

15 October 2005

**Response Of The Left Parties To The Note  
On WTO Negotiations  
(Submitted to the Government)**

**Introduction**

The detailed note on WTO Negotiations provided by the Government does not reflect any significant departure from the positions adopted by the previous Government. Given the structural inequality and asymmetry that is built in the WTO agreement, which favours the developed countries, India's long-term interests are best served by making common cause with the developing countries. The formation of the G 20 and the G 33 at the time of the Ministerial in Cancun in 2003 was a positive step in that direction. Subsequent events, especially India's becoming a part of the "Five Interested Parties" and its role in bringing about the "July Framework Agreement" in 2004, and lately, India's co-chairing the Services group with USA and maintaining silence on the attempts by developed countries to front-load the negotiating outcome against the developing countries, have raised questions regarding our commitment to the unity of the developing countries. In this context, the formulation contained in the Government's note: "*wherever there are common interests on specific issues, India has worked closely with developed countries also*", causes concern. The solidarity of the South, and not expedient "issue-based" coalitions with USA/EU, must be the bed-rock of our strategy in WTO. Some of the concerns on India's negotiating position on the issues of Agriculture, NAMA, GATS and TRIPS and some suggestions are elaborated below.

**Agriculture**

From all accounts, we are experiencing a deep agrarian crisis. The lack of employment opportunities and income have resulted in an unprecedented reduction in the per capita availability of food-grains for the rural poor, pushing, by some of the estimates, three quarters of the rural population below "the poverty line". The condition of even the relatively better off sections of farmers seeking higher returns due to their exposure to the volatile world agriculture market, particularly in the period of a deep cyclical downturn, on the one hand, and on the other, the sharp rise in the cost of inputs, drastic reduction in the availability of credit and declining state procurement at remunerative price. Widespread phenomenon of farmers' suicides is a result of this crisis.

WTO's Agreement on Agriculture (AoA) paradigm favours capital-intensive and corporate agribusiness-driven agriculture, and is insensitive to the needs of the masses of peasantry and threatens the livelihood of the vast masses of the small and marginal farmers in developing countries such as India. It is this thrust of the AoA agreement that has led to peasant distress not only in India but also in all countries where agriculture is a livelihood issue. If we do not question and change the current AoA paradigm, we will end by furnishing access to our markets to the corporate led, highly subsidised and therefore artificially low-priced imports from the developed countries to the detriment of the already beleaguered peasantry.

The Government seems to be focussing on opening up of the agriculture sector to corporate capital and introduction of large-scale corporate agriculture to address the agrarian crisis. The arena of operation of the corporate sector is situated in the context of integration with the world agriculture markets within the framework of the WTO's Agreement on Agriculture (AoA). We do not think that a solution to the current agrarian crisis lies in this direction. A necessary, though not sufficient, condition to enable fashioning of an appropriate strategy to meet the crisis, is the insistence on a change in the current AoA paradigm itself. This requires a South-South co-operation axis and also being sensitive to the needs of other developing countries.

The hopes raised by the revival of the solidarity of the South with the emergence of G-20 at Cancun in 2003 have been dampened by the compromise accepted in the so-called July 2004 framework. India brokered this compromise as part of the "Five Interested Parties". The much publicised achievement of having made EU to agree to eliminate export subsidies on all agricultural products by "a credible end date" and the New Delhi declaration of G-20 specifying a five year period for the purpose have to be seen in the context of the substantial improvement in access to our markets through severe reduction in our tariffs being sought by the developed countries as a quid pro quo.

The G20 proposal for reduction of subsidies by the developed world will not come into effect, at least till 2012-13. It is well known that agricultural subsidies given by the EU under the CAP (Common Agricultural Programme) will continue till 2013 and cannot be withdrawn before that. Moreover US subsidies under the 2002 Farm Bill is for a period of 10 years i.e. till 2012. Therefore, there will be no reduction in subsidies of the developed countries at least till 2012. Even the G20 demand on export subsidies grant developed nations 5 years for elimination. This means that up to 2011 (from Jan 2006), export subsidies will continue. However, the market access that is being negotiated starts from 2007! Even if the developed countries do not wriggle out of their subsidy reduction commitments as they have done in the past, once the developing countries lower their tariff barriers, the cheap, subsidised imports from the developed countries could devastate the developing countries in these five years.

