

**Trade-Related Agenda, Development and Equity (TRADE) Analysis Series**

**THE AGENDA FOR TRANSFER OF TECHNOLOGY:  
THE WORKING GROUP OF THE WTO ON TRADE  
AND TRANSFER OF TECHNOLOGY**

**SYNOPSIS**

This TRADE Analysis examines the current status of the Working Group, revisit the expectations of developing countries from the Working Group, and options and strategies to raise the discussion in the Working Group to a level where there is sufficient basis for moving to the consideration of substantive recommendations in the lead-up to Sixth Ministerial Conference.

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OF THE WTO ON TRADE AND TRANSFER OF TECHNOLOGY**

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## THE AGENDA FOR TRANSFER OF TECHNOLOGY: THE WORKING GROUP OF THE WTO ON TRADE AND TRANSFER OF TECHNOLOGY

### I. INTRODUCTION

1. Technology transfer is a mechanism for the shifting of information across borders and its effective diffusion into recipient economies, thus involving numerous complex processes, ranging from innovation and international marketing of technology to its absorption and imitation. The process of technology transfer includes the technology itself, trade terms and intellectual property rights, and policies of technology exporting countries, investment, and competition issues that can affect the terms of access to knowledge.<sup>1</sup>

2. The aim of the Analysis is to shed light on the current status of the negotiation process on transfer of technology in the WTO and specifically to address the work of the Working Group on Trade and Transfer of Technology (Working Group). The Note will summarise the current status of technology transfer in different fora, including the work under WIPO<sup>2</sup> UNCTAD<sup>3</sup> and UNIDO.<sup>4</sup> Since the Working Group is the focal point of discussion on technology transfer at the multilateral level with participation by other organizations and member states as well, the note examines the current status of the Working Group on Trade and Transfer of Technology, addressing the issues of why it was set up, the nature of its work and the status of the agenda for technology transfer in the WTO. Finally the paper outlines the possible steps in the upcoming Ministerial Conference and what should be achieved by the end of the Doha Round.

### II. THE CURRENT STAUTS OF DISCUSSIONS ON TECHNOLOGY TRANSFER

3. The Task force on Science, Technology, and Innovation of the UN Millennium Project made a key finding that international rule-making and standard setting institutions, including the WTO, have established a wide range of rules that affect the capacity of developing countries to build domestic scientific and technological capabilities and recommended that such rule-making and standard-setting activities need to be reviewed to determine how they could be adjusted to better meet the needs of developing countries.<sup>5</sup>

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<sup>1</sup> Maskus, Keith E. (2004), 'Encouraging International Technology Transfer,' *UNCTAD-ICTSD Project on IPRs and Sustainable Development, Issue Paper No. 7*, available at <http://www.iprsonline.org/unctadictsd/projectoutputs.htm> last visited on 13 October 2005, p. 1.

<sup>2</sup> World Intellectual Property Organisation.

<sup>3</sup> United Nations Conference on Trade and Development.

<sup>4</sup> United Nations Industrial Development Organisation.

<sup>5</sup> Juma, Calestous and Lee Yee-Cheong (2005), 'Innovation: "Applying Knowledge in Development,"', *Task Force on Science, Technology, and Innovation of the UN Millennium Project*, Earthscan, London, available at, [http://bcsia.ksg.harvard.edu/publication.cfm?ctype=book&item\\_id=390](http://bcsia.ksg.harvard.edu/publication.cfm?ctype=book&item_id=390), last visited on 13 October 2005, p.11.

4. The report of the task force pointed out that one area in which international organisations play a crucial role is in setting norms and standards, providing guidance and coordination and providing scientific and technical advice.<sup>6</sup> As a result, it is pertinent to point out the role played by multilateral organisations in norm-setting and implementation for the promotion of technology transfer that assist developing countries in implementing development objectives.

## II.1. Transfer of Technology in WIPO, UNCTAD and UNIDO

5. The issue of technology transfer at WIPO has been treated like a subsidiary issue to the work of WIPO even though it is part of the mandate of the organisation. WIPO when it became a UN specialized agency in 1974 under the agreement with the UN, assumed the obligation to take appropriate action to promote creative intellectual activity and facilitate the transfer of technology to developing countries, in order to accelerate economic, social and cultural development.<sup>7</sup> WIPO's work has, however, relegated its work on technology transfer to two narrow technology specific work areas under the 'Division for Infrastructure Services and Innovation Program.'

