OAS TRADE, GROWTH AND COMPETITIVENESS STUDIES
Analyses on trade and integration in the Americas

Trade Issues of Concern to Civil Society

OTGC/Trade Unit Staff

A Publication of the
Organization of American States
Office of Trade, Growth and Competitiveness

June 2005

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The **OAS Trade, Growth and Competitiveness Studies** series addresses issues of importance to trade, economic integration, growth and competitiveness in the Western Hemisphere. The reports are prepared by the Office of Trade, Growth and Competitiveness Staff and invited authors and do not necessarily reflect the opinions of the OAS member states. An electronic version of this document is available on the Internet at a site maintained by the OTGC's Foreign Trade Information System, which is also known by its Spanish acronym, SICE. The address is: http:/www.sice.oas.org/Tunit/tunite.asp

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PREFACE

In recent years, scholars, parliamentarians, journalists, representatives of the business community and members of non-governmental organizations (NGOs) have raised a number of key issues when discussing trade agreements and the effects of trade liberalization. For example, do developing countries stand to gain from free trade agreements with rich countries? Do trade agreements hurt the poor? Does free trade give companies/countries an incentive to abuse the environment? Are patent rules in trade agreements favoring corporate interests and developed countries over developing countries? Can developing countries whose primary exports are agricultural products benefit from services liberalization? Do investment rules curtail a government's ability to regulate multinationals? Are all sectors of an economy open to foreign investors when a country has signed a free trade agreement? Who pays the costs for dispute settlement under a trade agreement? Are poor countries at a disadvantage?

Given the importance of these questions and with a view to enhancing public awareness of these trade-related issues, the Office of Trade, Growth and Competitiveness (OTGC) has prepared six short papers on issues of particular concern to civil society: investment, services, intellectual property rights, environment, dispute settlement, and asymmetrical treatment in trade agreements. The OTGC is very committed to promoting hemispheric and regional dialogue between OAS Member States and their civil society. In addition to disseminating trade-related information, the OTGC has over the years organized a number of activities (conferences, seminars, workshops) tailored to journalists, NGOs, parliamentarians, and business leaders, with a view to providing them with a better understanding of how countries can reap the benefits of trade agreements.

The publication of these issue papers, coordinated by Sherry Stephenson, is very much the result of a team effort by the members of the Office of Trade, Growth and Competitiveness. Their commitment to this publication, now available in both English and Spanish, made the realization of this study possible. Contributors include Patricio Contreras (services), Paul Fisher (environment), César Parga (intellectual property), Rosine Plank-Brumback (dispute settlement), Maryse Robert (investment), Sherry Stephenson (services), Yolanda Strachan (asymmetrical treatment) and Theresa Wetter (intellectual property). We are also grateful to Patricio Contreras, Gimena Fernández, César Parga, Bexci Sánchez, Gisela Vergara, Fabián Víctora, Theresa Wetter and Ivonne Zuñiga for the translation into Spanish of these issue papers.

The OAS Trade Unit was established on April 3, 1995 under the Office of the Secretary General to support OAS Member States in carrying out the trade and integration-related mandates of the Summit of the Americas and Trade Ministerial Meetings. On September 15, 2004, the Trade Unit became the Office of Trade, Growth, and Competitiveness. The mission of the OTGC is to support OAS Member States in their efforts to promote prosperity and growth in the Hemisphere in the related areas of trade and integration, transparency and competitiveness, including in specific sectors such as tourism and other services sectors. The Office is organized in four divisions: Trade and Information; Growth and Competitiveness; Tourism and Small Enterprise; and Inter-American Ports.

At the OTGC, we believe firmly in the vision of the Summit of the Americas process. We are committed to strengthening democracy, economic integration, investment and free trade with a view to guaranteeing *sustainable development and improving the standards of living of the peoples of the Americas. The key objective of the OTGC is to support the integration process in the Hemisphere and provide assistance to OAS Member States in their efforts toward this goal. In doing so, we continue to provide analytical and technical support to countries, particularly smaller economies, for the conclusion and the establishment of the Free Trade Area of the Americas (FTAA) process. We also continue to respond to the trade-capacity building needs of OAS Members States through the FTAA Hemispheric Cooperation Program and other cooperation mechanisms under free trade agreements and integration processes in the Americas with a view to assisting countries in participating effectively in the negotiations, implementing their trade commitments, and adjusting to free trade and integration. Most importantly, we are committed to assisting countries with different levels of development and size of the economies in the design, formulation and implementation of policies aimed at strengthening their productive capacity and competitiveness so as to enable them to reap the benefits of free trade through economic growth and poverty alleviation.*

As noted above, the OTGC is also promoting hemispheric and regional dialogue between OAS Member States and their civil society through the dissemination of information on trade-related issues. It is producing analyses on trade and growth-related issues at the micro and macroeconomic levels with a view to understanding the economic trends in Latin America and the Caribbean, and to identifying the key issues having an impact on the economic performance of these countries.

The OTGC welcomes comments from readers on this and other studies, and hopes to contribute to fostering the dialogue on trade, economic integration and competitiveness-related issues in the Hemisphere. The views expressed in the OAS Trade, Growth and Competitiveness Studies series are the authors' own and should not be attributed to the General Secretariat of the OAS or any OAS Member State.

José Manuel Salazar-Xirinachs

Director
Office of Trade, Growth and Competitiveness

June 2005

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Abbreviations

CARICOM	Caribbean Community
DR-CAFTA	US-Dominican Republic-Central America Free Trade Agreement
EC	European Community
EPZ	Export processing zones
FDI	Foreign direct investment
FIPA	Foreign Investment Protection and Promotion Agreement
FTA	Free trade agreement
FTAA	Free Trade Area of the Americas
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
GI	Geographical indication
GSP	Generalized system of preferences
ICSID	International Centre for Settlement Of Investment Disputes
ICC	International Chamber of Commerce
IP	Intellectual property
IPR	Intellectual property rights
LDC	Least developed country
MEAs	Multilateral environmental agreements
MFN	Most favored nation
MNC	Multinational corporation
NAFTA	North American Free Trade Agreement
NGO	Non governmental organization
OAS	Organization of American States
OECD	Organization for Economic Co-operation and Development
PCT	Patent cooperation treaty
R&D	Research and development
SCM	Subsidies and countervailing measures
SME	Small and medium sized enterprises
SPS	Sanitary and phytosanitary standards
SRLDEs	Small and relatively less developed countries
TFP	Total factor productivity
TRIPS	Agreement On Trade Related Aspects Of Intellectual Property Rights (TRIPS)
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNDP	United Nations Development Program
UPOV	International Union for the Protection of New Varieties of Plants
WIPO	World Intellectual Property Organization
WHO	World Health Organization
WTO	World Trade Organization

I. INVESTMENT

A. INVESTMENT IN GENERAL

1. What are the forms of an investment and how is investment defined?

Investment is a concept that can be defined either narrowly or more broadly. A narrow definition includes direct investment, which encompasses capital to acquire an enterprise, build a plant and buy equipment. Direct investment implies a long-term relationship between the investment and the investor, as well as a lasting management interest. In contrast, indirect (portfolio) investment consists of instruments (shares and stocks, bonds and notes, money market instruments, and financial derivatives) that are short-term in nature and do not provide any controlling interest in the investment.

In recent treaties and agreements on investment signed between States, the term investment is usually defined very broadly and can therefore take other forms than direct investment. In addition to portfolio investment, it also includes turnkey and concession contracts, intellectual property rights, and other tangible and intangible, movable and immovable property such as leases and mortgages.

2. How is direct investment measured?

Two concepts are of particular interest and of great use in measuring the level of direct investment in a given economy:

Gross capital formation measures the level of ***gross domestic investment*** within a given economy in a given year. It consists of the additions to the fixed assets (land improvements; plant, machinery, and equipment purchases; and the construction of commercial and industrial buildings, roads, airports, railways, etc.) of the resident producers plus the net changes in the level of inventories and valuables. (World Bank).

Foreign direct investment (FDI) is defined by the International Monetary Fund as the net inflows to acquire an ownership share (a lasting management interest) in an enterprise operating in an economy other than that of the investor. The threshold is 10 percent or more of the voting stock. Foreign direct investment is the sum of equity capital, reinvested earnings, and other long-term and short-term capital. Equity capital in the form of FDI can be divided into two different categories:

- ***Mergers and Acquisitions*** (M&As) is the combination of two or more companies, which may or may not belong to the same legal entity. Cross-border M&As dominate FDI in developed countries.

- ***Greenfield investment*** involves the creation of a new subsidiary by one or more foreign investors. Greenfield investment is the more prevalent form of FDI in developing countries.

The difference between gross capital formation and FDI is defined as domestic investment.

3. How important is investment for the domestic economy?

Investment plays a major role in the growth and development of a country. Capital formation (physical capital) brings more inputs to the production process and leads to an increase in output. For instance, investing in an industrial plant and equipment or in infrastructure services such as phones, roads and airports will increase the economic capacity of a country and create jobs. In addition, investing in infrastructure services will improve the efficiency with which firms are using their resources to produce goods or provide services. Since approximately two-thirds of the output is made up of wages and salaries to workers, rising output means more employment and/or better salaries for the labor force.

To pay for all these investments, a nation must use a portion of its national income, either drawing upon its savings or diverting money away from consumption, or, alternatively, a country may rely on foreign investment.

In most –but not all- countries in the Americas, gross capital formation accounts for approximately 20 percent of the increase in gross domestic product. Therefore, investment represents 20 percent of the increase in the market value of all the goods and services produced within a given country in a given year. (World Development Report 2005).

4. What is the role of foreign direct investment in developing countries?

FDI plays a vital role in complementing the efforts of domestic investment. Although the effect of FDI varies from country to country and sector to sector, in general FDI contributes directly or indirectly to building the national capabilities by upgrading the skills of workers, improving their productivity, and giving them the opportunity to have access to better-paid jobs, which demand higher skills. It also contributes to strengthening the technological capacities of a country by being a source of new technologies and innovation, thus improving the competitiveness of a country's exports in world markets.

5. What are the FDI trends in Latin America and the Caribbean?

FDI trends can be explained by a number of factors, including the possession of natural resources, the size of the market, and the skills of the labor force. Foreign investors also respond to changes in government policies. In Latin America and the Caribbean, key policies having had an impact on the FDI level include import substitution in the 1950s and 1960s, the push toward natural resource development in the 1970s, structural adjustment in the 1980s, and trade and investment liberalization and privatization in the 1990s. (IFC 1997).

FDI has traditionally flowed in the natural resource sector in South America and in the processing industries in Central America, whereas the services sector has been the lead sector in the Caribbean for years. Since the privatization boom of the 1990s, the region as a whole has shifted towards services. Infrastructure services such as telecommunications, financial services, and energy have been the lead recipients of FDI inflows. (World Investment Report 2004).

The shift towards services is not a phenomenon unique to the Americas. It is also prevalent in the rest of the world. The growth of FDI in services as a share of the total FDI stock has been spectacular since the 1950s. During that decade, the stock of FDI in services accounted for 20 percent of the total stock. By 1990, services accounted for 49 percent of the total. A decade later, in 2002, services captured 60 percent of the total. (World Investment Report 2004).

Following four consecutive years of decline and a 53 percent drop between 1999 and 2003, FDI inflows to Latin America and the Caribbean rose for the first time in five years in 2004, up 37 percent to US$69 billion. Although larger economies (Brazil and Mexico) are the main FDI recipients among developing countries in the Americas, FDI inflows relative to GDP in smaller countries such as the Caribbean are as high as in larger economies.

FDI as Percentage of GDP 2003
Top Ten Countries in the Americas
St. Kitts and Nevis
Grenada
St. Vincent and the Grenadines
Antigua and Barbuda
Dominica
Jamaica
Panama
Trinidad and Tobago
Ecuador
Nicaragua

6. Is there a link between investment levels and growth?

Recent research has demonstrated that investment productivity, and not just the level of investment, is what matters most to accelerate growth in a country. Studies of aggregate growth performance across countries have shown that the differences in growth between these countries are not due to the accumulation of physical or human capital. In fact, the key element explaining these differences is "total factor productivity (TFP)," which is defined as the increase in output not explained by the contribution of workers (human capital) and their machineries (physical capital).

Early research on growth theory underlined the role of technology as the key component of TFP. These studies emphasize that differences in technology help explain differences in growth rates among countries over the last 200 years. More recent work has shown that the broader environment (investment climate) in a given economy also plays a significant role in explaining differences in growth rates across countries. (World Development Report 2005; Baier, Dwyer and Tamura 2004).

7. What is the role of the investment climate in increasing growth and FDI?

As discussed above, the productivity of an investment and its impact on growth and development is linked to a country's domestic policies. Good governance and institutions (low level of corruption and transparent rules), stability and security of property rights, the cost of doing business (administrative procedures, regulations and taxes), and well-functioning financial markets and good infrastructure are key factors of a good investment climate. (World Development Report 2005, Salazar-Xirinachs (2004), Global Economic Prospects 2003, and Moran (2002)).

Researchers at the World Bank have shown that the rule of law is related to the level of FDI inflows (Kaufman, Kraay, and Zoido-Lobaton, 2000). They have demonstrated that increasing/improving the rule of law leads to an increase in FDI inflows. Other researchers at the same institution have underlined that during the 1990s countries with better investment climate (as defined by the level of corruption, political openness, rule of law, quality of the regulatory regime, government effectiveness, and political stability) received a larger share of FDI. Countries that registered high scores on the regulatory regime, government effectiveness, and political stability received more than half the FDI to developing countries. (Global Economic Prospects 2003).

B. TRADE AND INVESTMENT

8. What is the relationship between trade and investment?

In the past, investment was essentially seen as a substitute to trade. Countries would impose high tariffs or use other types of import barriers, which would encourage firms to invest in their markets to serve local consumers. In Latin America, import substitution policies played such a role from the 1950s to the mid-1980s.

But this relationship -trade and investment as substitutes for one another- is not as significant today, as trade liberalization is now a worldwide phenomenon. The globalization of the world economy and the internationalization of production have shown that investment has also become a complement to trade. For example, a manufacturer of tables may choose to build a factory in a foreign country (investment), import more wood from the home country of the investor (trade), and export the finished tables to that same country (trade again).

