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The investment issue in WTO

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Background to the Doha Decision

At the Singapore WTO Ministerial (1996), Ministers agreed to form a working group to study the relationship between trade and investment. It was explicitly stated there was no commitment to negotiate an agreement.

For the next five years (1997-2001) the WTO Working Group on Trade and Investment held several discussions. Major developed countries pressed very hard to have the working group be transformed into a negotiating group that would negotiate an investment agreement in

WTO. However, the majority of developing countries were extremely reluctant to agree to this. Some of these countries were strongly opposed.

Ministerial Conferences of the LDC group (Zanzibar Sept 2001), of the African region under the OAU (Abuja October 2001) and the ACP group (Brussels, November 2001) issued statements stating the view that they were not prepared to enter negotiations on the issue. At the WTO in Geneva, the majority of developing countries also made clear their opposition. However the draft Declaration sent from Geneva to Doha reflected the EU-led position that negotiations should start on investment.

At the Doha Ministerial, the opposition of developing countries continued (refer, for example, to formal statements made by

many Ministers on rejection of developing countries midway through Doha at a 11 November informal plenary meeting on new issues). Even on the last scheduled day (13 November 2001), the Africa, LDC and ACP groups issued a set of proposals to replace the draft text on investment and other new issues. The new text proposed by these countries stated that most developing countries lack the capacity to engage these issues with full appreciation of the implications for their countries and people, that the relevant bodies undertake further work and that the 5th Ministerial "shall determine the desirability or otherwise of negotiations in these areas." It was clear from this proposal that the countries wanted the study process to continue (i.e. that they did not want a negotiation process to begin) and that the next Ministerial would decide "on the desirability or otherwise" of negotiations on these areas.

However, due to manipulative tactics, including the convening of a marathon Green Room session on the last night at Doha (6pm to 5am), a draft Declaration was issued on the morning of 14 November which in para 20 "recognised the case for a multilateral framework" on investment and which agreed that "negotiations will take place after the 5th Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations."

Then, and even now, it is not clear at all how the new text was drafted or by who. It certainly was not drafted in an open, transparent session where all countries could be present and put forward their position or alternative formulations. The text was put before an informal plenary meeting in the afternoon of 14 November. India supported by a dozen countries, requested changes to the text to the effect that the consensus required was for negotiations and not merely on modalities. The compromise reached was that the draft Declaration would be adopted unmodified but that the Conference chairman would clarify that the position of India and the dozen other countries was accepted. At the

final formal session, the Chairman made the following statement:

"I would like to note that some delegations have requested clarification concerning Paragraphs 20, 23, 26 and 27 of the draft declaration. Let me say that with respect to the reference to an 'explicit consensus' being needed, in these paragraphs, for a decision to be taken at the Fifth Session of the Ministerial Conference, my understanding is that, at that session, a decision would indeed need to be taken by explicit consensus, before negotiations on trade and investment and trade and competition policy, transparency in government procurement, and trade facilitation could proceed.

In my view, this would also give each member the right to take a position on modalities that would prevent negotiations from proceeding after the Fifth Session of the Ministerial Conference until that member is prepared to join in an explicit consensus." (Statement by Conference chairman, Honourable Mr Youssef Hussain Kamal, Minister of Finance, Economy and Trade, Qatar at the closing plenary session of the Doha Ministerial Conference. 14 November 2001.)

According to the renowned authority on international trade, Bhagirath Lal Das, the Chairman's statement has legal standing and force in the WTO context. According to Das:

The Chairman has made *this* statement in response to the requests of some delegations to have "clarification concerning paragraphs 20,23,26 and 27". Hence his statement is in the nature of the "clarification" of the language in these paragraphs. Also the Chairman has termed the first part of it as "(his) understanding". Normally a chairman gets such understanding by a process of consultations with the participants in the meeting and he/she includes agreed formulations in his/her understanding. If there is no objection or reservation from the participants after the chairman has expressed his/her understanding, it is considered to be the collective wish of the

meeting. In this plenary during this Conference, there was no objection or reservation from the participants after the Chairman expressed his understanding. All this makes this part binding on the WTO process unless it is modified by a later WTO Ministerial Conference.

This part of his statement will be considered to interpret the meaning of the language in these paragraphs (i.e., paragraphs 20,23,26 and 27). Hence it is necessary to have an explicit consensus before negotiations in these four respective areas "could proceed". The text in the relevant paragraphs in the Declaration speaks about the decision by explicit consensus on modalities of negotiations. A question arises whether the negotiation will automatically proceed when the modalities are agreed to by explicit consensus. Here the text in the Chairman's statement comes into play. It speaks about decision by explicit consensus on the negotiation to proceed. All this considered together suggests a two-stage decision by explicit consensus, one stage for the modalities for negotiation and another stage for the negotiation to proceed. It should be noted that there is no prescribed sequencing in these two stages; for example, even before the modalities are taken up for a decision (by explicit consensus), the matter of negotiation itself can be taken up for decision (by explicit consensus).

Decision by consensus is defined in the footnote 1 to Article IX of the Marrakesh Agreement Establishing the WTO as a situation when "no Member, present at the meeting when the decision is taken, formally objects to the proposed decision". Thus, technically speaking, even one Member can withhold consensus on modalities and thereby withhold the negotiation in this area thereon. Also even one Member can withhold consensus on negotiation to proceed.

