



## **Report of the In-Depth Study Session on the World Trade Organisation for Human Rights Professionals**

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### **1. Objectives and Participants**

The objective of the In-Depth Study Session on the WTO was to provide information on the rules and processes of the World Trade Organisation (WTO) in order to enable human rights professionals to effectively engage in discussions on trade and human rights. The ultimate aim of the process of which this Study Session is part, is to ensure that WTO rules are negotiated and applied in a way that contributes to guaranteeing human rights. During the two-day Study Session, participants, speakers and facilitators shared experiences and explored the human rights concerns that arise in the context of international trade. Discussions aimed to develop knowledge and understanding that enables the trade-human rights debate to move beyond rhetoric and legal abstractness, in order to dispel unfounded fears, analyse specific concerns, and consider practical and concrete responses.

The Study Session was designed for a small group of mid- to high-level professionals active in the field of human rights or international trade. About twenty participants from all over the world took part. Participants included staff of intergovernmental organisations, national governments, non-governmental organisations, academic institutions, as well as independent experts of the UN's human rights system. All speakers, facilitators and participants spoke in their personal capacity.

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## 2. Introduction to the World Trade Organisation (WTO)

The introductory session began with a history of the multilateral trading system. The speaker said that the WTO's predecessor, the General Agreement on Tariffs and Trade (GATT), had been an *ad hoc* arrangement pending entry into force of the 1948 Havana Charter, which was to set up the International Trade Organisation. However, the Havana Charter never came into force, so GATT continued to exist as the principal forum for multilateral trade negotiations. GATT's mandate was essentially limited to trade. It focussed primarily on the reduction of trade tariffs and only gradually began to address non-tariff barriers to trade. Moreover, the GATT system was self-contained and throughout most of its history, it did not relate to the wider corpus of international law. This only changed when the first disputes relating to environmental matters were brought to the GATT dispute settlement system, in 1991.<sup>1</sup>

The WTO began its work in 1995, taking the place of GATT. The preamble of the Agreement Establishing the WTO mentions sustainable development as one of the objectives that the Organisation must respect. The WTO Agreement contains several agreements, decisions, and understandings, some of which predate the WTO (e.g. the text of the GATT itself, which still applies today in a slightly modified form), some of which were created in more recent years.<sup>2</sup>

The speaker described the key principles of the GATT/WTO system: (1) most-favoured nation treatment and (2) national treatment, according to which WTO Members may not discriminate between "like products" from different WTO Members, and must treat imported products in the same way as nationally-produced "like products". The speaker stressed the importance of the definition of "like products," pointing out that there is no established definition of this term. Whether products are "like" has been determined in the GATT and WTO on the basis of whether they share (1) physical characteristics, (2) end uses, (3) tastes and habits of consumers, and (4) tariff classification. However, in the recent *Asbestos*<sup>3</sup> case, the WTO Appellate Body said that health risks should be taken into account when determining likeness of products. This is significant as it could open up the possibility that in future other criteria than the four mentioned above might be considered equally relevant for the determination of likeness, thus allowing countries to distinguish between two otherwise like products if one poses a health risk or a threat to the environment and the other does not.

The definition of "like products" which underlies almost all of the WTO's work is particularly relevant in discussions on human rights in the WTO, as some people argue that importing countries should be allowed to distinguish between otherwise "like" products on the basis of whether or not they are produced, say, by child or slave labour, or on the basis of whether they are produced in a country with harmful human rights policies. Another term of WTO jargon relevant in this context is "PPMs": process and production methods. GATT and the WTO have traditionally been considered as not permitting Members to distinguish between like products on the basis of how they are produced, i.e. on the basis of their PPMs. The speaker and participants noted that there is no explicit provision in the GATT or WTO as to the legality of a PPM-based distinction between products. Although the WTO

<sup>1</sup> See in particular the two *Tuna-Dolphin* cases: *US-Restrictions on Imports of Tuna* (1991), 30 I.L.M. 1594 and *US-Restrictions on Imports of Tuna* (1994), GATT Doc. DS29/R.

<sup>2</sup> The text of the WTO Agreement is set out in the *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations* (15 April 1994), on the web at <[www.wto.org/english/docs\\_e/legal\\_e/ursum\\_e.htm](http://www.wto.org/english/docs_e/legal_e/ursum_e.htm)>

<sup>3</sup> See *European Communities--Measures Affecting Asbestos-Containing Products*, Report of the Appellate Body, WT/DS135/AB/R (12 March 2000).