C. INVESTMENT AND TRADE AGREEMENTS

9. Why do countries include a chapter on investment in their free trade agreements?

Countries have generally three objectives in mind when they include a chapter on investment in their free trade agreements. Essentially, the chapter represents a commitment to a transparent, stable and predictable policy environment. First, countries want to provide legal certainty to foreign investors, to ensure that these investors know what to expect when they decide to invest in their country. So these agreements clearly spell out what the rules are in case, for example, of transfers abroad. They also list the conditions under which the government can expropriate an investor of the other signatory countries to the trade agreement.

Another key component in providing certainty to foreign investors in a free trade agreement is to guarantee that sectors of the economy which are open to foreign investment will remain open in the future, i.e. the government will not prohibit foreign investors from investing in these sectors in the future. Free trade agreements signed by Canada, Chile, Central American countries, the Dominican Republic, Mexico, and the United States, for example, all include this key component.

Finally, countries' third objective is to provide a forum for settling disputes between the host State and the foreign investor.

Bilateral investment treaties have traditionally included two of the abovementioned components: protecting the foreign investor and providing a special mechanism for disputes between States and foreign investors. More than 2,200 of these treaties have been signed worldwide. The investment treaties signed by the United States and Canada also include the third component.

10. Do trade agreements attract FDI? Are all countries going to attract the same level of FDI inflows?

Trade agreements are likely to have a significant impact on FDI inflows when they result in a more liberal investment policy and the opening up of sectors which had in the past been closed to foreign investors. Economic growth generated by these agreements will also encourage higher levels of FDI inflows. But it is difficult to determine *a priori* which countries will benefit most from a liberalized investment framework and attract more FDI. As discussed above, the reason for this is quite simple. Other factors, such as access to resources, the investment climate (as defined in Question 7 above), skills of labor force, and the quality of infrastructure services also play a very important role in explaining any increase in FDI inflows. Therefore, each country must strive to exploit its own country-specific advantages. A trade agreement does not negate the ability of countries to enhance their attractiveness to FDI inflows by improving their physical infrastructure (telecom, roads, ports, airports, power, etc.), spending more on primary and secondary education, and eliminating "red tape."

D. DOMESTIC VS FOREIGN COMPANIES AND THE RIGHT TO ESTABLISH AN ENTERPRISE

11. Do trade agreements discriminate against domestic firms? Are all sectors of the economy open to foreign investors?

Trade agreements do not discriminate against domestic firms. In fact, domestic and foreign investors have the right to invest in the same sectors of the economy, for the most part. For instance, under the Chile-US Free Trade Agreement, American and Chilean investors are allowed to set up a plant to manufacture lamps in Chile, and Chilean and American investors have the right to build, buy, sell or manage a hotel in the United States. But countries do include exceptions to this rule in trade agreements. They do so by including in an annex to the agreement their laws and regulations which limit the right of foreign investors to invest in specific sectors and ban foreign investors from investing in other sectors. These so-called "non-conforming measures" are thus excluded from the application of some obligations under the Agreement, such as national treatment. For example, in the North American Free Trade Agreement (NAFTA), the Government of Mexico included its law allowing only Mexicans to own land in a number of sectors: agriculture, livestock, and forestry. Governments may wish to limit the areas in which foreign investors are allowed to invest for reasons of national security, environmental regulations, protection of consumers, and/or sensitive cultural reasons. Governments may also place requirements on foreign investors so that they help to fulfill legitimate policy objectives such as universal service for telecommunications or the provision of financial services to rural communities.

E. SUBSIDIES AND INCENTIVES

12. Are subsidies allowed under international trade agreements?

At the World Trade Organization (WTO), the Agreement on Subsidies and Countervailing Measures (SCM Agreement) has prohibited the use of export subsidies related to goods in developed countries since 1995. The same prohibition applies to all developing countries since 2003, except for 1) those countries (least-developed countries and a few other developing countries) listed in an Annex to the Agreement and for 2) developing countries that requested and obtained an extension. For the first group of countries, the use of export subsidies is unrestricted under WTO law. Therefore, they can use export subsidies in export processing zones (EPZs). The second group of countries requested an extension at the WTO Ministerial Conference in Doha in 2001. The SCM Agreement provided developing countries with the possibility of extending the 2003 time limit to phase out export subsidies. Countries, which requested an extension of the deadline, can use export subsidies (including those in EPZs) until the end of 2009 but they cannot increase the level of their export subsidies. Moreover, when they attain export competitiveness for a particular product (that is when the export share in that particular product reaches 3.25 percent of world trade for two consecutive years), they have two years from the date they achieved export competitiveness to phase out export subsidies for this product.

The WTO General Agreement on Trade in Services (GATS), which covers investment in services, allows subsidies but prohibits discrimination among foreign service providers, including foreign investors. The GATS also prohibits discrimination between national and foreign investors in the services sectors for which countries have made commitments, unless these countries stipulate otherwise.

13. Can the government oblige investors to meet certain requirements when they receive an incentive to make an investment?

In certain situations free trade agreements in the Americas give governments the right to ask investors to meet certain requirements when these investors receive an incentive: for example, to locate production in a particular region, to provide a service, to train workers, to build or expand facilities or to carry out research and development. So the government could offer an incentive to a foreign investor and ask him/her to locate his/her firm in a poor region of the country. The government of a country could also grant an incentive to a foreign investor and require that the investor carry out research and development.

F. RIGHT TO REGULATE

14. Do investment rules curtail a government's ability to regulate foreign companies? Are multinational firms allowed to ignore domestic environmental standards?

Trade agreements do not take away the right of governments to regulate foreign companies. Multinational firms as well as domestic companies must obey all the domestic laws (including labor and environment) of the country where they have invested and therefore cannot ignore domestic environmental standards. Foreign companies failing to comply with the environmental laws and regulations of the host state will be subject to the same fines and penalties that domestic companies face when they break the laws.

G. EXPROPRIATION

15. Can a government expropriate an investor's property? Under what circumstances?

Most investment agreements prohibit the expropriation of foreign investors (the same is the case under the constitution of several countries with respect to national investors) **unless** four conditions are met. First, the expropriation has to be for a public purpose (for instance, to build an airport). Second, it has to be done on a non-discriminatory basis (for example, if several investors are located at the site where the government wants to build an airport, the government cannot expropriate one investor and not the others). Third, the expropriation has to be done under due process of law. Finally, the expropriated investor has to be compensated.

H. RIGHT TO REGULATE AND EXPROPRIATION

16. Can a foreign investor allege that he has been "indirectly" expropriated because the government enacted a new regulation?

Under customary international law, the State has the power to take actions, in the public interest, without having to pay compensation, even if the interests of the individual property owners may be adversely affected. Customary international law distinguishes between a state action, which constitutes an expropriation and requires compensation, and a state action which is a regulation and does not entail compensation.

Traditionally, investment agreements (bilateral investment treaties, investment chapters in trade agreements, and other types of investment agreements) have not distinguished between government actions that require compensation and those that do not.

In the NAFTA, public controversy arose under Chapter 11 (investment chapter) with respect to the concept of indirect expropriation and its impact on the right of States to regulate. Claims made by some investors under the NAFTA Investor-State Dispute Settlement Mechanism that changes in government regulations (such as environmental regulations) were a form of indirect expropriation, and therefore had to be compensated, prompted countries to clarify the concept of indirect expropriation in recently signed free trade agreements.

The new generation of trade agreements (for example those signed by Chile, Central America, and the Dominican Republic with the United States) seeks to clarify the concept of indirect expropriation and reaffirm the right of States to regulate. These agreements specifically state that, except in rare circumstances, nondiscriminatory regulations (i.e. regulations which do not differentiate between foreign and domestic investors and among foreign investors) by a government that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations. The United States and Canada have included similar language in their new model bilateral investment treaty.

I. INVESTOR-STATE DISPUTE SETTLEMENT

17. Why are provisions on dispute settlement so important? What purpose do they serve?

In addition to the general dispute settlement mechanism, several free trade agreements as well as most bilateral investment treaties contain provisions for an investor-State dispute settlement mechanism. Since only States can bring claims under international law, the objective of the investor-State dispute settlement mechanism is to depoliticize investment disputes and put them into the sphere of international arbitration. In most trade and investment agreements, the investor may choose between the local courts and international arbitration. In some agreements, this choice is final, in order to avoid simultaneous procedures and contradictory decisions. At it is the case for the general dispute settlement mechanism, the procedures of an investor-State dispute settlement mechanism call for both parties to the dispute to seek to resolve their disputes through consultation and negotiation.

18. Who can resort to dispute settlement under a trade agreement? Can companies or private persons file suit?

As discussed above, some free trade agreements have a chapter on investment, which allows an investor to submit a claim that the host country has breached an obligation under the investment agreement *and* the investor has incurred a loss or damage as a result of the breach. The arbitral tribunal has the authority to award compensation to the injured investor but *cannot* request the host government to change its laws or regulations. Under NAFTA, other trade agreements, as well as the bilateral investment treaties signed by the United States and Canada, among others, no claim may be submitted to arbitration after more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the breach alleged.

19. Where do countries go to settle their disputes (which forum)?

Under the investor-State dispute settlement mechanism, it is the investor (the claimant) who chooses which forum to use to settle the investment dispute. The investor may choose between the local courts and international arbitration. As discussed above, in some agreements, particularly in bilateral investment treaties, this choice is final ("fork in the road"), in order to avoid simultaneous procedures and contradictory decisions. In contrast, NAFTA and other free trade agreements (FTAs) contain a "no U-turn rule," which allows an investor to abandon the local courts before or after the award is rendered, in order to submit a claim under the investor-State dispute settlement mechanism. The investor, however, cannot return to local courts, once an FTA claim has been submitted.

Once the investor and the host country have consented to arbitration, they must decide whether they will opt for an *ad hoc* mechanism such as the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) or an institutional mechanism such as the procedures and arbitration available under the International Centre for Settlement of Investment Disputes (ICSID) or the International Chamber of Commerce (ICC) Court of Arbitration. Most free trade agreements signed between countries of the Americas provide the parties to the dispute with three options: 1) the ICSID rules, provided that both the State of the investor and the host country are parties to the ICSID Convention (as of December 2004, 142 States had ratified the Convention, including 25 from the Americas); 2) the ICSID Additional Facility Rules, provided that either the State of the investor and the host country, but not both, is a party to the ICSID Convention; or 3) under the UNCITRAL Arbitration Rules. The Chile-US FTA also states that if the disputing parties agree, a claimant may submit his claim to any other arbitration institution or under any other arbitration rules.

20. What is the scope of public access to dispute settlement under a trade agreement? Can organizations or private persons file briefs and have their opinions heard? Are hearings conducted in secret?

Under the investor-State dispute settlement mechanism of the recently signed free trade agreements, such as the Chile-US FTA and the DR-CAFTA, the tribunal has the authority to accept and consider *amicus curiae* submissions from a person or entity that is neither the investor nor the host country. The Chile-US FTA also stipulates that the submissions must be in both Spanish and English, and must identify the submitter and any Party, other government, person, or organization, other than the submitter, that has provided, or will provide, any financial or other assistance in preparing the submission. Both agreements also stipulate that the tribunal must conduct hearings open to the public. Moreover, the following documents must be transmitted by the host country to the home country of the investor and be made available to the public in general: notice of intent; the notice of arbitration; pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions; and minutes or transcripts of hearings of the tribunal.

At their 2001 meeting, the NAFTA Trade Ministers agreed to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven (investment) tribunal, subject to redaction of confidential business information; information which is privileged or otherwise protected from disclosure under the Party's domestic law; and information which the Party must withhold pursuant to the relevant arbitral rules, as applied. With a view to enhancing the transparency and efficiency of the investment chapter's investor-State dispute settlement process, in 2003 NAFTA Ministers agreed on recommended procedures regarding submissions from non-disputing parties and a standard form for Notices of Intent to Submit a Claim to Arbitration.

In June 2004, the hearing in the NAFTA case *Methanex Corporation v. United States of America* took place before a three-member arbitral tribunal. This case had been initiated under Chapter Eleven of the NAFTA and was governed by the UNCITRAL Arbitration Rules. At the request of the parties and the tribunal, ICSID accepted to administer the hearing. The parties to the dispute agreed to make the hearing open to the public. The hearing was broadcast live, as from Day 3, on the ground floor of the World Bank in Washington, DC.

21. Who are the judges? How are they selected? Can they be removed for cause? Are they held accountable for their decisions?

With respect to the investor-State dispute settlement mechanism, most free trade agreements and bilateral investment treaties provide that unless the disputing parties (investor and host country) otherwise agree, the tribunal comprises three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who will be the presiding arbitrator, appointed by agreement of the disputing parties. As explained above, under NAFTA-like agreements, States have established rosters of available arbitrators. Under ICSID, any member of the Tribunal may attach his individual opinion to the award, whether he/she dissents from the majority or not, or a statement of his dissent.

Canada's New Model (2004) Foreign Investment Protection and Promotion Agreement (FIPA) stipulates that the arbitrators must have expertise or experience in public international law, international trade or international investment rules, or the resolution of disputes arising under international trade or international investment agreements; be independent of, and not be affiliated with or take instructions from, either Party or disputing party; and comply with any Code of Conduct for Dispute Settlement as agreed by the Commission (the body created by the State Parties).

Under ICSID, the conduct of arbitrators is one of the grounds for which either the investor or the host country party may request annulment of the award by an application in writing addressed to the Secretary-General. The ICSID Convention lists the following grounds for which an annulment is allowed: the Tribunal was not properly constituted; the Tribunal has manifestly exceeded its powers; there was corruption on the part of a member of the Tribunal; there has been a serious departure from a fundamental rule of procedure; or the award has failed to state the reasons on which it is based.