6. The first work area focuses on Small and Medium Enterprises and the second on a training program called the WIPO University Initiative which involves the training of Intellectual Property coordinators from developing countries to be better equipped in exploiting R&D and decision making in the area of licensing and technology transfer.

7. The WIPO Development Agenda raises the development dimension that should be reflected in the works of WIPO, transfer of technology and the impacts of intellectual property rights on transfer of technology including access to knowledge. This proposal has been the most recent introduction and robustly advances development needs in relation to technology transfer as a specific issue area to be examined and addressed in the form of a Treaty on Access to Knowledge and Technology.<sup>8</sup> As a result, though technology transfer has been a subsidiary issue in the work program of WIPO, the present development agenda created the opportunity for WIPO to engage in more pro-active role in its cross-cutting norm-setting activities for the promotion of technology transfer to developing countries. The agenda is broader than and different from the Working Group on Trade and Technology Transfer in the WTO, as the latter

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<sup>6</sup> *Ibid.*, 160.

<sup>7</sup> WIPO, Agreement Between the United Nations and the World Intellectual Property Organisation, 1974, Article 1, available at <http://www.wipo.int/treaties/en/agreement/>, last visited on 12 October 2005.

<sup>8</sup> See WIPO, Proposal to Establish a Development Agenda for WIPO: An elaboration of issues Raised in Document WO/GA/31/11, Communication from Groups of Friends of Development, IIM/1/4, April 6, 2004.

focuses on provisions of WTO Agreements, implementation and review within the structure of its mandate and that of the WTO.

8. UNCTAD has a historical tie to the topic of technology transfer at the multilateral level in that it was the first forum to address this issue and out of its early work drafted the International Code of Conduct on Technology Transfer which failed to be adopted due to disagreements amongst parties on the text and substantive issues. The draft code of conduct provides a legal mechanism to regulate anti-competitive practices of multinationals in the area of technology transfer.

9. UNCTAD has continued to be at the forefront at the multilateral level through an Expert meeting on Technology Transfer and publications on technology Transfer (in the Doha Round Briefing Series and other publications) and the running of the website on Science and Technology Diplomatic Initiative as an electronic gateway to build negotiating capacity for diplomats, scientists and policy makers. The Commission on Science and Technology was created through the ECOSOC<sup>9</sup> and the UNCTAD has been responsible for substantive servicing of the Commission. UNCTAD also has a Commission on Investment, Technology and Related Financial issues which has engaged in identifying best practices for transfer of technology and capacity building. UNCTAD has observer status in the WTO Working Group on Trade and Transfer of Technology and has written reports and papers to clarify and help address issues of interest for members of the Working Group.<sup>10</sup>

10. UNIDO has a program on development, investment and technology transfer. UNIDO's work in technology transfer is more practical in terms of setting up and upgrading of investment promotion and improving capacity of local business by negotiating and obtaining improved terms for better conditions transfer. UNIDO facilitates technological partnership opportunities to attractive industrial sectors and prepares assessments of technological enterprises to forge international industrial partnerships. UNIDO also prepares publications on technology transfer. As a result, both UNCTAD and UNIDO are playing their role on technology transfer dealing with practical issues under the constraints of multilateral norms that do not adequately support technology transfer to developing countries.<sup>11</sup> Other UN agencies have different roles and functions in relation to innovation, science and technology, relevant for discussion on technology transfer.<sup>12</sup>

<sup>9</sup> United Nations - Economic and Social Council.

<sup>10</sup> See WTO. Working Group on Trade and Transfer of Technology - First Session - Note on the Meeting of 16 April 2002, Doc, WT/WGTTT/M/1, available at [http://www.wto.org/english/tratop\\_e/devel\\_e/dev\\_wkgrp\\_trade\\_transfer\\_technology\\_e.htm](http://www.wto.org/english/tratop_e/devel_e/dev_wkgrp_trade_transfer_technology_e.htm), (hereinafter all documents of the Working Group are indicated by their number and title and they are available in the same webpage indicated here)

<sup>11</sup> See: <http://www.unido.org/>

<sup>12</sup> See, Musungu, Sisule (2005) Rethinking innovation, development and intellectual property in the UN: WIPO and beyond, Quakers International Affairs Programme, Ottawa, available at <http://www.qiap.ca/pages/publications.html>.