Appellate Body has never directly ruled on this, it has suggested that PPM-based distinctions could in some circumstances be justified under GATT's Article XX exceptions<sup>4</sup> (see below for these exceptions). This and the decision in the *Asbestos* case indicate the increasing likelihood that WTO Members will in due course explicitly allow distinctions between products based on their PPMs (although given the lack of textual legal basis for disallowing such a distinction, this has always strictly speaking, been possible).

If a WTO Member fails in its claim that it is justified in discriminating between two products that have the same physical characteristics, end-uses and tariff classification on the basis of how they are produced or their health or human rights effects, the Member can defend the discrimination between the two products saying that it is allowed under the exceptions to WTO rules. GATT Article XX for instance allows a country to make regulatory distinctions between like products if it is necessary to do so in order to protect public morals, to protect health, or for the conservation of exhaustible natural resources.<sup>5</sup>

There was wide-ranging discussion on the relevance of PPMs and GATT Article XX to human rights and labour standards. One participant said that this kind of distinction could open the door to unilateralism, given that there is no set of universally-agreed moral standards, and that GATT Article XX(a) provides no definition of the term "public morals". Whilst some standards of morality might gather broad support, others are more problematic. Could one construe a ban on child labour as an effort to protect one's public morals? Participants raised the example of the International Labour Organisation's (ILO) invitation to its members to take measures to ensure that their economic relations with Burma do not aggravate violations of labour rights. A speaker pointed out that Saudi Arabia, when negotiating its accession to the WTO, asked whether they could block imports of products made by women, as this goes against Saudi public morals.

Distinguishing between products in order to protect public morals could be the thin edge of a wedge towards unilateralism: we start by allowing a ban on imports of a product like asbestos, which kills, then a ban on tuna fished in a way that harms dolphins is allowed, and then we might allow a ban on imports of products made by women, or of sugar from a country which does not respect the importing country's standards of freedom of expression. Also, it is hard to tell when a country is really applying moral values and when it is using these to disguise protectionist intentions.

The speaker concluded by touching on some broader issues related to the WTO. He questioned whether the WTO framework is still appropriate today, pointing out that the WTO could become a "victim of its own success" as it brings new issues in under its scope and because it is, rightly or wrongly, perceived as a strong Organisation with enforcement powers. This draws the attention of civil society groups, some of which criticise it for being too strong in defending trade interests, whilst others turn to it as they think it offers the potential to enforce not only trade law but also law relating to environmental protection, human rights or labour standards. It was pointed out that there is much greater interest in trade issues today than there was a few years ago, on the part of civil society and other actors such as parliaments. This means that trade negotiations are coming under more scrutiny. Given also that there are more issues on the WTO's agenda and more countries participating in the negotiations now than ever before, we are in for a rough ride as trade proposals are likely to be questioned by the diversity of Members or other non-trade actors who take an interest in the issues.

### 3. Trade liberalisation, Development and Human Rights

The objective of this session was to illustrate the constraints and pressures developing countries face in the WTO. The speaker said that integrating development into trade negotiations is a constant

<sup>4</sup> See *US-Import Prohibition of Certain Shrimp and Shrimp Products* ("*Shrimp-Turtle*" case), Report of the Appellate Body, WT/DS58/ABR (12 October 1998).

<sup>5</sup> GATT Article XX, *General Exceptions*, paragraphs (a), (b) and (g).

challenge. She pointed out the inconsistencies between some decisions made in the international social arena and the trade arena, despite the fact that the WTO preamble recognises sustainable development and therefore legitimises discussion in the WTO of human rights and other social concerns such as development. Although there are discussions on “coherence” in the WTO, these focus on links between the WTO, the IMF and the World Bank and there is no indication that the discussions will be broadened beyond "economic coherence".

The speaker outlined out different types of pressures which developing countries face. For instance, given the currently strong free-trade ideology, if a country expresses the wish to move slower on liberalisation in a given area, or to assess the effects of existing trade agreements before proceeding with further liberalisation, that country runs the risk of being accused as being anti-free trade. The speaker commented that the strength and speed of the momentum within the WTO does not leave much time for reflection or assessment. She pointed to the fact that whilst the General Agreement on Trade in Services (GATS) provides that there should be an assessment of the experience so far before liberalising further, WTO Members are arguing about whether an assessment is necessary or how such an assessment should be carried out. In effect Members have begun the process of further GATS negotiations without a proper assessment having been undertaken, in part because of lack of information and in part due to a lack of time. The speaker disagreed with the Members that are of the view that there is neither time nor reason to undertake a detailed and comprehensive assessment, asking how it was possible to negotiate if the negotiators do not know or understand fully the effects of what is being negotiated.

