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Unilateral Trade Measures By States

(Paper submitted by India in the WTO General Council in the preparatory process for the Third Ministerial Conference, Seattle)

Unilateral trade measures do not make economic sense because they are fundamentally against the theory of free trade and comparative advantage. Unilateral trade measures are clearly indefensible.

BACKGROUND

Unilateral trade measures are normally measures taken by stronger trading nations against weaker ones with a view to influencing the latter. Though it is usually couched in language such as "fair trade" or "level-playing field", the real reasons usually have to do with either protection of the domestic industry of the stronger nation or gaining market access through pressure on the weaker trading nation. **Unilateral trade measures do not make economic sense because they go fundamentally against the theory of free trade and comparative advantage.** As will be shown in this paper, **unilateral trade measures do not find any sanction or justification either in international law or indeed in GATT/WTO law.**

INTERNATIONAL LAW

1. The regulation of unilateral measures in international relations is one of the important areas of international law. Most obligations created through such unilateral measures are formulated not in terms of a definite result, but seeking only compliance with a certain pattern of conduct. The issues arising out of unilateral measures need to be addressed within the framework of existing international legal principles. In general, **a unilateral measure or a threat thereof could take either of the following forms: a) threat to withhold some benefit or b) to withdraw a benefit previously given in the general framework of international law.** It is argued that any threat and/or initiation of a unilateral measure could be violative of Article 2 paragraph 4 of the United Nations Charter, which prohibits use of force or the threat thereof against the political independence or territorial integrity of any state or in any other way inconsistent with the purposes of United Nations. **Current practice of international relations outlaws any form of threat or coercion that seriously threatens fundamental national interests and also allows states to defend those interests.**

2. The issues relating to the unilateral measures are also addressed in the context of legal regimes governing so-called "self-contained regimes". As noted by the International Law Commission, the self-contained regimes are characterised by the fact that the substantive obligations they set forth are accompanied by a prescribed legal response for alleged violations of these obligations. It is further argued that the Members of such "regimes" are obliged to invoke those legal measures as are prescribed within the regime itself and are not entitled to initiate broad counter measures which are the subject of general international law.

3. **Any unilateral measure based on national law brings into sharp focus the issues concerning the extra-territorial effects of such acts. The basic principle in**

international law is that all national legislations are prima facie, territorial in character. State practice and doctrinal evolution in international law reflect an almost unanimous rejection of the extra-territorial application of internal legislation for the purpose of creating obligations for third States. For instance, the Heads of State belonging to countries of the Permanent Mechanism for Consultations and concerted Political Action met in Asuncion in August 1997 and adopted a declaration on unilateral measures, in which they clearly considered the unilateral and extra-territorial application of national laws as actions violating the legal equality of States and the principles of respect for and dignity of national sovereignty and non-intervention in the internal affairs of other States.

GATT 1947

The General Agreement on Tariffs and Trade, 1947 was, as is well known, a contract between States. As the name indicated, it regulated trade in goods and created a set of obligations based on commitments undertaken by countries in the area of tariffs. **GATT 1947 did not sanction unilateral trade measures; it allowed for General Exceptions (Article XX), Security Exceptions (XXI) and Non-application (XXXV) for political reasons. But these exceptions had to be taken under carefully defined parameters and were subject to scrutiny in the GATT.** GATT being a self-contained regime, its contracting parties are obliged to invoke only prescribed measures and to refrain from initiating broad counter measures, which may be the subject of general international law. The commitments undertaken under GATT are in the form of Schedules of Concessions (Article II) and their security and predictability is assured through Articles I (MFN) and III (National Treatment). Unilateral trade measures would seriously erode the security and predictability of the commitments undertaken by countries with each other. Clearly, this was not the intention of the drafters of GATT, nor does it meet the chief objectives of GATT as it evolved till the conclusion of the Uruguay Round.

WTO

1. **The Uruguay Round was launched with the explicit objective of strengthening an open, equitable and non-discriminatory multilateral trading system. Besides, the dispute settlement mechanism was to be strengthened and made automatically binding on Parties. Both these features were specifically aimed at reducing, if not eliminating altogether, the threat of unilateral trade measures.** After all, for the weaker countries there would be the multilateral trading system which would offer them security and assurance, and for the stronger countries, a strengthened dispute settlement mechanism would guarantee that rulings

and findings by Panels/Appellate Body would be implemented, hence obviating the need for unilateral trade measures.

