Star LAW *analysis*

Trips Agreement: Concern for DCs and LDCs

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THE WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs Agreement) has been a major contentious trade issue between developed and developing/ least developed country members of the WTO. It creates competing interests among them by implicating intellectual property (IP) with trade. This causes considerable concerns for developed and least developing countries in the fields of investment, technology transfer, public health, food security, education, and human rights. It generates further tension when it introduces a uniform and mandatory protection regime for all WTO members -- developed, developing and least developed countries alike. This 'one size fits all' approach seems to have treated developmental needs of developing counties as trade impediments and strict protectionism of developed countries as restraint to free trade.

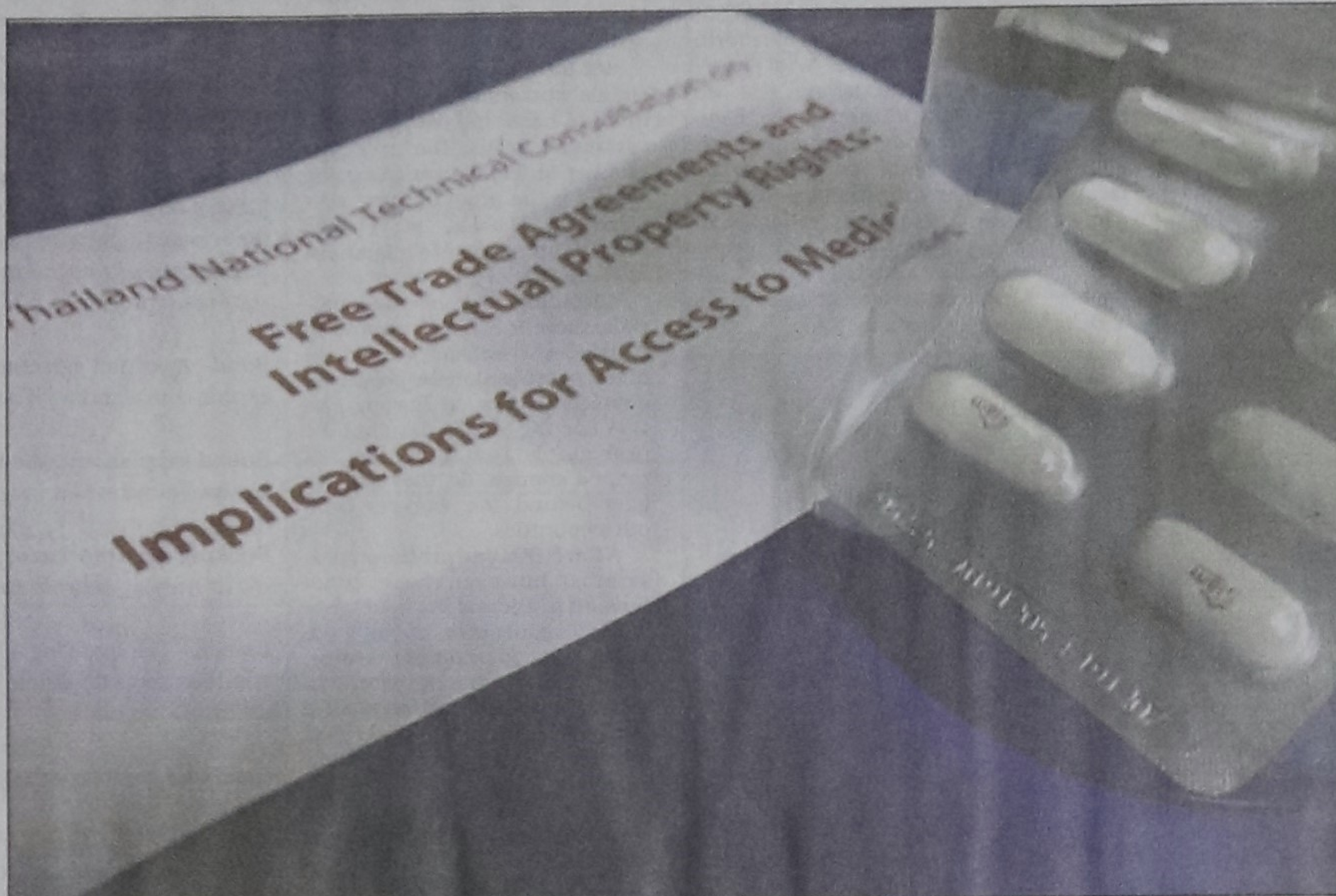
The TRIPs Agreement treats intellectual properties as trade-related intellectual properties (TRIPs). Since the Agreement comes within the auspices of the WTO to facilitate international trade, intellectual properties are deemed to hold market value and involve trade implications. It arranges protection of intellectual property rights (IPRs) in the form of copyright, patent, design, trademark and so on. It also recognises the traditional role of IPRs in guarding against piracy and counterfeiting i.e. unauthorized making, using, copying or selling of intellectual properties.