Decisions in the WTO are made by consensus. There is a right to vote, but developing countries have resisted voting, because through consensus individual Members are able to retain a right of veto, which gives them some bargaining power with the developed countries. Furthermore, not all developing countries have common interests and therefore would not necessarily vote in the same way.

Factors that compound developing countries' difficulties in international trade include the fact that the majority of the WTO's professional staff is from industrialised countries, and the lack of internal transparency within the WTO. The speaker remarked how it is particularly difficult for countries with small, or no, delegations in Geneva to have their views represented in negotiations, particularly given that the WTO's agenda is so broad and so many meetings take place at the same time. Regularly in WTO negotiations, documents appear that reflect the interests of the powerful countries, and do not reflect the divergence of views between Members. This puts developing countries in a situation where they need a consensus to *not* accept the document.

The speaker commented that the provisions for special and differential treatment (SDT) for developing countries has been reduced under WTO as compared to what was allowed under GATT, but pointed out that the WTO Committee on Trade and Development now has the mandate to find ways to give meaning to SDT. There was discussion between participants and speakers on how SDT could better be operationalised, for instance in the context of the WTO's rules on agriculture. Participants also commented that developing countries have been participating more actively in the WTO's work since the Doha Ministerial Conference<sup>6</sup>.

Participants talked about the WTO's technical assistance programmes for developing countries, including comments that these programmes are insufficient. After Doha it seems likely that WTO technical assistance and capacity-building programmes will be increased. Even so, some participants feared that technical assistance provided through the WTO serves to promote developing countries' compliance with WTO rules, rather than to help these countries determine what their interests are and what the best trade and economic policy for them would be.

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<sup>6</sup> Fourth WTO Ministerial Conference, Doha, Qatar, 9 – 14 November 2001.

#### 4. Legal Aspects of the Human Rights-WTO Debate, and Introduction to the WTO Dispute Settlement Mechanism

The objective of this session was to explore whether and if so, how, WTO law conflicts with human rights law, and how human rights might be dealt with in the WTO Dispute Settlement System (DSS). The speaker said that actual legal conflicts between human rights law and WTO rules were difficult to find, but said that we don't know whether a WTO Member that refused to import goods produced in a country where labour rights were violated would be in contravention of WTO law, or whether WTO law would allow a Member to require that a product from a country that allows child prostitution be labelled as such.

The speaker stressed that the WTO DSS is only a narrow part of trade and human rights debate, but attracts much attention because of the perceived strength of the DSS. Article 23 of the WTO Dispute Settlement Understanding (DSU) provides that any alleged violation of a WTO rule must be taken to the WTO (this provision was included to prevent the U.S. unilaterally resorting to its choice of dispute settlement forum). The DSS is also perceived as strong as it is so easy to trigger: a letter from one Ambassador to another suffices and there is no need for the complaining Member to prove any legal or economic interest. Moreover the DSS is quick, often issuing its ruling within one year of the initial complaint having been received.

Participants asked the speaker to what extent non-governmental information such as *amicus curiae* briefs are taken into account by the DSS. The speaker said that this issue has been very contentious within the WTO. Although the DSS is a process strictly between WTO Members only, the DSU allows panels to seek information from any relevant source. She pointed out that some WTO Members, particularly developing countries, fear that *amicus* briefs might reflect the views of corporate entities or of Northern governments. Also, some Members fear that if *amicus* briefs are allowed, the DSS would be flooded with them, and consideration of this extra reading material would make it harder for panels and the Appellate Body to issue their rulings within the already-tight time limits. One participant said that despite the uncertainty in this area, he thought it was still worth sending *amicus* briefs in.

There was considerable discussion between participants and the speaker about whether and how the WTO DSS would take non-WTO law into account, one participant asking what can be done to make the WTO DSS human rights-sensitive. The speaker recalled that the DSS can only rule on whether a specific measure applied by a WTO Member is a violation of a WTO provision in the specific case before it – it cannot issue general rulings or make pronouncements as to whether other international legal norms have been infringed. The DSU also clearly provides that the DSS must not "add to or diminish" the obligations of Members under the WTO.