22. Who pays the costs of an investor-State dispute?

Two new features now included in the recently signed free trade agreements (such as the Chile-US FTA and the DR-CAFTA) provide that in the event that the host country so requests within 45 days after the tribunal is constituted, the tribunal must decide on an expedited basis any objection that the dispute is not within the tribunal's competence. Moreover, when it decides a host country's objection, the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorneys' fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal must consider whether either the claimant's claim or the host country's objection was frivolous, and must provide the disputing parties a reasonable opportunity to comment.

23. What happens when a case is decided? Are the rulings final and binding?

When a tribunal makes a final award against the host country, the tribunal may award, separately or in combination, only monetary damages and any applicable interest; restitution of property, in which case the award shall provide that the host country may pay monetary damages and any applicable interest in lieu of restitution. In the Chile-US FTA and the DR-CAFTA FTA, the tribunal may also award costs and attorneys' fees. The award is binding and must be complied with. Should the host country failed to abide by the award, a panel must be established under the State-to-State dispute settlement mechanism of the trade agreement.

For more information and views on investment, see:

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II. SERVICES

A. SERVICES IN THE NATIONAL ECONOMY

1. How important are services for the national economy?

Services represent the fastest growing sector in national economies, account for the largest share of production and are the primary source of employment in most developed and developing countries. There are many and very diverse types of services, encompassing activities under such broad categories as business services, professional services, telecommunication, construction & related engineering, distribution, education, environmental, financial transport, health-related and social services, tourism, recreational services and cultural services. In the Americas, services account on average for over 60 percent of total economic activity and over 20 percent of total exports. During the 1990s, exports of services in the Americas expanded on average 1.12 percent faster than merchandise trade exports, constituting the second fastest growth rate in the world after Asia. For the smaller economies of Central America and the Caribbean, services exports (such as tourism, call centers, back office services, and offshore financial services, among others) are the largest foreign exchange earner and the main driver of economic growth. Services sectors are also the main recipient of foreign investment. This is particularly important for developing countries, which would otherwise lack the resources to develop investment-intensive basic infrastructure services, such as road, port, telecommunications and energy services, all of which are critical to a country's manufacturing and agricultural competitiveness.

2. Is it necessary to distinguish between goods and services production? Aren't services just inputs for the production of goods?

Many services do indeed serve as crucial inputs into the production of goods, and it is difficult to distinguish the final product as between the components of goods and services. Such inputs as banking loans for business operations, transport and shipping, advertising, distribution through wholesale and retail outlets, accountancy services, computer services, are all part of the built-in cost of the final product and are essential for the final product to reach consumer markets. So everything that is produced has a large component of incorporated services. But services are also important in their own right. Not only because efficient goods production requires efficient services inputs, but also because many services also reach consumers as final products. However, services markets do not always operate in the most efficient manner so that consumers can acquire the final product in quantities and quality they require at the prevailing market price. This means that it is not only important to distinguish between goods and services, but also among services themselves. For instance, some services require strong government regulation because they serve social purposes or national security objectives. Among these services would be the provision of education, health care and police protection. Others require government regulation to protect consumers because they tend to be dominated by monopoly suppliers who can easily abuse the market such as in the area of telecommunications or road, rail or air transportation. In still other cases firms may have more knowledge than consumers and be tempted to carry out fraudulent or unsound practices if they are not subject to strict supervision and regulation. Among these services would be banking and insurance activities and many professional services such as doctors, lawyers and accountants. For all of these reasons, services are more highly regulated than goods.

B. SERVICES TRADE

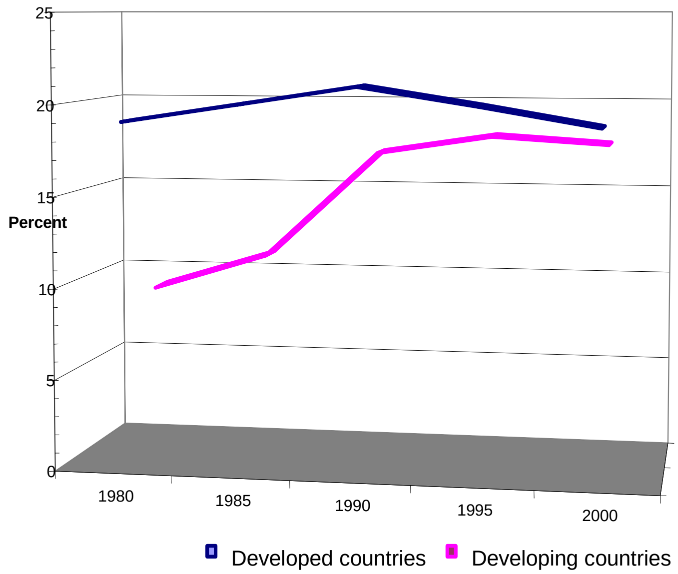
3. Can services be traded internationally?

Not only are services traded internationally, but the share of services in world trade and investment has been increasing. They have been among the fastest growing components of world trade over the last 15 years. World services trade was greater than $1.5 trillion in 2002, representing over one fifth of total world trade. This type of statistic does not however reflect the full extent of services trade. This happens both because services serve in many cases as inputs for traded goods and hence are not recorded separately, and because services transactions themselves are difficult to measure. As opposed to goods, services are in most cases intangible and non-storable, which implies that proximity between producer and consumer is required for a services transaction to take place. Since it is difficult to establish when and, at cases, where this actually happens, services transactions tend to be understated in national statistics. In order to capture services trade, it is best to first characterize services transactions as two types: cross-border trade or the establishment of a commercial presence. For a cross-border transaction to take place, either the producer or the consumer has to change physical location. For instance, if a person in Colombia wishes to purchase medical services from a doctor in Costa Rica, they must meet either in Colombia or in Costa Rica. If, on the other hand, the service can be stored, for instance in a computer file, then there is no need for the producer or the consumer to change location as the producer can send the product to the consumer via email. This would be the case with computer software or architectural designs. Alternatively, a services provider might decide to establish a commercial presence in the country where he intends to sell his services, like for instance a U.S. commercial bank that invests in a subsidiary in Colombia.

4. Why should developing countries have an interest in participating in services trade since it is developed countries that export most of the services in the world and have the biggest advantage in this area?

The transformation of an economy from a primary-product based focus to that of a more diversified structure, necessarily involves the fostering and development of more efficient services, many of which may be imported as well as exported. The list of services that are now traded has grown tremendously due to the application of information technology, which has enabled many services to be sent electronically across borders. In today's world, developing countries are exporting many types of services, of which they may even be unaware. These include data processing services, health care services, cultural services (performances of music and dance groups abroad), construction and engineering services, education services, and various professional services (accountants, legal experts, consultants, etc.). Tourism is a service sector of vital importance to developing countries and is one of the most rapidly expanding economic activities, now employing one out of ten workers worldwide. The growing interest of developing countries in service exports is one of the main reasons why these countries have begun to initiate and conclude trade agreements covering trade in services. And as the chart below shows, developing countries have been rapidly closing the gap with the developed world, through increasing the share that they hold in world services trade.

Converging Trends in Services Trade



C. SERVICES TRADE LIBERALIZATION

5. What purpose is there in liberalizing trade in services since most trade consists of trade in goods?

Even though it is true that over three-fourths of trade, as currently measured, consists of trade in merchandise or goods, what people tend to ignore is the fact that many services are actually encompassed in the final cost of these traded goods. Such important inputs as banking loans for business operations, transport and shipping costs, advertising, distribution through wholesale and retail outlets, accountancy services, computer services, are all part of the built-in cost of the final product, but which is not yet decomposed in the statistical accounts. Without these important and even critical services inputs, it would be impossible to trade any product, either manufactured or industrial items. So services incorporated into final products actually do account for a very large part of international trade, easily as much as 50 percent and probably much more. When it will be possible to measure this component of international trade separately in the future, then people will have a better understanding of how important services really are in the tradable context. Having efficient services as inputs into final products is crucial for the ability of agricultural and manufacturing exporting firms to be competitive on world markets.

Having a more efficient and productive service sector allows a country to enhance its position in world trade in those areas in which it has a comparative advantage.

6. Is there a link between services trade liberalization, growth and poverty reduction?

Yes, there is a link, though it may not be as direct as some think. Many people look to services liberalization to deliver needed reform of the services sector, from which the poor will also benefit, while others see services liberalization as a threat to regulatory sovereignty and to the government's freedom to pursue pro-poor social policies. Where does the reality lie? What trade liberalization can deliver for countries is the ability to grow faster and more efficiently. In the services area, however, this is often dependent upon properly-conceived and properly-sequenced reforms. Liberalization must be coupled with the strengthening of regulatory institutions and policies in many cases in order to ensure that it is effective. If not, liberalization can even be counter-productive and work to the detriment of the poor. This may be the case, for example, when service monopolies in telecoms or transport services are transformed into private market-sharing arrangements. But when reform policies are well-structured and conceived, then they can bring about considerable benefits to a country in terms of greater economic efficiency, more competitive output and faster growth. To the extent that the government additionally has in place progressive, or pro-poor social policies that help the benefits of this growth to be spread throughout the greater population, then services liberalization will support poverty reduction. However, services liberalization on its own carried out either unilaterally or through trade agreements, cannot ensure the complementary action that is needed to deliver pro-poor policies. These policies must be a part of the parallel domestic agenda and conceived and carried out hand in hand with the trade agenda. Better policy research in this area, along with enhanced technical and financial assistance to improve the regulatory environment and social policies in developing countries is very important to assist governments to use the potential power of services trade liberalization to also benefit the poor.

7. What do developing countries whose primary exports are agricultural products stand to gain from services liberalization?

Developing countries need to be not only efficient exporters of those services in which they have a comparative advantage, but also efficient importers of services. This is just as important, if not more so, in order for a country to be able to enhance its productivity and make all sectors of its economy more efficient. Importing high quality and lower-cost services also means that a country is better able to produce those goods or other services which it can then export more competitively. For example, many developing countries export tourism services, which is one of the fastest growth sectors in the world economy and which employs one out of every ten workers. However, the ability to supply tourists with better communication services, better roads to visit sites, ATM machines to withdraw cash, among others, through the import of more efficient telecommunications providers, transport providers and financial service providers, will benefit the development of this sector. Developing countries also gain from the export of many other types of services, the same as they gain from the export of goods, through an increase in income and welfare. Exported services also tend to have a higher level of skill content in them, which means that as they export more services, developing countries can move up the value-added ladder.

Because services are still so highly regulated and because the services sector is still fairly closed and protected in many countries around the world, the potential gains from liberalization of services trade can be quite high. This is also true because the gains from services liberalization include both the direct effect on the sector itself and the indirect effect on all the other sectors in the economy that make use of the service. Thus the potential gains from liberalizing trade in intermediate services are much higher than the gains from trade in final goods (Hodge 2002).

D. SERVICES AND TRADE AGREEMENTS

8. Why are services the subject of trade agreements? Is it necessary to develop separate disciplines for goods and services?

The rationale for services liberalization is no different from that which has driven the liberalization of merchandise trade, namely to exploit a country's comparative advantage through acquiring a more open and legally secure access to foreign markets. As with goods, removing or lowering barriers to the export and import of services engenders freer movement of services through greater market access. However, effective market access also depends on greater predictability and stability in the rules governing the provision of and the conditions under which firms and individuals can trade services. This is the reason that agreements have been negotiated to cover services trade, nearly all of them since the mid-1990s. The fact that services are highly regulated and traded in more numerous ways than goods has meant that it has been necessary to develop a set of rules and disciplines to cover services trade, although many of the basic principles contained in such rules, including most-favored nation treatment, national treatment, and transparency, are the same. However, many of the rules contained in the regional trade agreements apply to both goods and services equally, such as those on investment, competition policy, government procurement, intellectual property rights, transparency, and electronic commerce.

9. Are there differences in the way that services are treated in trade agreements at the multilateral and regional levels?

At the multilateral level, the General Agreement on Trade in Services (GATS) contains rules and disciplines for services trade that were negotiated for the first time during the Uruguay Round and that have been in effect since January 1995. At the regional level, many trade agreements have been negotiated that cover trade in services. In the Western Hemisphere, no less than 18 regional agreements on services have been concluded, subsequent to the NAFTA which came into effect in January 1994. Nearly all of the regional agreements in the Hemisphere take a more far-reaching or comprehensive approach to services trade liberalization, under which all service sectors fall within the scope of the disciplines of the agreement, not just those that the government chooses to include, as in the WTO. Under this approach, often termed "negative list," governments also agree to remove all measures that discriminate against foreign service providers, unless they make reservations to this requirement for specific sectors. The aim of the agreement is to treat all service providers equally, whether they are nationals or from the other party to the regional agreement. However, if a government wishes to maintain a preference for its own service providers and retain some discrimination, it is allowed to do so by including these measures in annexes.

Governments may maintain these measures intact and are not required to remove or liberalize them in the future. However, they commit themselves not to increase the degree of protection or discrimination contained in the measures in the annexes, which must be based on laws, decrees and regulations actually in force, unlike at the WTO level in the GATS. Governments also have the right to exempt certain sensitive service sectors completely from the agreement, if this is part of the negotiated outcome. The annexes are an integral part of the trade agreements and provide a great deal of certainty to service providers, who are ensured of having accurate information on the conditions under which they are able to supply services to the markets of other members to the agreement. They also provide for a very high level of transparency around government policies in the services sector that affect trade.

E. Services and Regulation

10. Does a services agreement reduce the government's right to regulate?

Contrary to a widespread misconception, trade agreements on services do not reduce or limit the government's right to regulate. This sovereign right is stated at the outset of all trade agreements and is preserved throughout. The government remains free to regulate in the way it desires for the purpose of achieving what it deems to be legitimate policy objectives. These objectives may include the limitation of monopoly powers in sectors such as energy, transport or telecommunications, or the protection of the consumer in banking, insurance and professional services (medical malpractice), or the fulfillment of nationally-agreed social objectives such as the provision of universal health care or education.