In actual practice, it will depend on the motivation of the Members and the political situation existing at that time. The Fifth Ministerial Conference will be technically within its rights to alter the situation created by this understanding."

Thus, from a legal viewpoint, the two texts (Declaration and Chairman's statement) have to be read together, and the Doha Ministerial has not mandated that there will be negotiations on an investment agreement. Moreover, although the Declaration recognizes the need for a multilateral framework, it does not say what kind of framework (in substance or whether legally binding or non-binding) nor what is the appropriate venue.

Current work in the WTO

Between now and the 5th Ministerial, work will proceed in the working group. This will be guided by (1) the working out of the issue of modalities of negotiations, that had been mentioned in para 20 of the Doha Declaration; (2) subjects mentioned in para 22 "for clarification", ie clarification of scope and definition, transparency, non-discrimination, modalities for pre-establishment commitments based on a GATS-type, positive list approach, development provisions, exceptions and balance of payments safeguards, consultation and the settlement of disputes; (3) other subjects mentioned in para 22, ie any framework should reflect in a balanced way the interests of home and host countries, take account of development policies and objectives of host governments and their right to regulate in the public interest. There is mention also that the special needs of developing countries should be taken into account; due regard to other relevant WTO provisions; and account should be taken of existing bilateral and regional investment arrangements.

Historical background

The EU and Japan are the main developed economies seeking to upgrade the study process into a negotiation for an agreement. Since many developing countries are opposed to introducing an investment agreement in WTO, the EU and Japan etc are attempting to portray their aim as one intended to produce a development-friendly investment agreement. Some developing countries are

willing to move into negotiating mode, but most are reluctant or opposed.

There is a long history of developed countries attempting to persuade developing countries to agree to a binding international investment treaty. During the Uruguay Round, the developed countries included investment rules in the TRIMS (Trade-Related Investment Measures) negotiations. However, developing countries were unable to accept this and succeeded in restricting the TRIMS agreement to only trade-related measures. The developed countries tried again in 1995-96 to have the WTO negotiate an investment agreement but the Singapore Ministerial only agreed on setting up a working group for discussion on trade and investment. They tried again through the OECD (Organisation for Economic Cooperation and Development) to have an investment agreement, but this failed. The efforts to have the negotiations in the WTO intensified after the OECD failure and this intensified before and at the Seattle Ministerial of 1999.

In the Draft Ministerial Text for Seattle Ministerial (dated 19 Oct 1999), the position of an influential group of developing countries (the like-minded group) on investment is laid out in para 56. In brief it says that the investment working group shall pursue its present mandate, and further work should focus on issues of interest to developing countries, in particular the effects of foreign direct investment (positive and negative) on the development objectives of host countries, the obligations of foreign investors to host countries, and the obligations of home countries in respect of disciplines on their investors. The working group shall report to the next Ministerial Conference on the results of its work. On the other hand, para 41 presents the developed countries' position, that "negotiations shall aim to establish a multilateral framework of rules on foreign direct investment (FDI)", with eight points on the framework.

The collapse of the Seattle Ministerial meant that there was a two-year "reprieve." The Doha decision has brought the

prospect of negotiation much greater.

Main design and strategic aim of proponents

Among main aims of developed countries is to eventually establish international binding rules on investment that:

- ? Provide foreign investors the rights to enter countries without conditions and regulations, and to operate in the host countries without most conditions now existing, and be granted "national treatment" and MFN (most favoured nation) status.
- ? Performance requirements (eg regulating equity, obligations for technology transfer, investment incentives) *would* be prohibited.
- ? Regulation of mobility of funds into and out of the country *would* be prohibited.
- ? The original definition of investor (eg in the proposed OECD MAI) would include FDI, portfolio investor, creditors, even IPR (Intellectual Property Rights) holders and non-commercial organisations, and in all sectors except security and defence.
- ? There would also be strict standards of protection for investors' rights, in relation to "expropriation" of property. A wide definition is given to expropriation in the MAI model; it includes "creeping expropriation". The NAFTA (North American Free Trade Area) experience is very pertinent. Expropriation is likely to include the loss of goodwill and future revenue/profits of a company or an investor, as a result of a government measure or policy.
- ? Governments are prohibited by international law to impose the prohibited regulations or conditions, and can be brought to a panel in WTO for violations. This design is in the original EC paper (1995) proposing the agreement, and the elements are also in the

OECD draft of the MAI (multilateral agreement on investment), which is the prototype of the proposed investment agreement.

Tactical shifts and tactical methods

Due to the unpopularity of this extreme model, including with citizens in the North that successfully opposed the OECD-MAI, the major proponents are now offering watered-down versions. These versions would not be so extreme, and would not enable the proponents to reach the ultimate goals immediately. Instead, step-by-step or stage-by-stage approaches are now proposed, whereby Members of WTO will agree to negotiate an agreement, and in the agreement they can have the choice of which sectors and how fast to liberalise. (This is presumably what the "GATS-type" approach refers to). The idea is to draw in countries to agree to the concept that investment rules belong to the mandate of WTO; and then to draw them into an agreement which appears not to be so harmful and where there is some space to make choices; and then later on to pressure them to liberalise more and more in terms of sectors and depth of policy measure.

The main tactical shifts that took place prior to Doha were as follows:

(a) The EC has proposed that instead of a blanket right of investors to establish, there can be a GATS type (services agreement) approach, where each country can choose to offer which sector to liberalise, and the degree of openness (in terms of national treatment). However, there will still be certain general rules, e.g. relating to free mobility of funds, prohibition or restrictions on performance requirements, and protections against expropriation, etc.