However, as the WTO Agreement is part of public international law, the DSS must take other rules of international law into account when interpreting WTO law (WTO rules should not be read in clinical isolation). The Appellate Body has also recognised the principle of evolutive interpretation: legal rules must be interpreted in accordance with the law as it stands today. Thus if the DSS had to interpret the term "public morals" it would be likely to take into account the current relevant law and not just the law which existed at the time when the GATT was drafted. It was noted that in the *Shrimp-Turtle* cases the DSS found that the health of sea turtles can justify derogating from GATT rules. Thus it is more than likely that the WTO DSS would allow derogation from GATT rules to protect the health of children, should such a case arise. Regarding *jus cogens* human rights norms, the speaker recalled that during its 2001 session, the International Law Commission said that it would be hard for *jus cogens* to clash with other legal norms, because these other norms would be interpreted in such a way as to be consistent with *jus cogens*. The speaker expressed her view that WTO Members are also bound by the legal principle of good faith: if they have committed themselves to be bound by human rights law, then their dealings in the WTO must be compatible with their human rights obligations. There was also an exchange of views as to whether the WTO had legal personality and

thus obligations under international law similar to a State's. If so, could the WTO as an organisation be held responsible in a case where a WTO decision resulted in violations of human rights?

She concluded that she does not believe that there is legal conflict between WTO rules and human rights *per se*, and that the WTO DS procedures are not fundamentally flawed in this regard. The speaker concluded by saying that if the WTO's DSS is so strong it is a matter of policy: if States gave international human rights bodies as much power as they give the WTO's DSS, no one would care about the WTO. Another policy issue is that the WTO doesn't say what a country should do with its tariff revenues, or how it should implement WTO law. If one country buys weapons with tariff revenues and the other builds schools, they can still both be WTO-compatible. So if she were a human rights activist she would focus on policy rather than on dispute settlement.

## 5. Civil Society and Sustainable Development in the International Trading System

The objective of this session was to give participants an insight into strategies adopted by civil society to raise sustainable development concerns in the WTO. The speaker recalled that the text of GATT reflected the mercantilist nature of the trade system, whereas the WTO Agreement's preamble refers explicitly to the objective of sustainable development. The basic premise of sustainable development work in the trade policy arena is to nudge the system in a direction in which trade policy can promote public interests rather than just the interests of exporters. He said that until recently governments acted on behalf of their traders and exporters, but now are more likely to act on behalf of the public interest. The speaker stressed that trade should enable countries to achieve sustainable development – including human development aspirations like education – and if it does not, the international trade regime should at least not disable countries from achieving those objectives. He outlined what he sees as the three elements of sustainable development aspirations: (1) social, (2) environmental and (3) economic. He said that neither of these elements are really taken into account in the WTO Agreement, as the Agreement focuses on income growth.

The speaker said that trade policy formulation is the key area to focus on, underlining that it is important to involve stakeholders (including non-trade actors) in trade policy formulation if the realising the goal of sustainable development is to be achieved. He encouraged the human rights community to ensure that its concerns are understood by the trade community and that trade policy makers take these concerns on board. It was pointed out that most countries have separate missions in Geneva for trade and human rights, and several participants felt that there should be more rotation amongst government officials who work on trade and those who work on human rights. The speaker said that progress on sustainable development had been made in the WTO when different stakeholders had been able to talk to each other about trade policy, or about policy areas affected by decisions in the international trade arena.

Several participants referred to a recent example of a successful strategy involving sustainable development: the response to the challenge to Brazil's patent law by the U.S. The U.S. complained in 2000 to the WTO DSS that Brazil's patent law – which allowed the Brazilian government to award compulsory licenses for the production of affordable drugs for the treatment of AIDS – was incompatible with the WTO Agreement on Trade-related Intellectual Property Rights (TRIPs). In this case, the Brazilian ministry of health was the most active governmental actor and pushed for a coordinated strategy in which Brazil took up the issue in the World Health Organisation, the Human Rights Commission and the WTO. The WTO DSS case was settled. Moreover, the coordinated strategy between trade officials and a range of governmental and non-governmental non-trade actors, working in a number of international fora towards a common goal, led to the adoption of the Declaration on TRIPs and Public Health,<sup>7</sup> an outcome that was almost unimaginable a few months

<sup>7</sup> Declaration on the TRIPs Agreement and Public Health, on the web at <[www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/min01\\_e.htm#declarations](http://www.wto.org/english/thewto_e/minist_e/min01_e/min01_e.htm#declarations)>

prior to Doha. Many countries had their own health policy experts on their delegations at the WTO's Ministerial Conference in Doha, and civil society and developing countries were working hand-in-hand towards the adoption of the Declaration on TRIPs and Public Health.