Where the government decides to provide the service itself, then the rules of trade agreements do not apply to this activity. The rules and disciplines of trade agreements covering services apply to the services supplied under competitive conditions only. However, even here the government can regulate as it wishes, provided only that the regulations it adopts are the least trade-restrictive in nature. The intersection between regulation and trade agreements lies in a provision on discipline on domestic regulation often contained in the latter. The tension that may arise between trade agreements and the right to regulate derives from the requirement that such regulations should not be more burdensome than necessary to ensure the quality of the service and to achieve the government's legitimate objective. Determining how a regulation conforms to this requirement may be challenging, although the application of this discipline has never been challenged in a dispute settlement case under any trade agreement. In fact, in the area of designing and executing regulation, government supremacy is not likely to be questioned in the services area.

11. Does the government have to privatize service activities in areas where it may be the only provider, such as education and health services?

In situations where the government is the only service provider, there is no obligation under trade agreements for this service (or any other service) to be privatized. The decision to privatize or not the supply of services is one that is made in the context of national economic policy, not international trade agreements. Moreover, when the government is the sole provider of services that are produced on a non-competitive, non-commercial basis, then these services are not considered to fall under the scope of the trade agreement. When the government produces services that are in competition with those of private providers, then such services would fall within the scope of a trade agreement. However, no trade agreement obliges the government to relinquish its share in national economic activity, unless it so chooses on its own behalf.

12. Is a country that liberalizes services in water, health and education increasing social inequality by preventing the poor from having access to these services?

The liberalization of services in critical areas of social concern such as the supply of water, health and education, does not necessarily mean that the government turns over such activities to the private sector. It may simply mean that the government allows some of these services, such as universities for higher education or other institutions for specialized education, to be provided on a for-profit basis. It may also mean that a part of the service, such as laundry or food supply for hospitals, can be sub-contracted to private suppliers. A complex interaction exists between the policy action and its effects on the general public. There may be effects on price, on quality and on level of access, some of which may be positive and others less so. When the government steps out of an economic activity back to allow for private service suppliers to come in, the desired result is to achieve the supply of such service at lower cost with a wider product choice and improved quality. However, the overall policy and regulation of the service sector remains in the hands of the government who must ensure that its objective of "universal service," or ensuring that the poor continue to have access to these basic services, is met under these new arrangements. Often the liberalization of part of a service activity may mean that the final service can be supplied at a lower cost than previously, which is clearly beneficial to the poor. However, trade agreements alone do not ensure that a universal service objective is reached within a country. This will depend importantly upon what type of commitments are negotiated within a services agreement.

F. SERVICES TRADE LIBERALIZATION AND THE MOVEMENT OF PEOPLE

13. Who benefits from the movement of people to provide services in foreign markets?

Unlike trade in goods, trade in services often involves the mobility of either capital or labor. The movement of natural persons is one of the four modes of trade in services, often cited as "mode four." This differs from regular migration in that movement of natural persons in the international trade context is understood to be a temporary, not a permanent relocation though the nature of temporary is not defined in a precise way under the WTO or under bilateral free trade agreements, leaving this up to the discretion of the participating countries.

Currently there are limited commitments in international trade agreements that allow for the movement of natural persons between countries to carry out services trade, such as for professional service providers of doctors, lawyers, accountants or engineers, health care workers, automobile or aircraft repair workmen, members of construction/engineering crews, university professors, consultants, those workers in the hospitality and entertainment industries and others.

Given the comparative advantage that developing countries have in the numbers of skilled, semi-skilled and lower-skilled workers, this is an area of high priority for them in the negotiation of trade agreements or services commitments. The larger the differences between trading partners in this area, the larger will be the potential gains from opening up international trade. In the case of the movement of natural persons, potentially large returns would be possible if those workers who are relatively more abundant in developing countries, were allowed to move and provide their services in industrial countries. The potential gains from even a modest movement of labor are estimated to be tremendously large. For example, it is estimated that an increase in industrial countries' quotas on the inward movements of both skilled and unskilled temporary workers equivalent to 3 percent of their work forces would generate an increase in world welfare of more than US $150 billion a year. (Winters, Walmsley, Wang and Grynberg 2002). These gains would be shared by both industrial and developing countries. However, the negotiation of such commitments has met with political resistance and considerable sensitivity in many domestic markets, including fears about cultural identity, problems of assimilation, fears related to national security, difficulties in enforcing a temporary versus a permanent stay, and the impact on the labor market. Efforts to reap the considerable potential gains in this area must confront these legitimate concerns and political challenges.

G. SPECIAL TREATMENT FOR DEVELOPING COUNTRIES

14. Can developing countries defend their interests in trade negotiations?

Developing countries can defend their interests in trade negotiations through a variety of ways, depending upon how they define them. In order to best do so, they must participate actively in such negotiations on the basis of clearly defined priorities and national interests. Only in this manner are their government representatives able to clearly express and defend a coherent national position. Such a national position needs to be developed for services through an extensive process of consultation with the stakeholders involved in each of the various service sectors, including government ministries, private sector service providers and regulators. It is important that the government act to protect the interests of the consumers and not those of the national service suppliers when it undertakes negotiations.

Developing countries' interests can be advanced if they undertake proper preparation for the liberalization process and for the increased competition which will result from greater market access. This includes, among other things, laying the proper institutional framework through implementing sound domestic regulations, and identifying coherent strategies that maximize the gains while minimizing the adjustment costs of liberalization.

Proper management of the liberalization process can also help developing countries to defend their interest in trade negotiations. This includes bringing about liberalization progressively, or in incremental stages. To defend their interests, developing countries have to carefully choose which service sector and mode of supply to open and which barriers to remove. Developing countries can also make demands on trading partners for market access in sectors and modes of interest export to them, for example negotiations on the removal of restrictions on the temporary movement of labor.

In many regional agreements, capacity-building activities and objectives have accompanied the negotiation of the legal text as an integral part of the negotiating process. This is the case now with the FTAA negotiations through the Hemispheric Cooperation Program, and it is also the case with several of the bilateral free trade agreements that have been or are being negotiated in the Western Hemisphere. Developing countries can benefit from these capacity-building activities in the services area, as in other areas.

15. Is there a way for developing countries to liberalize their services more slowly under a trade agreement if they are not yet ready?

Yes, developing countries can pace the liberalization of their services sector. In the context of trade agreements they can also choose which sectors they wish to liberalize and which ones they do not. The decision to participate in any trade agreement is first and foremost a political one; it is up to a government to decide if and when it wishes to engage in trade negotiations and at what pace it would be most suitable to liberalize its domestic services market.

The GATS makes it explicit in Article XIX.2 that the liberalization process shall take place with due respect for national policy objectives and at the level of development of individual WTO Members, both overall and in individual sectors. Moreover, it recognizes the right of developing countries to: liberalize fewer types of transactions; progressively extend market access in line with their development level; and to attach conditions when making access to their markets available to foreign services suppliers.

In some trade agreements such as the GATS, developing countries can limit their commitments only to the sectors and modes which they would like to include in their schedules. Developing- country WTO Members are free to inscribe a lesser number of commitments and in fewer sectors. They do not have to make commitments in sectors where they wish to retain policy discretion or where considerable national sensitivity exists. Even where commitments have been undertaken, developing countries can restrict access to the sub regional or non-federal level.

In regional agreements, members often commit to incorporate all service sectors under the agreement to reflect the desire to be comprehensive in coverage. However, this does not mean that all service sectors must be liberalized. Under regional agreements it is also possible for developing countries and other members to refrain from opening sensitive sectors and to attach reservations to those sectors where it is felt necessary to retain some form of protection for the domestic market. By making use of the option of pre-commitment or progressive liberalization, members of regional trade agreements can also choose to liberalize their services sectors at a gradual pace and can commit to reduce or eliminate barriers to services trade over time according to a set timetable. Thus in all types of trade agreements, developing countries can influence both the extent and pace of liberalization of their services sector.

For more information and views on services, see:

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III. INTELLECTUAL PROPERTY

A. INTELLECTUAL PROPERTY IN GENERAL

1. What are intellectual property rights?

Intellectual property rights involve intangible assets with economic worth that result from human intellectual effort or creativity. They usually entitle the creator to an exclusive right over the use of his/her creation for a certain period of time. The use of the term "intellectual property" is relatively recent and it encompasses the two traditional areas of "industrial property" and "copyright and related rights."

Under "industrial property" we find areas such as patents, trademarks, geographical indications, industrial designs, among others.

A ***patent*** grants an exclusive right for an invention which is a product or a process that provides a new way of doing something, or offers a new technical solution to a problem. Patent protection means that the invention cannot be commercially made, used, distributed or sold without the patent owner's consent. Patents provide incentives for innovation by offering recognition for creativity and material reward for marketable inventions. All patent owners are obliged, in return for patent protection, to publicly disclose information on their invention in order to enrich the total body of technical knowledge in the world.

A ***trademark*** is a distinctive sign which identifies certain goods or services as those produced or provided by a specific person or enterprise. Trademarks help consumers identify and purchase a product or service because of its nature and quality indicated by its unique trademark. Some examples of trademarks are Kodak, BMW, Embraer, Juan Valdez, Jose Cuervo, Toshiba, Colgate.

A ***geographical indication*** (GI) is a sign used on a product that has a specific geographical origin and possesses qualities or a reputation due to that place of origin (e.g., climate, soil, inhabitants). Most commonly, a geographical indication consists of the name of the place of origin of the goods. Some well-known GIs are Champagne, Tequila, Roquefort Cheese, Prosciutto di Parma.

An ***industrial design*** protects the aesthetic aspect of an article but does not cover any technical features or functions. The design may consist of the shape or surface of an article, patterns, lines or colors that appeal to the eye. Industrial designs are applied to a wide variety of products of industry and handicraft such as textiles, technical and medical instruments, watches, jewelry, electrical appliances, vehicles and architectural structures.

Copyright allows a creator and his/her heirs exclusive rights for their literary and artistic works, including the right to authorize others to use the work. Works typically covered by copyright include novels, poems, plays, computer programs, films, musical compositions, paintings, photographs, architecture, maps and technical drawings.

The field of ***rights related to copyright*** grew up around copyrighted works and the rapid advances in technology. They provide similar, although often more limited and of shorter duration, rights to: (i) performing artists (such as actors and musicians) in their performances; (ii) producers of sound recordings; (iii) broadcasting organizations in their radio and television programs.

B. INTELLECTUAL PROPERTY IN TRADE AGREEMENTS

2. Why are countries including intellectual property rights in trade agreements?

Before becoming part of the multilateral trading system, intellectual property rights were regarded solely as a unique legal field led by an exclusive group of stakeholders and professionals. The international regime was managed by the World Intellectual Property Organization (WIPO), a UN specialized agency dedicated to intellectual property. Compared to trade agreements, the system under WIPO evolved in norms, coverage and participation at a much slower pace without enforcement or dispute settlement system.

As part of the package at the end of the Uruguay Round, all WTO members agreed to conform to minimum standards of IPR protection pursuant to the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). The effort of industries and some developed countries to bring this issue into the WTO reflected the increased importance of knowledge intensive or high technology products as a component in international trade and their interest to provide for protection for IPR. Despite the opposition of some trade experts and developing countries, the trade-related aspects of IPR are now part of the international trading system.

Since the TRIPS negotiations concluded in 1994, intellectual property has evolved, particularly because of changes in technology and information systems. New questions and areas, such as Internet-related issues and new technologies were unforeseen at the time. Topics of interest to both developed and developing countries are being discussed, including the IPR aspects of domain names, biotechnology, copyright and related rights in digital networks, protection of data bases; IPR issues that arise in the context of access to genetic resources, protection of traditional knowledge and expressions of folklore. Recent negotiations in multilateral fora, subregional and bilateral Free Trade Agreements with IPR provisions have addressed some of these issues. The fact that countries share common minimum standards of protection of intellectual property has provided a base for negotiations in this area.

3. What are developing countries concerns with intellectual property rules in trade agreements?

Some of the concerns of developing countries relate to the perception that IPR exclusively reflect the interests of developed countries. It is claimed that intellectual property protection, as codified in trade agreements, increases the costs of technology transfer in the form of royalty payments and widens the technology gap. Furthermore, that capital investment in developing countries is likely to center on foreign-owned enterprises and economic rewards for innovation will flow to developed countries. Other concerns center on the limitations faced by countries to formulate public policy in areas related to IPR as a result of the standards of protection agreed in trade agreements.

In order to determine whether these increased costs of transfer of technology prevent developing countries from catching up and closing the technology gap, these costs would have to be weighted against the potential benefits derived from the use and assimilation of new technologies. While not disputing the reality of the increased short-term financial burden of importing new technologies, it is also highlighted that IPR protection could generate three types of long-term benefits: encourage domestic innovation, provide incentives for multinational corporations (MNC) to invest in developing countries, and faster diffusion of new technologies into developing countries.

4. What is the share of intellectual property rights-sensitive products and services in international trade?

The importance of knowledge intensive or high technology products as a component of international trade has increased significantly in recent years. The share of knowledge intensive or high technology products in total trade doubled between 1980 and 1994 from 12 percent to 24 percent. With respect to the US for example, an estimate indicates that the percentage of the country's exports with a high intellectual property content rose from 9.9 percent in 1947 to 27.4 percent in 1986. Recent reports indicate that the share has continued to grow and high-technology exports represent 32 percent of U.S. manufactured exports in 2003. More than half of US growth is currently generated by industries that were hardly in existence a decade ago. There is a similar trend in other developed and some developing countries (China, Korea, Mexico, Costa Rica).

C. Patents

5. Why do countries grant patents?

The patent system works as a social contract, administered by the government. It plays an important role in promoting innovation and productivity by encouraging the creation, development and use of new technologies. One of the key goals of a patent system is to balance the interests of the inventor with the broader interests of society at large.

Patents offer inventors recognition for their creativity and material reward for their inventions. Patents give patent owners an exclusive right to market their invention during a 20 year period. On the other hand, to have a sustainable patent system it is important not to overlook short-term objectives to allow the use of existing inventions and creations. All patent owners are obliged, in return for patent protection, to publicly disclose information on their invention in order to enrich the total body of technical knowledge in the world. Competition and regulation are also needed to prevent abuses and acts of unfair competition by patent owners.

