</sup> *Experience with the Implementation of the Uruguay Round Agreement on Agriculture*, Committee on Commodity Problems, Sixty-third Session, Rome, 6 - 9 March 2001, para.31.

<sup>66</sup> *ibid*, para.23.

importing developing countries (NFIDCs) had considerable interest in the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries. Many studies presented the view that the Decision was part of an overall contract (the Uruguay Round Agreements) that recognized that some countries could suffer during the reform process, for which assistance provisions had been made. None of the studies reported any "positive" experience with the Decision; rather, the experience was said to be negative in that there was no "response" even in 1995 and 1996 when food import bills rose sharply.<sup>67</sup> The experience with food aid shipments, one of the assistance mechanisms, was mentioned in many studies as an example of the ineffectiveness of the Decision. In particular, it was stressed that food aid shipments fell to record low levels during a period when there was a hike in food prices (in 1995 and 1996) and food import bills rose sharply.

The findings of fourteen country case studies<sup>68</sup> commissioned by FAO in the summer of 1999 to review national experiences with the implementation of the Uruguay Round (UR) Agreement on Agriculture (AoA) and changes in trade flows and other effects of the reform programme concludes<sup>69</sup> that

One observation common to several of the case studies was that there was a general trend towards the consolidation of farms as competitive pressures began to build up following trade liberalization. While this has generally contributed to increased productivity and competitiveness, it led

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<sup>67</sup> *ibid*, para.17.

<sup>68</sup> The case studies were conducted by national experts and covered: Bangladesh, Botswana, Brazil, Egypt, Guyana, India, Jamaica, Kenya, Morocco, Pakistan, Peru, Senegal, Sri Lanka and Thailand. The selection of the 14 countries was based on a number of considerations, such as broad geographical balance, inclusion of different categories of countries, such as least-developed countries, net food-importing developing countries and agricultural exporters, and availability of national consultants to complete the studies by a specified deadline. This work was part of a broader FAO project on Agriculture, Trade and Food Security

<sup>69</sup> Agriculture, Trade, and Food Security Issues and Options in the WTO Negotiations from the Perspective of the Developing Countries: Country Case Studies, Commodities and Trade Division, (FAO, 2000) Vol. II, <http://www.fao.org/DOCREP/003/X8731e/x8731e01a.htm>

to the displacement and marginalization of farm labourers, creating hardship that involved typically small farmers and food-insecure population groups, and this in a situation where there are few safety nets....The Indian case study noted the conundrum that the incidence of poverty has failed to decline, despite faster economic growth since 1991, when a substantial liberalization programme was initiated, whereas there had been a reduction in poverty in the 1980s. A possible explanation put forward was that food prices rose faster than other consumer prices after 1991 and price stability was consequently considered essential for protecting the welfare of the poor during the transition. In this context, the study came to the conclusion that both trade and stockholding policies are essential components of an effective food security policy and reviewed some possible problems arising from stockholding policies within the current AoA rules.

The study suggests:<sup>70</sup>

The 14 country case studies, as well as studies made elsewhere, basically point to the need for a cautious approach to trade liberalization if social costs are to be minimized. Where the costs involve a large segment of the population, as in many low-income agrarian economies, the text-book solution of redistributing the gains between winners and losers at the national level becomes impracticable. As a result, policy makers in developing countries, most of whom are convinced of the need for market orientation and trade liberalization, face a dilemma in deciding the appropriate pace of trade liberalization. The solution is not simple because the major problem faced is inadequate competitiveness, in both domestic and export markets. Competitiveness cannot be enhanced overnight and requires increased investment in technology and infrastructure. Therefore, in the final analysis, the pace of trade liberalization has to bear some relationship to the ability of economic agents in agriculture to adapt to the new conditions and be more competitive.

International agricultural prices in the post-1995 period have declined sharply, and agricultural exports from developing countries such as India have declined. As most of the developing countries were familiar only with support in the form of input subsidies and price and marketing support, at the time of signing of the GATT agreement, developing countries got the impression that reduction in AMS would imply reduction in overall support for agriculture. These countries were not quite familiar with support in different forms of direct payment to producers, infrastructural services, pest control, environment

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<sup>70</sup>        ibid

programme, which, as per the WTO agreement, is clubbed under the Green Box and is exempt from reduction commitments. With the implementation of the WTO agreement, several member countries realized the seriousness of Green Box subsidies, level of export subsidy and AMS in the developed countries' agriculture.<sup>71</sup> It is now said that developed countries shifted support from non-exempt categories to exempt category, which is providing their produce advantage over the produce of developing countries.<sup>72</sup>

**(d) India's food security and the AoA**

A serious debate is taking place in India regarding AoA and its impact on India's food security. This debate is significant as the recent household survey data in India shows that the incidence of poverty has persisted, i.e. did not decline, despite faster economic growth since 1991, when a substantive liberalization programme was started. One argument made to explain this was that food prices rose relatively faster than general consumer prices after 1991. As a result, price stability was considered essential for protecting the poor during transition.