In addition to showing that there is potential for sustainable development concerns to be taken on board in the WTO, this case opened the way for better relations between developing countries and civil society in the trade field. A Study Session participant noted that until recently, developing countries had essentially seen NGOs as an additional instrument of political power by industrialized countries against the developing countries. These countries' main fear was that trade sanctions would be used against developing countries as a means of enforcing industrialised countries' preferred environmental or human rights policies. Several participants commented on the remarkable change in this situation, pointing out that many developing countries now see civil society groups as helpers in developing countries' efforts to offset the imbalances that they suffer at the negotiating table. In addition, some developing countries are now turning to human rights fora to ask that economic, social and cultural rights be considered in international economic discussions, including discussions in the International Financial Institutions and the WTO. One participant commented that several industrialised countries consider economic issues to be matters for the international economic institutions, but put forward his view that the Agenda agreed to in Doha will create a new need and these issues will be reconsidered.

There was discussion about whether it is possible for civil society organisations working on trade to have both a broker role and an advocacy role – i.e. whether the broker role could limit the scope for advocacy later on. Concern was expressed that there could be incompatibility of interests between NGOs and trade policy formulators and that working together on some issues could lead to NGOs being "complicit" in adoption or application of trade policy with which they do not agree.

## 6. The Agreement on Trade-Related Intellectual Property Rights (TRIPs), Traditional Knowledge, and Indigenous Peoples' Rights

The objective of this session was to provide a better understanding of how the TRIPs Agreement could affect traditional knowledge (TK) and indigenous peoples' rights, and to discuss approaches that could be applied to ensure that WTO rules on intellectual property (IP) did not result in violations of human rights. The speaker began by setting out the rationale and history of IP protection. Intellectual property was brought within the international trade regime primarily due to pressures from industry and government in the U.S., Europe and Japan. The TRIPs Agreement does reflect the need to maintain a balance between the interests of producers and users of IP, and social welfare, but does not indicate what the appropriate balance is.

Typically patents protect products, processes or uses (including new uses for an existing product). Under TRIPs, patents give inventors exclusive rights for 20 years. TRIPs provides for exceptions to its patenting requirements on a number of grounds including to protect public order or morality, and more controversially, under Article 27.3(b), which allows Members to exclude new plant varieties from patentability, as long as the Member provides some other kind of IP protection.<sup>8</sup> The *sui generis* protection that most countries apply is generally not as strong as patent protection, so plant breeders can use one variety to breed a new one without permission of the right holder. And generally these systems allow farmers to keep replanting (but not sell) harvested seeds.

The speaker said that a South African research institution had recently patented extracts from a plant chewed by Bushmen to suppress hunger. The patent had been licensed to a company interested in

<sup>8</sup> TRIPs Article 27.3(b) reads: "...Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. The provisions of this paragraph shall be reviewed four years after the date of entry into force of the WTO Agreement."

developing a treatment for obesity. Even if the Bushmen had been able to write down the plant's biochemical formula and find their way through the legal and administrative processes necessary to obtain a patent, they would not have been able to acquire one without demonstrating that the plant extract was "novel," which they could not do since Bushmen had been using this plant as an appetite suppressant for many years. The firm that licensed the patent claimed said that the "invention" was novel because it was for a new use that the Bushmen had not envisaged. Since an appetite suppressant is bound to be useful for treating obesity (and is in fact the use mentioned in the patent, this claim is highly suspect. The institute has since agreed to share the benefits from patenting this plant with the Bushmen, but the debate continues on whether patenting encourages unfair exploitation of traditional knowledge.

In response to the question whether, under current law a patent holder could exclude a community from using its TK, the speaker said that in the Bushmen case, they could still use their plant. But he referred to a recent case of a bean variety imported from Mexico and patented in the U.S. with very few changes. Now the U.S. patent owners are trying to stop the import into the U.S. of these beans from Mexico. A participant asked whether a patent could be revoked. The speaker said a patent could be challenged but it is costly and difficult to do so. A U.S. patent on the Amazonian Ayahuasca plant was revoked (but later reinstated) in response to a request for re-examination which was accompanied with documentation demonstrating lack of novelty. He referred to a U.S. patent on the use of turmeric powder for healing wounds, which – as all Indians know – has been used in this way in India for centuries. The Indian government challenged the patent application. They government demonstrated that it was common knowledge, but this was considered insufficient: the government had to adduce written evidence of the past uses of turmeric, and describe it in chemical terms. The speaker says this is probably due to the fact that patent examiners are scientists and engineers, and therefore privilege science and engineering literature over the often oral, traditional knowledge. The speaker noted that the TRIPs definition of invention is very Western, so traditional knowledge will continue to be treated as raw material for other people's inventions.

