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Some Key Issues Relating to the WTO

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CONTENTS

1 WTO Agreements: Implications and Imbalances

As one of the main objectives of the proponents of the Uruguay Round was to obtain commitments and concessions from the developing countries, it is no surprise that the final result is heavily weighted towards the fulfillment of that objective. Consequently, the contents of the agreements have severe imbalances with adverse implications for the interest of the developing countries. Hence an important aim of developing countries in the World Trade Organisation (WTO) should naturally be to try to correct these imbalances and make the WTO system more useful to them.

This paper aims at listing out some of the obvious imbalances which may hinder full utilisation of the system by the developing countries. The listing starts with the mechanism of enforcement of rights and obligations which has been hailed as a big achievement of the Uruguay Round, and then it goes on to the market access and the systemic issues of contingency actions and further to sectoral issues and the "new" areas of services and intellectual property rights. Towards the end, an attempt has been made to list out fresh efforts at introducing new imbalances.

Enforcement of Rights and Obligations

Effective enforcement of rights and obligations through an improved dispute settlement understanding has been considered to be one of the major achievements of the Uruguay Round. Effectiveness has been enhanced and dilatory tactics have been curtailed by prescribing specific

time schedules for various stages of the dispute settlement process and by near-automatic establishment of panels and adoption of panel reports.

This process is ideally suitable for disputes between the partners that are almost equally powerful. The system may prove less effective when a weak trading partner is to get redress against omissions and commissions of a strong trading partner. Some of the general deficiencies of the system as well as those arising from the weakness of a trading partner are mentioned below.

(i) Under normal situations a Member with a grievance may have to wait for nearly two years to get any redress. Seven to nine months may pass before the report of the panel or the Appellate Body is available and is adopted. Thereafter the Member that has been found to have done something wrong will have nearly fifteen months to implement the recommendations fully.

To get full relief in two years after having raised the issue would be considered a case of justice delayed by any standard. For weak trading partners like many developing countries, such delayed relief may sometimes be totally infructuous as their trade and economy would have suffered irreparable damage. Resilience of their industry and trade is comparatively low; therefore they may not be able to sustain the adverse impact of the wrong action of powerful trading partners for such a long time.

(ii) Even this delayed relief could be illusory for weak trading partners in some cases. The ultimate means of getting relief in the WTO framework is through retaliation against the erring trading partner. Normally, of course, the moral and political pressure would work to persuade an erring Member to take corrective action in accordance with the recommendations of the Dispute Settlement Body, but in real difficult cases, where the domestic

compulsions of the erring Member renders the implementation of the recommendations difficult or inconvenient, it may drag its feet or even totally refuse to take corrective action. Considering the importance of such cases, these may be of great relevance to the affected Member.

In such a situation, the erring Member takes the risk of retaliatory action by the affected Member. Naturally there will be more willingness to take such risks if the affected Member is not a strong or important trading partner. Clearly developing countries are more likely to be exposed to such risks.

For an affected developing country it may be difficult for various reasons to take retaliatory measures. Politically it may not be prudent to take action against a strong partner. Economically too, retaliation may not be convenient, as it has a cost.

Hence a weak trading partner, particularly a developing country, may sometimes find that the relief through the dispute settlement mechanism is not real and effective.

(iii) Time limits have been prescribed for the various stages of the dispute settlement process. Obligations in this regard have been laid on the Members, and in some cases on the panels and the Appellate Body.

But, in respect of panels and Appellate Body, apart from these provisions of time schedules being strongly persuasive and acting as a moral pressure, there is really no relief if these bodies fail to adhere to these schedules.

(iv) The most serious weakness introduced in the dispute settlement system, which has often remained unemphasised, is the severe curtailment of the role of panels in the disputes relating to anti-

dumping. In such cases the panels have been specifically restrained from pronouncing whether or not such a measure is consistent with the obligations of the Member under the Agreement on Anti-dumping. The panels have merely to determine whether the establishment of the facts by the authorities has been proper and whether the evaluation of the facts has been unbiased and objective. Once these conditions have been established to exist, the actual evaluation of the authorities will not be challenged, even if the panel comes to a conclusion different from that of the authorities. Further, if the relevant provisions of the Agreement admit of more than one permissible interpretation, the panels must declare the measure to be in conformity with the Agreement, if it rests upon one of these permissible interpretations.