## II.2. Technology transfer in the WTO: The Provisions of the Agreements

**11.** The WTO plays an important role on norm setting that has direct bearing on transfer of technology. Whereas the norm setting in WIPO could have a focus on technology transfer under multilateral intellectual property regimes, the norm setting in WTO encompasses various agreements whose subject matter extends beyond intellectual property. Transfer of Technology is a legal concept reflected in several WTO Agreements, though it had not warranted attention in its own right until the creation of the Working Group on Trade and Transfer of Technology through the Doha Mandate.

**12.** In a submission to the Working Group on Trade and Transfer of Technology developing countries identified provisions relating to transfer of technology, with the aim of assessing the implementation of WTO provisions relating to transfer of technology and identifying appropriate steps to increase transfer of technology flows to developing countries.<sup>13</sup> The provisions of WTO Agreements relating to transfer of technology, however, do not contribute to effective transfer of technology and in some instances do not pertain to technology transfer between developing and developed countries. The provisions identified as relevant for technology transfer are:

- Articles 7,8,40 and 66 of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)
- Article 9 of the Agreement on the Application of Sanitary and Phytosanitary Measures:
- Article 11 of the Agreement on Technical Barriers to Trade: Preamble,
- Article IV, XIX of the General Agreement on Trade and Services:
- Article 8.2 of the Agreement on Subsidies and Countervailing Measures.

**13.** Article 8.2 of the Agreement on Subsidies and Countervailing Measures establishes disciplines on non-actionable subsidies and sets out the criteria and standard for subsidizing the relevant area of research and development<sup>14</sup>. This Article has entirely no effect on transfer of technology as a whole since most developing countries do not possess the research capability like the developed countries. The Article regulates internal subsidies and does not involve cross-border activity, thus missing part of the equation which is *transfer*.

**14.** Under Article 9 of the Agreement on Sanitary and Phytosanitary Measures the WTO members have agreed to facilitate the provision of technical assistance to developing countries, either bilaterally or through the appropriate international organisations in the areas of processing technologies, research and infrastructure, technical expertise, training and equipment among others. The Article does not lack specificity to foster technology transfer in complying with sanitary and phytosanitary measures. The article is a more than a best endeavour

<sup>13</sup> See WTO Working Group on Trade and Transfer of Technology (Oct.2002), Provisions relating to transfer of technology in WTO Agreements, WT/WGTTT/3/Rev.1.

<sup>14</sup> See WTO, Agreement on Subsidies and Countervailing Measures, Article 8.2.

clause, since it conveys the agreement of member states to address the problem of crowding out of those countries least capable to implement the provisions of the agreement. The Agreement is being used for protectionist purposes. The current international standards are set by developed countries within their borders and are usually standards that developing countries cannot comply with. The setting of international standards can be obscure and difficult to assess for developing country firms which is exasperated by the difficulties of effective participation of developing countries in standard setting organizations such as the ISO.

**15.** Compliance with international standards requires use of technology and knowledge of product specifications which are not available in developing countries e.g., ecological packaging for fish and types of freezing requirements. The necessity for compliance usually leads to an increase in production costs especially if chemicals used in processing are not available within developing country borders which compounds the issue of access to technology to comply with such standards. In fact to define what a legitimate standard is could be difficult because that varies depending on the country and the region. As a result, the identification of Article 9 of the Agreement on Sanitary and Phytosanitary Measures in the Working Group on Trade and Transfer of Technology is one of the most important elements of technology transfer in the WTO. The provision needs to be supported by monitoring mechanisms, including reporting and trade policy review of the developed countries, consultation procedures in cases where changes in standards has adverse effect on the trade of developing countries or where the scientific basis of the new standard is itself disputed, and mandatory transfer of technologies necessary to meet the standard requirements which has adverse effect on the trade of developing countries. The other important dimension of the Article is in assisting developing countries to evaluate the safety and standard requirements of products imported. As a result of institutional and professional incapacity, developing countries may not have the technology to assess the quality of imported goods. The Article can be reviewed to demand mandatory transfer of product safety evaluation reports-whether the product is qualified for sale domestically in the developed countries.