The regulatory system further increases the likelihood of traditional knowledge being patented by others: in the U.S. the presumption is to award a patent unless there is a good reason not to, and patent examiners tend to easily award patents as they are paid from income acquired through payment of patent fees. Moreover, time pressures mean that they are unable to assess the patent applications, and therefore tend to give the applicant the benefit of the doubt. A leading U.S. patent lawyer recently said that the American patent system is a scandal: the quality of the patenting process is very poor. Several concurred that WTO Members could challenge the practices of the U.S. Patent Office under TRIPs Article 41.2 which says that enforcement procedures shall be fair and equitable: the economic incentives to US patent officers would fail Article 41.2's "fair and equitable" test. So if the U.S. were to challenge developing countries' patent enforcement procedures, developing countries could bring this counter-claim against the US patent office. Participants agreed that a useful first step to prevent big business patenting traditional knowledge would be to educate the patent examiners.

In the WTO's ongoing review of Article 27.3(b), Brazil and several other developing countries are advocating a form of positive protection of TK in the TRIPs context. One proposal to this end is that users of genetic materials should identify the source of these materials, in order that the country in which the materials originated can know that the invention was based on its genetic resources. Another proposal is that sharing of the benefits between owners of the genetic resource and the inventor be compulsory. Another submission says that TK should only be used after the traditional "owners" of this knowledge have given their "prior informed consent." Some WTO Members (including the U.S.) maintain that TK is unrelated to Article 27.3(b) but delegates from many countries disagree and say that if a plant is patented with the help of TK then there is a connection and it is necessary to have mechanisms to protect that knowledge. Importantly, the Doha Declaration gives the WTO TRIPs Council a mandate to discuss protection of TK.

A commentator raised a number of issues that arise from the perspective of indigenous groups in the context of TRIPs discussions about traditional knowledge: (1) many indigenous groups do not have a

concept of "ownership" of knowledge, as knowledge is for the benefit of the community, and to the extent that such "ownership" exists, it is often collective; (2) when indigenous groups seek recognition of their TK, it is not necessarily to own this knowledge, but to protect it; (3) international discussions do not adequately respect the sacred nature of certain kinds of indigenous knowledge; (4) there are competing international standards relating to indigenous knowledge, including the ILO Treaty 169, the Convention on Biological Diversity and the TRIPs Agreement; (5) activities of non-State actors have affected indigenous peoples, for instance World Bank loans have impacted on indigenous peoples; (6) the UN Economic and Social Council (ECOSOC) has agreed to create a Permanent Forum for Indigenous Peoples. This attempt to coordinate work on indigenous issues throughout the UN system might also have an effect on work in the WTO relating to TK; (7) increasingly States are legislating to protect indigenous rights over land and resources, which might allow indigenous peoples to keep pharmaceutical researchers off their land. This has already happened in a few places.

Participants suggested that ways should be found to ensure that WTO staff and diplomats better understand the questions of concern to indigenous groups, and be more open to input from these groups – particularly given that many developing countries would also benefit from protecting indigenous and traditional knowledge. One participant said that whereas staff of the Office of the High Commissioner for Human Rights (OHCHR) feel comfortable telling governments what they can and cannot do under human rights law, the Member-driven nature of the WTO means that the WTO Secretariat is not so free to do so. Strategically, therefore, human rights professionals (including OHCHR staff) would do well to focus on promoting better understanding of indigenous issues amongst government delegations.

Others thought that anything derived from TK should compulsorily be excluded from patent protection, or at least, that the patent system should be altered. Issues of definition might more usefully be raised in the World Intellectual Property Organisation (WIPO) than at the WTO. A participant said that blank tapes or blank CDs could be sold with an extra charge to cover the copyright costs of the music that might be copied to the tape or CD, suggesting that a similar approach might be a way of sharing the benefits of using TK. A participant said that IP is a property which belongs to the community. He referred to an Inter-American Court of Human Rights case involving indigenous property in Nicaragua in which the court recognised indigenous claims to property, defining property as including both tangible and intangible assets. Intangible assets could clearly include TK.

Another speaker described the relevant provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR), emphasising that all actors are bound by human rights law, and that the ICESCR recognises differentiated obligations for countries at different levels of development. He added that human rights are the basis for shaping policy in a way that benefits the powerless, so that the needs of the most disadvantaged are taken into account. The Committee on Economic Social and Cultural Rights (which oversees implementation of the ICESCR) adopts General Comments or Statements which clarify and flesh out the legal content of the ICESCR. The Committee's Statement on Intellectual Property and Human Rights<sup>9</sup> calls for a balanced approach to IP, and a recognition of its social function, stressing that IP should serve to promote human wellbeing and must protect indigenous peoples and disadvantaged groups.