The curtailment of the role of panels in anti-dumping cases is particularly harmful to developing countries, as these are the cases most predominant in the disputes involving them.

Further, a decision of the Ministerial Meeting in Marrakesh says that this provision must be reviewed after a period of three years with a view to considering the question of whether it is capable of general application. Thus there is a possibility of this provision being extended to other areas as well. If it actually takes place, it will make the whole dispute settlement process almost totally ineffective and infructuous.

(v) For the past few years the work of the panels has tended to be intensely technical. The panels have started going into fine points of law. It is fast becoming difficult for the authorities of developing countries to prepare their cases and make presentations before the panels with their own technical resources. This is particularly so when the other party involved is a developed country and information on details from that country

is required to be collected and analysed. Often the authorities of the developing countries have to employ lawyers and other experts from developed countries which proves very costly. In the case of very poor developing countries the cost of taking a case to the panels may be totally prohibitive.

These problems suggest their own solutions, for example:

(i) There should be a provision for quicker relief against the encroachment of the rights of others and failure to meet one's obligations. Besides, there should also be a provision for compensation to the affected Member by the erring Member for losses based on the duration for which the measure in question has remained operative. For calculating the quantum of compensation, the duration of the measure causing loss is relevant, rather than the time of initiating the dispute settlement process or the adoption of the panel report. The compensation could be in the form of some trade benefit or even in the form of cash payment.

(ii) If the erring Member fails to take the corrective action, the retaliation should not be left solely to be undertaken by the affected Member; rather there should be a joint action by all Members. Modalities for this purpose may be worked out. After all GATT 1994 does provide for joint action by Members in certain circumstances. Alternatively, there may be a provision for financial compensation by the erring Member to the affected Member.

(iii) There should be some built-in disincentive for the panel members to delay the process beyond the stipulated time limits. For example, one criterion for selecting the panel members could be the timeliness with which the panel gave its report.

(iv) The curtailment of the role of the panel in the anti-dumping cases should be completely eliminated. And there should be no question of extending this process to any other field.

(v) The panels have the discretion to call for materials on their own. There should be a practice that in case a developing country/ party to a dispute makes out a case for the need of some materials relevant to the case, the panels should collect these materials and take them into consideration. Besides, there could also be a provision for the panels awarding costs to the affected developing countries which should be paid by the erring developed country.

Market Access

It has been repeatedly emphasised on various occasions that developed countries have reduced their tariffs significantly during the Uruguay Round. They have been credited with having reduced their trade weighted average tariff on industrial products by nearly 39%. As a matter of fact their trade weighted average tariff on industrial products has been reduced from 6.3% to 3.9%. From the angle of its impact on market access, all it means is that a product with a unit price of $100 will now cost $103.9, whereas it was costing $106.3 earlier. This is a more realistic description of the reduction than the assertion that the tariffs have been reduced by 39% on an average.

It is not only the developed countries that have reduced their tariffs. Some developing countries which had very high tariffs earlier have significantly reduced their tariffs. For example, the trade weighted average tariff on industrial products has been reduced from 71.4% to 32.4% by India, from 40.7% to 27% by Brazil, from 34.9% to 24.9% by Chile, from 46.1% to 33.7% by Mexico, from 50% to 31.1% by Venezuela, etc.

In respect of the developed countries two points have to be particularly noted. First, their average tariff on goods from developing countries is relatively higher than those from developed countries. Besides, their tariffs are relatively high in products of export interest to developing countries, e.g., textiles, clothing, leather goods etc. Second, their tariff escalation continues to be high in spite of the commitments on various occasions to eliminate or reduce it.

Justification is often given by arguing that developing countries have too long enjoyed the fruits of the most favoured nation (MFN) treatment given to them by the developed countries. But this is clearly a partial view. It cannot be overlooked that developing countries, in their development process, have absorbed vast quantities of the products of developed countries and have thereby supported their industrial production. This has been particularly evident during the periods of recession in the developed world. In all fairness, due credit has to be given to developing countries on this account. And thus less attention to the products of their interest in the process of tariff reduction in developed countries is not justified.

Instead of putting the developing countries on the defensive in respect of the tariff reduction exercise, developed countries should indeed recognise their contribution and concentrate on further reducing the tariffs on the products of their interest. Besides, there is a need for significantly reducing the tariff escalation in the product chains of interest to developing countries. These countries are fully justified in asking for such action on the part of developed countries.