Until the 18th century, developed countries concentrated on national intellectual property protection system of protecting local interests from piracy and counterfeiting. The social and economic changes of the 19th century brought about extensive increase in trade of goods and its reputation. The trading in reputation led to piracy and counterfeiting abroad and affected national interests.

The countries affected by widespread piracy and counterfeiting of their goods abroad started to extend protection of national laws to foreign interests and they expected foreign countries to reciprocate the gesture. In the early 19th century, this tendency paved the way to conclude multilateral agreements to prevent piracy and counterfeiting of their goods abroad.

The international intellectual property regime consisting of major nations first appeared in the 1880's. It was based on the twin institution of the International Convention for the Protection of Industrial Property, 1883 (Paris Convention) and the Berne Convention for the Protection of Literary and Artistic Works, 1886 (Berne Convention). The World Intellectual Property Organisation (WIPO) was in the management of the regime.

The ineffectiveness and flexibility of the Paris Convention and the Berne Convention, result in piracy and counterfeiting of goods. For developed countries, piracy and counterfeiting of goods cause considerable adverse impacts upon trade revenues and hence they require stringent protection regime. For developing and least developed countries, IPRs-protection standard is set to promote socio-economic development but their rudimentary or weak economic conditions cannot easily afford the cost for IPRs-protection and technology transfer.



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To standardise the IPRs-protection system and assist the process of technology-transfer from one to another, especially from developed countries to developing or least developed countries, the first regime has been subsumed by a regime in 1994 based on the TRIPs Agreement. It works under the supervision of the WTO.

The TRIPs Agreement appears with the comprehensive and stringent TRIPs standard-setting for the international protection regime. It prescribes the standard domestically enforceable for IPRs-protection as a condition of membership of the WTO. This protection regime aims to support socio-economic development ensuring a balance of rights and obligations of IPRs owners and their users.

Despite the ambitious propositions laid down in the TRIPs Agreement, there exist disparities as regards the TRIPs' attitude towards developed and developing/ least developed countries in several respects.

With taking on board the TRIPs protection regime with its stringency and too little consideration for the needs of developing and least developed countries in cases of agriculture, pharmaceuticals, and information technology which are responsible for food security, livelihood of farmers, public health and technological development, the developing countries had come across the transitional period for their compliance with the TRIPs Agreement in 2005. Now is the turn for least developed countries by 2013 in all fields of TRIPs excepting pharmaceutical patents, which will expire in 2016.

With the use of the TRIPs Agreement, developed countries have been able to protect their knowledge based products in technology trade and transform themselves from manufacturing-based to technology-based economies. For example, the EC has been using the TRIPs Agreement for the protection of geographical indications. It is not certain whether the developing and least developed countries will be able to get the TRIPs benefits as regards geographical indications for the protection of the area or region specific handicrafts, foodstuffs, and agricultural products. It shows the disproportional advantage of developed countries over developing countries.

For developing counties, the TRIPs seem to be the rights of technology exporters since these private rights take preference over developmental objectives of developing countries. With some early resistance, they agreed to the TRIPs with the hope of Generalized System of Preferences (GSP) facilities. Subsequently GSP was denied and they were treated with non-discriminatory uniformity on the basis of most favoured nations (MFN) principle meaning giving equal advantage to all nationals irrespective of membership. In addition, protectionism in developed countries has frustrated the hope of greater market access in other sectors of the WTO, which was assured at the time of Uruguay Round as a trade-off for 'swallowing TRIPs'. For example, Bangladesh is competing with other countries for accessing the US market for its Ready-Made Garments (RMG) after losing GSP.

Cultural differences have stopped some developing countries from realizing the full implication of the TRIPs and their protection. Since the TRIPs standards are new in developing countries, their application and interpretation often depend on borrowing case law and jurisprudence from western developed country culture, which do not suit developing country needs and interests. It causes serious tension to developing countries.