(b) The EC also (via a strategy paper of Dec 2000) proposed that a plurilateral approach could be taken in which the Doha Ministerial agree that negotiations begin on a plurilateral agreement on investment. Members can all take part in the negotiations, but each Member can choose at the end whether or not to join in the

agreement. The EC paper says it expects the vast majority of developing countries to join in. Those that do not, may find there is pressure for them not to remain outside. This proposal was updated into a so-called "opt-in, out-out" approach that was put forward in October 2001 before Doha. However the Doha decision did not include it. It may re-appear as part of an option for "modality" in the future discussions.

(c) Japan proposed that there be negotiations for a multilateral agreement on investment but that at the first stage it be on transparency aspects. The market access or liberalisation aspect would presumably be at a subsequent stage. In the Doha decision, transparency is one of the issues for clarification.

(d) Prior to Seattle, there were also proposals that the Ministerial meeting decide that the working group continue to study the issue for another two years or so, but that after that negotiations should begin for an agreement. (This was known as the "bridging" approach that would be a compromise between those who want immediate negotiations and those that want the study to continue indefinitely in the working group). This approach is quite similar to the Doha decision, where two years of focused discussion would be followed by negotiations; however the Doha decision has given some room for flexibility as negotiations *would* depend on an explicit consensus on negotiation while the Chairman's closing statement provides even more room for the argument that consensus is required for starting negotiation itself.

Analysis and proposed positions to take

It should be recognised that the watered down versions and other approaches (GATS-type, plurilateral, transparency, bridging) are only shifts in tactics and not in the ultimate goals. Once an initial agreement with limited scope and commitments is obtained, pressure will be applied to widen the scope and deepen the commitments in subsequent rounds of negotiations. The example of the procurement issue is significant. The

discussions may begin on "transparency", but many unforeseen aspects are then added under the concept of "transparency" and it is likely that if there is a transparency agreement, there will be pressure towards a market access agreement, which then will move through stages to higher and higher standards or levels of market access. The example of services is also significant. Though in theory each country can choose the timing, sectors and degree for liberalisation, in reality there is pressure from developed countries for accelerating the pace and depth of liberalisation in many sectors. Moreover the services agreement also has general rules that apply across all sectors (whether or not they are on schedule for liberalisation) and these rules are being expanded (for example, the rules disciplining "domestic regulation").

Thus the "watered down approaches" of the EU, Japan etc. and now the Doha decision should be seen as only subtle methods of drawing developing countries into the web that will eventually develop into an investment agreement with rules that later on enable pressures to be applied for higher and higher standards of liberalisation and market access (for example, under the principle of "progressive liberalisation" used in GATS). Thus, the "watered down approaches" should not be accepted.

An international agreement on investment rules of this type is ultimately designed to maximize foreign investors' rights whilst minimising the authority, rights and policy space of governments and developing countries. This has serious consequences in terms of policy making in economic, social and political spheres, affecting the ability to plan in relation to local participation and ownership, balancing of equity shares between foreign and locals and between local communities, the ability to build capacity of local firms and entrepreneurs, etc. It would also weaken the bargaining position of government vis-a-vis foreign investors (including portfolio investors).

Due to the particular features and effects that foreign investment can have, there is a

need for government to retain the option for regulation. Among the effects are:

- (a) possible effects on balance of payments (especially increased imports and outflow of investment income, which has to be balanced by export earnings and new capital *inflows*; if the balance is not attained naturally, it may have to be attained or attempted through regulation);
- (b) possible effects on competitiveness and viability of local enterprises;
- (c) possible effects on balance between local and foreign ownership and participation in the economy.
- (d) Possible effect on the balance of ownership and participation among local communities in the society.

An investment agreement of the type envisaged would make it more difficult to have a policy that includes the required regulations. It is argued by proponents that an investment agreement will attract more FDI to developing countries. There is no evidence of this. FDI flows to countries that are already quite developed, or there are resources and infrastructure, or where there is a sizable market (eg to China even when there were not high standards of rules).

A move towards a binding investment agreement is thus dangerous as it would threaten options for development, social policies and nation building strategies. It is thus proposed that the strategy to be adopted, should be to prevent the investment issue from entering the mode of "negotiations." In the working group, cogent points should be put forward on why an agreement on investment rules is not suitable nor beneficial for the WTO. In the discussion on "clarification" and on "modality", points should be made towards this end.

It is proposed that the following position be taken:

- (a) Investment is not a trade issue, and thus bringing it within the ambit of WTO would be an aberration and could cause distortion to the trade system. It is certainly not clear that the principles of WTO (including

national treatment, MFN) that apply to trade in goods should apply to investment, nor that if they apply that it would benefit developing countries. Traditionally developing countries have had the freedom and right to regulate the entry and conditions of establishment and operation of foreign investments; restricting their rights would cause adverse repercussions. An agreement in WTO is likely to be of the type proposed by developed countries. It would be profoundly anti-development.

(b) Whilst Doha recognised the case for a multilateral framework on investment, it can be argued in the working group that it can also be recognised that there is a case against a multilateral framework, depending on what the framework is. An appropriate framework may be a balanced one, with the main aim of regulating corporations (instead of regulating governments); it could be one that is not legally binding; and it could be one that is located in the UN and not the WTO.