Contingency Trade Measures

We cover three areas under this heading, viz, safeguard, subsidies and dumping.

In these areas, significant improvements have been made, particularly by enhancing objectivity and by introducing de minimis clauses. However, it is clear that in the area of subsidies, it is the developing countries that have made significant concessions. Earlier, their subsidisation was recognised as a tool in their development process: now, except for a few types of measures like freight subsidy, they are generally debarred from using subsidy as a tool of development.

In these three areas some of the points needing further improvements are listed below.

Safeguard

It is clear that the new Agreement on Safeguard does not permit targeting a country or a set of countries for safeguard action; any such action has to be taken on a global basis. However, in respect of allocation of the share of the global quota, there is a provision for deviation from the normal practice in special circumstances. There is a fear that this enabling provision may be used to reduce the quota of developing countries. Special care needs to be exercised to ensure that this provision is not used in a discriminatory manner by putting developing countries to disadvantage.

One has to be careful particularly in the initial period when practices develop into accepted interpretations.

It may be desirable to develop some clear criteria for the conditions and extent of departure from the normal practice of allocation of the share of the global quota.

In safeguard, developing countries have the benefit of some de minimis provisions. However, it is not clear how it will operate. For example, if a Member takes to tariff type measures as safeguard, it is not clear how a

developing country falling within the de minimis provision will be excluded from higher tariff or charge. On the other hand, if quantitative restriction is adopted as a safeguard measure, again it is not clear whether a developing country falling within the de minimis provision will be totally excluded from the restrictions of export of that product into that Member country.

Considering that the de minimis provision excludes developing countries falling within such provision from the safeguard action, it is desirable to stipulate clearly that neither the higher tariff nor any limits to export will apply to such countries.

Subsidies

Subsidies which are commonly practised in developed countries, for example, those for research and development, for development of comparatively more backward regions and for adoption of environmental friendly technologies, have all been included in the list of non-actionable subsidies. However, those types of subsidies which developing countries generally apply in the process of industrialisation and development have been generally excluded.

The industrial and trading firms of developing countries suffer from natural handicaps, as very often they do not have the advantage of large scale operations, availability of technology and finance, entry into international networking in the relevant sector and similar other facilities which their competitors in the developed world have. Therefore it is sometimes necessary for developing countries to provide subsidies to them to encourage diversification and upgrading of production and entry into new markets. These needs have been almost totally ignored in the Agreement on Subsidies.

It appears desirable to recognise these needs, as it had been done in the case of the subsidy practices of developed countries. Subsidies in developing countries for upgrading and diversification of production, for absorption and adaptation of higher technologies and for entry into new markets should be treated as non-actionable.

Of course, some special provisions have been made for countries having per capita income of up to US$1,000. But in this case, too, some improvements need to be made. For example, a country crossing this limit is excluded from the benefit almost immediately. The rise in income might in some cases be a temporary phenomenon and not a structural feature. Hence, there should be a provision for exclusion only when a country has higher per capita income over a few years.

There is a provision of exclusion when a country achieves export competitiveness continuously for two years, but there is no provision for automatic inclusion of a country in this category once the per capita income goes down below this critical level. The automatic inclusion should be provided for.

Dumping

The provisions of the Agreement on Anti-dumping have become very complex in the process of adopting the practices followed by major developed countries. Very often the calculation of the cost of production and other expenses is involved in preparing the case on either side. For a developing country, it is very difficult to collect this information from developed countries. The authorities and the trade and industry in developing countries are not well equipped to locate the sources of such information in developed countries and collect them. Very often the services of law firms of these developed countries have to be employed and it becomes a very costly process.

In fact, considering the vast difference in the resources of the developed countries and developing countries, the process of anti-dumping enquiries, both at the importing end and the exporting end, becomes very much tilted against the developing countries, except if they are prepared to spend enormous amounts for collection of material from developed countries and engaging some law firms of those countries.

The only way out is to have very simple procedures, of course, taking care that the process does not become too subjective.

The most serious problem in the area of anti-dumping is the exclusion of this subject from the normal dispute settlement process as it has been explained above while discussing the enforcement of rights and obligations. There is a need to bring this subject into the folds of the common dispute settlement process.