A participant asked how the TRIPs Council would take into account the obligations under the ICESCR – shouldn't TRIPs Article 27.3(b) for instance, be read in light of the ICESCR? Discussion ensued about how human rights concerns could be raised in the WTO. Could relevant UN human rights documents, for instance, be circulated as WTO documents? One participant said that if the OHCHR had observer status in the WTO, the High Commissioner for HR could send OHCHR staff to WTO meetings. It is not clear whether the OHCHR already has such status by virtue of the UN having

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<sup>9</sup>*Statement on Intellectual Property and Human Rights*, adopted 29 November 2001, (document distributed to Study Session participants).

observer status in the General Council. It was recalled that even intergovernmental organisations have difficulty obtaining observer status in the WTO.

One participant said that success in the human rights field depends on the amount of public pressure put on in a specific case. In issues like torture, victims have names and faces, whereas the trade-human rights debate is about international public policy and legal norms, rather than about how to make the human rights system work in this area at the domestic level. Not many human rights groups work on these issues, and until they do, the general public may well continue to feel that trade and human rights are incompatible.

## 7. The WTO's General Agreement on Trade in Services (GATS) and Access to Basic Services

The objective of this session was to identify whether (and if so, how) the General Agreement on Trade in Services (GATS) could make access to basic services difficult, and thus result in violations of human rights. The speaker began by describing that the idea of regulating trade in services had emerged during the late 1980s, as services represented an increasing portion of the domestic economy of many industrialised countries, and as big services companies (particularly U.S. financial services corporations and groups like Federal Express) wanted to be able to expand their operations into other countries, and therefore wanted to ensure that countries' domestic regulations did not hinder the expansion of their exports. Negotiations to adopt GATS took place at the same time as those on TRIPs, which made it difficult for delegations of small and developing countries to adequately follow both. Many developing countries focussed more on GATS than on TRIPs and this is amongst the reasons why GATS is considered more responsive to their concerns than TRIPs is.

Services include a wide range of activities including telecommunications, transport, health and educational services and tourism. The GATS/WTO list of services groups these into 12 categories.<sup>10</sup> Negotiators are currently revising this list of categories and discussing expanding some of the listed categories, such as services incidental to energy distribution and services incidental to mining. Negotiators are also discussing whether to explicitly include the provision of water, which does not for the time being, appear in the WTO list of categories. Participants expressed surprise about the WTO services classification list, saying it really seems to commodify our daily lives.

Governments regulate the provision of services for a number of reasons. One reason is so that the consumer can assess the quality of the service. Another reason that certain services such as health care or basic education are important, and provided on a universal basis. Whereas trade in goods can be limited by tariffs, trade in services can be limited by regulations: internal regulations can constitute barriers to services trade. Where GATT seeks to reduce tariffs to promote trade, the GATS equivalent is to discipline domestic governmental regulation. GATS aims therefore include ensuring that domestic regulations are not trade restrictive.

A participant asked whether a country could limit the number of tourism boats on a river for environmental reasons. The speaker responded that the question of what can be considered legitimate regulatory objectives is currently a big issue in WTO discussions on services. She emphasised however that countries do have a great deal of flexibility as to what they liberalise under GATS – the GATS' "bottom-up" approach means that it is for countries to determine which sectors they wish to open to international competition. Thus GATS rules only apply to the sectors that WTO Members have explicitly opened to competition.

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<sup>10</sup>WTO, Note by the Secretariat, Services Sectoral Classification List, MTN.GNS/W/120, 10 July 1991, Attachment 8 to the Scheduling Guidelines (document distributed to Study Session participants).

A participant raised issues relating to privatisation of previously government-dominated services industries. In several countries, including Ecuador or Bangladesh, the government guarantees returns and benefits such as tax exemptions to the new, often foreign, companies. Where does this fit in to the GATS debate? Several participants asked to what extent the worldwide move towards privatisation goes hand in hand with GATS. The speaker responded that GATS does not require countries to privatise, but there is a link because certain forms of liberalisation go hand in hand with or are dependent on privatisation or elimination of public monopolies. Many countries are required to privatise by the World Bank or the IMF. If the privatised sector is then liberalised under GATS, this has a "lock-in effect" which makes it very difficult to reverse the privatisation process.