2. Thus, in the preamble to the WTO Agreement the last para stipulates-"Determined to preserve the basic principles and to further the objectives underlying this multilateral trading system". More significantly, in Article XVI para 4 it is enjoined on each Member to ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements. While negotiating this Article in the Legal Drafting Group, it was the clear understanding of the negotiators that **laws, which authorise unilateral trade measures with extra-territorial jurisdiction, are clearly inconsistent with the provisions of the WTO Agreement.** So, those countries, which maintain national laws authorising unilateral trade measures, are in clear violation of their obligations under the WTO Agreement. In fact, when the strengthened dispute settlement mechanism was sought to be "sold" to developing countries, the argument used was that this was a quid pro quo so that their stronger trading partners would henceforth deal with all their legal claims within the WTO and not resort to unilateral trade measures. Indeed, para 1 of Article 23 clearly provides that when Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreement, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

Illegality of Unilateral Trade Measures

1. **Unilateral trade measures, clearly, are legally indefensible.** In the case of unilateral measures authorised through domestic laws, negotiation is set entirely by the party taking measures, based on which foreign practices it considers to be "unfair". And what is an "unfair" practice is essentially a subjective and an arbitrary judgement. Furthermore, negotiations are designed to unilaterally force changes in the respondent nations' policies. Finally, negotiations proceed under the threat of denial of otherwise available trade benefits and restrictions of market access for products or services of the foreign nation should the desired changes not be accepted.

2. The above is in clear violation of the Dispute Settlement Mechanism which first asks Members to try a mutually agreed solution before resorting to the Panel/Appellate Body.

3. **The entry into force of the WTO and the operation of the strengthened dispute settlement mechanism does not seem to have ended the era of resort to unilateral trade measures.** The multilateral trading system, therefore, appears to be under permanent threat from the actions of some Members who resort to unilateral trade measures. Very recently, the United States instituted measures prohibiting imports of shrimps from some countries if they were not caught in vessels using Turtle Excluder Devices. The Panel and the Appellate Body ruled that the measure was illegal under WTO law and recommended that the US bring the measure into conformity with its obligations under the WTO Agreement. The Panel Report also said that if GATT were interpreted to permit countries to deviate from their obligations by taking trade measures to implement policies, including conservation policies, within their own jurisdiction, the basic objectives of the

General Agreement would be maintained. If, however, GATT were interpreted to permit countries to take trade measures so as to force other countries to change their policies within their jurisdiction, the balance of rights and obligations among member countries, in particular the right of access to markets would be seriously impaired. If this were carried forward to its logical conclusion, the GATT/WTO could no longer serve as a multilateral framework for trade among contracting parties. That would then be the end of the multilateral trading system, as we know it. It is obvious that the viability of the multilateral trading system depends on parties to it avoiding recourse to unilateral action damaging to the WTO dispute settlement system which is at the heart of this trading system.

FUTURE

1. The above case referred to the controversial relationship between trade and environment. But attempts are also on to base unilateral trade measures on other issues. Whatever the subject matter, the essential objective is the same: use trading advantage and market power to unjustly change an other country's policies/behaviour. For example, **there is an attempt to give concessions under their GSP scheme subject to recipient governments committing to comply with certain environmental/ labour standard norms. This is in violation of the "enabling clause" of GATT relating to GSP which clearly sets out that GSP must be non-discriminatory, non-reciprocal and generalised.** But by making the GSP selective in its application as mentioned above, it will be rendered both discriminatory and reciprocal. This falls foul of GATT.

2. **Despite the establishment of the WTO and the operation of the strengthened dispute settlement mechanism under it, the chances of strong trade powers resorting to unilateral measures cannot be ruled out.** Indeed, recent examples indicate that these may increase in the future so as to put enormous strain on the multilateral trading system. The lack of strong and unambiguous rejection of unilateral trade measures is also leaving scope for injudicious and 'activist' interpretation of rules. Already, reservations of some Members have been placed on record in the Dispute Settlement Body regarding the Panel/Appellate Body process usurping the rights of Members by the so-called 'evolutionary interpretation' of rules. This trend may undo the delicate balance between rights and obligations being constantly negotiated in the WTO. Hence, the WTO community needs to treat the issue of unilateral measures with the sense of urgency it deserves.

3. Unilateral trade measures, as has been shown by this paper, make little economic sense since they go against the fundamental tenet of any multilateral trading system - i.e. theory of comparative advantage and of trade liberalisation. More significantly, they are fundamentally illegal under the WTO Agreement and the Dispute Settlement Understanding, which came into force on 1st January 1995. The question therefore is, if unilateral trade measures are both violative of international law and of WTO law, then should they not be banned forthwith. If so, there would also be no justification for national laws authorising such action in the first place. **Full and faithful implementation of WTO Agreement would require that, not only must WTO Members undertake never to resort to unilateral trade measures, but also they must take immediate steps to modify national legislation that implicitly or explicitly authorises such action.**

Issues of Interest to Developing Countries

(Informal paper submitted by India in the ongoing process of Analysis and Information Exchange (AIE) in the WTO Committee on Agriculture)

The preamble to the Agreement on Agriculture specifically mandates developed countries to provide greater opportunity and market access to the agricultural products of interest to developing countries. It would be useful if the WTO Committee on Agriculture could analyse the post- Uruguay Round (UR) status for at least some products of interest to developing countries. For instance, a World Bank study has indicated that the post-UR base tariffs of a number of sensitive commodities in many industrialised countries are higher than the actual tariffs which existed in 1986-88. For rice, which is of particular interest to India, the World Bank has calculated that the tariff differential for a particular group of countries had increased by as much as 207 per cent.