Specific Sectors

We take up for consideration two specific sectors for which there are specific agreements, viz., agriculture and textiles. There has been a significant progress in bringing agriculture within the general discipline of the General Agreement on Tariffs and Trade (GATT) 1994. Specific commitments have been undertaken by governments in respect of reducing their import restraints, domestic support and export subsidy. In textiles, an important commitment has been to end the Multifibre Agreement (MFA) with the coming into force of the WTO Agreement and thereafter to bring this sector into the folds of the general rules of GATT 1994 by the beginning of 2005. The special arrangement in this sector, in derogation to the general rules of GATT 1994, had continued for nearly a quarter of a century; hence its final demise is an important event in international trade relations.

However, these two agreements have left in their trail a number of problems, some of which are described below.

Agriculture

(i) The countries which have been maintaining import restraints, domestic support and export subsidy have been obliged to reduce these measures to some extent during the implementation period. Substantial portions of the measures will, however, continue in these countries. But the countries which did not have such measures in the past are prohibited from introducing such measures beyond the de minimis levels. This appears patently unfair in the sense that those maintaining import restraint, domestic support and export subsidy in the past are allowed to continue with them although at reduced levels, but others are prohibited from undertaking such measures in future.

(ii) The agreement is naturally based on the assumption that totally free movement of agricultural products across borders is the most ideal condition. The underlying inference is that it is desirable for a country to import food from other countries if it is cheap compared to its own cost of production. This principle may perhaps be valid for most of the developed countries which have enough foreign exchange all the time to import whatever they want. But most of the developing countries are short of foreign exchange most of the time. If they depend for their food on import, their population may have to starve sometimes as they may not have enough foreign exchange to buy food from abroad. Such countries may consider it wise to grow their own food as far as possible, even if it is more costly than the food available in some other countries. The food production has too much social and human compulsions associated with it than can be tackled by pure economic considerations.

And yet the agreement in this sector aims at abolishing all support for food production and all restraints on the import of food items from outside. This will particularly affect the developing countries with chronic problems of availability of adequate foreign exchange for their imports.

(iii) Another special feature in many developing countries is that agriculture is not considered a commercial activity. Farmers take to agriculture sometimes because they have land and have nothing else for them to do. Some of them take to agriculture as purely a subsistence exercise. It will be extremely difficult to harmonise these special characteristics with purely commercial and price considerations which are the underlying principles in this agreement.

(iv) The problems of net food importing countries have been recognised, and yet there is no concrete mechanism to tackle this problem in the agreement.

(v) In the process of tariffication, several countries, particularly some major trading countries have overvalued the tariff equivalents of their non-tariff measures, with the result that their base levels of total tariffs have been recorded at very high levels.

These problems have to be given serious consideration. Of course, these may be raised during the review process; but it may be preferable to start with some of them even before that time.

Textiles

The main problem here is the process of liberalisation in accordance with the provisions of the agreement. Some major developed countries have claimed to fulfil their obligations of liberalisation without actually

liberalising the items under restraint. They have taken shelter under strictly technical interpretations of the agreement without giving any consideration to the spirit of the agreement. An immediate review of the implementation is needed to decide on a revised schedule of liberalisation by major importing developed countries.

Recent experience has shown that the Textile Monitoring Body (TMB) has not proved quite effective in checking the unreasonable use of the transitional safeguard mechanism. In one case the TMB failed to make its conclusion, even though the agreement makes it obligatory on this body to give its finding on the measures undertaken by Members and brought before this body for examination.

This agreement has an unusual clause of sectoral balance of rights and obligations. Generally GATT 1994 works on the principle of over-all balance; but an exception to this principle has found its place in this agreement. And there again, measures in the nature of penalty have been prescribed hitting only developing exporting countries. There is no mention of any explicit penalty for importing developed countries if they fail to abide by their obligations.

Services

It is basically a framework agreement within which countries undertake obligations for liberalising their services sectors.

One obvious imbalance in this agreement is in the treatment of labour and capital. There is a specific provision for allowing cross-border movement of capital, if such movement is an essential part of the market access commitment or if a commercial presence is involved. However, there is no such explicit provision on the movement of persons on similar lines.

In respect of developing countries, the agreement makes it clear that their participation in world trade must be facilitated through appropriate negotiated specific commitments. However, in actual practice, this provision has not been much respected. For example, in the negotiations on financial services, some major developed countries have insisted on very high levels of commitments from some developing countries which they are in no position to offer.