India, since independence, has launched a series of food security programme. How far the AoA affects on these programs is a serious matter for consideration.

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<sup>71</sup> Highest green box support (GBS) to agriculture is provided by the US which spends more than a third of its GDP on this support. Japan uses one-fourth of its GDP agriculture towards green box provisions. GBS in Canada and European countries is around 13 percent of the GDP. Among developing countries, Brazil provides 3 percent and Thailand provides 7 percent of its GDP for GBS. India used 2.34 percent of GDP agriculture for GBS (in 1995).

<sup>72</sup> Ramesh Chand & Linu Mathew Philip, "Subsidies and Support in Agriculture" , *EPW*, Vol.XXXVI, no.32, August 11, 2001, p.3014-15

Since quantitative restrictions (QRs) have been prohibited, the only main instrument for regulating import is the tariff. Earlier more options were available, such as QRs on trade, tariffs and buffer stock operations. If WTO-bound tariffs are high enough, applied rates can be raised up to the bound level to regulate imports and thus influence domestic prices. For India, this is still a feasible instrument.<sup>73</sup> A variant of such a scheme is to set price bands whereby applied rates are varied automatically in response to the gap between domestic and world market prices in order to stabilize the former. Although price band policies are still followed by some WTO members, their compatibility with WTO provisions is open to question, since the AoA explicitly outlaws variable levies. However, it has been argued that such policies are legitimate as long as applied duties do not exceed the bound rates. There are a number of instruments to attain modest degrees of price stability and trade liberalization and the AoA hardly limits the ability of the Government to stabilize prices to the extent necessary for food security.<sup>74</sup> It is important, however, for India to ensure that these options are preserved in future multilateral negotiations

Programmes such as Targeted employment programmes and the Public Distribution System (PDS) is India government's programme for food security. Green box measures are exempted from reduction commitment. Annex 2 of the AoA, Paragraph 4 thereof defines domestic food aid outlays as "expenditures (or revenue foregone) in relation to the provision of domestic food aid to sections of the population in need". It further states that "Eligibility to receive the food aid shall be subject to clearly-defined criteria related to nutritional objectives. Such

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<sup>73</sup> See n. 69.

<sup>74</sup> *ibid*

aid shall be in the form of direct provision of food to those concerned or the provision of means to allow eligible recipients to buy food either at market or at subsidized prices. Food purchases by the government shall be made at current market prices and the financing and administration of the aid shall be transparent." Targeted employment programmes seem to qualify as "the provision of means to allow eligible recipients to buy food either at market or at subsidized prices".

India, probably along with some other developing countries even closer to food self-sufficiency, faces a particular problem that has to be solved within the AoA rules--that of managing occasional food surpluses. A country may face a situation where simultaneously there are bumper harvests, due to good weather, and very low world market prices, but it cannot export the surplus without recourse to export subsidies, whereas such subsidies are not open to it under its UR commitments. If food security is an important goal of the AoA, some possibility should be provided for handling the situation without infringing the spirit of the Agreement. For India, as well as for some other countries in that situation, this question needs to be examined, with a view to seeking an appropriate solution in the WTO framework. For example, subsidized exports in this context could perhaps be regarded as falling within the general SDT provisions for developing countries.<sup>75</sup>

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<sup>75</sup>        *ibid*



## CHAPTER-IV

### CONCLUSION

The primary aim of the WTO is trade liberalization. The WTO has made it clear that it is not within the mandate of the organization to be a standard setter or enforcer of human rights. Unlike most human rights law, WTO agreements generally specify rights and obligations between States and not between States and individuals. But a series of crucial economic and social rights find expression in WTO agreements. Apart from the protection of human life, health and safety (right to life, health and safety) and food security and nutrition, it includes the protection and preservation of the environment, protection of public morals or to maintain public order or safety, right to freedom from forced labor (prison labor), sustainable development and conservation of natural resources, maintenance of international peace and security, protection of national treasures of artistic, historic or archaeological value and protection of the privacy of individuals (right to privacy). This is apart from reference in the preamble for raising standard of living, ensuring full employment, protecting and preserving the environment and sustainable development.