The G20's position on domestic supports in developed countries has been weakened considerably in comparison to their position in Cancun. The G20 had then asked for capping of the Green Box and they had rejected the Blue Box expansion. Today, they seemed to have softened their stand on the Green Box, possibly due to trade-offs with the EU, and their position on the Blue Box has been reduced to ensuring that there are some criteria/limits put on the US' use of it. Both of these positions are not acceptable. The developed countries will continue with the Green and Blue Box subsidies in the foreseeable future. India and other developing countries must insist on their right to the use of QRs to protect their domestic markets from such subsidised exports from the developed countries.

Rather than highlight fundamental issues confronting farmers and agricultural labour the G20 has focused on the narrow subject of market access. In July 2005, the group proposed a market access formula for tariff reduction (a middle ground between the Swiss and Uruguay round formulae), which has been widely accepted as a basis for further negotiation. This proposal calls for a banded approach to tariff reductions with 4 bands for developing and 5 for developed countries. Each band would be subjected to a linear tariff reduction approach with overall caps on high tariffs differentiated between developed and developing countries. Market access will primarily benefit agri-business interests in countries like Brazil and will do little to solve the agrarian crisis in the south.

The Government's response states that: "India has thus calibrated reduction of its own agricultural tariffs to the substantial and effective reduction in the level of subsidies that hugely distort international market, with the proviso that recourse to specific instruments to safeguard our vast rural poor against depressions in prices and import surges will be necessary". There is little evidence of such "calibration" especially given the fact that we have agreed to give up the principal instrument to safeguard our agriculture in the form of Quantitative Restrictions (QRs) in precisely the period when subsidies provided to agriculture in developed countries have actually gone up. Under the July Framework the provisos sought in terms of limited and highly conditional safeguards such as "Sensitive and Special Products" and "Special Safeguard Measures" will not be equal to the task of meeting the stupendous problems that the rural masses will continue to face in the wake of further integration of our agriculture with the world agriculture market.

Despite the G20 focusing on market access, Sanitary and Phyto-Sanitary (SPS) measures and technical barriers to trade (TBT) are frequently used by developed nations to stop imports from developing countries.

The developed countries use the protection of sensitive and special products allowed for developed nations and thereby deny market access. Further, they also use Special Safeguard Mechanism (SSM) to restrict imports from developing countries – Canada

reserves the right to use SSM for 150 tariff lines, EU for 539 tariff lines, Japan for 121 tariff lines, US for 189 tariff lines and Switzerland for 961 tariff lines. On the other hand only 22 developing countries can use SSM.

It is unrealistic to expect that corporatisation of the farming sector and increased opportunities for export will help bring about an agricultural transformation in India. Enormous displacement of peasantry that this would entail (without providing alternative avenues for employment) is fraught with the danger of destabilization of the democratic polity. Therefore, it is of paramount importance for India, and also for a large number of similarly placed other developing countries, to insist on the right to use quantitative restrictions (QRs) and secure adequate space for exploring appropriate strategies to solve their agrarian question.

It is eminently possible to claim that QRs are consistent with the GATT/WTO approach and agreements. A mere look at the Agreement on Textiles and Clothing which was very much an integral part of WTO; recalling the whole exercise of tariffication which preceded the AoA; and the extant provisions of Article XVIII of GATT - will show how entrenched the QRs are in the system. What is more, the developed countries have provided for themselves a quota system, a version of QRs, in AoA, in the name of Tariff Rate Quotas (TRQs), where a fixed volume of imports is allowed at a lower tariff rate and beyond that level, imports are allowed only at prohibitive tariffs. If the protection of the decrepit textile industry in the developed countries, which admittedly formed a very minor part of their economies, could justify imposition of QRs for five decades; if QRs could be resorted to by agricultural giants almost throughout the life of GATT and beyond; if safeguarding the external financial position of the developing countries could justify resort to QRs; then the paramount need to safeguard the livelihood of billions of peasants in the developing world should certainly provide an even more sound and compelling justification for resort to QRs.

While this move to insist on QRs may not be opposed as such by the agriculture exporting countries in G-20 like Brazil and Argentina, it has to be recognised that it does not offer them prospect of expanding markets for their agricultural exports. This requirement could be met by negotiating improved access to such exports under a calibrated regime of inter-developing countries' trade liberalisation where the danger of unfair competition is practically non-existing and where proper safeguards could also be built in more easily to ensure a degree of freedom necessary to allow working out of appropriate national strategies for agrarian transformation. Similarly, in order to take on board the concerns of food-import dependent countries in G-20 like Egypt, multilateral, regional or bilateral food security measures, including direct trade measures such as long-term contracts at affordable prices, could be envisaged as an integral part of the inter developing countries' trade and economic co-operation. It is this realignment in agriculture that India should seek.