1. India welcomes the papers submitted by Pakistan, Peru and the Dominican Republic (AIE/6) and the paper submitted by Cuba (AIE/12) on the issues of interest to developing countries. We would also like to thank the Secretariat for their paper on the Special and Differential (S&D) treatment provisions relating to the Agreement on Agriculture (AIE/S6) and the studies on the implementation and impact of the Agreement on Agriculture on developing countries (AIE/S7). These papers provide extremely useful factual data in the context of the issues which have been highlighted by delegations regarding the Special and Differential provisions for developing countries.

2. India would like to reiterate the importance that it attaches to the special and differential treatment provisions as provided for in the Agreement on Agriculture. Since we are in a process, which we hope will help to clarify some of the issues which are likely to be deliberated upon during the new round of negotiations, it would not be out of context to recapitulate some of the concerns which developing countries had during the Uruguay Round (UR) and which were sought to be allayed by the S&D provisions.

3. As is well known a large number of developing countries are predominantly agrarian countries where a very large percentage of the population is dependent on agriculture for its livelihood. While in the initial years the main concern of these Members was to ensure food sufficiency, this concern, once fulfilled, gradually evolved into a concern of finding markets for their agricultural surpluses, so as to ensure the continued provision of agricultural livelihood to this large population. During the UR these concerns got manifested into two broad areas. The first of these broad provisions related to domestic support which allowed developing countries to provide assistance, whether direct or indirect, to

encourage agricultural production as an integral part of the overall objective of rural development. **The second area related to the market access**, where it was felt that there was a need to improve access for developing country Members by improving both the opportunities and terms of access for agricultural products of interest to these Members.

4. These two very broad aspects were sought to be translated in to specific provisions for the developing countries. As highlighted in the Secretariat paper AIE/S6 there are **five broad areas where Special and Differential provisions have been provided for in the AoA***. These include the following, which in our view merit detailed deliberations:

- (i) market access;
- (ii) food security, with specific reference to net food importing countries;
- (iii) domestic support commitment;
- (iv) export subsidy commitment; and
- (v) notification requirements and technical assistance.

5. All these five areas need to be considered in detail during the course of this informal process of analysis and information exchange since they have important ramifications for developing country. For example, in the context of the improved market access which the Agreement had sought to provide to developing countries, India would like to draw attention to the first Special and Differential provision highlighted in the Secretariat doc. No. AIE/S6. **The preamble to the Agreement specifically mandates developed countries to provide greater opportunity and market access to the agricultural products of interest to developing countries.** Unfortunately, however, the status of implementation as far as this provision is concerned is not totally clear from the

* Agreement on Agriculture

information provided in the Secretariat paper. Members have already highlighted some of the specific areas where we need additional information to correctly evaluate the impact of the Uruguay Round. We would like to highlight one specific area where we need certain clarifications. On page 2 of the Secretariat paper AIE/S6 it has been indicated that there has been a "greater-than-average reduction in tariffs on products of interest to developing countries". The factual situation would perhaps have been clearer if figure relating to specific products may had been provided. We no doubt agree that compiling data for all products may not be possible but it **would be helpful if this committee could analyse the post-UR status for at least some products of interest to developing countries.** In this context, we would like to draw attention to a World Bank Policy Research Working Paper titled "Agricultural Trade Liberalisation in the UR", in which it has been indicated that the **post-UR base tariffs of a number of sensitive commodities in many industrialised countries are higher than the actual tariff equivalents of all border measures which existed in 1986-88. For instance, for rice, which is of particular interest to India, the World Bank had calculated that the tariff differential for a particular group of countries had increased by as much as 207 per cent.** It would therefore be helpful if the Secretariat could perhaps provide additional data as far as some specific products are concerned, since this would help us to better analyse the impact of the AoA on developing countries.

6. Similarly issues of food security also need to be adequately addressed. The preamble to the Agreement specifically highlights the need for Members to take into account non trade concerns such as food security. While this term has been extensively used in the past, we are not entirely sure whether the objectives relating to food security which have so clearly been spelt out in the preamble, have been met. In this context it may be mentioned that it was in the Bali Declaration of the Non-Aligned Movement that an attempt was made, perhaps for the first time, to define food security. The Declaration recognised that in spite of substantial increase in the world's food output, the number of people suffering from hunger and malnutrition had increased in many developing countries. India therefore feels that it is extremely important that one of the goals of agricultural trade liberalisation remains, the achievement of the objective of food security. It would be perhaps too simplistic to assume that agricultural liberalisation would by itself be able to

overcome the problem of food security. Free trade in agriculture is not without its long term social and economic ramifications. India would therefore like to suggest that it would help to clarify Member's perception, if, during this process of analysis and exchange of information, the Committee considers certain specific examples where agricultural liberalisation may have had some undesirable effects, specially from the point of food security. This would help identify those areas, policies and practices which may have had such an effect and which the impending round of negotiations would provide an opportunity to rectify.