(c) In the discussion on clarification of issues, and on modality, points that are appropriate for development, and for sustainable human development, should be put forward.

Khor is the Director of Third World Network. This paper initially published in April 2002 was circulated at the 6th SEATINI Workshop (2-5 April) in Arusha Tanzania.

Comments on the forthcoming work on investment in the WTO

Bhagirath Lal Das

It is given in paragraph 22 of the Declaration. The Working Group on the Relationship between Trade and Investment has been examining this relationship since 1996. Now the Declaration says that the Working Group will focus on certain specific elements. Besides, as mentioned in paragraph 20 of the Declaration and also in the Statement of the Chairman, "modalities of negotiations" will be worked out. What will be the essential subjects of the "modalities" has not been spelt out. The Declaration is silent on this point.

Paragraph 22 of the Declaration asks the Working Group to focus on the clarification of certain elements, viz., (i) scope and definition, (ii) transparency, (iii) non-discrimination, (iv) modalities for pre-establishment commitments based on GATS-type positive list approach, (v) development provisions, (vi) exceptions and balance of payment safeguards, and (vi) consultation and dispute settlement.

Then the Declaration goes on to give some guidelines on the possible framework. For example, the framework should reflect balanced interests of home and host countries, take account of development policies and development objectives of the host governments, take into account the special development, trade and financial needs of developing countries including the least developed countries, etc. It should be noted that these are the guidelines for a "framework", and negotiation on the "framework" can take place only after the Fifth Ministerial Conference, if the conditions mentioned above are fulfilled. Hence the relevance of these guidelines to the current work of the Working Group is not clear.

Background

The objective of the proponents of this subject in the WTO is to ensure and strengthen the protection of the rights of foreign investors in the host countries and to curtail the role of the host government in putting conditions on foreign investors' entry and operation. It has serious implications for the developing countries. They have priorities of development and they would like to channel foreign investment in the areas of their priority, for example in building of infrastructure, in production of exportable goods and services and in sectors which will instill innate strength to the country's economy. They would also like to have proper geographical spread of the foreign investment so that the under-developed regions~ of the country get priority attention. Further, they will prefer that the operation of the foreign investment is carried out in such a way that it links with the domestic economic activity in a

positive manner with mutual benefit to both the investor and the domestic economic activities. They will be keen to guard against any adverse effects of the foreign investment on their economic, social and political process. All these objectives need concrete government policies and measures.

The objective of the proponents of this subject is to restrict the options of the government in this regard so that the investor has freedom of entry and operation. It can have serious adverse impact on the host country's economy and its economic structure. The developing countries are particularly vulnerable in this regard. Hence it is quite natural that a large number of them have been extremely reluctant to let this issue enter the WTO, where the binding commitments cannot be annulled or modified without giving commensurate compensation. The approach of the developing countries to the work in the Working Group should be guided by these real apprehensions. Elements for clarification included in paragraph 23 of the Declaration

The Work Programme has identified certain elements for clarification as the focus of the work. Two important points need to be emphasized. Firstly, the items are mentioned for "clarification". Thus the existence of an item here does not mean that it has already been accepted as an appropriate subject in a multilateral framework. After the exercise of clarification, it may be decided that the item should be treated in a certain way or that it should not be included at all. Secondly, it should be noted that these are not the exclusive elements for clarification, since these have been identified for the focus of the work and not as exclusive work. Hence if the developing countries identify some other elements for consideration or clarification, this paragraph of the Declaration does not prevent them from doing so. In fact, it will be useful if the developing countries, apart from giving their ideas on these elements, also put up some other elements which they consider important from their point of view.

There may be a doubt whether the developing countries should actively engage in this exercise as they have been objecting to an expansion of the work on Investment and Competition Policy in the WTO. It is important for them to engage fully in this exercise at this stage; otherwise the work on clarification of these elements will go on without their contribution and they will thus lose an opportunity to place their ideas on the table and have an effective say in determining the content and relevance of these elements. The advantage for them lies in active participation and placing other elements for clarification which they may consider relevant.

Some preliminary ideas are given below in respect of the points for clarification identified as the focus of work in the Work Programme.

Scope and definition

Considering that this whole exercise is aimed at curtailing the government's options and role, it is important for the developing countries to have: the scope and definition in such a way that it is limited, well defined and not amenable to future expansion. For example, it is desirable to limit the scope to foreign direct investment (FDI) and not to include portfolio investment, loans or credit, short term deposits, speculative funds and other such flow of funds. *It should be ensured that the definition of foreign direct investment is fully clear and totally unambiguous.*

Transparency

Transparency should be limited to automatic or easy availability of the relevant rules, procedures and decisions. It should not transgress into the area of substantive decision making process.

Non-discrimination

Non-discrimination has two elements, viz., one, non-discrimination as between the investors of the territories of different Members (MFN principle) and two, non-discrimination as between the foreign

investor and domestic investor (national treatment principle). Both these principles are dangerous in respect of the developing countries; and, between the two, the second is much more dangerous. They should have the flexibility to give preference to investments from particular countries, based on the past experience and past linkages as also on the basis of the perception of future trends of cooperation. It will be extremely harmful for the developing countries to include national treatment. i.e., non-discrimination as between the foreign investor and domestic investor, in a possible framework for investment. Domestic investors stand on a different footing altogether. For example, they do not repatriate the returns on investment to foreign countries, they are more inclined to have domestic linkages with their investment, thus generating further domestic economic activities, etc.