**16.** Similarly, Article 11 of the Agreement on Technical Barriers relates specifically to imparting of know-how which is the crux of technology transfer. However, it remains a best endeavour clause and has to be reinforced to make it effective by review in the terms indicated above.

**17.** The General Agreement on Trade in Services establishes four modes of supply, out of which commercial presence and the movement of natural persons intersect with channels of technology transfer.<sup>15</sup> Trade in knowledge would also be applicable to the two other modes of supply, namely, cross border supply and consumption abroad. This intersection and inextricability of modes and

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<sup>15</sup> See Maskus, Keith, Saggi, Kamil and Hoekman Bernard, Transfer of Technology to Developing Countries: Unilateral and Multilateral Policy Options, World Bank Policy Research Working Paper 3332, June 2004. "The paper identifies four major channels of international transfer of technology: trade in products, trade in knowledge, direct foreign investment and international and international movement of people."

channels of international technology transfer in the area of services provides a general view of the impact of GATS rules on the issue of technology transfer.

**18.** Due to the status in service negotiations a relevant aspect of effective transfer of technology is the placing requirements. Article XIX allows developing countries to liberalise more gradually and attaches conditions to its liberalisation commitments to achieve the objectives under Article IV. Government measures on the basis of Article I.3 can ensure that standards that require the use of domestic work would foster technology transfer. Measures could also be taken for economic policy objectives. For example, a country needing to increase or ensure space for local suppliers may apply conditions to limit the number of foreign entrants.

**19.** To promote technology or knowledge spill-over from commercial presence of a Foreign Service supplier a country may apply conditions requiring local content or technology transfer. To safeguard fragile sectors from foreign takeovers a country may condition joint venture requirements. Venezuela utilised these kinds of measures to strengthen its domestic service suppliers in energy related services sector.<sup>16</sup> However pursuing these conditions especially in other service sectors of which the subject matter would be of interest to multinational enterprises (like in the area of telecommunications) could be problematic, especially if we examine WTO precedent set in the *Telmex Case*.<sup>17</sup>

**20.** WTO precedent in relation to universal service exception as part of objectives in favour of developing country Members has been interpreted by the WTO Panel rulings in a manner which would impede the effectiveness of Article IV. Mexico argued that commitments made by developing country members have to be interpreted in the light of paragraph 5 of the preamble to the GATS, and Article IV which recognize the need to strengthen domestic services capacity and efficiency and competitiveness. These provisions describe the types of commitments that members should make with respect to developing country members; they do not provide an interpretation of commitments. The US detailed how limited these exceptions are due to numerous Reference Paper restrictions on their use, particularly the requirement that universal service regulations must be “no more burdensome than necessary” and since other countries follow policies different from Mexico in the US view Mexico’s policies as not ‘necessary’.<sup>18</sup>

**21.** The Panel decision give the impression that developing country objectives through exceptions such as under Article IV are not comfortably positioned with their commitments which are designed to limit the regulatory power of WTO Members in cases involving sectoral reference papers. In effect, therefore, the necessary conditions for technology transfer in services sector where the modes of technology transfer intersect with the modes of service, have diminished and incapacitated the utility of articles such as Article IV. Thus

<sup>16</sup> Borrero, Elbey (2005), ‘GATS Conditions to Achieve Developing Country Policy Objectives,’ *South Centre T.R.A.D.E Occasional Papers*, 13, para.55.

<sup>17</sup> *Ibid.*, para.49.

<sup>18</sup> WTO, Report of the Panel (2004) ‘*Mexico-Measures Affecting Telecommunications Services*’, WT/L/452, para.7.303-333.



providing a situation where developing countries are stuck in a vicious cycle where technology is not necessarily transferred into their market in a situation where access is provided to their service markets including the sacrifice of telecommunications service to the public and development of infrastructure- which is less lucrative- but part of development objectives can be deemed unnecessary, anti-competitive and unreasonable.