And India's national interests are best served by taking a lead to mobilise the South on such a platform.

Based on the above and keeping our interests in mind we believe that the following should form the basis of our negotiating positions in the AoA:

1. There is a need to examine the outcome of the AoA as compared with the promise that was held out in terms of benefits to developing countries, *before* finalising the next phase of liberalisation.
2. All export subsidies, including export credit, export credit guarantee and export insurance by the developed countries should be eliminated immediately. Dropping the Blue Box (domestic support listed in Article 6.5 of the AoA) in any form as was originally visualised in the AoA, but was reversed in the July framework, needs to be re-emphasized. Further, it needs to be pointed out that most Green Box measures (domestic support listed in paragraphs 5 to 13 of Annex II to the AoA) are indeed trade distorting and thereby demand a reduction in the total producer support provided to agriculture in the US and the EU in return for any concession that developing countries may offer. Apart from notifying the Green Box subsidies within a month of the new negotiations, there should be reduction/elimination of these subsidies in a timebound fashion.
3. Considering the vital role that agriculture plays in providing livelihood to the large majority of the work force in developing countries, taking into account the nature of small -scale, largely rain-fed, small -and marginal-peasant- dominated nature of their agrarian economies, recalling the notorious volatility of world agricultural prices, (particularly the severe downturn in the recent years after the coming into being of AoA) and the continuing heavy subsidisation of agricultural production and trade by developed countries, the right of developing countries to impose QRs to safeguard the livelihood of three billion strong peasantry needs to be enshrined as an integral part of AoA on the lines of Article XVIII B of GATT.
4. The developing countries should be entitled provide subsidies (outside the scope of reduction commitments) for domestic production of food products for domestic consumption in order to ensure food security. The developing countries may also be entitled to provide subsidies (outside the scope of reduction commitments) to farmers for the purpose of protecting their livelihood.

5. The developing countries that have been denied the facility of the special safeguard in agriculture until now should have access to it. Developing countries should be allowed to use the "Special Safeguard Mechanism" in respect of all agricultural commodities.
6. A developing country may take SSM for protection against price falls. This cannot be dependent on an import surge as suggested in the July Framework, as domestic price falls are not necessarily triggered by import surges, but, more often than not, are induced by the fall of prices of commodities in the international market. For a price slide, it may be stipulated that a developing country may take SSM if the price of the product falls below a certain percentage of the previous years' average price.
7. There should be expansion of TRQs maintained by developed countries beyond the levels earmarked for specific countries, and it should be available to all countries without discrimination. Various Non-Tariff Barriers imposed by the developed countries also need to be eliminated.
8. Under S&D provisions, the developing countries may provide export subsidy, specially for adoption of higher technology and adaptation to product and process standards as well as to compensate for various handicaps for e.g. in financing, guarantees and insurance, in respect of production and export.

## **NAMA**

The Government's position on NAMA is a cause of serious concern. The "July Framework", to which India is a party, resurrects in NAMA the *Derbez Text* that was rejected by majority of the WTO-member countries including India in Cancun. The key issue in NAMA is that while developing countries protect their markets through higher tariffs, the main mode of protection for the developed countries is through Non-Tariff Barriers (NTBs), particularly through the use of technical barriers. Therefore a further reduction in tariffs as is being negotiated in NAMA will not lead to any greater market access for the developing countries but will certainly ensure greater market access for the developed countries. Cuts in bound tariffs for developing countries would be drastic and make it difficult for countries like India to use tariff protection as a tool for industrial policy in the future.