It will not be enough if the developing countries are given some differential treatment in this respect. Past experience in the GATT/WTO system has shown that differential treatment do not have the safeguard of real and stable protection. What should be ensured is that the principle of non-discrimination as seen in the mo sense, as explained above, should not have a place in a framework for investment at all.

Modalities for pre-establishment commitments based on GATS-type positive list approach

Here the reference is to the specific commitments in the GATS. A country chooses which sector to include in its commitments and what conditions to apply for the entry and operation. In the context of investment, it would perhaps imply that a country will undertake obligations on the entry of investment in areas specified by it and also will be able to prescribe conditions for entry and operation. At the surface it may appear safe. But the experience with the GATS negotiations on specific commitments has shown that it does not give adequate protection to the developing countries. Though in theory a country is free to

choose sectors for inclusion in its commitments, in actual practice, its commitments, including its choice of sectors. will be the result of a series of bilateral and plurilateral negotiations with other countries, in particular the major developed countries. In these negotiations, individual developing countries are put to intense pressures from the latter and are often unable to limit their commitments to the sectors of their choice.

Development provisions

A desirable development provision will be that a developing country will be totally free to apply conditions on the entry and operation of the foreign direct investment in accordance with its own perception and decision on its development process. A developing country should have total freedom to make its own autonomous decision and thus it should not be required to justify it either bilaterally or multilaterally.

Also, a developing country should be enabled to apply domestic content requirement that is at present prohibited under the Agreement on TRIM.!: and Article ill of the GATT 1994.

Exceptions and balance-of-payments safeguards

If a developing country has full discretion and flexibility about putting conditions on entry and operation of the foreign direct investment, it will not need exceptions and balance-of-payment safeguards. While allowing the entry of investment it will be retaining its options of actions in the situations needing exceptions or balance-of-payment safeguards.

Consultation and dispute settlement between Members

A possible framework will have a dispute settlement process to resolve the disputes between the Members. The investors should have no role in this process. The dispute settlement mechanism should be separated out from the normal Dispute Settlement Understanding of the WTO, in

the sense that there should be no provision of cross-retaliation as is contained in Article 22.3 of the Dispute Settlement Understanding of the WTO

Elements for clarification to be placed by the developing countries

As mentioned above, these are not the exclusive elements for clarification. Surprisingly, the selection of these elements has been very much one-sided. Several specific points made by the developing countries in the Working Group which could have formed part of this list of elements have not been taken into account. Hence it is important for the developing countries to place their own points for clarification in this part of the work of the Working Group. Some proposals of this nature had been included by the developing countries in the draft for Seattle Ministerial Conference (para 56 of that draft). Suggestions are given below for some elements to be introduced by the developing countries in the Working Group.

Obligations of foreign investors

The foreign investors should have the obligation not to undertake what are considered restrictive business practices, for example, restrictive conditions on consumers or other users, transfer pricing, collusive pricing, predatory practices, etc. They should also have the specific obligation of total transparency in their dealings, particularly in respect of their raising of resource, sale of products and services, purchase of products and services, distribution and use of profits, etc. Further they should have the obligation not to act prejudicial to the social norms and economic interests of the host countries. There should be a provision for international blacklisting of the investors found to be defaulting on their obligations.

Foreign investors may also be obliged to: undertake technology transfer (including to domestic firms), train domestic personnel, allow domestic firms/persons participation in equity, bring specified amounts of capital, retain certain levels of profit in the

country, etc.

Obligations of home government

The home government of the foreign investor should have the obligation to ensure that the obligations of the foreign investor are discharged fully.

These are only some examples. There may be other elements based on the experiences of the developing countries with the foreign investment over the years.

Das was formerly India's Ambassador and Permanent Representative to the General Agreement on Tariffs and Trade Forum. He has also served as Director of International Trade Programmes at the United Nations Conference on Trade and Development (UNCTAD). He is currently a consultant and advisor to several intergovernmental and non-governmental organisations. This is an abridged article from his paper on The New Work Programme of the WTO.

NGOs call on governments to drop investment issue at WTO Cancun meeting

More than 50 NGOs and social movements have called on WTO member governments to drop any proposals or plans to launch negotiations on a new investment agreement during the Cancun Ministerial Conference in September this year. They also asked the governments to also reject launching negotiations on the other "new issues" or "Singapore issues" (competition policy, transparency in government procurement and trade facilitation). The calls were made in a Joint Declaration of NGOs and Civil Society Movements on "No Investment Negotiations at the WTO."

The Declaration was first drawn up at a NGO Workshop on the WTO Investment Issue held in Geneva on 18-21 March 2003. It was organised by the Third World Network, Oxfam International, WWF, Public Services International, Centre for International Environmental Law, Institute for Agriculture and Trade Policy. After the workshop, the Declaration has been

circulated to other NGOs and movements, and more groups have been signing on. The Declaration was also released at a media conference held in Geneva on 21 March. It will also be sent to the Missions of the member governments of WTO.

Declaration of Non Governmental Groups and Civil Society Movements:

We, members of civil society organisations from developing and developed countries, explicitly reject the launch of negotiations on investment and the other Singapore Issues at the Ministerial Conference in Cancun this September.

We have gathered from a broad spectrum of civil society groups, including groups working on development, environment, faith-based, social, labour, human rights, food security, gender, and rural and indigenous community issues. We have met over four days in Geneva in the shadow of global conflict and have reached the following conclusions.