**22.** Article XXV of GATS which is currently on request as part of the examination of the Working Group on Trade and Transfer of Technology involves technical capacity building, which is, however, narrowed to technical assistance from the secretariat at the multilateral level, thus not related to the subject matter of technology transfer.

**23.** The mode-4 supply of services is also an important tool of technology transfer. Employment, learning and participation in research and development have been the traditional mode of access, transfer and diffusion of technology. The negotiation under GATS can be a success if it can achieve in commitment on part of developed countries to allow movement of natural persons from developing countries for service provision.<sup>19</sup>

**24.** The Agreement on TRIPS has been the most contentious of all the agreements in relation to technology transfer. Several provisions of the TRIPS refer to transfer of technology and other aspects regulated by the agreement such as disclosure and compulsory licensing with implications for transfer of technology.<sup>20</sup> Article 7 of the Agreement states that the protection and enforcement of intellectual property rights should contribute to the promotion of technological development and innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological and in a manner conducive to social and economic welfare.<sup>21</sup> When Article 7 is viewed as an operative provision it seems to indicate that intellectual property rights do not necessarily promote innovation and dissemination of transfer of technology, hence, members must act accordingly to implement their obligations under the agreement in a way that effectively contributes to those objectives.

**25.** Article 8 of TRIPS provides for measures consistent with the agreement needed to prevent the abuse of intellectual property rights or the resort to practices that which unreasonably restrain trade or adversely affect the international transfer of technology. The limitation to Article 8 measures is that they must be consistent with provisions of the agreement. The extent to which

<sup>19</sup> See, Maskus, cited above on n15.

<sup>20</sup> See Correa, Carlos, "Can TRIPS Agreement foster technology transfer to developing countries." (Draft of the paper was submitted to a Conference at Duke University March 2003). The extended analyses on clauses that may affect aspects of technology transfer are addressed in this paper in terms of compulsory licensing- in relation to Refusal to deal. Developing countries may adapt the 'access to essential facilities' doctrine as to include cases in which patent protection impedes competition, particularly in key specific areas, such as medicines. A further analysis is provided when compulsory licensing will be ineffective for transfer of technology to developing countries due to weak entrepreneurial capabilities of potential recipients, or where states are more vulnerable to political pressures.

<sup>21</sup> See TRIPS Agreement. Article 7

such policies may be adopted successfully remains unclear since the technology owner, in principle, enjoy the right to refuse to transfer their technologies.<sup>22</sup>

26. Article 40 of the TRIPS Agreement deals with licensing practices or conditions pertaining to intellectual property rights which may impede the transfer and dissemination of technology and have an adverse effect on the relevant market. The Article also established consultation procedures between members to address practices that are in violation of the members' laws and regulations on the subject matter of this section and wish to secure compliance with such legislation, without prejudice to any action under the law and to the full freedom of an ultimate decision of either member. The article further safeguards confidentiality on the matter in question. The article sets a limitation that the assessment has to be on a case by case basis. The consultation system has no record of actual use and has not afforded any assistance to developing countries in dealing with restrictive practices in transfer of technology transactions.<sup>23</sup> Hence, it is pertinent to review the article so as to make it more effective.

27. Article 66 of the TRIPS Agreement is the other relevant and specific provision on technology transfer that deals with least developed countries. However, the report on the implementation of the article by developed countries in this context has shown varied levels of compliance. Most of the reports by the developed countries have failed to meet the criteria established by the decision. The incentives regimes described in developed country reports are rarely specific to LDC's and are mostly a citation of general development assistance programmes rather than those generally provided to developing countries in technological terms.<sup>24</sup> The US report does not outline significant statistical or other information provided on the functioning in practice of the incentives regimes or the use of incentives to encourage technology transfer by eligible enterprises.<sup>25</sup> Based on the reports it can be concluded that developed countries have not established mechanism for the implementation of the requirements of Article 66 of the TRIPS.

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<sup>22</sup> Correa, cited above at n20.