By submitting a proposal in the middle of April this year along with Argentina and Brazil (ABI proposal), India has agreed to a non-linear Swiss-type formula for

line-by-line tariff reduction for all bound tariff rates. India has also agreed to bind its unbound tariff lines. All these unilateral concessions have been made without any corresponding concession on the part of the developed countries for providing greater market access and easing up on the NTBs. The Government's note tries to provide some justification for this. For instance it is stated that "*The July framework agreement in its Annex B paragraph 4 requires the Negotiating Group to continue its work on a non-linear formula applied on a line-by-line basis...*" (emphasis added). However, according to the very first paragraph of the Annex B of the July Framework agreement: "...this framework contains initial elements for future work on modalities by the Negotiating Group on Market Access. Additional negotiations are required to reach agreement on the specifics of some of the elements. These relate to formula, the issues concerning treatment of unbound tariffs...the flexibilities for developing country participants, the issue of participation in the sectoral tariff component preferences". Hence no point mentioned in the subsequent paragraphs of Annex B (paragraph 4 for instance) should be treated as binding. Instead, going by the opening paragraph, "the specifics of some of the elements" should be treated as open for negotiations. The developing countries have the right to reject any approach mentioned in Annex B, as its essential elements do not have the status of being accepted; they are still to be negotiated.

The Government's note has further claimed that "*The line by line approach is the best method to deal with the problem of tariff peaks, tariff escalations and high tariff; major problems faced by the developing countries vis-à-vis developed countries*" (emphasis added). This is difficult to accept. The problem of tariff peaks, high tariff and tariff escalations has already been raised by developing countries and is recognized in paragraph 2 of the Annex B. This problem can be resolved within the framework of average tariff rate reduction commitments. For instance, the highest tariff rate leviable by any country can be specified as a fixed mark up over the newly calculated tariff average, the mark up being negotiable for each country. Another method to deal with tariff peaks is by introducing suitable tariff caps, with developing countries capping their tariffs by a factor 'x' higher than that for the developed countries. The problem of tariff escalation over HS Chapters can be similarly regulated.

The Government's note states, "*For countries like India, which has a flat tariff binding structure with a small dispersion of individual tariff around the average, no significant advantage is gained by the average based tariff reduction method when compared to the line-by-line tariff reduction method*". This line of thinking has its pitfalls since WTO commitments are not about the current regime internal to the country but the options a sovereign country has in dealing with the international economy. If we undertake a line-by-line reduction of the bound tariffs rates, then in future, the Government will not be left with any option to exercise its right to protect the

economy from a possible fall in the international price of some manufactured goods by increasing tariffs. This is not a theoretical issue. We have recently witnessed a decline in the prices of agricultural products in the global market. There are indications that with increasing capacity being built in the developing countries, we are likely to see a fall in the international prices of some manufactured goods also in the near future. This may eventually lead to a surge of imports in India resulting in de-industrialization. It is therefore important to draw a distinction between autonomous tariff adjustments as a part of our domestic policy and an obligation in the WTO to bind our tariffs. The former process can be modified in accordance with our needs from time to time. But a commitment in the WTO is practically irreversible and will close our option to raise the tariffs beyond their bound level.

The current ABI formula has two proposals; one for bound tariff rates and another for unbound tariff rates. For bound rates the formula has a parameter “B” that is negotiable, the other components being the average tariff rate and the applied rate. The formula for unbound rates has an additional parameter  $x$ , which is the mark-up over the applied rate,  $x$  being negotiable for countries. In order to make some estimates of the extent of tariff reductions that would be required under the ABI formula, let us assume the value of  $x$  to be 2 and take India’s average tariff rate as 44.5%. Here for all unbound rates, majority of which have applied tariff rate of 35%, the value of base rate is 70% (mark-up value,  $x=2$ ). Most of the manufactured items in India have a bound rate of 40%, or in some cases 25%.

BASE RATE	B=0.25	B=0.5	B=1	B=1.5	B=2
25%	7.70%	11.77%	16%	18.19%	19.52%
40%	8.70%	14.30%	21.06%	25.01%	27.60%
70%	9.60%	16.88%	27.20%	34.17%	39.18%

The above table shows different levels of the reduced tariff rates against the current applied rates, for different parametric values of B. If B=1, tariff rates will have to be reduced to 16%, 21.06% and 27.20% for current applied rates of 25%, 40% and 70% respectively. Tariff reductions of this order (which has been calculated under plausible assumptions) are bound to have an adverse impact on domestic industries. The non-linear formula of tariff reduction is detrimental to the interest of the Indian Manufacturing Sector and should be revised. The commitment of line-by-line tariff reduction is also totally unwarranted and should be reconsidered.