For developing countries, the costs of compliance with the TRIPs Agreement seem to be the most crucial concern. The entire legal and administrative framework needs to be reshuffled with adequate administration, trained personnel, and effective process of acquisition and registration of TRIPs.

Imported technologies act as sources of new production knowledge. To this end, the TRIPs Agreement contains a number of provisions as regards transfer of technology. But it has made transfer of technology dependent on strict mandatory protection of TRIPs. If these two go together, it may frustrate the economic developmental objectives. For a developing country, certain levels of industrialisation require to be achieved before reaping long-term benefits of TRIPS protection. The US, Japan, and other developed countries first made economic development, later they maintained strict protection of IPRs.

The TRIPs patentable products include foodstuffs, seeds, farming chemicals, and pharmaceuticals. Patenting of them may lift the price of essentials to levels that are too high for the poor to afford in most of the developing and least developed countries, where almost eighty five percent of people live below the poverty line. It is a matter-serious concern for developing countries. To face national emergencies and in public interest patent right of pharmaceuticals can be denied but the exercise of permissible exceptions is often put to threat of developed countries. For example, recently South Africa and Thailand have faced such threats.

To fight against AIDS, the Doha Declaration on the TRIPs Agreement and Public Health adopted on 14 November 2001 speaks about generic drugs by stating that the TRIPs Agreement will not prevent a member from using 'measures for the protection of human, animal or plant life or health, or of the environment at the levels it considers appropriate'. But the generic drug provision applies only to known diseases, not to unknown potential diseases. It also says that the production of generic drugs under compulsory licences must be 'predominantly for the supply of the domestic market'. It means that members with little or no manufacturing capacity cannot produce generic drugs domestically for their own use or even they cannot import these drugs from other countries. Amidst fiercest US resistance, this has now been changed allowing developing countries to import generic drugs from foreign generic drug producers.

To be patentable, an invention must be new, involve a formal inventive step and have industrial application. Patenting of new plant varieties is also permissible. In that sense, medicinal plants, indigenous knowledge, ideas or innovations evolving naturally or products and technologies arising out of resources identified, developed, and used by indigenous people from time immemorial are not patentable but if they are collected, refined or produced as knowledge in modern laboratories with a view to earning profits in the open market they become patentable. This process often termed as bio-prospecting or bio-piracy involves the expense of those who cultivate knowledge to protect their heritage from appropriation and over-exploitation but it does not care for authorisation from or compensation to these indigenous people. It forces them to pay high prices for the finished product. It is a cause for great concern for biodiversity-rich developing countries.

Patenting of such products and their commercial exploitation by MNCs appear to be a huge concern for biodiversity. Though it is a source of massive profits, it has been causing damage to the biodiversity by preventing the production or reproduction of indigenous products and food supply chains. As a result, it has been economically injuring the livelihood of small producers and obstructing the poor people from using their own traditional resources and knowledge to cater their human rights to health and nutrition.

MNCs are producing seeds using 'terminator' technology which do not germinate second time and farmers are forced to pay royalties each time they plant these engineered varieties of seeds. It causes adverse effects on their livelihood.

The TRIPs Agreement has been limiting the availability of educational materials for developing country school and university students through the adoption of strict copyright regime.

So, it shows that compliance with the international protection regime laid down by the TRIPs Agreement appears to be complicated, challenging, and expensive for developing and least developed countries. To get fixes for those concerns, amendment of the TRIPs Agreement through re-negotiation is undoubtedly the best way but it is the most difficult job for developing and least developed countries with their least negotiating capacity to achieve in the face of mighty opposition from developed countries. The best thing they can do is to seek compromise on the transitional period and ask for technical and financial assistance to build up the infrastructure appropriate for compliance.

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RIGHTS *corner*

Agencies target female mutilation

LAURA TREVELYAN

A range of United Nations agencies are calling for the practice of female genital mutilation to be ended within the space of a generation. An estimated three million girls a year are thought to be at risk from this practice, many of them in Africa. The practice of cutting off the clitoris of a young girl - and often more - is deeply rooted in some cultures.

Ten UN agencies want a major reduction in the tradition by 2015.

The practice is seen in some countries as a way to ensure virginity and to make a woman marriageable. Yet it also leads to bleeding, shock, infections and a higher rate of death for the women's new-born babies, say the UN groups.

Communities urged

Up to 140 million women are thought to have undergone this procedure in 28 countries in Africa, and a few in Asia and the Middle East.

It is also happening to girls and women who have left their original countries and settled in the West. The UN agencies say traditions are often stronger than law and legal action by itself is not enough to tackle this.