7. Issues relating to domestic support commitments, export subsidies, notification requirements and technical assistance also need to be similarly examined. A good way would be to encourage developing countries to submit papers on these issues. However, it may be necessary for the Secretariat to provide technical assistance to these delegations so that they can appropriately organise their Country experiences in the form of submission papers.

8. In this context we also support the suggestion made earlier, that organisations like FAO, UNCTAD, World Bank etc. which have done some excellent work in this area are invited to make general contributions on issues of interest to developing countries, particularly regarding the implementation and impact of the Agreement on Agriculture. These contributions could be in the form of papers which the Secretariat could circulate to Members. The relevant organisations could then be invited to a special meeting of the AIE process where their papers can be taken up for consideration.

9. We have highlighted only some of the issues of interest to developing countries. As evident, there are a number of other critical areas and issues which need to be addressed during the course of the Analysis and Information Exchange process. Some of these we have listed in para 3 above. Others have been identified in the papers submitted by Pakistan, Peru, Dominican Republic and Cuba. This list is obviously not exhaustive. Would therefore suggest that as the Committee deliberates on the special and differential provisions, an evolving check-list of issues of interest to developing countries is prepared. This would help focus further work on special and differential treatment in the context of market access, food security, domestic support, notification requirements, special safeguards and technical assistance.

International Harmonisation of SPS Standards

(Paper submitted by India in the WTO Committee on Sanitary and Phytosanitary (SPS) Measures)

While it is desirable to achieve harmonisation on as wide a basis as possible by conforming to international standards, doubts arise as to the representativeness of such standards. The developing countries, in particular, are directly affected by such partisan and impractical standards, since they not only restrict market access, thereby acting as non-tariff barriers, but also involve high costs of achieving impractical and unrealistic standards.

1. **The Agreement on the Application of Sanitary and Phytosanitary Measures (the "SPS Agreement")** desires to further the use of harmonised sanitary and phytosanitary measures between Members on the basis of international standards, guidelines and recommendations developed by the relevant international organisations, e.g., the Codex Alimentarius Commission, the Office International des Epizooties, and international and regional organisations operating within the framework of the International Plant Protection Convention. Article 3.1, in particular, states that:

"To harmonise sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary and phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3."

Article 12.4 adds that:

The Committee on Sanitary and Phytosanitary Measures shall develop a procedure to monitor the process of international harmonisation and the use of international standards, guidelines or recommendations.

2. **It is clear that the SPS Agreement requires Members to base their technical and SPS regulations on international standards, guidelines or recommendations.** In order to encourage countries to use such international standards in their regulations, the SPS Agreement provides that national regulations which conform to international standards shall be presumed not to be barriers to trade. However, even though the SPS Agreement lays considerable emphasis on countries using international standards in their SPS regulations, curiously enough, the SPS Agreement does not define in precise terms when a standard should be considered as an international standard. **The criteria adopted for determining an international standard is rather general and broad-based. All standards, guidelines and recommendations developed by an international standardising body or system are required to be treated as an international standard and a standardising body has been simply defined to be international if its membership is open to "at least all Members of WTO". It is therefore clear that in the**

absence of a precise definition of an international standard, a standard adopted by the standardising bodies is deemed to be an "international standard", even if only a limited number of countries may have participated in the technical work on developing the standard, and even if it may have been adopted, not by consensus, but by a slender majority vote.

3. Despite the efforts that are being made by some of the international organisations to encourage and broaden the participation of countries in standardisation activities, **the participation of developing countries in the activities of these organisations continues to be marginal.** Only a few developing countries are able to participate actively in the meetings of the technical committees. **The majority of developing countries, even if present, are unable to participate effectively, since they are not backed by background research that is needed for the submission of the technical papers.** The system of giving the responsibility for organising the technical work to host countries, which provide secretarial facilities, further puts developing countries in a disadvantageous situation. Because of various constraints they are not always in a position to offer such facilities and therefore, cannot effectively participate in the technical work. **It remains a matter of concern that most countries have been unable to actively and effectively participate in the meetings of the international standard setting bodies. Their written comments are also often not given due weight which at times leads to the adoption of standards which are not in consonance with the ground realities in most developing countries.**