NTBs are used as the primary tool for blocking import by all developed countries. Today, 44% of Indian exports to the US and 23% to the EU face NTBs. Technical Barriers to Trade (TBT) and Sanitary and Phyto-sanitary (SPS) measures are the



main NTBs affecting Indian exports. Though recognized as a major problem, no unified system of recognizing NTBs or their abusive usage has been devised till date. The Government should address the issue of NTBs concurrently with that of tariff reduction. There should be no agreement on tariff reductions unless an agreement is reached on how NTBs are to be reined in. Moreover, the issue of sectoral tariff elimination proposed with specifications by the NGMA (Negotiating Group on Market Access) Chairman's Draft but subsequently diluted in the July Agreement, Annex B remains to be an important area of concern. The items originally identified by the Draft were fish and fish items, leather goods, textile and clothing, footwear, stones and precious metals, electronics and electrical goods and motor vehicle parts and components. Although these items have not been specified in the July Agreement, the point regarding sectoral elimination of tariff remains. Although India has export interests in some of the items proposed in the Draft mentioned above, some of them also come under SSI. Attempts to eliminate tariff for these items should be avoided. Over-optimism regarding export potential should not result in overlooking the interests of the domestic SSIs.

The issue of livelihood of innumerable poor people is also associated with NAMA, most importantly those involved in fishing. Any drastic changes in tariff or other rules of market access will have direct consequences for them. The Government must therefore give special consideration to this fact and any deliberation on NAMA must entail special discussions on the impact on employment and livelihood in such sectors.

On the basis of the issues detailed above, the following should be incorporated in the negotiating position on NAMA.

1. The Non-linear ABI formula should be reconsidered.
2. Instead of line-by-line tariff cuts, the Uruguay Round approach of average cuts, together with minimum cuts per tariff line should form the basis of our negotiating position.
3. The problem of tariff peak can be solved by negotiating that the highest tariff rate leviable by any country can be specified as a fixed mark up over the newly calculated tariff average, the mark up being negotiable for each country. Another method to deal with tariff peaks is by introducing suitable tariff caps, with developing countries capping their tariffs by a factor 'x' higher than that for the developed countries.
4. India should reiterate its earlier position of not binding unbound lines. The position against harmonization must be steadfastly adhered to.

5. The issue of NTBs should be addressed concurrently with that of tariff reduction. There should be no agreement on tariff cuts without any agreement on how NTBs are to be reined in.
6. SSIs should be given special consideration before formulating positions on tariff reductions.
7. There should not be any sectoral tariff elimination commitment.
8. India must oppose attempts to convert livelihood issues into trade issues, for e.g. the inclusion of the fishing sector under NAMA.

### **GATS**

The GATS had some built in safeguards wherein it was largely left to the countries to decide whether or not they will make commitments and what those commitments will comprise. The pace of liberalisation under GATS was to be in line with the stage of development of the developing countries. It was recognised that the developing countries would undertake opening up of fewer sectors and the developed countries would give priority to opening up of those sectors where the developing countries have export interest. However, the developed countries are now trying to unravel this basic structure of the GATS in the name of “benchmarking approach”, “a common baseline approach” or more recently “complementary approaches” to negotiations. The thrust of these approaches is to compel the developing countries to open up a critical mass of their markets to the service providers of developed countries. Since the developed countries already have a more liberalized services sector, such an approach essentially implies that the burden of opening up the services market in the current round have to be borne by the developing countries. In other words, if the developed countries get away with this approach, they will extract concessions from developing countries in this round of negotiations virtually “for free”. Instead of nipping this move in the bud, India seems to be approving of it by its silence.

It is surprising in this backdrop that India is adopting a pro-active stance in the GATS negotiations. A very extensive “offer list” covering a large number of sectors and sub-sectors have been submitted, which includes sectors like water, health and education. Although the Government’s note mentions that it “..will calibrate its offer based on how India’s requests have been accommodated by its major trading partners like US and EC”, going by the extensive offers that have been made, there seems to be a willingness to open up several sectors of the economy if some concessions in terms of liberalization in Mode 4 (movement of natural persons) and Mode 1 (cross border supply including BPO) are attained. The Government has itself noted that “*Preliminary analysis of the revised offers tabled by US and EC in*

*the WTO recently shows that EU has marginally improved its offer on Mode-4 specifically in respect of CSS and IP.. However, US has struck to its Uruguay Round commitments of Contractual Services Suppliers (CSS) and Independent Professions (IP)”. In contrast to this India’s offer covers a large number of sectors and sub-sectors including architectural, integrated engineering and urban planning and landscaping services, veterinary services, environmental services, distribution services, construction and related engineering services, tourism services, educational services, telecommunication services, computer related services, life insurance services, banking and financial services, medical and dental services, research and development services, professional services, rental and leasing services, real estate services, etc. Furthermore, for all these sectors and sub-sectors, virtually unrestricted access has been offered for movement of persons. The proposed horizontal regime of market access for natural persons and corporate employees is offered on a “bound” basis. The mismatch between the aggressive and extensive Indian offer of liberalization and the niggardly response of the US and EU in the areas of India’s ‘offensive interest’ cannot be missed.*