International human rights instruments give a broader definition of the right to health which includes the right to a standard of living adequate for the highest attainable standard of physical and mental health. WHO gave a social dimension to the right to health by defining health as a “state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity”. The Alma-Ata Declaration, the Ottawa Charter and the Beijing

Declaration give a wider dimension to the right to health. The Ottawa Charter goes to the extent of declaring that peace, housing, education, food, income, sustainable environment, social justice and equity are all necessary for the achievement of health. The Beijing Declaration links the social, political and economic context to health by affirming that “Women's health involves their emotional, social and physical well-being and is determined by the social, political and economic context of their lives, as well as by biology”.

Contrary to the above attempt by the international community to give a broader definition to the right to health, WTO agreements, which have greater human rights implications, do not give a definition of the right to health. These agreements enable the Member countries to “take measures necessary to protect human life or health”. These also have provisions which have a positive impact on the right to health. These provisions include raising the standard of living, protection and preservation of the environment, food security and nutrition, protection of public morals or to maintain public order or safety, right to freedom from forced labor (prison labor), sustainable development and conservation of natural resources, maintenance of international peace and security, and ensuring full employment. One can argue that countries are free to formulate national policies and laws, especially after the decision in *United States – Standards for Reformulated and Conventional Gasoline Case*,<sup>1</sup> *Complaints by Venezuela*, in which the WTO's Appellate Body (AB) held “Article XX contains provisions designed to permit important state interests—including the protection of human health as well as the conservation of exhaustible natural resources- to find expression”. In fact, the AB has given a more narrow

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<sup>1</sup> WT/DS2/AB/R, 29 April 1996.

interpretation of the exception under Article XX (b) (protection of health) than the exception under Article XX (g) (protection of environment). Regarding the protection of the environment it held that, “WTO members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislations they enact and implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the General Agreement and the other Covered Agreements”. Carlos M. Correa points out that “...though there is room for national autonomy in determining what the adequate public health measures are, the application of the “necessary” test limits the options available to the States. This may set a very high hurdle for public health policies....”

This will not address the apprehensions of the developing world that the developed world might use the provisions of WTO agreements as protectionist measures, even after the AB tried to alleviate these concerns by stating thus: “The purpose and object of the introductory clauses of Article XX is generally the prevention of abuse of the exceptions of Article XX... The chapeau is animated by the principle that while the exception of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the General Agreement.”

The “necessary” test causes further problems. National policy makers have in mind their own countries, particular circumstances while drafting the policies. When a dispute comes before the panels and the AB, they had to second-guess domestic regulators without necessarily possessing the expertise and an adequate knowledge of the particular circumstances in which a measure

has been adopted and whether the alternative less restrictive measures were reasonably available.

The AB in *European Communities – Measures Affecting Asbestos and Asbestos – Containing Products*<sup>2</sup> made a popular decision by upholding the ban on asbestos. Whether this health-friendly approach is a fundamental shift or just an act to co-opt public opinion is yet to be ascertained. The Appellate Body went to the extent of stating that under Article XX(b) of GATT, member states can provide differential treatment between two ‘like products’ for protecting human health, life, plant and animal life, and for conservation of natural resources under Article XX (g). However, this decision has again pushed to the centre stage the debate whether the WTO is the right forum to decide on issues relating to health and should trade liberalization be the important factor to decide on the legitimacy of the measures.

The AB addressed health concerns by looking into “the actual potential for adverse effects on human health in the real world where people live and work and die” in the *Beef-Hormone* case.<sup>3</sup> It held that the risk assessment “must not necessarily embody only mainstream scientific opinion, but divergent opinions from qualified and respected sources may also be taken into account, especially when the risk involved is life-threatening”. This decision gives some scope for the Member countries to face emergency situations.

TRIPS and its impact on access to drugs is a major concern for developing countries. Even though the general provisions and the basic

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<sup>2</sup> WT/DS135/AB/R, March,12,2001

<sup>3</sup> WT/DS26/AB/R and WT/DS48/AB/R, January 16, 1998.

principles of the TRIPs address the concerns of the developing countries regarding access to drugs, actual implementation proves to be contrary. The relevant resolution of the UN Sub-Commission on the Promotion and Protection of Human Rights makes an important contribution in this regard. It points out that the right to protection of the moral and material interests resulting from any scientific, literary or artistic production of which one is the author is, in accordance with article 27, paragraph 2, of the Universal Declaration of Human Rights and article 15, paragraph 1 (c), of the International Covenant on Economic, Social and Cultural Rights, a human right, subject to limitations in the public interest. The Doha Conference was also significant from the developing world perspective. It reaffirmed that the developed world cannot suppress the collective strength of the developing world and that there still is possibility of redrafting the WTO agreements. The legal binding nature of this declaration is doubtful. The question arises as to whether the declaration is a soft law document. What will be the legal status of this declaration before the WTO Dispute Settlement panels and the Appellate Body relative to the WTO agreements is also a serious question. Also, a serious doubt arises that if the provisions in the declaration suggest an outcome different from that in the TRIPs Agreement, which document will prevail.