Change must come from within communities, they say, citing the example of West Africa, where villages have joined together to make pledges to abandon this practice.

Source: BBC News, New York.

BBC

VACANCY ANNOUNCEMENT

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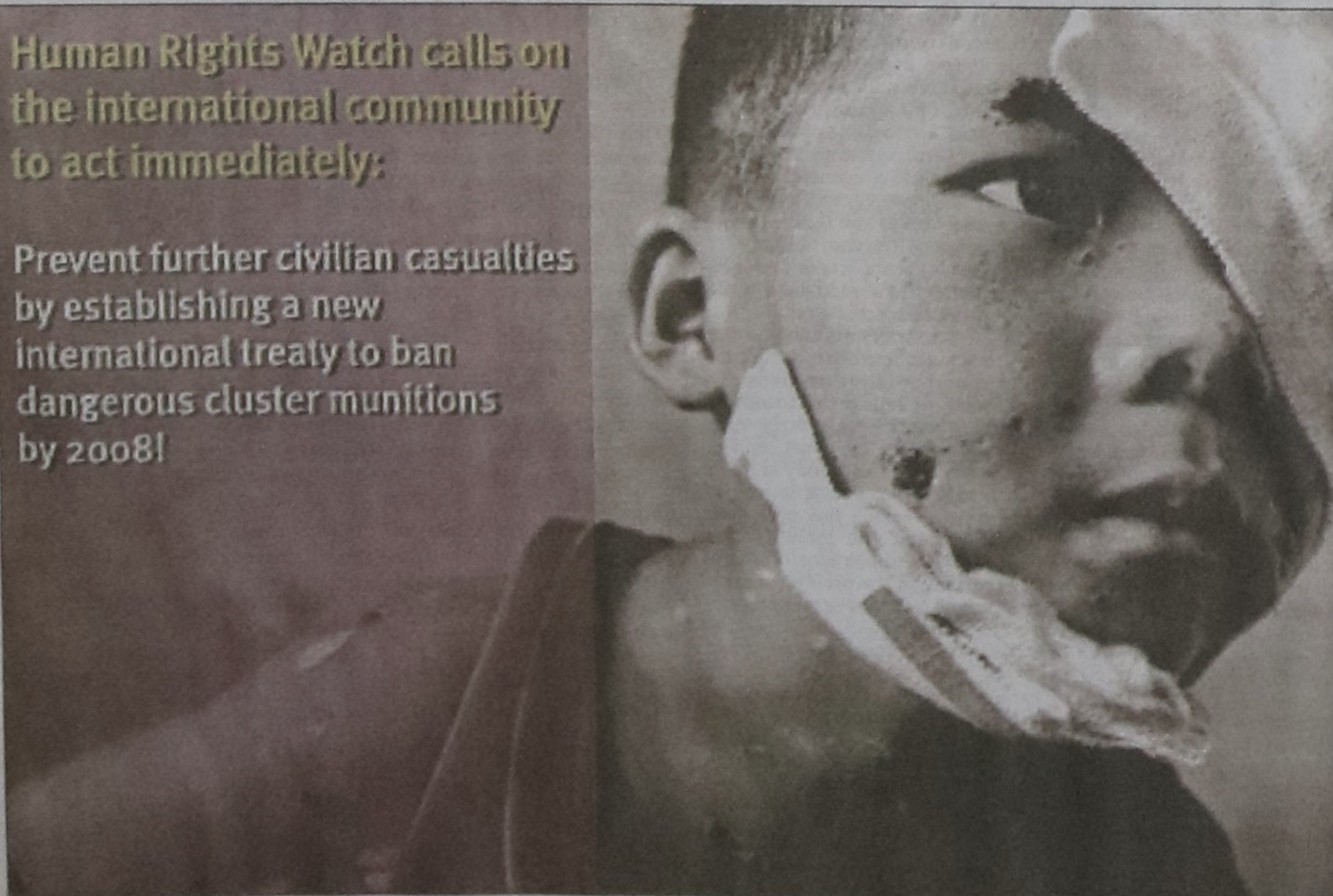
HUMAN RIGHTS *advocacy*

Ban on cluster munitions



HUMAN RIGHTS WATCH

EIGHTY-two nations endorsed a strongly worded draft treaty on cluster munitions, moving the world closer to a ban on weapons that cause horrific civilian casualties, Human Rights Watch said today at the end of a week of diplomatic talks in Wellington, New Zealand. The push for a comprehensive ban on clusters, which harm civilians during and after conflict, came despite efforts to water down the text by a handful of states with stockpiles of the weapon.