According to WIPO, the patent system has four significant functions: a) to facilitate technology transfer and FDI; b) to stimulate R&D at universities and research centers; c) to serve as a catalyst of new technologies and new businesses; and, d) to empower businesses, especially small and medium enterprises (SME), with regard to IP asset accumulation, management and use. WIPO underscores that these functions are applicable "regardless of the difference in culture, religion, political system and the degree of economic development, as long as the entrepreneurs are supported by a set of well-planned, coordinated, and pro-active patent policies by the government."

6. Can animals and plants be patented? Is this mandated by trade agreements with patent rules?

Different views remain on the question of the patentability of animals and plants, even among developed countries. The decision of allowing patents for plants and animals is a matter of national policy.

Under the TRIPS Agreement governments can exclude some kinds of inventions from patenting, i.e. plants, animals and "essentially" biological processes (but micro-organisms, and non-biological and microbiological processes have to be eligible for patents). However, plant varieties have to be eligible for protection either through patent protection or a system created specifically for the purpose ("sui generis"), or a combination of the two. For example, some countries have enacted a plant varieties protection law based on a model of the International Union for the Protection of New Varieties of Plants (UPOV).

Both bilateral FTAs recently signed in the Americas (Chile-US and DR-CAFTA) cover the issue of patent protection for plants. Under DR-CAFTA countries agreed to undertake "all reasonable efforts to make patent protection available by the date [DR-CAFTA] enters into force." Under the Chile-US FTA the commitment is to "undertake reasonable efforts, through a transparent and participatory process, to develop and propose legislation within four years from the entry into force of the Agreement that makes available patent protection for plants."

Beyond patentability there are other implications such as the moral or ethical dimensions of commercialization of inventions involving genetic alteration of plants or animals, the conservation and preservation of the environment and the protection of animal and human health (including such issues as biological diversity and sustainable development).

7. Are patent rules in trade agreements favoring corporate interests? Are patent rules in trade agreements favoring developed over developing countries?

The patent system exists to protect the work of any inventor, whether an individual, a university, or a corporation in both developed and developing countries. It does not matter if the invention belongs to a single person, a small business or a huge multinational corporation.

Statistics show that multinational corporations (MNC) take advantage of the patent system far more and often than small and medium-sized enterprises (SMEs) or individuals, particularly in developing countries. For example, IBM receives 10 patents per day (3,415 in 2003) whereas all the corporations and individuals from some developing countries in the Americas obtain less than 10 'international' patents per year. There is a clear need in developing countries to promote local innovation, facilitate that businesses, in particular SME, seek patents or other IPR, and promote the use of the patent system as a source of strategic competitive information.

Among developed countries there is an upward trend in patent applications, particularly noticeable in Japan, the United States and Europe (e.g., in Japan it took 95 years to grant the first million patents, whereas it took only 15 years to grant the next million).

Use of patents is also increasing in some developing countries that have started to accumulate knowledge and gain economic power. The number of Patent Cooperation Treaty (PCT) applications filed by developing countries in 2001 rose by 70.6 percent, with the largest number generated by users in China, the Republic of Korea and South Africa. Compared to the 2000 statistics, the increase was particularly high in China (188 percent), India (103 percent) and the Republic of Korea (53 percent).

D. Patent Protection and Public Health

8. Is patent protection affecting the fight against AIDS in least-developed countries?

Patents are one of many aspects that influence access to health care and drugs. There are broader issues such as socio-economic factors that act as barriers to access to drugs, including limitations in national health and social infrastructures.

The public debate on multiple international for a regarding access to medicines and patent rules, induced by the HIV/AIDS crisis in Sub-Saharan Africa as well as campaigns and protests from NGOs, resulted in a number of consensus and commitments to resolve this serious problem. Nowadays it recognized that a concerted, cooperative effort by governments, business community and civil society groups is needed to successfully prevent the spread of HIV/AIDS and to make health care and drugs available and affordable to those already affected by the disease.

9. Do trade agreements with patent rules limit the ability of governments to protect public health emergencies?

Pursuant to the WTO TRIPS Agreement, member nations established a minimum level of patent protection in their national laws. The TRIPS Agreement was the result of intense negotiations and in some instances provisions are crafted in carefully balanced language. Among those rules there are some exceptions, limitations and uses without authorization of the patent owner in certain limited circumstances such as public health emergencies.

These provisions have been tested in recent years. The high profile cases of South Africa (1997) and Brazil (2001) in their efforts to ensure availability of affordable medicines to treat HIV/AIDS, and the experiences in the United States and Canada with the anthrax spores crisis in 2001, illustrate the complexities and sensitivities of balancing patent protection and public health emergencies. These cases provided important long-term lessons for both developed and developing countries about the importance of flexibility, appropriate safeguards, and the need for intellectual property protection. The importance of this flexibility was recognized in the WTO Ministerial Meeting in Doha (November 2001).

In the Doha Ministerial Declaration WTO Ministers stressed that it is important to implement and interpret the TRIPS Agreement in a way that supports public health — by promoting both access to existing medicines and the creation of new medicines. In the Declaration on TRIPS and public health, Members reaffirmed that global trade rules allow countries to decide what constitutes a health emergency and to use compulsory license drugs (see question 10 for definition) to fight HIV/AIDS, tuberculosis, malaria and other epidemics. Thus, each Member has the right to grant compulsory licenses and to determine the grounds upon which such licenses are granted. Furthermore countries have the freedom to establish a national regime to deal with parallel imports (see question 10 for definition).

Another complicated issue is the case of WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector. It is widely recognized that these countries could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement. Therefore, in 2003 WTO Members agreed to provide extra flexibility for such countries and allow them to *import* patented drugs made under compulsory licensing.

Both bilateral FTAs recently signed in the Americas (Chile-US and DR-CAFTA) do not contain any obligations that would restrict the use of compulsory licenses and therefore do not affect the flexibility recognized under TRIPS and the Doha Declaration in order to address public health crises.

10. What are the instruments or flexibilities available to governments to deal with national public health emergencies?

The TRIPS Agreement provides flexibility for governments to make exceptions to patent rights in cases such as in national emergencies or anti-competitive practices provided certain conditions are fulfilled. The main mechanisms are described below.

Compulsory licenses: Compulsory licensing refers to a permission to use patents, compelled by the government in order to accomplish some public or social objective. Compulsory licensing forces a patent owner to allow others to use that property in exchange of an adequate remuneration according to the circumstances of each case.

Parallel imports: These are products marketed by the patent owner or with the patent owner's permission in one country (A) and imported into another country (B) to be sold without the approval of the patent owner. When a country (B) allows parallel imports (grey market goods) these foreign manufactured *genuine* products imported by a third party will compete directly with patented products marketed by the patent owner in that country (B). Each country can decide whether parallel imports are legal or not. A country cannot bring a dispute in the WTO over parallel imports unless fundamental principles of non-discrimination are involved.

Research exception: Many countries allow researchers to use a patented invention for research, before the patent protection expires.

Regulatory or Bolar exception: Some countries allow manufacturers of generic drugs to use the patented invention before the patent protection expires to obtain marketing approval from public health authorities. This allows generic producers to market their versions upon expiration of the patent. This type of provision was upheld as conforming with the TRIPS Agreement in a WTO dispute settlement case ("Canada-Patent Protection for Pharmaceutical Products-April 2000").

Anti-competitive practices: Under TRIPS a Member may adopt appropriate measures to prevent or control licensing practices or conditions that may constitute an abuse of intellectual property rights if they affect competition. The objective of this instrument is to prevent abuses of intellectual property rights, unreasonable restraining trade, or hampering the international transfer of technology.

11. What are generic drugs?

"Generic drug" is used to mean copies of patented drugs (not patented in that particular country) or drugs whose patents have expired. When copies of patent drugs are made by other manufactures, they are either sold under the name of the chemical ingredient (making them clearly generic), or under another brandname. If a pharmaceutical is patented in a country and is illegally copied (infringing patent protection) in that country, it is not generic. Similarly, parallel imports are also not generics.

There is a key role for generics in promoting competition and reducing the price of drugs particularly in countries deeply affected by HIV/AIDS and other health emergencies.

12. Do trade agreements that provide for patent protection affect the price of medicines?

The impact of patent protection on the price of medicines is a real issue, particularly for developing countries. In the Declaration on TRIPS and Public Health, countries recognized the concerns about the effects of patent protection on prices. This concern must be balanced against the recognition that some degree of protection is necessary to provide incentives to the industry to invest in R&D and develop new drugs.

The price of drugs depends on a wide variety of factors, including the cost of research and development, production, distribution and marketing.

13. Do patent rules limit the development of drugs for tropical diseases?

There is a clear disincentive to invest in R&D on drugs to combat the diseases of "the poor" (pneumonia, malaria, typhoid, cholera, tuberculosis, etc.) as opposed to those of "the rich." This reality responds to the limited market for drugs aimed at diseases associated with developing countries. The R&D numbers confirm this trend. It is estimated that although more than US$56 billion is spent annually on health research, less than 10 percent is directed toward diseases that afflict 90 percent of the world's population. Between 1975 and 1997, 1223 new compounds were introduced on the market but only 11 of these were aimed at tropical diseases.

As the WHO Commission on Macroeconomics and Health concluded, this can only be solved by a major international effort that is backed by increased aid and facilitated by public-private partnerships. With respect to trade rules, there is a need to develop additional mechanisms and instruments to put in place incentives for further research and development and production of drugs aimed at these diseases.

14. Why is the issue of patents and access to medicines so controversial?

Any decision affecting the availability of medicines represents a key public policy issue for both developed and developing countries. Public health constitutes one of priorities for governments because of its significant developmental and political implications.

Experts agree that balancing patent protection and access to medicines for public health emergencies is a highly complex issue. There are multiple studies but not enough conclusions on the net effects on access to medicines and the application of TRIPS in developed and developing countries. The discussion becomes more difficult due to the fact that powerful and divergent interests are active participants of the debate.

F. Intellectual Property Rights Protection and Economic Development

15. What are the effects of intellectual property rights protection on economic development, growth and foreign direct investment?

Even though research and studies on issues directly related to economics and intellectual property rights have increased in recent years, particularly after the adoption of the WTO TRIPS, there is not enough evidence to draw definite conclusions or answers regarding the impact of IPR applicable to all countries. There are differing opinions among those who have addressed these subjects. Some are supportive of the positive impact of intellectual property protection whereas others disagree.

Development

The complex interplay between IPR and the many facets of a nation's economy makes very difficult to separate or disaggregate the effects of IPR from other factors that impact developing economies. Some suggest that the role of IPR in economic development is likely to be case-specific, with variations both from industry to industry and country to country. Some argue that only developed countries can benefit from IPR.

Growth

More than ever, technology and knowledge play an important role in economic growth. The cases of Finland, Ireland, Korea and China have confirmed that the new drivers of wealth in contemporary society are knowledge-based assets. Moreover, the UNDP Human Development Report underscores the linkage between innovation and technology and human development. It has been postulated that IPR significantly influences the appreciation in value and quantity of human capital and the rate and direction of technological change. An emerging attitude in both developed and developing countries considers that the growth in patent filings influences the growth of knowledge activities and that patent-related statistics can act as an indicator of the strength or weakness of the economy.

Other authors point out the short-term losses for developing countries and argue that patent protection can only enhance economic growth rates once a particular level of development has been reached.

Foreign direct investment

Decisions on FDI depend on a number of complex factors regarding local markets, incentives and regulations. Some argue that the strength or weakness of the IPR system has a strong effect on FDI and that low level of IPR protection will preclude certain types of investments. Some highlight the importance of IPR varies by industry and market structure. Thus, IPR protection is more likely to be important in industries in which intangible, knowledge-based assets specific to each firm are significant, such as pharmaceuticals, chemicals, food additives and software, as well as firms considering investing in local research & development

(R&D) facilities. Other studies indicate however that the evidence of the positive impact of IPR protection on FDI is inconclusive.

16. What are the effects of intellectual property rights protection on research and development (R&D) and on the transfer of technology to developing countries?

There is not a simple answer to the crucial issue of whether IPR protection helps or hinders developing countries access to the sophisticated technologies that are required for their development.

Research and development (R&D)

It is claimed that the IPR system is an important element of the institutional infrastructure to encourage private investment in R&D, especially in industrial and scientific fields. This trend is documented in OECD countries where a strong correlation exists between the level of R&D expenditure and the level of patenting activity. Some emerging countries (e.g., Republic of Korea, India and Brazil) have experienced similar tendencies during the latter half of 1990s. Others indicate that there is no sufficient evidence to confirm this link in developing countries.

Transfer of technology

According to some, a robust patent system and appropriate enforcement are pre-requisites for technology transfer. They underscore that without patent protection, no business is comfortable in disclosing its technologies or investing in R&D. The experiences of Japan and Korea, as countries that relied on the patent system to promote FDI and transfer of technology, are commonly cited as success stories.

On the other hand, evidence has shown that the benefit of technology transfer is not automatic. In order to create a base for the development of the knowledge economy, technology transfers need to be followed up by a mechanism that empowers local researchers, engineers, entrepreneurs, and other innovators to use the transfer as a spring board for the creation of new knowledge. Otherwise the impact of any transfer of technology from other countries will be insignificant.

A fundamental limitation when dealing with rules on technology transfer is that technology, whether patented or in the form of know-how, is primarily in the possession of industrial companies. To such companies their technology is a valuable commodity and they cannot afford to give it away without receiving a reasonable return on that investment. Even if required to implement international agreements, governments cannot issue a decree or force the transfer of those technologies.

As suggested by the report "*Integrating Intellectual Property Rights and Development Policy*" published by the UK Commission on IPR in 2002, a wider agenda is required, including serious consideration by developed countries of their policies for encouraging technology transfer and more effective research and cooperation with and among developing countries to strengthen their scientific and technological capabilities.