International human rights instruments have broadly defined the right to food. The right to “adequate food” is considered a part of everyone’s right “to an adequate standard of living for himself and his family”. The right to adequate food is realized when “every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means

for its procurement". The Rome Declaration on World Food Security and the World Food Summit Plan of Action makes clear that "food security exists when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life". It recognizes trade as a key element in achieving food security. The Declaration on the Eradication of Hunger and Malnutrition affirmed "that every man, woman and child has the inalienable right to be free from hunger and malnutrition in order to develop fully and maintain their physical and mental faculties." The World Declaration on Nutrition recognizes "access to nutritionally adequate and safe food is a right of each individual."

As in the case of the right to health, the WTO has not attempted to define the right to food or food security. The definition of "non-trade concerns" given in the preamble to the Agreement on Agriculture (AoA) includes food security. No further details are provided: for example, about the definition of these terms or how these concerns are to be addressed. However, the AoA provides for some food security policy options for State parties. Developing countries have at their disposal a variety of options that would allow them to pursue policies in support of producers and consumers, without violating their obligations under the WTO. But the actual impact is different. Case studies prove that there was a general trend towards the consolidation of farms as competitive pressures began to build up following trade liberalization and basically point to the need for a cautious approach to trade liberalization if social costs are to be minimized. In the final analysis, "the pace of trade liberalization has to bear some relationship to the

ability of economic agents in agriculture to adapt to the new conditions and be more competitive”.

The Doha Conference made an attempt to address the food security concerns of developing countries. It urged the Members to exercise restraint in challenging measures notified under the green box by developing countries to promote rural development and adequately address food security concerns.

To conclude, the larger question still remains unanswered. The national governments have to comply with two legally binding bodies of international instruments: international human rights instruments, whose primary aim is to protect and promote human rights, and WTO agreements, whose primary aim is to liberalize international trade. If there is a conflict between these two, which instrument should be given primacy remains a dilemma.

## **ANNEX-1**

**WORLD TRADE  
ORGANIZATION**

**WT/ MIN (01)/DEC/W/2**

14 November 2001

(01-5770)

**MINISTERIAL CONFERENCE**

**Fourth Session**

**Doha, 9 - 14 November 2001**

### **DECLARATION ON THE TRIPS AGREEMENT AND PUBLIC HEALTH**

1. We recognize the gravity of the public health problems afflicting many developing and least-developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics.
2. We stress the need for the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) to be part of the wider national and international action to address these problems.
3. We recognize that intellectual property protection is important for the development of new medicines. We also recognize the concerns about its effects on prices.
4. We agree that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all. In this



connection, we reaffirm the right of WTO Members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose.

5. Accordingly and in the light of paragraph 4 above, while maintaining our commitments in the TRIPS Agreement, we recognize that these flexibilities include:

(a) 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.

(b) Each Member has the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted.

(c) Each Member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency.

(d) The effect of the provisions in the TRIPS Agreement that are relevant to the exhaustion of intellectual property rights is to leave each Member free to establish its own regime for such exhaustion without challenge, subject to the MFN and national treatment provisions of Articles 3 and 4.

6. We recognize that WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement. We instruct the Council for TRIPS to find an expeditious solution to this problem and to report to the General Council before the end of 2002.

7. We reaffirm the commitment of developed-country Members to provide incentives to their enterprises and institutions to promote and encourage technology transfer to least-developed country Members pursuant to Article 66.2. We also agree that the least-developed country Members will not be obliged, with respect to pharmaceutical products, to implement or apply Sections 5 and 7 of Part II of the TRIPS Agreement or to enforce rights provided for under these Sections until 1 January 2016, without prejudice to the right of least-developed country Members to seek other extensions of the transition periods as provided for in Article 66.1 of the TRIPS Agreement. We instruct the Council for TRIPS to take the necessary action to give effect to this pursuant to Article 66.1 of the TRIPS Agreement.

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