In fact the process of sector by sector negotiations is basically flawed. The interests of various countries may not converge in the same sector. The process of give and take will be much smoother if negotiations are undertaken in a large number of sectors at the same time, so that a country may be able to offer concessions in some sectors for receiving concessions in some other sectors. Based on the difficulties experienced in the sectoral negotiations so far, there is a clear case for rethinking on this issue.

TRIPs (Trade-Related Intellectual Property Rights)

The basic imbalance in this agreement lies in the fact that it provides for minimum protection levels for the holders of intellectual property rights. There is hardly much concern explicitly shown in the agreement for users of the intellectual property. A balance can be attempted by countries in their legislations within the limits of the discretion allowed in the agreement.

New Issues

Further imbalances are likely to occur in the WTO Agreements through the introduction of new issues. For example,

(i) the proposed agreement on investments seeks to ensure free entry of investors into a country without any concern for the needs and priorities of the host countries;

(ii) some proposals in the area of environment seek to justify trade restrictions without adequate objective examination in the framework of GATT 1994;

(iii) the proposals on social clauses are thinly veiled attempts to neutralise the advantage of developing countries in respect of their low labour costs, totally forgetting that there is no means of neutralising the advantages of the developed countries in the form of cheaper and easier availability of capital, access to high technology and highly developed infrastructure and networks;

(iv) the consideration of competition policies may be targeted at clipping the wings of comparatively stronger firms in developing countries so that they do not stand in competition with the well-established firms of developed countries;

(v) the consideration of corruption may be aimed at attacking the credibility of the authorities and institutions of developing countries.

Conclusion

This illustrative list of problems in the existing agreements in the WTO suggests that the review process in the successive ministerial meetings for a few years can remain busy with tackling them and finding out solutions. In fact, these and similar other relevant problems should be listed out to form the agenda for ministerial meetings. Recent experience has shown that these issues of existing agreements are more likely to be ignored and further fresh issues are likely to keep the ministerial meetings busy. This trend can be changed only by a concerted action of a group of developing countries that find their interests ignored in the WTO.

2 A Critical Analysis of the Proposed Investment Agreement in the WTO

Barely a year has passed since a decade of intense Uruguay Round negotiations culminated in the ushering in of the World Trade Organisation (WTO) Agreement under which developing countries assumed major obligations; and even before their cumulative effects have been well understood, intense pressures are being built up to force developing countries to assume totally new obligations in the field of investment.

Having obtained in these negotiations significant concessions for their transnational corporations (TNCs) in the area of goods, services and intellectual property monopolies, the major industrialised countries are now seeking total freedom abroad for their TNCs.

In the early stages of the Uruguay Round, the majors had in fact proposed new disciplines in the area of investment. But after testing the waters for some time, they thought it prudent to limit their expectations in this area to the traditional General Agreement on Tariffs and Trade (GATT) obligations. But now that the Agreements are in operation, some of them are coming back with the very same, but significantly strengthened and reinforced proposals.

In particular, the European Commission is pushing hard for starting a process for multilateral negotiations on investment in the WTO. It is attempting to get an endorsement for the start of the process at the Ministerial Meeting in Singapore. The EU makes no secret of its intention to seek a multilateral agreement on investment within the framework of the rights and obligations of the WTO Agreement.

As far as can be made out from EU documents, the contents of the proposed multilateral investment agreement (MIA), will give full rights for foreign investors to invest and establish themselves in all sectors (excluding perhaps, defence) in any WTO member, get treatment for the Foreign Direct Investment (FDI) at least on the same level as accorded to the domestic investments, and effective implementation of the obligations undertaken in the agreement.

Thus the proposal aims at eliminating all flexibility which a country may have at present to permit foreign investment and allocate FDI to priority sectors; to discourage or stop altogether the flow of foreign investments in sectors where such investment is not considered desirable or appropriate; to provide special preferences for domestic investment and stipulate conditions for FDI, like ceiling on equity, restrictions on ownership and so on.

Investors will thus have freedom without any responsibility, except in respect of their own profits. The implementation of the obligations of governments is sought to be ensured by locating the MIA in the WTO, so that for any perceived infringement, action can be taken against exports of the country.

Implications of FDI

Foreign investment is often welcome to countries, as it augments the country's capital and investment stocks. But the main implication of FDI is that the returns on such investments—in the form of dividends and profits, as well as many fees including licence fees, management expenses and so on—are sent out of the country in foreign exchange. Hence, if the investments do not help the country, either directly or indirectly, to earn foreign exchange, the negative effects of the outflow may be serious.