More than 100 states attended the Wellington Conference on Cluster Munitions from February 18-22, 2008 to discuss a draft treaty prohibiting the use, production, stockpiling, and trade of cluster munitions. Eighty-two endorsed the Wellington Declaration, which commits states to participate in the formal negotiations in Dublin, Ireland, from May 19-30, and to conduct the negotiations on the basis of the text developed in Wellington. Others are expected to endorse the declaration ahead of the Dublin meeting.

"It was heartening to see so many governments determined to create a cluster munitions treaty that will make a real difference in saving civilian lives and limbs," said Steve Goose, director of the Arms Division of Human Rights Watch. "All proposals to weaken the draft treaty most notably by Denmark, France, Germany, Japan, and the United Kingdom were rejected." However, it is expected that the proposals will be re-considered at the Dublin negotiations and Human Rights Watch urged participants to hold fast to the Wellington text and ensure the creation of an effective treaty.

Cluster munitions are large weapons that release dozens or hundreds of smaller sub-munitions. Air-dropped or ground-launched, they cause two major humanitarian problems. First, their wide-area effect virtually guarantees civilian casualties when they are used in populated areas. Second, many of the sub-munitions do not explode on impact as designed but lie around like landmines, causing civilian casualties for months or years to come.

One year ago in Oslo, Norway, 46 states agreed to conclude a treaty by the end of 2008 that bans cluster munitions "that cause unacceptable harm to civilians." The treaty was then developed and discussed in subsequent international meetings in Peru and Austria, as well as regional meetings in Cambodia, Costa Rica, Serbia, and Belgium. "The Wellington draft treaty is an excellent basis for negotiations," said Goose. "The agreement to send it on to Dublin for final negotiation without watering it down is a victory for those who want an end to the civilian harm caused by cluster munitions."

In addition to the ban, the treaty also includes provisions requiring clearance of contaminated areas and assistance to victims. States affected by clusters, particularly Cambodia, Laos, and Lebanon, spoke out strongly in favour of the Wellington text, as did others in the developing world, notably Indonesia. About 140 representatives of nongovernmental organizations from 34 countries participated, with particularly compelling testimony provided by cluster munitions survivors.

The attempts to weaken the treaty came in three main issues: efforts to exempt certain types of cluster munitions or technologies from the ban altogether; to have a "transition period" in which the banned weapons could still be used, and to delete or gut a provision that prohibits states from "assisting" with the use of cluster munitions by armed forces that are not part of the treaty (so-called "interoperability" concerns). Some states also pushed to delete a provision that calls on user states to help with the clearance of cluster munitions from conflicts that pre-date the treaty. The most objectionable proposals for exceptions were put forward by France, Germany, Japan, and Switzerland; for a transition period by Germany and Japan (with notable support from the United Kingdom); and for interoperability by Canada, Germany, and Japan (with notable support from Australia). Other states vocal in their support of provisions to weaken the treaty included the Czech Republic, Denmark, Finland, Italy, the Netherlands, Slovakia, Spain, and Sweden.

Despite the fact that none of these proposals were included in the final draft treaty text, all of these states decided to endorse the Wellington Declaration and to participate fully in the Dublin negotiations. Until the last moment, it appeared many would refuse to endorse, and would walk away, as some had privately threatened to do. On the positive side, there was notable movement in the right direction in many of these countries on these and other issues during the course of the week, giving confidence that a strong treaty will emerge from Dublin. Although many of the main users of cluster munitions, such as Israel, the United States, and Russia, did not attend the conference, 75 percent of the world's cluster munitions stockpilers were present, and most of the producers and past users.

The treaty process was sparked in part by the recent conflict between Israel and Hezbollah in Lebanon in 2006. As documented in a Human Rights Watch report released earlier this week, Israel dropped an alarming 4.6 million sub-munitions on southern Lebanon during the fighting. Up to 1 million duds failed to explode and remained on the ground as de facto landmines, threatening the lives and livelihoods of civilians.

At least 14 countries and a small number of non-state armed groups have used cluster munitions in at least 30 countries and areas. Thirty-four countries are known to have produced more than 210 different types of air-dropped and surface-launched cluster munitions. At least 13 countries have transferred more than 50 types of cluster munitions to at least 60 countries.

Source: Human Rights Watch.