<sup>23</sup> Ibid. The subject matter under Article 40 historically contributed to the breakdown of negotiations on the proposed International Code of Conduct on Transfer of Technology under UNCTAD due to the diverging views of developed and developing countries. The consultation system set up through Article 40.3 has no record of actual use. ”

<sup>24</sup> See, for example, the European Communities, Council for Trade-Related Aspects of Intellectual Property Rights - Report on the Implementation of Article 66.2 of the TRIPS Agreement- Supplement, WTO. Doc.,IP/C/W/412/Add.7 (2004), U.S., IP/C/W/412/Add.3 (2003), Norway, IP/C/W/412/Add.4 (2003).

<sup>25</sup> Id. IP/C/W/412 Add.3 (12 Nov.2003).

### II.3. Review of the activities of the Working Group on Trade and Transfer of Technology

28. The Working Group was established by the Doha Ministerial Declaration to examine, under the auspices of the General Council, the relationship between trade and transfer of technology, and make any possible recommendations on steps that might be taken within the mandate of the WTO to increase flows of technology to developing countries.<sup>26</sup>

29. There have been two standing agenda items in the most recent minutes from the Working Group, "The analysis of the Relationship between trade and transfer of technology," and, "Any Possible Recommendations on Steps that might be taken to within the mandate of the WTO to increase flows of technology to Developing Countries." A lot of analytical work was undertaken on the relationship between trade and transfer of technology with submissions from different Member states and information from UNCTAD's relevant work area. There is a stalemate in formulating practical recommendations as to what can be achieved within the WTO and reporting that to the General Council.

30. One of the key concerns expressed during discussions of the Working Group refers to the linkage between intellectual property and technology transfer, as noted for example in the Report of the Working Group on Trade and Transfer of Technology to the General Council (WT/WGTTT/5), of July 14, 2003. One of the issues raised involves the development impacts of the patenting of technologies developed out of public sector funding.<sup>27</sup> The submissions by the European Communities (EC) and a group of developing countries including Cuba, India, Kenya, and Pakistan, were identified as potential starting points for discussions. The EC submission suggested focusing on developing a common understanding of the definition of technology transfer and of the conditions under which the various channels for transfer of technology are most effective. The submission focuses on expertise in particular technology transfer channels including foreign direct investment, licensing and franchising. The submission proposes consideration of both home and host countries' factors, including domestic policies, structural problems and business practices.

31. The submission by developing countries had proposed several agendas aimed at undertaking meaningful analysis of the technology transfer issues in the WTO.<sup>28</sup> The first recommendation of the developing countries submission suggests that provisions contained in various WTO Agreements relating to technology transfer should be examined with a view to make them operational and meaningful. The second proposes an analysis of how to mitigate the negative effects of provisions that may have the effect of hindering transfer of technology

<sup>26</sup> See WTO, Ministerial Declaration, Forth Ministerial Conference, Doha, 2001, Para 37.

<sup>27</sup> See South Centre/CIEL, *IP Quarterly*: First Quarter 2004, available at <http://www.southcentre.org/info/sccielipquarterly/index.htm>, last visited on 13 October 2005, p.6.

<sup>28</sup> See WTO (2003), The working group on trade and transfer of technology Communication from Cuba, India, Indonesia, Kenya, Pakistan, Tanzania and Zimbabwe WT/WGTTT/W/6.

to developing countries. In this context, the submission made by a group of developing countries WT/WGTTT/3 was highlighted.<sup>29</sup>

## **II.4. Options and Strategies to move forward the current discussion in the Working Group on Trade and Transfer of Technology**

### *II.4.1. Challenges of the Working Group on Trade and Transfer of Technology*

**32.** One of the presentations to the Working Group, by UNU/INTECH identified transfer of technology as one of the key determinants for development. In the presentation, it is clearly outlined that international flows of technology have much to contribute to the process of learning and innovation and that these flows are in three principal forms: embodied technology, tacit knowledge and codified knowledge. The presentation outlines how each of these is currently governed in part, by international regimes negotiated within the WTO.<sup>30</sup> The presentation further outlines how there are serious disincentives to learning and innovation through the trading, intellectual property and investment systems these including WTO regimes such as TRIMS, GATS and TRIPS. The current debate has stemmed from the previous agenda item and recently on the need to examine provisions in other WTO Agreements relating to technology transfer and whether they have the effect of hindering technology transfer. Members have disagreed on several areas.<sup>31</sup>

- Expressed reservations on whether or not technology transfer was a key determinant for development.
- Whether the Working Group had a mandate to make the provisions related to technology transfer operational and effective.
- The Working Group was not a negotiating body and therefore not the appropriate forum in which existing provisions relating to transfer of technology could be amended.
- Implications of the relevant provisions should be discussed in the relevant WTO bodies.
- Caution in presumption that provisions in some WTO Agreements actually hindered technology transfer.