Previous attempts to negotiate a multilateral agreement on investment, including the failed Multilateral Agreement on Investment (MAI), have been criticized by civil society around the world as overly focused on investor protections and for failing to adequately address poverty reduction, sustainable development, and corporate accountability and liability.

Discussions to date within the WTO's Working Group on the Relationship between Trade and Investment indicate that some WTO Members such as the EU, US and Japan are similarly focused almost exclusively on granting greater rights to transnational investors to hold themselves above national decisions on development priorities, macroeconomic policy, environmental directives, and implementation of international human rights law and norms.

Foreign direct investment can make a positive contribution to sustainable development when undertaken within a strong regulatory framework that will maximize the benefits and minimize the costs of investment. Most, if not all,

developed countries have made use of policy tools, such as performance requirements, to ensure that incoming investment would help to develop infant industries, enhance export capacities, and promote inward technology transfers, and yet many developed countries now seek to "kick away the development ladder" by denying developing countries the right to use identical policies.

Existing international investor protection rules in the North American Free Trade Agreement (NAFTA) and hundreds of bilateral investment agreements, as well as in provisions in contracts and loan agreements, are being used to challenge and seek compensation for governmental actions that are essential to achieving a just and sustainable future. This is a problem that affects both developing and developed countries. The filing of new claims by corporate investors in international arbitration is increasing at an alarming rate.

While the threats to regulatory prerogatives of governments is clear, there is little if any empirical evidence that adopting the types of investor protection rules being discussed at the WTO and negotiated in the Free Trade Area of the Americas and elsewhere will lead to any increase in the amount or quality of investment flows.

The WTO is the wrong forum for global investment talks. Moreover, the WTO is in the midst of a crisis as it is not making progress on issues of fundamental importance to developing countries and many other constituencies. Moreover, adding the Singapore issues (investment, competition, transparency in government procurement and trade facilitation) to an already crowded agenda will prevent the WTO from undertaking the reforms and rebalancing necessary.

Finally, WTO negotiations on investment and the other Singapore issues would result in rules that developing countries in particular do not need and cannot afford.

Therefore, we call upon the Members of the World Trade Organisation to:

- ? Explicitly reject the launch of negotiations on investment and the other Singapore Issues at the Ministerial Conference in Cancun this September,
- ? Reject the NAFTA/MAI approach to investment liberalisation.

NGOs and social movements that would like to sign on to the statement can contact the organisers at the following email: stopthenewissues@hotmail.com

Editorial: Negotiations on the Singapore issues should not begin
Yash Tandon

What Are The New Issues?

Although it is the four Singapore issues that have captured most attention as “new issues”, in actual fact all those issues that have been brought on to the agenda of the WTO since Marrakesh are technically speaking new issues.

Background to the Singapore Issues: the Broad Picture

The background to the introduction of the four issues into the WTO has to do with the end of the cold war (1989/90), and the search for profitable openings by Western corporations, especially after 1995. The final collapse of the Soviet bloc has created opportunities for the triumphant West to push open the doors for trade and investments in the former East and Central European countries, and in the countries of the South. The third world countries had taken advantage of the space created by the cold war to build “national” economies under tariff protection, and state subsidies to the so-called infant industries.

The liberalisation of competition, investment and public procurement regimes are presented as if they are good for the South. In actual fact, they are measures to advance the interests of private corporations of the North rather than to protect the interests of the South. Like many other measures in the West, such as

for example, mergers and acquisitions, the forcible prying open of markets hitherto protected by the South and of avenues for investments, are measures to combat decreasing rates of profitability in the West, especially after the collapse of the stock market boom of the 1990s.

Like with similar other agreements under the WTO (such as the TRIPS agreement that also became part of the WTO regime under pressure from the Western pharmaceutical industry) the four Singapore issues came to be part of the WTO agenda largely as a result of pressure of private corporations in the West. They were particularly concerned about removing what they called obstacles to “free competition” in the countries of the South, especially in the public sector, which, they argued, had become hotbed of monopoly profits and state corruption. Furthermore, they desired a freer atmosphere for the flow of their capital so that it could move around without national encumbrances. It is against this background that the issue of Competition Policy, Investment Policy, Government Procurement and Trade Facilitation came to be advanced by the industrialised countries at the First WTO Ministerial meeting in Singapore in November 1996.

History of the Singapore Issues in the WTO

When the industrialised countries first advanced these four issues, they had not expected much opposition from the developing countries (DCs). However, the DCs (barring a few) did not want to go beyond the Marrakesh Agreements on the grounds that the developed countries had not yet fulfilled many of their obligations, they had not lived up to their promises. Furthermore, the DCs argued that they could not afford to load their work programme before fully understanding the implications of the four issues. Also, they were not even sure if these issues were properly the subjects of a trade body like the WTO. However, as a compromise, working groups were set up for each of the four issues to carry out further studies on them. On the issue of Government Procurement there was already in existence

a plurilateral agreement among the industrialised countries, but the DCs were not party to it.

Accordingly, since 1997 these issues were under study with the four working groups at the WTO in Geneva. However, the European Union (EU) countries and Japan were so anxious to ensure a speedier resolution on the issue of the movement of capital, that they could not wait for the WTO studies to be completed, and hence sought to get a multilateral agreement on investments (MAI), negotiated among themselves (through the OECD), and then imposed on the rest of the world. This move met with stiff resistance from both Northern and Southern civil society movements (indeed the Canadian people threatened to take their government to court on this issue). These anti-MAI actions of the civil society culminated with the withdrawal of France from the push for MAI in 2000, and led to its final defeat. Its re-appearance at Doha as an issue on "investment policy" is in fact a resurrection of the MAI.