4. **Further, due to the non-participation of developing countries in the proceedings of various international organisations engaged in standardisation, standards get fixed by default. In view of this there is an urgent need to rationalise the procedure of standardisation activities presently followed by these organisations and to make them more broad-based and representative so as to give adequate consideration to the views of the developing and least developed countries.**

5. It needs no emphasis that 89 per cent of the countries of the world fall in the category developing/least developed

countries. In spite of this, various committees or expert groups, based on a majority decision of the countries attending the meetings of these bodies, adopt international standards. In the absence of most developing countries, these meetings are naturally steered by developed countries and very often the safety limits which are decided by these bodies are those which are felt to be appropriate by the developed countries, without necessarily taking into consideration the conditions prevailing in the developing countries. Consequently, the developing and least developed countries find it difficult to comply with sanitary measures that are based on such standards, particularly since the safety limits in many cases are prescribed without conducting any clinical study in the developing countries with regard to contaminants, pesticides, animal disease etc.

6. Moreover, given the diverse conditions prevailing in the developed and the developing countries, it may be more appropriate to harmonise standards of a particular region where similar conditions prevail and where the population also has more or less similar immunity levels. Presently, all regions do not have duly harmonised regional standards, which should be encouraged so as to facilitate the setting up of international standards. Since it is felt that these regional standards play a vital role for the determination of international standards, the international organisations engaged in standardisation activities should take due note of these regional standards at the time of fixing the international standard so as to give a much wider representation than exists currently.

7. **In India's view, the international standards formulation procedures followed by different international organisations should have uniformity. Presently, there are two major international organisations in the area of standards for foods, namely, the International Organisation for Standardisation (the "ISO") and the Codex Alimentarius Commission (the "Codex"). These organisations are following different standards formulation procedures. The procedures followed by the ISO involve voting by letter ballot in which all members have an equal vote. In the Codex, the decision on acceptance of standards is on the basis of the decision taken at its meetings in which the extent of participation of developing countries is uncertain as discussed above. Therefore, it needs to be ensured that standards formulation procedures are harmonised at the international level.**

8. The recent experience of the working of international standardising organisations further shows that it is becoming increasingly difficult even for countries that participate in such work to adopt standards by consensus. Until a few years back, decisions were generally made by consensus. In fact, some of the definitions of international standards even stated that they had been adopted by consensus. This is no longer true and **in some organisations like the Codex, more and more standards are being adopted not through consensus but by a majority vote. Though theoretically**

it may be difficult to argue against the practicalities of such a modality, it has without doubt lead to a situation where a number of standards are being adopted even though a sizeable number of countries have opposed their adoption. For instance, in the specific case of natural mineral water, the standard was ultimately adopted with 33 countries voting in favour and 31 voting against. This in effect meant that a standard, which had the support of only about one-fifth of the total number of Members, was adopted. This is particularly disconcerting in the light of the fact that these meetings are as it is, often attended by only a certain percentage of the Membership.

9. The involvement of international organisations in developing standards that are to be applied on a mandatory basis has resulted in the **increased interest of groups and lobbies in the standardising work. Governmental participation has become more direct**, not least to ensure that the adoption of the standards does not result in governments having to change existing regulations or to accept standards which may be more stringent than their national standards, and there is simultaneously a greater involvement of the business community and environmental groups. **This interest from non-scientific bodies could result in the evolution of standards that may not be based solely on scientific evidence but could also reflect certain non-scientific considerations. This possible politicisation of standardisation activities can have serious ramifications on the role of science in the formulation and adoption of international standards. There is, therefore, a felt need to adopt a more precise and stringent definition of international standards, and to ensure that these are based on empirical, scientific evidence alone.**

10. A solution to some of the issues which arise from these recent developments in standardisation activities, as well as those that arise from the ineffectual participation of developing countries in these activities, could perhaps be found by adopting a more precise definition of international standards, particularly those that are to be used as a basis for technical and SPS measures. For instance, international standards could be distinguished according to whether they are being developed for being used on a voluntary or a mandatory basis. The existing definition states that all standards prepared by international standardisation bodies should be treated as international standards could be applied to standards which are to be used on a voluntary basis. For standards that are developed with a possible view of adopting them on a mandatory basis, a narrower definition could be adopted. Such a narrower definition could provide that for the purpose of the SPS Agreement, a **standard, guideline or recommendation shall be considered mandatory only if an agreed minimum number of countries from different regions have participated in its formulation, i.e., in the entire process relating to its adoption, and that it has been adopted by consensus.**

11. The advantages of such an approach are two-fold. Firstly, the obligation under the SPS Agreement to use, to the maximum extent possible, an existing international standard would then be a realistic obligation since the standard would have been adopted by consensus. This would greatly improve the compliance of the obligation and also reduce the possible conflicts which otherwise so often arise when international standards are found to be far more stringent than existing national standards. It would be indeed unrealistic to expect that the governments of countries which have voted for the adoption of an international standard when it was being adopted, would subsequently have a problem in adopting it as part of their national regulation. Secondly, such a methodology would also ensure that there is wider participation in the work on formulation of standards since the countries having trade interests in the standard/ product would actively and effectively participate in the deliberations of the concerned international standardisation organisation.