India should adopt a cautious approach vis-à-vis making offers and desist from making commitments on so many sub-sectors of the services sector. Moreover, the basic principle of binding India’s autonomous regime in most sectors that has been enunciated in the Government’s note does not qualify for a *‘reasonable offer, which is conditional and can be withdrawn if our satisfaction levels are not met’*. Unlike the autonomous liberalization regime upon which the Government has some degree of control, in the case of a withdrawal of the GATS commitment for certain sub-sectors in the future India would be liable to pay a heavy compensation to the Member countries. It would introduce an element of irreversibility and compromise the freedom of the Government to protect or regulate those sectors in future. India’s offer list also does not reflect the concerns related to domestic regulation of FDI. The only limitation that India has specified as a horizontal commitment (applicable to all sectors included in a schedule) is that in case of joint ventures/collaboration with PSUs, preference in access will be given to foreign service providers who offer the best terms for transfer of technology. The 51% equity cap on FDI that has been specified is too high for several sub-sectors and needs to be urgently reviewed.

Opening up of basic sectors like health and education and trading-off deregulation in highly sensitive areas like banking and financial services in order to ensure freer movement of skilled personnel to the developed countries under Mode 4 does not seem to be justified. Even the overoptimistic assessments of 20 million direct jobs through remote services (Mode 1) and import of customers (Mode 2) or annual revenue gains between \$150 billion and \$200 billion from Mode 4 liberalization, quoted in the Government’s note, do not justify the opening up of such sensitive sectors in return. India’s software and service outsourcing industry seems to be

keen on including these services under a WTO agreement. While India is likely to gain from offshore outsourcing in terms of employment and foreign exchange it is myopic to cement these gains through a GATS framework. Prudence lies in retaining regulatory space over these emerging and fast changing sectors and not rush into making binding commitments.

India's offer list should be thoroughly revised. The offers made by India appear to be driven by the requests from developed countries rather than an application of the need based criteria. We should open up only those sectors which will help us to generate employment and serve other national interests. Before tabling the offer on any sector there should be extensive consultations with all the domestic stakeholders. Our domestic needs vis-à-vis skilled professionals in different sectors also have to be assessed. It is not clear whether sufficiently broad based consultations were held or such assessments made by the Government. Besides the areas like legal services, retail and auditing, which the Government has itself decided to keep out of the revised offer, other sensitive areas like water, health and education should also be kept out of the offer list. Moreover, there should not be any dilution of India's defensive position in Agriculture or NAMA in order to get concessions on 'offensive interests' in Mode 1 and Mode 4 liberalization.

The following suggestions are being made for incorporation into the negotiating position on the GATS:

1. India must resolutely oppose the moves of developed countries to introduce new concepts such as "benchmarking" "baseline-" or "complementary approaches" into the GATS seeking to destroy the built- in Special and Differential Treatment in favour of developing countries. As other developing countries are opposed to these moves, our task of pre-empting this attempted sabotage of GATS should not prove difficult.

2. Withdraw the offers submitted with respect to the commitments for market access for basic services like water, health and education.

3. Revise the offer list in view of the response of the US and EU. Movement on the offer process should be preceded by extensive domestic consultation with the stakeholders of every sub-sector which is being included in the offer.

4. Review upwards the FDI cap of 51% specified in the offer list. Sensitive sectors which presently have FDI caps below 51% in India should be taken out of the offer list.

5. No dilution of defensive position on Agriculture or NAMA in order to get concessions on 'offensive interests' in Mode 1 and Mode 4 liberalization.