The speaker pointed out the indirect interaction between GATS and human rights. Sometimes privatisation can have a positive effect on human rights. But if privatisation is not carried out properly, i.e. with the appropriate flanking policies, it can have a negative effect. Several people described cases where privatisation could adversely affect human rights. For instance, prisoners, even in private prisons, should be treated according to human rights standards. When fees are introduced for primary education, fewer children go to school: this affects human rights. Likewise, in countries like Zimbabwe that charge for health services, less people seek these services. Participants agreed that these issues are more to do with privatisation than with the text of GATS itself. The Sub-Commission's 2001 resolution on trade in services<sup>11</sup> was described, as was the work of the Special Rapporteur on the Right to Education, who has looked at GATS in the context of the right to education. Experts from UN human rights bodies agreed that access to services needs to be monitored from a human rights perspective and said that they would welcome good data on this from governments and civil society and others.

There was wide-ranging discussion about developing countries' concerns in relation to GATS. A main concern is imbalance: many developing countries lack negotiating capacity, and have insufficient data on their economies. This makes it hard for them to formulate their negotiating positions. Developing countries also fear that they do not have many services to export. Few are competitive in the high-tech and financial services areas, but some developing countries are focussing on sectors such as tourism, construction services, and health services (nurses working abroad). Several developing countries also fear that the service sectors which they would like to develop locally will be run out of business by competition from bigger, foreign, multinationals

Participants discussed the issues of migration and mobility of people. Movement of natural persons is one of the ways (modes, in GATS jargon) of trading services recognised by GATS, and movement of natural persons is the mode thought to be of most interest to developing countries. However, little progress has been made on negotiations in this area. In addition, industrialised countries have been reluctant to open up to service providers from abroad – and when this has happened it has tended to be to low-cost, unskilled labour. The speaker recalled that GATS only refers to temporary movement of persons, not to permanent immigration. Another problem is that of brain drain. If trained professionals such as teachers or nurses go to work in countries where wages are better rather than stay in their own country where the need for their services is probably higher this can bring about negative economic and social consequences for the services-exporting country.

The speaker concluded by saying that many things were left out when GATS was adopted, so further GATS negotiations are now underway in the WTO. Although she felt that the negotiations were likely to be quite untransparent, the WTO Secretariat, some country delegations and civil society were aiming to work together. Most importantly, since negotiations on many critical issues are ongoing, the debate is not over and there is a chance to develop a GATS that is more responsive to the needs of developing countries and the most vulnerable inhabitants of the world.

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<sup>11</sup> *Liberalization of trade in services, and human rights*, Sub-Commission resolution 2001/4, available on the web via <[www.unhchr.ch/html/menu2/2/53sub/resolutions.htm](http://www.unhchr.ch/html/menu2/2/53sub/resolutions.htm)>

## 8. Conclusion and Avenues for Further Action

Participants agreed that human rights professionals need better, unbiased, information on WTO rules and processes, as well as on the concerns of the trade community. Likewise there is a need for more basic information for the trade community on human rights concerns, norms and processes. Several participants pointed out the need for activities towards confidence-building between the trade and human rights communities. They also noted that efforts are needed to compare notions and issues used by both the trade and human communities, such as non-discrimination, which mean one thing in the trade context and another in the human rights context.

In particular, the human rights community should move away from a defensive role in relation to the WTO. They should make it clear that many human rights professionals do not aim to raise human rights in the trade context in order to have sanctions imposed on countries with weak human rights records. The human rights community should take initiatives to show that human rights can play a role in enhancing policy and empowering the powerless. Many groups are indeed working to ensure trade rules are devised and implemented in a way that makes it easier for all countries to respect human rights.

Several participants referred to the desirability of better using the UN human rights treaty bodies' periodic review mechanisms, as well as their individual complaints procedures to raise human rights concerns that arise in the area of international economic policy. Attention was drawn to the fact that the WTO will be holding a symposium for NGOs from 29 April –1 May 2002, which will be widely attended.

Participants discussed non-defensive avenues for action. Possibilities mentioned included following the example of the International Confederation of Free Trade Unions, who prepare a report on respect for core labour standards in each country reviewed by the WTO's Trade Policy Review Mechanism (TPRM) and submit these reports to interested delegations. The TPRM looks at general structure of trade policy formulation in WTO Member states. Civil society groups concerned with human rights might also want to consider making input into the preparation of their country's report to the TPRM. One participant encouraged national monitoring of WTO policies would be useful activity – citing the example of Finland where this takes place.

## 9. Speakers, Facilitators and Participants

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