12. India would, accordingly, like to make the following suggestions:

- (i) The SPS Committee should evaluate what steps have been taken by the international standardising bodies to **ensure effective participation of developing country Members in the adoption of standards**. This is perhaps the most crucial issue to be addressed in the context of international harmonisation, since a large number of developing countries feel that they have been sidelined in the standardisation process and that as a consequence, standards which invariably restrict their market access are adopted by these bodies.
- (ii) It should also be examined whether **due care has been taken of the capacity of developing country Members to prepare and adopt international standards, guidelines or recommendations which accommodate their development and trade needs compatible with their prevailing level of technological and socio-economic development and trade**. This would facilitate the harmonisation of international standards with their national standards and thereby minimise the possible conflict between international and nationally acceptable standards. One way of doing this could be by inviting representatives of international standardising bodies to make written and oral presentations to the Committee with a view to assessing whether and in what way account is being taken of the special problems of developing countries.
- (iii) **Lack of transparency in the procedures of the three sister organisations is another constraint in the fulfilment of obligations** by Members under the SPS Agreement. It has been noted by India in various meetings of the Codex that, in order to reflect the views of all Members of the Codex, there is need for inclusion of a voting procedure, with voting being undertaken at both the draft and approval stages. This would be in line

with the procedure followed by the ISO and the IEC. The underlying problem would be automatically mitigated if consensus-based decision making were adopted.

- (iv) There is need to **specify the basic definition of an international standard and to clarify the weight given by the international standardising bodies to their recommendations and standards**. Whereas Article 3.1 of the SPS Agreement does not differentiate between guidelines and recommendations vis-a-vis standards, the standardising bodies themselves do not treat them at par. Hence, as elaborated in paragraph 10 above, the Committee could consider adopting a separate definition for standards, depending on whether they are proposed to be adopted on a voluntary or a mandatory basis.
- (v) The process of harmonisation of national standards, with international standards, to be universally acceptable to Members, has to ensure that in the formulation of international standards, the basic principles of the SPS Agreement are not lost sight of. Some core principles are enunciated in Article 5 of the SPS Agreement. Article 5:4 states that **"Members should, when determining the appropriate level of sanitary or phytosanitary protection, take into account the objective of minimising negative trade effects"**. Article 5:6 states that: **"Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility"**. These principles need to be integrated into the process of standard formulation by the international standardising bodies if the standards formulated by them are to gain acceptability of the majority of the WTO Members, with their wide divergence of capabilities in processing technologies and perception of risk.

13. In view of the foregoing, while it is desirable, as per the SPS Agreement, to achieve harmonisation on as wide a basis as possible by conforming to international standards, doubts arise as to the "representativeness" of such standards. The developing countries, in particular, are directly affected by such partisan and impractical standards, since they not only restrict market access, thereby acting as non-tariff barriers, but also involve high costs of achieving impractical and unrealistic standards. We would reiterate that special dispensation for developing countries envisaged in the SPS Agreement should be translated into reality by Members. This could be given effect to not only by providing a longer transitional period so as to enable the developing and least developed countries to integrate themselves effectively into the multilateral trading system, but also by providing them with a level playing field through adequate technical assistance of fair and reasonable terms.

Transparency

Paper Submitted by India in the WTO Committee on Sanitary and Phytosanitary (SPS) Measures

Transparency is critical for ensuring that trade is not subject to hidden barriers, since non-availability of relevant information regarding standards adopted by the importing countries can hamper free flow of trade. Very often the notifications of member countries do not contain the details of the methodology of risk assessment and the factors taken into account while determining the appropriate levels of sanitary and phytosanitary protection. WTO should create a suitable database incorporating the member countries' SPS rules and regulations having a major trade impact so as to provide precise information about SPS requirements of various countries.

1. Article 7 of the SPS Agreement states that:

"Members shall notify changes in their SPS measures and shall provide information on their SPS measures in accordance with the provisions of Annex B."