**33.** The deadlock on several of the issues of technology transfer has undermined the work of the Working Group and further diverts attention from

<sup>29</sup> IP Quarterly (1<sup>st</sup> quarter 2004), cited above at n.28.

<sup>30</sup> See WTO (2002), Working Group on Trade and Transfer of Technology - Second Session - Note on the Meeting of 11 June 2002, WT/WGTTT/M/2, Annex.II.

<sup>31</sup> See WTO (2004), Working Group on Trade and Transfer of Technology - Ninth Session - Note on the Meeting of 19 July 2004, WT/WGTTT/M/9.

the fact that technology transfer is a key determinant for development and that some WTO Agreements actually hinder technology transfer while other relevant provisions remain to be operationalised.

**34.** The Working Group has faced serious setbacks to its function by arguments against its mandate to make a review of provision related to transfer of technology. The review of the WTO provisions is an integral part of the current mandate of the Working Group to facilitate improvement of transfer of technology flows to developing countries.<sup>32</sup> The Working Group has failed to agree on basic premises as mentioned above and to follow up on analytical work as regards making the necessary practical policy recommendations to the General Council on how to foster transfer of technology to developing countries. However, a number of developing country Members reiterated their interest in continuing discussing these recommendations at the next meeting.<sup>33</sup>

**35.** The root of the crisis faced by the Working Group is the approaches of developed countries that favour pursuit of mere discussions without any substantive outcome that improve the transfer of technology to developing countries. The Working Group as a result, barely touched upon issues of relevance for the fulfilment of its mandate, as envisaged by the submission from developing countries, especially WT/WGTTT/W/6.Add.1.

#### *II.4.2 Revisiting the Objectives of the Working Group*

**36.** The Working Group on Trade and Transfer of Technology was the result of a protracted negotiation during the Doha Ministerial Conference that envisaged placing development as its goal. As many of the promises of the WTO Agreements - including technology transfer, growth and development, governance and restriction of use of unilateral mechanisms against developing countries- have failed, the Doha negotiation round would be showing signs of failure on its development agenda if the Working Group became unsuccessful in making progress on the implementation of its mandate. That seems the strategy of arguments advanced to dispute the mandate of the Working Group. The agenda for technology transfer is the most important agenda for development- from which the Doha negotiation round cannot fail. It is designed to redress the failure of the promises of WTO Agreements to transfer and disseminate technology for developing countries in a bid to balance the ground for fair competition.

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<sup>32</sup> Examination of provisions undergoing in the various WTO bodies relating to transfer of technology are also undertaken by a reporting mechanism from CTS that in the context of Article IV, XXV of GATS See WTO.Doc,W/WGTTT/6 Report (2004) of the Working Group on Trade and Transfer of Technology to the General Council. (1 December 2004).

<sup>33</sup> WTO (2005), Working Group on Trade and Transfer of Technology - Eleventh Session - Note on the Meeting of 11 April 2005, WT/WGTTT/M/11

#### *II.4.3 Options and Strategies in the Run up-to Hong Kong*

37. Developing countries need to be cohesive in tackling the challenges facing the Working Group in carrying out its mandate. The proposals under WT/WGTTT/W/6 encompass the most pertinent elements that an agenda for technology transfer should involve.<sup>34</sup> The issues identified by the submission for can be summarised as:

- the review of provisions of various WTO Agreements relevant for technology transfer;
- the review of the provisions which may hinder transfer of technology to developing countries;
- the consideration of addressing the restrictive practices adopted by Multinational Enterprises in transfer of technology;
- the impact of tariff peaks and escalation in developed countries on technology transfer and recommendations on how to address their adverse impact;
- the assessment of the difficulties faced in meeting the standards set by different agreements for lack of relevant or required technology, and deliberation on the practicality of developing an early warning system with regards to standards and a mechanism to facilitate adjustment by developing countries to meet the new standards;
- the needs for and desirability of internationally agreed disciplines in relation to transfer of technology with a view to promoting trade and development;
- the need and desirability of a self contained agreement on trade related technology transfer and development, including negotiations aimed towards such an agreement as part of the Doha Work program.