## TRIPS

The Doha Ministerial Conference held in November 2001 stipulated that the following issues of Trade Related Aspects of the Intellectual Property Rights (TRIPS) would be negotiated and reviewed. These issues in the relevant paragraphs are as follows:

1. Implementation of Article 23(4) of TRIPS: Establishment of a multilateral system of notification and registration of geographical indications for wines, and spirits and establishment of protection of geographical indications provided in Article 23 to products other than wines and spirits;
2. Review of Article 27.3 (b) relating to patentability of micro-organisms and non-biological and micro-biological processes;
3. Review of implementation of TRIPS Agreement under Article 71.1 and other relevant new development raised by the members pursuant to this Article;
4. To examine *inter alia* the relationship between the TRIPS Agreement and the Convention on Biological Diversity and protection of traditional knowledge and folklore;
5. To examine relationship between Trade and Transfer of Technology and increased flows of technology to the developing countries.

The Doha Ministerial Declaration under Para 19 also stipulated that in undertaking the Work Programme relating to TRIPS Agreement 'the TRIPS Council shall be guided by the objectives and principles set out in Articles 7 and 8 of TRIPS Agreement and shall take fully into account the development dimensions' arising from the mandate of the Work Programme. Para 12 point (b) of the Declaration also provides that 'the other outstanding implementation issues shall be addressed as a matter of priority by the relevant WTO bodies, which shall report to the Trade Negotiations Committee by the end of 2002 for appropriate action'.

It is observed from the deliberations in the General Council during its meetings on July 27 and 29, 2005 that progress in regard to the negotiations on TRIPS related issues have been rather slow or incomplete. The fact remains that the developed countries seem to be disinterested in the TRIPS related issues. The developing countries have to take a pro-active approach to settle these issues and India should play a leading role in this regard. Some suggestions on the TRIPS related issues, keeping in view stipulations in Para 19 of Declaration are as follows:

Protection of Geographical indications: Protection under geographical indications has to be extended to agriculture, natural goods, manufactured goods or any

goods of handicraft or goods of industry or food stuff. It is important to prevent any unauthorized persons for misusing geographical indications relevant to our country. We should operationalise our 1999 Act on Geographical Indications of Goods (Registration and Protection) and simultaneously expedite negotiations in this area in the WTO.

Patentability of micro-organisms and non-biological and micro-biological processes: Patenting of micro-organisms and non-biological and micro-biological processes have tremendous implications both for agriculture and industrial sectors. Precisely because Art.27.3 (b) of TRIPS was such a contentious provision, a mandatory review was provided for in the TRIPS agreement. In the ongoing review of this provision India should argue for exclusion of these subject matter from patentability. Micro-organisms occur in nature and as such their discoveries cannot be treated as inventions. Meanwhile we should take steps to rectify the provision made in this respect in our patent laws about their exclusion.

Review of TRIPS: Art.71 of TRIPS says: *“The Council shall, having regard to the experience gained in its implementation, review it two years after that date, and at identical intervals thereafter. The Council may also undertake reviews in the light of any relevant new developments which might warrant modification or amendment of this Agreement”*. There is today growing evidence globally that the TRIPS agreement jeopardizes access to medicines and has a detrimental effect on the dissemination of scientific knowledge in diverse sectors such as software and biotechnology. Keeping this in mind India should press for a review of TRIPS, not in the narrow sense that developed countries would want (in terms of the actual translation of its provisions in the country laws of different countries) but in the broader context of reviewing its impact and pressing for changes in the Agreement itself. (A detailed proposal for the Review of TRIPS is provided in the Annexure).

Relationship between the TRIPS Agreement and Convention on Biological Diversity: There are three issues which have to be negotiated in this respect. They are: 1. Access to biological resources or traditional knowledge; 2. Prior informed consent from the provider of these resources or knowledge; and 3. Benefit sharing from their commercial use accruing from the patented product. These issues should be pursued in the WTO. It is also important that our patent laws and laws of the member countries of the Biodiversity Convention should stipulate these provisions. This will help in resolving the matter at the WTO expeditiously.

General Public License (GPL) in Software and Biotechnology: In order to reduce the concentration of IPR in the hands of the large global MNCs, the concepts of Open Software, General Public Licenses and Biological Open Source Licenses have arisen. Developing countries like India need to promote these in order to encourage public domain science. A major hurdle in the development of public

domain knowledge is that softwares put in the public domain are being used to do work which is being copyrighted. The GPL license can provide legal protection and stop such privatisation of public domain software. A similar initiative has taken place in biotechnology where initiatives have been taken to fashion in patenting, a similar licensing concept. Here too, if a patent is put into public domain, and is then incorporated in a further innovation, then the resulting innovation should also be in public domain.