While this provision is an integral and important part of the Agreement it is our view that the issue of transparency needs to be considered in a broader perspective. **Transparency, we feel, cannot be limited to issues of notification and the need to ensure fulfilment of notification obligations alone, and would need to be viewed as an integral part of the primary objective of the Agreement that measures taken by Members do not constitute hidden barriers to trade.**

2. In our view, therefore, issues of transparency need to be considered from two broad aspects. First, as generally accepted, it is of vital importance to ensure that all Members are up to date in the fulfilment of their notification obligations with respect to the implementation of the Agreement. **The second aspect from which transparency provisions need to be examined is in ensuring that the process of developing SPS measures is made as transparent as possible, especially in view of the potential that SPS measures have for affecting international trade. This is particularly important where new measures are being introduced and where, as per Annex B of the Agreement, the notifying Member is expected to provide adequate opportunity to interested Members to comment on the proposed regulatory measures.**

Viewed from this aspect, it is clear **that transparency is critical for ensuring that trade is not subject to hidden barriers, since non-availability of relevant information regarding the standard(s) adopted by the importing countries can hamper free flow of trade. Very often the**

notifications of Members do not contain details regarding the methodology of risk assessment and the factors taken into account for determining the appropriate level of SPS protection. It is often difficult and time consuming to obtain information in this regard since, at times, more than one domestic agency (within a Member) is involved in establishing these standards. The documentation/ information provided is at times in the language of the importing country which may not necessarily be one of the official languages of the WTO. Moreover, requests for detailed information are responded to after a considerable time has elapsed and often after the expiry of the time period for making comments, rendering the whole exercise futile.

4. In this context we would like the Committee to consider the following issues in the course of the review:

- (i) A primary issue which needs to be examined is **whether the notification provides sufficient information to enable Members to become acquainted with the proposed SPS measures.** Often only a very brief description of the proposed measure is given. This necessitates that details of the measure have to be then obtained from the Enquiry Points and by the time that these details are actually obtained, the last date for comments is invariably past. Similarly, the main legislation which is being amended is also usually not available and its procurement too takes a long time, which further delays the process. It also needs to be strictly **ensured that the notification is in one of the official languages of the WTO only, and not in any other language.**
- (ii) A second issue which is significant relates **to the time that is provided to the Members to analyse and respond to the new regulations that are proposed**

to be implemented. Article 2 of Annex B states that except in urgent circumstances, Members shall allow a reasonable interval between the publication of an SPS regulation and its entry into force, in order allow time for producers in exporting Members, particularly in developing countries, to adapt their products and methods of production to the requirements of the importing Members. This recommended procedure has also been elaborated in G/SPS/7. However, it is unfortunate that very few notifications proposing the adoption of new SPS measures actually fulfil the obligations specified in Article 2 of Annex B.

- (iii) It is clear that **Members proposing new SPS measures need to provide adequate time for other interested Members to raise concerns.** If complete details are not provided, as is often the case, then it is not possible for Members to obtain all necessary documents related to the proposed notification, analyse it and submit comments, all within a time frame which is invariably short. In fact, we have specific instances in the past where notifications have been issued on the last day of a month and which have indicated the next month as the date of entry into force, thereby providing practically no time for Members to respond to a proposed measure. One reason for this is that the Agreement does not specify what should be deemed to be a sufficient interval between the circulation of a proposed measure and its entry into force. **While recognising the need for flexibility in urgent circumstances, India feels that this is an issue which needs to be addressed in the review of the Agreement.**
- (iv) **Annex B pertaining to SPS regulations stipulates that proposed regulations be discussed bilaterally upon request. It is however felt that at times the comments are not given due consideration by the notifying Member, and the entire procedure is gone through only routinely.** It may be appropriate for Members to be given an opportunity to present the comments personally and the Member who presented the comment should be intimated of the outcome of the discussions on the comments presented. In this context we would like to suggest that Members should specifically respond to Members who have submitted comments or raised

objections on the proposed notification. Another alternative which could be considered is to ensure that the **proposed measure, the various comments which may have been received, and the notifying Members response to the comments are all put on the Internet. This would go a long way in increasing the transparency in the procedure.**

- (v) We would also like to **highlight the importance of a second interval of time, whenever new measures are being introduced. This second time frame that we are referring to is intrinsically related to the objective of providing producers sufficient time to adapt to the new requirements of the importing countries.** It is logical to assume that producers in the exporting countries would commence initiating such changes only after the consultation process has been exhausted and the concerned Member has indicated its intention to finally promulgate an SPS measure, whether in the form that it was originally notified or in an amended form as a result of the consultations entered upon. **This interval is perhaps as critical, if not more so, if SPS measures are not to act as barriers to trade.** We hesitate to qualify this time period and would only like to state that, except in urgent circumstances, it should be as long as it would take for producers to practically adapt to the changed requirements. If such a period is not provided for, new SPS measures initiated by Members could very easily result in the temporary nullification of exports, particularly from developing countries.
- (vi) It would also be appropriate to **create a suitable data base incorporating Member's SPS rules and regulations having a major trade impact so as to provide precise knowledge about SPS requirements for various countries,** particularly since many of the rejections are due to lack of knowledge of these aspects. It may be noted that at times there is also lack of awareness of the legislative requirements of the importing country. It may be possible to mandate certain obligations on the importing Member that he keep the suppliers/exporting Member fully informed about the SPS obligations that would have to be met for the goods sought to be exported. It may therefore be useful to circulate standards on the Internet to facilitate easier and quicker accessibility.