38. The last submission, WT/WGTTT/W/9 (dated 1 July 2005) focused on the need for the Working Group to agree on concrete recommendations for adoption at the Sixth Ministerial Conference and to reach on a solution on the first two focus areas of WT/WGTTT/W/6. With these considerations in context, the most important step for developing countries is taking a cohesive approach to the aforementioned issues and synthesising their stance as a necessary recommendation to the General Council. The next meeting of the Working Group, as it is the last meeting before the Sixth Ministerial Conference, should result in an unequivocal determination that the Working Group has not undertaken its important mandate in making recommendations for increased flow of technology to developing countries and that the renewal of the mandate of the Working Group is necessary in coming up with the expected recommendation.

39. The priority action area for developing countries, as a result, should be to raise the profile of the discussions in the Working Group to a level where **there is**

<sup>34</sup> See WTO. Doc, WT/WGTTT/W/6. cited above at n28.

**a sufficient basis for moving into negotiations or substantive discussion on technology transfer issue during the forthcoming Hong Kong Ministerial Conference.** In order to achieve such level of substantive discussion, it is recommended that:

- the discussion and efforts of the sponsors and cosponsors of developing countries' proposals should be supported by as many developing countries as possible. In this regard concerted participation is expected to continue from all ACP countries in the discussions of the Working Group;
- the recommendations of the WGTTT should result in clarifying the mandate by establishing the process, time table and scope of further works of the WGTTT;
- In order to achieve clarity on the made as indicated above recommendation has to be submitted by the Working Group to the Sixth Ministerial at least in the first two areas of the proposed activities of the Working Group under WT/WGTTT/W/6/Add.1, as indicated under WT/WGTTT/W/9;

#### *II.4.4. The Agenda for Technology Transfer: Hong-Kong and beyond*

**40.** The most important and relevant work of the Working Group is not only the analysis of individual articles relevant for technology transfer, but also the cumulative effect of WTO agreements. It would require a broader problem solving approach to examine structurally how the agreements stand as a whole and cumulatively in relation to each other. This type of focus by the Working Group would help to facilitate the analysis and clarification of the fundamental discrepancies between WTO Agreements that might potentially give rise to disputes, where more than one type of legislation is involved especially in the area of technology transfer which is cross-cutting, and a development objective for all developing countries.

**41.** The upcoming Sixth Ministerial Conference of the WTO should result in the renewal of the mandate of the Working Group with the focus on examination of recommendations to foster technology transfer to developing countries. Apart from review of the WTO Agreements, the Working Group should play the important role in advancing almost all of the proposals set out under WT/WGTTT/W/6.

**42.** It is, however, imperative to prepare the ground for development of a mechanism for the mandatory transfer or transfer into the public domain of essential technologies, process and methods, whether on or off patent, that are necessary to meet basic needs such as providing water, education, sanitation, health. It is also imperative to continue the work on development of international norms and principles that address technology transfer problems.

**43.** The traditional problem in keeping the political will and interest in this area could cost a lot for developing countries as the WTO is the most important

forum in addressing the problem of science and technology as identified by the Task force on Science, Technology, and Innovation of the UN Millennium Project.

### III. CONCLUSION

**44.** The issues of transfer of technology have been under discussion in several multilateral fora for a long period of time but had not warranted attention in its own right in the WTO until the creation on the Working Group on Trade and Transfer of Technology. The Working Group, however, has failed to agree on basic premises to follow up on analytical work and to make the necessary practical policy recommendations to the General Council on how to foster transfer of technology to developing countries. The Working Group on Trade and Transfer of Technology has made no progress in developing concrete and practical recommendations to the General Council as what can be done to foster transfer of technology to developing countries. There is a need for coherence and cohesion on the issue of technology transfer as an important focal issue in the WTO with a long term effect on almost every sector of an economy and every segment of a society.



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