Before the Seattle Ministerial, the DCs (again barring a few) continued to oppose the inclusion of the four issues on the agenda of negotiations, whereas the developed countries argued that they would not carry out their obligations under the so-called "implementation issues" (issues left over from Marrakesh) unless the DCs compromised on these four issues. The Seattle Conference of the WTO (November 1999) collapsed amid disagreement between the USA and the European Union (mainly on agriculture), and opposition from the DCs, and civil society action on the streets of Seattle.

When the matter came back to Geneva, the study groups continued their studies, pending the next meeting of the WTO in Doha in November 2001. During the preparatory process, the DCs continued to oppose the commencement of negotiations on these issues, and argued for the completion of the study process. However, their views were disregarded, and in a "clean text" (i.e. a negotiating text without the contentious issues being put under

brackets, as is normally the custom), the Doha draft Ministerial Declaration included the four issues. The text disregarded the opposition of the developing countries to the inclusion of the new issues.

At Doha, many DCs put up a strong resistance against the inclusion of these issues on the negotiating agenda. They were concerned that once they are forced to negotiate on them, without proper preparation, they might lose all policy options they have in controlling foreign investments and foreign corporations in their countries, and this might prejudice the interest of their own companies, the employment of their people, and the transfer of technology. They were also concerned that the free flow of capital would introduce financial volatility that had brought ruin to the economies of East Asia in 1997/98.

During the course of the "negotiations" at Doha, many DCs found their delegations and Heads of Government pressurised (through a combination of stick and carrot methods of "persuasion") to concede to accepting the "clean texts" on the four issues (paragraphs 20 to 27). Especially active in this kind of manipulation was Pascal Lamy, the Commercial negotiator for the European Union (which negotiates as a single body in the WTO), and the Director General of the WTO, Mike Moore. By a shrewd manipulation of offers of "technical assistance" and securing "for" the ACP countries a waiver on the issue of the Cotonou Agreement, the industrialised countries were able to divide the South, and get the four issues included in the Doha Declaration. In the final draft, which the WTO Secretariat released on the last day of the Conference, the Ministers agreed that negotiations would take place on all the four issues after the Fifth Ministerial Conference "on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations." This seemed to imply that a decision had already been taken in principle to start negotiations towards new agreements, and only the modalities of the negotiations had to be agreed by "explicit consensus". On Indian insistence for

clarification, however, the Chairman made his own “understanding” of the relevant paragraphs, and since this is a contentious issue, it is worth reproducing it here. This is what he said:

"I would like to note that some delegations have requested clarification concerning paragraphs 20,23,26 and 27 of the draft Declaration. Let me say that with respect to the reference to an 'explicit consensus' being needed in these paragraphs for a decision to be taken at the Fifth Session of the Ministerial Conference, my understanding is that, at that Session, a decision would indeed need to be taken, by explicit consensus, before negotiations on Trade and Investment and Trade and Competition Policy, Transparency in Government Procurement, and Trade Facilitation could proceed.

"In my view, this would give each Member the right to take a position on modalities that would prevent negotiations from proceeding after the Fifth Session of the Ministerial Conference until that Member is prepared to join in an explicit consensus."

Most lawyers would agree that the chairman’s clarification meant that on the four Singapore issues the WTO is still in the pre-negotiations stage.

Why the Negotiations Phase is such a critical stage

There are in various stages of preparation, pre-negotiations, and negotiations. The most critical phase is when an issue reaches the stage of negotiations where nations engage in actual, concrete, give-and-take bargaining. Before that stage is reached a matter may pass through various pre-negotiations stages – including, bilateral or multilateral consultations between countries, a possible study stage where a group of experts are called upon to examine the issue, submissions by various countries, the study group reporting its findings to the WTO, negotiations on the modalities of the negotiations, etc. Once negotiations begin, it is usually difficult to roll back the process. This is the most significant stage,

and must be carefully thought through before getting there. Finally, when an agreement is reached and signed by the participating countries, it is generally irreversible; it becomes binding on the signatories, and is subject to the disputes settlement and sanctions system of the WTO.

Why should the DCs block Singapore Issues from getting to the negotiations stage

First it is for the reason given above. Keep a matter at the pre-negotiations stage until you fully understand its implications and can live with them.

Secondly, it is contended even by such free trade ideologists such as Professor Jagdish Bhagwati that these issues are not proper subjects for a trade body (such as the WTO). They argue that whilst a multilateral regime of rules for matters of trade are justified, the same cannot be said for issues like investments. The non-discrimination principles of the WTO (National Treatment and the Most Favoured Nations clause) would make a mockery of , for example the investment regime, because the flow of capital is fundamentally different from the flow of goods.

A third reason is that the Developing Countries have not yet fully analysed the implications of a multilateral investment agreement for their economies and for their policy options. It is certain that if the National Treatment and the MFN principles are applied to the four Singapore issues, the developing countries would substantially lose their policy options. For example, they would not be able to apply necessary performance criteria to foreign investments. They would not be able to use government procurement as an instrument of social policy. In other words, it would go completely against the “developmental” assumptions of the Doha Declaration. An international regime on these issues is likely to be a charter for Multinational corporations rather than for the developing countries.