Monthly update from PMI/Geneva

(15th June 15th July, 1999)

GENERAL COUNCIL

A special session of the General Council (GC) was held on 17 June 1999 to continue the discussions on preparatory process for the 1999 Seattle Ministerial Conference. The focus of this meeting was 'proposals on para 10 of the Geneva Ministerial Declaration' i.e. the organisation of future work. Most members, specially the developed country members, seem to favour negotiation based on a single undertaking, with the possibility of an early harvest. They also feel that the negotiations should be restricted to a three year period and should not be allowed to drag on as was the case during the Uruguay Round. Our view, which we reiterated in the meeting was that the organisation of future work i.e. para 10 issues should only be considered once the discussion on para 9 are complete. There would be an artificiality to the whole discussion if we were to consider issues such as single undertaking, early harvest, timeframe, etc. without there being any conclusion, as yet, on what issues are going to be taken up in the post Seattle period. Smaller delegations also stated that negotiations must be carried out in the existing bodies itself, as otherwise, it would increase the burden on them, manifold.

A special session of the GC was again held on 6th and 7th July, 1999. The focus of the discussion was both paras 9 & 10 of the Geneva Declaration. Members introduced a number of new proposals, though, as before, agriculture continued to remain the focus of the discussion. Views were also expressed on the future schedule of meetings and it was agreed that the GC should devote as much time as possible to deliberate on the specific proposal made under the various agreements, in an informal mode. It was agreed that these meetings would be scheduled in the third week of July.

SANITARY AND PHYTOSANITARY MEASURES

A meeting of the SPS Committee was held on 7-8 July, 1999. The Committee considered the provisional procedure adopted in October, 1997 on the monitoring of international standards, and discussed whether to continue with the same procedures or to amend it. The Committee unanimously agreed that the said procedure should be extended for a further period of two years and that this procedure would be reviewed before July 2001

with a view to decide whether to continue or amend or devise another set of procedures. Regarding consistency, informal consultations on the draft guidelines to further implementation of the Article 5.5 of the Agreement were held on the basis of a paper prepared by the Secretariat. However, since there was no agreement on this issue, the Chairman postponed the discussions on this issue and requested Members to make available their comments by end of August. The Committee also considered the issue of granting observer status to various organisations. With the US opposing inclusion of one such organisation (the OIV) on the grounds that its membership procedures were not transparent, the EC blocked the consideration of the grant of observership to all organisations which had applied, stating that this matter could only be considered in totality and that if US was blocking the grant of observership to one organisation, the other organisation would also have to wait.

REGIONAL TRADING ARRANGEMENTS

A seminar on Regional Trading Agreements was held in Geneva on 30 June 1999. The IMF and the World Bank jointly organised this seminar. The concept of regionalism was discussed in detail. A general view which emerged was that regional arrangements and custom unions were a reality and needed to be accepted. Regionalism by itself had an important and significant role in development of the multilateral system, but proliferation of RTAs was a matter of concern. Some Members felt that proliferation of RTAs was due to the fact that WTO had at no stage assessed the impact of the RTAs on the Multilateral Trading System. Speakers unanimously agreed that the provisions of Article XXIV of GATT and Article V of GATS were not very clear and that the CRTA's task of judging the consistency of RTAs against these articles was an impossible one.

An informal meeting of the Committee on Regional Trading Arrangements (CRTA) was later held to consider the changes proposed for the concluding paragraph of the various reviews of existing RTAs pending before the committee. On the format of the concluding paragraph, HKC presented a paper, on which divergent views were expressed by Members. This matter will be taken up for consideration again, since there is no conclusion on the manner in which the reviews can be finalised. On 1-2 July

when the CRTA met formally, HKC's paper on systemic issues arising from Article V of GATS, came up for discussion again. Members while discussing both these papers felt that there should not be a priori exclusion of any services sector from any agreement and that any determination of whether a RTA covers all sectors or not, should be carried out sector by sector. It has been suggested that a special meeting of the CRTA should be held solely focussing on Article V of GATS so that services experts can attend from the capitals.

SELECTION OF THE NEW DIRECTOR GENERAL

The process of selecting of the new DG of the WTO is continuing. The proposal by the Bangladesh Ambassador for the two candidates, that is, Mr. Moore of New Zealand and Dr. Supachai of Thailand to share a six year term is gaining ground. However, the modalities of sharing the term, including the manner of deciding as to which one of the candidates will take the first term, as also the appointment of the DDGs are yet to be worked out.

Schedule of Meetings at the WTO, Geneva : August 1999*

20/8/99 : Dispute Settlement Body

(August being the summer break in Geneva,
there was only one meeting during the month)

*Source : WTO / Geneva as on August 12,1999

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