For more information and views on IPR, see:

On IPR in General, the TRIPS Agreement and Patent Protection:

WIPO. 2004. *WIPO Intellectual Property Handbook: Policy, Law and Use*. WIPO Publication No.489 (E). Geneva: WIPO. http://www.wipo.int/about-ip/en/iprm/index.htm

WTO Intellectual property gateway page: http://www.wto.org/english/tratop_e/trips_e/trips_e.htm

On patent protection and access to medicines:

Intellectual Property Section, Home Page of Consumer Project on Technology http://www.cptech.org/ip/health/

WIPO studies:
"Striking a Balance: Patents and Access to Drugs and Health Care,"
"Patent Protection and Access to HIV/AIDS Pharmaceuticals in Sub-Saharan Africa," (by the International Intellectual Property Institute) and
"Parallel Imports in Pharmaceuticals: Implications for Competition and Prices in Developing Countries," http://www.wipo.int/ about-ip/en/studies/

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IV. ENVIRONMENT

1. What is the relationship between international trade policy and the environment?

The trade and environment interface is an increasingly important subject in international relations. Policy makers have made tremendous progress in striking a balance between two policy objectives; namely the promotion of adequate levels of environmental protection and, ensuring an open, equitable, multilateral trade system.

Some environmental issues such as climate change, or the protection of the ozone layer, are global in nature and affect every country. Others, such as the disposal of wastes, or the protection of endangered species, can also involve interactions between many different countries. As a result of globalization there is greater interaction between countries, it is therefore understandable that trade issues arise in the context of international or global environmental issues. This might be because measures taken to protect the environment have an impact on trade, or because trade is itself part of the way a particular environmental issue is addressed – for example the shipment of waste for recycling in other countries.

In formulating trade policy, it is therefore important that we take account of the potential environmental impacts of proposals, and work for the most environmentally beneficial outcomes possible. Increasingly, our efforts to govern these types of interlinkages are being broadened to encompass not only the environmental pillar of sustainable development, but also the social and economic pillars.

There are three main aspects to the trade-environment relationship:

- The impact of trade and trade liberalization on the environment;
- The potential effects of environmental measures on trade flows;
- The use of trade measures to achieve environmental policy aims.

2. If one of the main objectives in negotiating free trade agreements is trade growth, what is the impact of trade liberalization and growth on the environment?

Trade liberalization has some specific locational and sectoral ***effects*** and thus impacts on the patterns and growth of trade. Trade liberalization allows product manufacturers and service providers to exercise more choices in where and how they make their products. As a result, they are able to pursue the most advantageous "economies of scale," or the level of output of a product that is most cost-effective for them. These decisions can lead to significant changes in economic activity, and therefore to possible impacts on the environment in different countries.

Consider the following types of environmental effects of trade liberalization and growth:

Scale effects

Because trade liberalization promotes the ability of companies to choose the most cost effective place for doing business, this has helped transform traditional economies of scale from a national to a global level. As a result, many resource extraction and industrial companies seek to maximize their economies of scale with larger production centers able to produce products at a cheaper cost. When large-scale production is located in areas where there are insufficient environmental controls to manage the potential impacts of the higher levels of production on natural resource sustainability, on air and water quality and on waste management, the increased economic activity can lead to serious environmental degradation. Thus, from a development perspective, the longer-term economic benefits of better economies of scale are tied to the presence of appropriate environmental management structures.

Structural effects

Structural effects encompass changes in location or concentration of industrial sectors or groups of related sectors, based on broad comparative advantages. Where the sectors that leave as a result of structural changes are heavily polluting or technologically out-of-date, this can have positive effects. However, as structural effects are essentially a magnification of scale effects, the requirement for appropriate environmental management is again critical to achieving longer-term economic benefits that are not later reversed by increased environmental degradation, especially if new sectors are fairly heavily polluting ones.

Product effects

Trade liberalization can promote the transfer of environmentally sound products to many countries as barriers to trade are reduced and removed. Indeed, "the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services" is one of the express goals set out for negotiations in the WTO under the Doha Ministerial Declaration. However, trade liberalization could allow trade in goods that could potentially harm the environment and create pressures to exploit natural resources to the detriment of the environment. This can be mitigated through the enforcement of national laws and regulations designed to protect the environment while promoting trade liberalization.

Technology effects

Technology effects on the environment from international trade opening can also be positive and negative. First, there may be increased opportunities to trade in new technologies. Second, if increased trade brings about investments with new technologies, modernization of the industrial base will be promoted, with related environmental benefits. However, if new investments use outdated technologies that are transferred from older locations, technology impacts will be environmentally negative in most cases. A second trade-related factor is the role that competition plays in forcing domestic industry to innovate to remain competitive in the face of potential new imports. Increased competitiveness can help promote technological innovation.

Regulatory effects

When a country decides to become a party to the various multilateral environmental agreements (MEAs) or join the WTO, it is taking a sovereign decision to be bound by rules that establish parameters for the development of domestic environmental legislation. Commitments under the WTO and MEAs set out obligations that have an impact on how, and to what extent, a state can enact environmental protection and other public welfare measures. Enforcing these obligations requires a significant investment in institutional and human resources which some countries lack. For example, undertaking a risk assessment and defining the least trade restrictive measure available to meet a defined goal can be a substantially demanding step in the legislative process now required by the WTO Agreement on Technical Barriers to Trade as well as the Agreement on Sanitary and Phytosanitary Measures. It is for this reason that international development institutions and agencies have worked with national governments to build capacity to ensure that governments develop appropriate policies to protect the environment, such as requirements for investors to use environmentally-friendly technologies in extractive or resource-based industries, or zoning regulations to protect coastal areas from overbuilding for investors in the tourism sector.

It is easily seen from this review of different types of environmental effects of trade liberalization that there can be a very positive. Increased trade can be good provided that the appropriate national policies and regulations are put in place.

3. Why is discussing the relation between the environment and sustainable development so contentious in the context of trade?

The trade and environment debate is not new. The link between trade and environmental protection, consisting of both the impact of environmental policies on trade, as well as the impact of trade on the environment, was recognized as early as 1970. In the early 1970s, there was growing international concern regarding the impact of economic growth on social development and the environment. This led to the 1972 Stockholm Conference on the Human Environment.

Developments within the GATT

During the Tokyo Round of trade negotiations (1973-1979), the question of the degree to which environmental measures (in the form of technical regulations and standards) could form obstacles to trade was taken up. The Tokyo Round Agreement on Technical Barriers to Trade, known as the "Standards Code," was negotiated. Amongst other things, it called for non-discrimination in the preparation, adoption and application of technical regulations and standards, and for their transparency.

In 1982, a number of developing countries expressed their concern at the fact that products prohibited in developed countries on the grounds of environmental hazards, or for health or safety reasons, continued to be exported to them. With limited information on these products, they were unable to make informed decisions regarding their import.

During the Uruguay Round of negotiations (1986-1993), trade-related environmental issues were once again taken up. Modifications were made to the Standards Code, and certain environmental issues were addressed in the General Agreement on Trade in Services (GATS), the Agreements on Agriculture, Sanitary and Phytosanitary Measures (SPS), Subsidies and Countervailing Measures (SCM), and Trade-Related Aspects of Intellectual Property Rights (TRIPS).

In 1991, a dispute between Mexico and the United States regarding a US embargo on the import of tuna from Mexico caught using nets which resulted in the incidental killing of dolphins, heightened attention on the linkages between environmental protection policies and trade. Mexico claimed that the embargo was inconsistent with GATT rules. The panel ruled in favor of Mexico based on a number of different arguments. Although the report of the panel was not adopted, its ruling was heavily criticized by environmental groups who felt that trade rules were an obstacle to environmental protection.

Developments in the environmental fora

During this time period, important developments were also taking place in environmental fora. Although the relationship between economic growth, social development and environment was addressed at the Stockholm Conference, it continued to be examined throughout the 1970s and 80s.

In July 1970, an international research team at the Massachusetts Institute of Technology initiated a study of the effects and limits of continued world-wide growth. It argued that even under the most optimistic assumptions about advances in technology, the world could not support present rates of economic and population growth for more than a few decades. However, with more evidence of the contribution of technological advancement to resource savings, and of the role of prices in registering the relative scarcity of resources and consumer preferences and in allocating resources efficiently, the "limits to growth" paradigm was quickly overturned.

In 1987, the World Commission on Environment and Development produced a report entitled Our Common Future in which the term "sustainable development" was created. The report identified poverty as one of the most important causes of environmental degradation, and argued that greater economic growth, fuelled in part by increased international trade, could generate the necessary resources to combat what had become known as the "pollution of poverty."

Recent FTAs in the region

The DR-CAFTA and the Chile-US FTA contain environment provisions that include core commitments by the Parties concerning effective enforcement of environmental laws, establishing and maintaining high levels of environmental protection, and not weakening environmental laws to encourage trade or attract investment. These FTAs establish an Environment Affairs Council to implement the Environment Chapter of the FTA, and to serve as a high-level forum to discuss environmental issues and concerns. They also ensure transparency and provide opportunities for public input and environmental cooperation between the parties.

4. Does free trade give companies/countries an incentive to abuse the environment?

No, for several reasons. First, trade agreements promote transparency and require the Parties to enforce their own national laws. Second, environmental standards are at best a minor factor in where businesses choose to set up shop in a particular location. Such considerations as guaranteed property rights protection, a functioning legal system, a well-educated workforce, and sufficient infrastructure figure much more prominently in the calculations of most business managers than do lax environmental regulations. Second, there are considerable cost savings associated with standardized production techniques. Thus, companies tend to operate at the highest environmental world standard rather than adopt multiple production technologies for use in different areas. Third, much of the foreign direct investment directed to developing countries is used to privatize inefficient state-owned manufacturers, which tend to become less polluting as they are restructured. Fourth, trade and investment fosters the spread of pollution control technology and enable developing countries to purchase cleaner energy inputs on world markets. Finally, the most important result of trade and investment is economic growth, which in turn leads to a better environment. That is true because, as incomes rise, the demand for improved environmental quality and the ability to pay for it also rise.

5. Is it true that environmental provisions in trade agreements can prevent governments from taking the environmental measures they need to protect their natural resources?

As sovereign nations, parties to a trade agreement share a common recognition that open markets are superior to protected markets. Free trade agreements are established to foster trade liberalization and expansion and to create a framework for resolving disputes according to a mutually negotiated and agreed set of rules. When a country decides to become a party to the various MEAs or join the WTO or a FTA, it is taking a sovereign decision to be bound by rules that establish parameters for the development of domestic environmental legislation. However, excluded from Free Trade Agreements are broad categories of trade restrictions, including those related to conservation of natural resources, national security, public health and safety, and banning imports made with forced or prison labor. By contrast, national sovereignty is threatened in the absence of rules, where market barriers or sanctions by one country against another are more likely.

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V. DISPUTE SETTLEMENT: STATE-TO-STATE

1. Why are provisions on dispute settlement under a trade agreement so important? What purpose do they serve?

Provisions on dispute settlement in a trade agreement serve to ensure that the subscribing states will fulfill the market access and other commitments they have undertaken under the agreement. States enter reciprocally into a trade agreement expecting to realize the benefits of increased trade opportunities as a result of market liberalization. When a state party to an agreement does not live up to its obligations, this upsets the intended bargain. Despite efforts by negotiators to be clear and precise in their language, trade agreements are complex contracts, sometimes difficult to understand in all respects. Disputes inevitably arise as to the meaning and scope of some of their terms, and whether a new action that a government takes, or sometimes its failure to take action, is consistent with the agreement. Dispute settlement provisions lay down in advance—and ahead of a dispute--procedures for settling disputes between the states parties. These procedures generally provide first for consultations between the parties within specified time periods to try in good faith to arrive at a politically-negotiated resolution of the matter. If these efforts prove unsuccessful, then there is usually provision for qualified, impartial arbitrators/panelists/judges to be appointed by the parties in order to render an opinion or make a ruling on the legal issues in dispute.

2. Who can resort to dispute settlement under a trade agreement? Can companies or private persons file suit?

As a general rule, only governments can resort to dispute settlement under a trade agreement because only governments have rights and obligations under it. This is the case under the World Trade Organization (WTO) agreements. Companies or private persons, which feel harmed or threatened by a measure taken by a state party other than their own, and which they believe is inconsistent with that government's obligations under the agreement, must convince their own government to pursue the case against the other party. This may involve formal recourse to dispute settlement under the agreement. However, the North American Free Trade Agreement (NAFTA) and subsequent NAFTA-like agreements have a chapter on investment, which allows an individual investor (company) to file an arbitration claim against a host state for not meeting its commitments under the chapter (investor-state dispute settlement is explained in a separate paper relating to investment). The Andean Community does provide standing in certain circumstances for private parties, natural or legal persons, as well as for the General Secretariat to file complaints alleging violation of Community law before the Andean Court of Justice.

3. Where do countries go to settle their trade disputes (WTO or other forum)?

It is the complaining party which decides where the trade dispute will be settled. If it is a party to more than one trade agreement, there is potentially more than one forum to which the complainant can have recourse. A state party chooses which forum to use based on where the party considers it has the best "applicable law" or its best rights on the matter, the best functioning and most timely dispute settlement system, and the best possibilities for redress available. For example, there may be a measure that a state could complain about under the WTO or another trade agreement. The party might feel that the WTO has a more experienced dispute settlement system but on the other hand the party may have a more substantial right under the bilateral agreement that is affected by the measure; e.g., a zero duty or WTO-plus norm under the bilateral agreement. In other words, the potential defendant or party complained against may have made more substantial commitments under the bilateral agreement than the WTO. Under any trade agreement, an obligation by one party represents a concomitant right by the other. Similarly the potential plaintiff or complaining party may have made more substantial commitments, which it could potentially withdraw for greater impact in case a neutral panel finds a legal breach and the losing party fails to bring its measure into conformity with its obligations in a timely manner. Under NAFTA-like agreements, it is easier and quicker for the "winning" party to take retaliatory action than under the WTO, where the winning member must wait until the end of a reasonable period of time, which can be 15 months or longer, for the losing member to comply, and then seek multilateral authorization for sanctions.

NAFTA-like agreements all contain "choice of forum" provisions, which obligate a complaining party, once it has "chosen" or elected to pursue dispute settlement proceedings in one "forum" or under one trade agreement like a bilateral or sub-regional agreement, to refrain from pursuing the same matter under another agreement or in another forum like the WTO. Usually, the "fork in the road" that defines when this selection or choice takes place and is exclusive or definitive, is when the complainant requests under one agreement the establishment of a panel to render a legal ruling on the matter. The aim of choice of forum provisions is to limit the possibility of double litigation.