A fourth reason is that the work load of the DC negotiators in both Geneva and in the

capitals (especially those coming from Africa) is so enormous that it is totally unfair to demand of them they acquire the necessary knowledge and negotiating skills on these additional issues. Offers of “technical assistance” appear to be aimed at forcing the issue of negotiations rather than a genuine effort to enable the negotiators from the DCs to acquire the knowledge and the capacity to negotiate. In any case, how can they possibly negotiate on these issues unless they fully understand the implications of these issues on their countries’ policy options? Hence, it is strongly suggested that the Working Groups set up in the WTO should continue and complete their work BEFORE the issues are brought at the negotiations stage.

In response to the above objections from the developing countries, it has been suggested that the issues could be negotiated under the GATS type of arrangement under which issues are brought on to the agenda of negotiations on a voluntary basis. In other words, the DCs do not have to bring those matters on the agenda if they feel uncomfortable about them. But this is dangerous. Why? Because, first it will divide the developing countries among themselves, and create the situation of a “race to the bottom” in which the DCs fight amongst themselves for the presumed benefits of, for example, foreign direct investments (FDIs). Secondly, this is a thin end of the wedge. Once the issues come under the negotiations phase under any pretext, once the camel’s nose is allowed in the tent, it is simply a matter of time for the whole camel to get into it.

Recommendations

The SEATINI 6th Workshop in preparation for the Cancun meeting made important recommendations on the Singapore issues. The Workshop believed that the decision to be made on the four Singapore issues, would be perhaps the most important decision to be made at Cancun. It therefore urged African policy makers and negotiators to pay great attention to these issues.

Before Doha, the developing countries were of the opinion that the WTO membership should, in the next years, focus on resolving the problems arising from the Uruguay Round as well as the institutional and systemic issues. However the developed countries pushed very hard to have the WTO expand to incorporate new areas. Most developing countries were resistant to this, as evidenced by the decisions and declarations of the LDCs Ministerial Conference, in Zanzibar and the African Trade Ministers Meeting in Abuja. However their views, as explicitly expressed in the WTO General Council before Doha, and at the Doha meetings, were ignored, in successive Doha Declaration texts. As a result, a decision was made in Doha that negotiations would begin on the four Singapore issues after the Fifth Ministerial, but only on the basis of an explicit consensus on modalities. Moreover, the Chairman’s understanding read out at Doha, states that any Member can prevent the start of negotiations until it is willing to join the consensus.

This was taken to mean clearly, that a decision has not yet been taken to begin negotiations, and that a crucial set of decisions will be taken at Cancun, whether or not negotiations will begin.

On examining the present status of discussions, the Workshop was of the view that WTO Members are far from reaching a consensus on the modalities of each of the Singapore issues. Since there are only a few months remaining, it is not possible that consensus will be reached before or at, Cancun. Several issues have been brought up after Doha that require further clarification. Moreover, the more aware African delegations have become of the new issues, the more worried they have become, in that the new obligations arising from the proposed new agreements, will limit policy space and flexibility and could severely damage developing countries’ present and future development. Therefore there are now more substantive reasons to add to African countries’ concerns. Although there has been some technical assistance provided since Doha, this has mainly been in the form of workshops and

many of these have been donor-driven. The capacity of African countries to negotiate on these issues has not increased (especially since the expanded work programme after Doha has stretched personnel resources even more) and their capacity to implement new obligations arising out of the four issues has also not increased.

The Workshop was therefore of the view that African countries should take the position that the Cancun meeting should decide that negotiations on the four issues should not begin. African countries should take the position that instead of starting negotiations, the process of clarification of issues (for each of the issues), should continue in the respective working groups.

The reasons for this are that:

- African countries do not have the capacity to begin negotiations on these complex and important subjects, as they lack the financial and personnel resources and technical expertise, especially because the extremely heavy workload of the Doha work programme, is taxing the time of their policy makers and negotiators, even more than ever before;
- African countries still do not have sufficient knowledge about the issues, and therefore the process of clarification of issues should continue;
- There is no consensus among WTO members on the modalities of the issues;
- African countries are now sufficiently aware of the issues, to realise that negotiations on these issues, would lead to new agreements that would commit African countries to a range of serious obligations, that would adversely affect the flexibility and policy options they currently exercise over development policies. Indeed Africa does not have the capacity to negotiate such commitments and they would also hinder both Africa's present and future development prospects and damage its social and economic development structures.
- The technical assistance programmes to enhance the negotiation capacity of developing countries have not been adequate, in that they are not designed by the developing countries themselves. Instead, experts for carrying out these programmes have been chosen by and from developed countries. In addition, it is now clear that the real capacity need for developing countries is that of skills enhanced negotiators, as opposed to that of understanding the issues for negotiations.

**Tandon is the Director of SEATINI*

**Produced by SEATINI Director and Editor: Y. Tandon; Advisor on SEATINI: B. L. Das
Editorial Assistance: Helene Bank, Rosalina Muroyi, Percy F. Makombe and Raj Patel
For more information and subscriptions, contact SEATINI, Takura House, 67-69 Union Avenue,
Harare, Zimbabwe, Tel: +263 4 792681, Ext. 255 & 341, Tel/Fax: +263 4 251648, Fax: +263 4
788078, email: seatini.zw@undp.org, Website: www.seatini.org
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