**Trade and Transfer of Technology:** Article 7 of TRIPS Agreement stipulates that 'the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations'. In view of the above unambiguous stipulation in Article 7 the matter is for the member countries to provide in their patent laws for transfer of technology rather than negotiating the issue, which is otherwise quite clear.

On the basis of the understanding elaborated above, the following suggestions are made for the consideration of the Government in the area of TRIPS:

- 1.** Expedite negotiations on Protection of Geographical Indicators in the WTO, in order to extend it to agriculture, natural goods, manufactured goods or any goods of handicraft or goods of industry or food stuff on the lines elaborated earlier.
- 2.** In the ongoing review of the Patentability of micro-organisms and non-biological and micro-biological processes, India should argue for the exclusion of these subject matter from patentability.
- 3.** India should press for a review of TRIPS in the broader context of reviewing its impact and pressing for changes in the Agreement itself on the lines elaborated in the Annexure.
- 4.** The issues of access to biological resources, prior informed consent and benefit sharing should be pursued in the WTO in line with the CBD.
- 5.** India should propose mechanisms to promote public domain science. Specifically, General Public License in software & bio-technology needs to be argued for on the basis of the principle that all inventions and software that make use of knowledge in the public domain under open licenses cannot be copyrighted or patented and the laws of all countries should reflect this protection.

6. The patent law of each country should provide for technology transfer promptly without further negotiations.
7. The Motta Text imposes severe impediment to the provision of Parallel Import by bringing in strict conditionalities. These should be interpreted as barriers to trade and done away with.

### **Conclusion**

The negotiating positions adopted by the Government in the Hong Kong Ministerial in December 2005 and the outcome of these negotiations will have far-reaching and even irreversible, adverse consequences for the country's economy and polity, particularly for the peasantry and working classes. The Uruguay Round commitments were made in a non-transparent manner. The fait accompli was sought to be justified in the initial years in terms of highly exaggerated estimates of "gains" computed by biased "experts". Now it is an acknowledged fact that developing countries were short-changed in that round and it turned out to be a severely adverse bargain. We should learn from that bitter experience. It is thus imperative that the positions that the Government proposes to pursue at the Hong Kong Ministerial are set out in a White Paper and discussed in the Parliament during the Winter session. It is important that an informed debate takes place on the floor of Parliament and no commitment is made without a national consensus to back it.



## **Annexure**

India should press for a comprehensive Review of the TRIPS which should include the following:

- 1.** The Doha Declaration on TRIPS Agreement and Public Health clarifies that “the (TRIPS) Agreement can and should be interpreted and implemented in a manner supportive of WTO Members’ right to protect public health and, in particular, to promote access to medicines for all”. It is not possible to implement this provision to protect the public health of our people where a large population is suffering from HIV/AIDS, tuberculosis, malaria etc, as patent protection has to be provided according to Article 27 for ‘any invention in all fields of technology’. This aspect needs to be reviewed to enable member countries to exclude patenting of drugs, which are needed for use in critical diseases relevant to their country. Further the definition of ‘invention’ for patentability should be applicable only to ‘basic invention’ so that the scope of patentability is applied to only real research based inventions.
- 2.** Article 27 also provides that the imports of patented products by the patent holders will enjoy without discrimination the same right as are applicable to the locally produced patented products. This stipulation absolves the patent holder to manufacture his patented product even in such countries where large demands would generate because of the size of the country. This aspect requires to be reviewed.
- 3.** Article 31 of the TRIPS in sub-article (h) provides that the right holder shall be paid adequate remuneration taking into account the economic value of the authorization (compulsory licence). This kind of stipulation can raise disputes between the patent holder and the licensee. A ceiling of 4% on royalty payment in respect of all compulsory licence should be taken up as a review issue.
- 4.** Article 33 provides for a term of twenty years for the patent holder. This term under the new circumstances when the products are fast changing in less than 4-5 years appears to be too long. The interest of patent holder may diminish in a much shorter period but the compulsory licence holder will be under obligation to pay royalty right upto the end of the patent term. This provision needs to be rectified with the following suggested stipulation: “The term of protection available shall not end before the expiration of period of twenty

years counted from the filing date or ten years from the date of grant of patent whichever is shorter”.

5. TRIPS must provide mechanisms to promote public domain science. Specifically, General Public License in software & bio-technology needs to be provided for on the basis of the principle that all inventions and software that make use of knowledge in the public domain under open licenses cannot be copyrighted or patented and the laws of all countries should reflect this protection.