4. What is the scope of public access to dispute settlement under a trade agreement? Can organizations or private persons file briefs and have their opinions heard? Are hearings conducted in secret?

As discussed above, generally-speaking only governments can resort to dispute settlement procedures under a trade agreement as only governments have rights and obligations under the agreement. Governments are of course free to and often do receive and use inputs from interested private sector groups or the public at large about a matter. This may often be the way a government first finds out about a possible breach by another party to an agreement, which adversely affects the interests of national economic actors and stakeholders. Governments are free to use materials provided by the private sector or the public at large as part of their official submissions to, and argumentation before, a dispute settlement panel. A WTO panel has the right to seek information and technical advice from any source but must inform beforehand the authorities of the member state, within whose jurisdiction the individual or body is located. NAFTA-like agreements subject the panel's recourse to outside experts to approval, or absence of disapproval, by the parties to the dispute. WTO panels are free to consider and to accept or reject unsolicited requests from non-governmental entities to submit written views on the dispute. This is also the case in some recent free trade agreements signed by the United States, but limited to entities that are located in the territories of the states parties to the dispute. If a panel accepts such a submission, it should provide ample opportunity for the parties to the dispute to comment on it.

In the WTO, a party to a dispute is free to disclose its own positions to the public, but must treat as confidential any information submitted to the panel by another party that the latter has designated as confidential. Subject to the protection of confidential information, some recent free trade agreements signed by the United States provide that the written briefs and responses by the parties shall be public as well as a written version of their oral statements.

These U.S. agreements also provide that one hearing of the parties to the dispute before the panel shall be open to the public. However, the practice in the WTO is that access to hearings of the panel and of the standing Appellate Body is restricted to the parties to the dispute and any third member party, which has duly notified its interest in the matter.

Under any trade agreement, governments are free to include non-governmental persons as part of their official delegations in dispute settlement proceedings. Internal deliberations of the panel among its own members and their assistants are always confidential.

5. Who are the judges in a trade dispute? How are they selected? Can they be removed for cause? Are they held accountable for their decisions?

All trade agreements have provisions seeking to ensure that panelists or arbitrators are qualified experts and will render an impartial opinion on the dispute. Many NAFTA-like agreements and the WTO have codes of conduct for arbitrators and their assistants and require disclosures of financial interest or other conflicts of interest by potential panelists or arbitrators.

Panelists are selected by the parties to the dispute. Under NAFTA-like agreements, the parties have established rosters of available potential arbitrators by common agreement before any dispute has arisen, from which the parties may select or "cross-select" their judges when a panel is established. These rosters may contain non-governmental experts who are nationals or non-nationals of the parties. In the WTO, the practice is for the parties to the dispute to agree to panelists based upon nominations by the WTO Secretariat. The Secretariat may refer for these purposes to the WTO roster of national candidates nominated by individual WTO member countries or may nominate qualified candidates outside the roster. The practice is for panelists not to be nationals of any party to the dispute or third party.

There are provisions under the WTO and other trade agreements for removal of arbitrators for cause under certain circumstances, particularly for conduct giving the appearance of lack of impartiality.

Under the WTO and NAFTA-like agreements, the opinions of individual panelists are anonymous.

6. Who pays the costs for dispute settlement under a trade agreement? Are poor countries at a disadvantage?

The proceedings before WTO panels and the Appellate Body are free of charge to the parties to the dispute. Most panelists are Geneva-based delegates from WTO member countries, who receive no additional remuneration for serving on a panel. Travel expenses of panelists, who are governmental officials but not based in Geneva, are borne out of the WTO budget, which is financed by WTO member countries on the basis of their share of international trade. Panelists who are non-governmental persons receive a fee for their panel-related work and, if not based in Geneva, have their travel expenses and a subsistence allowance in Geneva paid for, all borne out of the WTO budget. The WTO Secretariat provides support, including legal support, to the panel, which is also financed from the WTO budget.

NAFTA-like agreements provide that the parties to the dispute equally bear the fees and expenses of the panelists, their assistants and experts. Administrative support to panels is provided by the national sections of the parties to the agreement.

Another aspect of the costs for dispute settlement is the litigation costs of the parties themselves, including costs within the government and for outside assistance. The WTO Secretariat provides technical assistance to developing country members, including making available upon request a qualified legal expert to assist such a member, but must do so in a manner which preserves the continued impartiality of the Secretariat. An Advisory Center on WTO Law based in Geneva offers legal support throughout dispute settlement proceedings in the WTO at discounted rates for its developing country members and least developed countries.

Many private law firms compete to offer legal services to countries for disputes under trade agreements.

7. What happens when a case is decided? Are the rulings final and binding?

Unless the ruling can be and is appealed under the trade agreement or unless the parties to the agreement, including the so-called "winning party," are free to and do agree to reject the tribunal's decision, the ruling is regarded as resolving the matter finally as between the parties to the dispute. If a tribunal of arbitrators finds that a state party has violated its obligations under the trade agreement, the recommended resolution is for this party to withdraw its inconsistent measure. If within a certain time period a government is unable or unwilling to remove the measure, this so-called "losing" party can offer to compensate the other party to the dispute for continuing to be in non-compliance. The two parties then can agree on the proper level for such compensation. Some recent free trade agreements signed by the United States provide for a monetary assessment to be offered by the party in breach--a kind of compensation. As a final and less desirable recourse, the "winning" party may be entitled or authorized to retaliate by suspending benefits enjoyed by the losing party at a level equivalent to the breach as a way to restore balance of rights and obligations under the agreement. Compensation or suspension continues only for such time as the losing party fails to bring its inconsistent measure into compliance with its obligations under the agreement.

8. Are rulings a threat to national sovereignty?

Ultimately it is up to the state party to decide whether and how to comply with a ruling. If it takes the sovereign decision not to comply, the state party is liable to submit to the consequences of its non-compliance under the trade agreement, which the party freely entered into. Such consequences to the party may include suffering retaliatory action through the withdrawal by other parties of benefits, which were accorded to the party under the trade agreement. The benefits withdrawn are supposed to be equivalent to the level of the breach.

9. Is dispute settlement fair to developing countries?

There is perhaps no greater guarantee of a level playing field under a trade agreement than its dispute settlement system. It entitles a party, no matter how undeveloped its economy, to have its dispute against a stronger, richer party decided on its legal merits before impartial judges that both parties have selected by common agreement.

An example of a small developing party "winning" a WTO dispute against a more developed party is the case successfully brought by Costa Rica against U.S. safeguard restrictions on imports of cotton and man-made fibre underwear. There the WTO Appellate Body found that the backdating of these restrictions violated the WTO Agreement on Textiles and Clothing. In compliance, the United States did not renew the measure, which expired according to its own terms within a month after the adoption of the Appellate Body's report.

There is also the complaint brought by Peru against an EC regulation requiring that only products prepared exclusively from fish of a certain species found in the Eastern North Atlantic Ocean, Mediterranean Sea and Black Sea (Sardina pilchardus), could be marketed as "preserved sardines" in the European Communities, and not products prepared, for example, from the species found along the coasts of Peru and Chile (Sardinops sagax). This meant that the word "sardine" could not appear as part of the name on the container for the Peruvian product. The WTO Appellate Body concluded that this EC trade description violated the WTO Technical Barriers to Trade Agreement. Peru and the EC reached a mutually agreed solution whereby the EC regulation in dispute was amended to allow products prepared from fish of species other than Sardina pilchardus, such as the Peruvian Sardinops sagax, to be marketed as "preserved sardine-type products."

The WTO dispute settlement system is used regularly by its members, developed and developing countries alike. Since its inception on January 1, 1995 until April 30, 2005, there have been 329 complaints notified to the WTO, counted as requests for consultations, the first stage of the dispute settlement process. Of these 329 disputes raised, 84 have resulted in adopted Appellate Body and panel reports, 45 in mutually agreed solution, 27 have been otherwise settled or not pursued, and 25 are currently being examined by panels.[1] The breakdown by developed/developing members of the complaints submitted to the WTO is as follows:[2]

Complaints by Developed Country Members	
Respondents – Developed	127
Respondents – Developing	75
Complaints by Developing Country Members	
Respondents – Developed	70
Respondents – Developing	51
Complaints by both Developed and Developing Country Members	
Respondents – Developed	6
Respondents – Developing	0

The trend in recent years is that developing countries are requesting consultations more than developed countries are.[3] Of the five requests for consultations notified to the WTO in the period January-April, 2005, four have been made by developing countries, and two of these have been directed against developing countries.

For more information on Dispute Settlement, see:

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[1] WTO Secretariat (2005), p. iii.
[2] Ibid., p. iv.
[3] Hughes (2004), pp. 103-105.

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Advisory Centre on WTO Law, at http://www.acwl.ch

World Trade Organization. *Dispute Settlement*, at http://www.wto.org/english/tratop_e/ dispu_e/dispu_e.htm

WTO Secretariat. 2005. *Update of WTO Dispute Settlement Cases*, WT/DS/OV/23. April 7. Available at http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm

VI. ASYMMETRICAL TREATMENT IN TRADE AGREEMENTS

A. SMALL AND RELATIVELY LESS DEVELOPED ECONOMIES: THE BASICS

1. What are small and relatively less developed economies?

Globalization and economic integration present special challenges for small and relatively less developed economies (SRLDEs). In order to encourage their full and effective participation, these economies should be allowed greater flexibility and policy space to ensure that trade liberalization is compatible with long term sustainable development.

There is no consensus on what defines a SRLDE. In the Western Hemisphere it is particularly difficult to classify countries based on their size and levels of development because there are no easily agreed upon criteria. Several measures such as population, size of the economy, level of human development, and size of territory have been used to identify countries that would fall into this category. In general, small and relatively less developed countries tend to stand out as those with the smallest populations, the least total land area, and the lowest absolute levels of national income.

In the Americas there are 33 developing countries but not all of them are small economies. With respect to population, most small economies in the Western Hemisphere are those with populations of less than 12 million people. However, within this group there is great diversity. For instance, many of the CARICOM countries are extremely small states such as St. Kitts and Nevis with a population of only 39,000. On the other hand Ecuador has a population of nearly 13 million but because of its relatively low level of economic development it could be considered a small underdeveloped economy.

Income-wise, small economies stand out as some of the poorest and richest in the hemisphere. Consequently, there is no automatic relationship between size and level of development. For the Bahamas and Barbados, two of the smallest countries in the hemisphere, small size has not been an obstacle to achieving very high levels of human development. By the same measure Haiti is an impoverished small economy of 8 million with the lowest level of human development in the region.

When it comes to economic performance, small countries are not automatically at a competitive disadvantage because of their size. In the Western Hemisphere some of the smallest countries are among the best economic performers. For example, from 1998-2003 Antigua and Barbuda, Barbados and Belize outperformed larger economies such as Argentina and Brazil in terms of growth and indebtedness.

2. Why do small and relatively less developed economies need special consideration in trade agreements?

International trade is important for development and poverty alleviation. Because of the huge potential that trade has to improve standards of living, it is important that small and relatively less developed economies are able to take advantage of the benefits of the international trading system.

As mentioned before, small size does not automatically translate into economic disadvantage. However, small size does impose certain limitations on the economy that can restrict development options and may have implications for trade policy.

In small economies, exports are naturally an important component of economic activity and are usually concentrated in one or two key products or sectors. This lack of diversification implies greater vulnerability to changes in prices, demand, natural disasters and a limited capacity to recover from external shocks.

Because of the small size of the domestic market, small economies tend to be more dependent on trade. Small size (small local market) is directly relative to the inability of small states to exploit economies of scale which is an important feature because it harms international competitiveness. Lack of economies of scale raises the cost of providing public goods and infrastructure, and also the cost of producing goods and services for export. Small states also tend to experience greater economic volatility than larger economies, a characteristic than makes them more vulnerable and fragile.

Economic and Structural Characteristics of SRLDEs

- Relatively undiversified export base with exports highly concentrated in one or two key sectors
- Small Domestic markets with limited scope for economies of scale
- Large dependence on imports
- Economic growth characterized by a high degree of volatility
- Vulnerability to external shocks and natural disasters
- High dependence on trade taxes for revenue
-
- High cost of infrastructure and public administration

B. Asymmetrical Treatment in Trade Agreements

3. Can small and relatively less developed countries defend their development interests in trade agreements?

One of the biggest myths regarding SRLDEs is that they are powerless to protect their interests when negotiating trade agreements with larger and more developed countries. In fact, small and relatively less developed countries are often very vocal in ensuring that negotiations take into account their particular needs and development interests because they have so much at stake. In broad terms, trade agreements incorporate a variety of provisions that afford developing countries certain privileges designed to allow for their lower level of economic and institutional development. Often developing countries may benefit from longer time periods to liberalize, they can undertake a reduced level of obligations, or be exempt from certain requirements depending on the agreement.

For example, in the WTO, where the 148 countries are of different sizes, and levels of economic, political and institutional development, there are approximately 145 provisions spread throughout the agreements which give special and differential treatment to developing countries. In fact, most modern trade agreements incorporate a variety of provisions to safeguard the interests of developing countries and to facilitate their full participation in trade agreements. Countries have recognized that a 'one-size fits all' approach is not realistic given the asymmetries in size, income and level development when they negotiate with smaller and more vulnerable trading partners. These provisions give developing countries substantial policy discretion with respect to their domestic markets and can give flexibility in undertaking and implementing trade commitments. In the current Doha Round of trade negotiations, one proposal envisaged that the least developed countries (those with less than US$1,000 per capita income) be exempt from making commitments to liberalize their markets for agricultural and industrial goods. Developing countries have also sought more flexibility to restrict imports and use export subsidies to promote domestic industries.

In the Americas, developing countries have also sought to defend their development interest in trade agreements by introducing similar provisions into bilateral and sub regional trade agreements. For example, in the CARICOM single market and economy there is special treatment for less developed and disadvantaged countries such as Haiti, St. Lucia and Dominica. In NAFTA, Mexico incorporated special provisions enabling it to restrict foreign ownership in the energy and basic petrochemical sector. DR-CAFTA contains expressed language to recognize the differences in the levels of development and the size of the economies of the signatories. DR-CAFTA countries can draw on safeguards, which are temporary import restrictions, for certain goods (such as beef, milk powder, and pork) to protect sensitive sectors and agricultural livelihoods. Furthermore, as relatively less developed countries in the DR-CAFTA, Nicaragua and Honduras benefit from longer implementation periods for certain obligations.

4. Do trade agreements require that developed and developing countries assume the same obligations?

Essentially trade agreements require that all parties subscribe to the same set of rules, although there are flexibilities to ensure that the obligations assumed are consistent with each Member's level of development. For example, membership under the WTO requires that all members of the organization respect the two basic principles of non- discrimination and national treatment. These are considered core principles and should be respected by all parties to ensure predictability and consistency in trade between countries. This does not mean that the WTO takes a "one size fits all approach." For example WTO GATS allowed total flexibility in making liberalization commitments.

In bilateral agreements, the level of obligation is often more ambitious. Because bilateral agreements are negotiated among only a few participants who want to trade more freely with each other, countries often undertake more ambitious obligations that extend beyond the core WTO principles. Although developing country obligations may not be identical to developed countries, they go beyond MFN and national treatment to discipline the use of many policy instruments and introduce new rules in intellectual property, services, labor, environment, and government procurement. Although developing countries tend to take on more commitments in bilateral agreements, countries are still given flexibility to undertake obligations as far as they are commensurate with the level of development.

5. Do trade agreements constrain countries' rights to use development policies?

The issue of policy space is currently under discussion at the WTO and convincing arguments have been presented on both sides of the debate. Developing countries have complained that their freedom to pursue policies that promote development is being curbed by rules on international trade. They are calling for recognition of their right to policy space, that is, the freedom to choose their own development strategies without being subject to limitations by WTO rules and other trade agreements. Because they are often used to discriminate between domestic and foreign firms, instruments such as such as subsidies, tax incentives, export credits, and policies that require the hiring or training of local workers by foreign investors violate the national treatment principle in trade agreements and are generally not allowed. Developing countries perceive these limitations as a threat to their overall economic and development objectives.

Within the WTO, developing countries argue that these types of instruments are important vehicles for generating employment, protecting minority groups, promoting local small and medium enterprises, promoting specific regions and sectors, and encouraging technology transfer. The right to this kind of policy space will allow them to pursue development policies that are more appropriate to their particular circumstances as relatively less developed economies. They contend that they need this kind of flexibility in order to catch up developmentally to industrial economies.

Industrial economies believe in the right of developing country governments to regulate for development purposes. They claim that this right is fully enshrined in the WTO, under the GATS which allows complete flexibility by allowing a sector to be as opened or as closed as a country wishes. In addition, in the WTO Agreement on Agriculture, countries with subsidies that do not exceed 10 percent of total production are exempt from reduction commitments. For developing countries this threshold is 5 percent.

Industrial countries also argue that many of the policy instruments developing countries would like to use are ineffective, harmful to trade, and it is in their best interest to eliminate them. A number of empirical studies have been done which show that imposing requirements on foreign investors as conditions for accessing the market are unsuccessful at generating employment and technology transfer. Furthermore, the use of subsidies and import substitution policies during the 1960s and 1970s generally did not produced positive results in the developing world. Industrial countries maintain that if developing countries still wish to use these policy instruments they should be consistent with WTO rules and applied in a non discriminatory manner.

6. What kinds of flexibilities are given to developing countries in trade agreements to accommodate their level of development?

Measures to take into account the differences in size and level of development between countries fall into several different categories: arrangements which grant preferential market access; flexibility in obligations and exemptions from certain rules; extended time periods to comply with rules and implement commitments; and technical assistance.

First, many developing countries receive preferential access to industrial country markets through non-reciprocal agreements such as the Generalized System of Preferences, the Andean Trade Preference and Drug Eradication Act, and the Caribbean Basin Initiative, the Caribbean Economic Recovery Act granted by the United States and the General Preferential Tariff, CARIBCAN (the Canadian Government's program that provides duty-free access to the Canadian market for most Commonwealth Caribbean exports) and the Least Developed Preferential Tariff granted by Canada. Under these arrangements, they are granted opportunities to increase their trade by being able to export certain goods to industrial county markets duty free and without reciprocal concessions to developed countries. However, these schemes are preferential arrangements, not trade agreements, which means that they are laws enacted by developed countries that are subject to congressional review. Preferential schemes are highly one-sided in that they can expire or be unilaterally revoked by developed countries and in the even event of a trade dispute developing countries have no recourse to arbitration. In addition, some trade preferences are conditional on developing countries fulfilling obligations in areas that are unrelated to trade. Developing countries recognize that these schemes have been highly beneficial in allowing them to penetrate rich country markets, but they also recognize the limitations of associated with preferential schemes. For this reason, many developing countries are shifting away from preferential arrangements to trade agreements in order to lock in market access and to create trading relationships based on reciprocity and a more equitable balance of power.

Under reciprocal trade agreements, there are a variety of ways in which SRLDEs can benefit from differential treatment. The first is to allow for countries to undertake obligations that are related to the size and level of development of their economies. Flexibility for LDCs in trade agreements also includes differences in obligations that take into account size and level of development. For example, in the WTO GATS, developing countries have the flexibility to liberalize fewer sectors, fewer types of transactions, and to progressively increase access to their markets as they wish. In bilateral agreements developing countries often have the option of phasing in commitments and liberalizing a reduced number of products compared to developed countries. This helps SRLDEs protect policy space to achieve their development objectives.

Developing countries also benefit from phased implementation timetables which gives them longer time periods to implement commitments contained in trade agreements. By taking advantage of these provisions, they can receive a grace period for reducing tariffs or phasing out certain types of subsidies.

Another way to take into consideration size and level of development is through trade-related technical assistance. Developing countries are usually offered technical assistance to increase their capacity to benefit from the commitments they make to open sectors and markets. Technical assistance initiatives encompass the training of government officials to participate in trade negotiations, provision of advice regarding the implementation of commitments, and measures to encourage investment for the development of infrastructure.

C. SRLDEs in the International Trading System

7. Do developing countries stand to gain from free trade agreements with rich countries?

All countries can benefit from increased trade liberalization, and it is an accepted truth that smaller countries can benefit more than do larger countries. According to economic theory, smaller countries are those which potentially stand to gain the most from trade liberalization and from the increased specialization that would arise from exploiting their comparative advantage within a larger regional market. The reason for this lies in the theory of international trade and comparative advantage. Small size, by whatever indicator and openness, increases concentration in production and specialization in trade. Openness to trade allows small economies to specialize in a few product sectors and/or services and to derive larger benefits by overcoming the limitations of scale economies due to the small size of their domestic markets. This higher degree of specialization should result in gains from trade which will be greater for a small country than for a large country.

The World Bank indicates that there are tremendous benefits for SRLDEs when they liberalize trade with industrial countries.[4] These agreements give developing countries the opportunity to exploit their comparative advantage in becoming more integrated with industrial economies. They increase the possibility of technology transfer and the adoption of best practices for enhanced productivity. In the political realms, these agreements can encourage developing countries to adopt and commit to good economic policies and to carry out reforms in order to consolidate and further enhance their integration into industrial country markets.

When they enter into trade agreements, small open economies increase their opportunities to learn from and exchange ideas with other countries. Improvements in technology and efficiency often lead to enhanced productivity and thus higher incomes for workers. Enhancement of skills generates more human capital for the economy. The transfer of technology, information, and production techniques help countries to become more efficient at what they currently produce and to upgrade production to better and more valuable products.

Although trade liberalization has many benefits, there are often costs associated with opening up a developing economy to foreign competition. Adjustment costs are typically smaller than the gains from trade, but in fragile developing countries these costs require proper management. The burden of adjustment costs is most heavily felt in import competing industries. For this reason, sensitive sectors such as agriculture can receive special and differential treatment by having longer and slower transition periods. Sequencing of liberalization can make a difference and it is important to ensure that proper reforms have been carried out to make the most of the benefits of trade liberalization. For workers that may be displaced by liberalization, social safety nets and well functioning credit markets can cushion the effects of unemployment and make it easier for workers to find new jobs. Retraining and career development is very important for helping the unemployed to transition to new jobs that will be created in industries that benefit from liberalization. For some small economies, liberalization implies losing a large share of government revenue as tariffs are lowered and gradually eliminated. This concern is justified as tariff revenue contributes more than half of government revenue in some small economies. Tax reform in these countries would help to broaden the tax base and to minimize public sector adjustment costs caused by liberalization.

8. Do trade agreements hurt the poor in less developed economies?

Trade is recognized as a powerful vehicle for economic growth and has tremendous potential to make life better for the poor. In a world where 2.9 billion people, half the world's population, lives on less than $2 a day, open markets can boost economic growth and increase living standards for those who need it most. The World Bank 2004 Global Economic Prospects estimates that if the Doha Round substantially lowers agricultural and manufacturing tariffs and achieves the total elimination of agricultural subsides, world poverty would fall by 8 percent by the year 2015. This is because trade liberalization allows an economy to make better use of its resources which increases productivity and leads to growth. Growth in turn increases incomes for

[4] World Bank (2000).

everyone, including the poor. India and China, two countries with the largest absolute numbers of poor people, are expected to experience substantial reductions in the incidence of poverty because of growth effects. The challenge is to insure that less developed countries can seize the potential of trade to penetrate markets and associated with trade liberalization to reduce poverty and improve living standards.

There are many ways in which trade can help the poor. Trade liberalization and foreign investment can create jobs directly and indirectly that provide new opportunities for the poor. Trade liberalization also changes relative prices and is thus likely to affect poverty via the effect of price changes on consumption. In this way, imports become more cheaply available to consumers. For the poor, this is very important since it can lower the cost of basic goods and services such as food and clothing. Investments in infrastructure can also help to lower the cost of utilities such as electricity and other services.

Although trade agreements can have a positive effect on the poor, it is not an automatic solution to poverty. Country governments must develop and strengthen domestic policies to increase opportunities for the poor. This means reducing inequality, developing human capital and increasing opportunities and access for the poor so that they can be integrated into the economy and global trading system.

9. Do trade agreements worsen inequality?

In recent years, economists have observed a rise in inequality between countries and within countries. However there is no clear systematic relationship between trade liberalization and rising inequality. Inequality can be attributed to a multitude of factors such as history, natural resource and human capital endowments, investment, institutional capacity, productivity and a host of other considerations.

Although economists have yet to identify a precise relationship between trade and income inequality, it is clear that trade can help poorer countries to grow faster. Faster growth can reduce poverty and consequently inequality. Since 1960 poor countries that have opened up to trade through lowering their tariffs and other barriers to trade, have grown faster than poor countries that are closed to trade. China and India are two examples of large poor countries that are making a dent in poverty rates through growth. Due to the tremendous growth in these two countries alone, global poverty rates are expected to decline significantly by 2015.

Rising inequality continues to be an issue that is important for both developing and industrial. Severe disparities in income and opportunity can compromise economic growth in developing countries and can harm global development and international security. The solution is not to constrain trade liberalization, but to develop global and domestic policies that are more inclusive so that the poor can benefit more from trade liberalization and growth.

10. How can small and relatively less developed countries reap the full benefits from trade agreements?

Trade agreements and liberalization are a step in the right direction for growth and poverty reduction, but trade without the necessary policies and cooperation to support and implement these agreements, liberalization can fall short of expectations. Developing countries must get their own houses in order so that they can reap the full benefits of liberalization. To encourage poverty reduction, growth, and employment, trade liberalization must be accompanied by supporting policies in the following three general areas: investment, productivity growth, and good governance.

Investment

Foreign investment can have a clear positive impact on economic development through job creation, technology transfer, and productivity growth. Governments must improve their economic fundamentals by providing a stable macroeconomic environment with proper legal and regulatory infrastructure that reduces uncertainty for investors.

Productivity

Trade liberalization can open markets but without proper policies to foster competitiveness, liberalization is only a half hearted attempt at development. Countries must develop strategies to increase human capital, encourage technology transfer, and build national innovation system for greater productivity and enhanced global competitiveness.

Good governance

Strengthening domestic institutions is important for managing trade liberalization, attracting investment, and growth. Strengthening the rule of law, the judicial system, the financial system and corporate social responsibility are important components of the reform package.

To reap the full benefits of trade agreements, countries must also implement measures to ease potential adjustment costs when sectors are liberalized. Helping workers to transition to new jobs requires access to education, training, and retraining to acquire new skills. Social safety nets to protect the vulnerable and provided temporary benefits for those who have been displaced are also a mechanism for easing adjustment costs.

For more information on SRLDEs and Asymmetrical Treatment, see:

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The Organization of American States

The Organization of American States (OAS) is the world's oldest regional organization, dating back to the First International Conference of American States, held in Washington, D.C., from October 1889 to April 1890. The establishment of the International Union of American Republics was approved at that meeting on April 14, 1890. The OAS Charter was signed in Bogotá in 1948 and entered into force in December 1951. Subsequently, the Charter was amended by the Protocol of Buenos Aires, signed in 1967, which entered into force in February 1970; by the Protocol of Cartagena de Indias, signed in 1985, which entered into force in November 1988; by the Protocol of Managua, signed in 1993, which entered into force in January 29, 1996; and by the Protocol of Washington, signed in 1992, which entered into force on September 25, 1997. The OAS currently has 35 Member States. In addition, the Organization has granted Permanent Observer status to 57 States, as well as to the Holy See and the European Union.

The basic purposes of the OAS are as follows: to strengthen peace and security in the Hemisphere; to promote and consolidate representative democracy, with due respect for the principle of non-intervention; to prevent possible causes of difficulties and to ensure the pacific settlement of disputes that may arise among the Member States; to provide for common action on the part of those States in the event of aggression; to seek the solution of political, juridical and economic problems that may arise among them; to promote, by cooperative action, their economic, social and cultural development, and to achieve an effective limitation of conventional weapons that will make it possible to devote the largest amount of resources to the economic and social development of the Member States.

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