The FDI can perform a direct beneficial role by producing exportable goods and services, and an indirect role by producing such goods and services which may help in producing other exportable goods and services or in replacing imported goods and services. Besides, an indirect role can also include developing infrastructure facilities which may encourage further FDI inflows.

But if the FDI is only for capturing the domestic market, it may still generate profit for the investor, but such profit may leave the country in foreign exchange.

There are two other serious implications. These are:

- In profitable domestic consumption sectors, foreign investments may overwhelm domestic investors (which may generally not be as strong as the foreign counterparts) and in some cases may eliminate them;

- Some critical sectors, like land, minerals and forests, where countries often like to have effective control on ownership because of social, political and strategic reasons, may, in a big way, pass under the control of foreign nationals.

Different Needs of Investors and Host Countries

Investors from industrialised countries want to come to developing countries for three main reasons:

- They apprehend that the return on capital in their home country is not adequate;

- They want to combine their capital with the cheap labour of the host country to reduce the cost of production;

- They want to utilise the raw materials of developing countries near their source.

The host developing countries, on the other hand, are interested in:

- development of their services and infrastructure which may help their industrialisation and development;

- production of exportable goods;

- continuous technological development in their industrial production and services.

These two sets of objectives are not incompatible. And the interests of foreign investors and host governments may be harmonised. But it is critical that any FDI meet both sets of objectives.

This can be achieved if the investors decide on the viability of specific projects, and the host governments decide on the priority sectors and conditions of FDI, consistent with their economic and development objectives.

Wherever the two coincide, FDI will flow. But for FDI to have a beneficial effect, it is important to realise that the roles of both sides are significant.

An MIA is really not necessary for this purpose. What is needed is that governments have clarity of objectives, and these are spelt out clearly. Sets of transparent and stable criteria adopted and announced by governments can help the foreign investors to assess the viability of investments under those conditions. Naturally, governments wishing to encourage foreign investments will lay down criteria which will welcome the investors in priority sectors rather than scare them away.

If there is ample scope for the convergence of the interests of investors and those of the host governments and if it can be brought about by the domestic policies and measures of host governments, why is it then that some industrialised countries are pressing for a multilateral discipline?

The main reason is that they want to eliminate or, at least, constrict the powers of host governments regarding the choice of the priority sectors for FDI and imposition of conditions on such investments, so that foreign investors are able to operate unencumbered by such constraints.

The main objective of the investors naturally is to earn high profit in a short time and repatriate the profit.

And the objective behind bringing the proposed discipline on investments into the folds of the WTO Agreement is to utilise its dispute settlement process to enforce the discipline.

The WTO, through its provision of cross-sector retaliation, will enable them to take restrictive measures against the developing countries which may be perceived as violating the discipline.

False Arguments in Favour of MIA

As it was observed during the Uruguay Round, some major industrialised countries are adopting the usual carrot and stick method to pressurise developing countries. The following arguments are put forth:

(i) It is said if developing countries do not agree to a multilateral discipline, strong industrialised countries may take unilateral action against them.

(ii) With an MIA there will be higher FDI flows to developing countries.

(iii) With an MIA in place, developing countries may not have to enter into competition among themselves in offering incentives to attract FDI.

(iv) Since an MIA is being negotiated in the Organisation for Economic Cooperation and Development (OECD), it may be better for developing countries to engage in the negotiation at this stage in the WTO, rather than wait for the conclusion of an agreement at the OECD and be faced with the option of accepting or rejecting it.

Considering the vehemence with which these arguments are advanced, it is useful to examine them one by one.

- Can unilateral trade action be taken?

  The answer must be a NO.

  The WTO Agreement (and earlier the GATT) confers certain rights on the Members in the areas of goods, services and intellectual property. These cannot be unilaterally suspended, withdrawn or restricted. For example, if the entry of a product on the payment of a certain duty is allowed in a country in accordance with its obligations under the WTO/GATT Agreement, this right cannot now be unilaterally restricted.

  Similarly, if an obligation has been taken on the level of the duty on a product, the country taking the obligation cannot unilaterally increase the duty or levy any additional charge on the import of that product, generally or from a particular source. The same applies to the obligations in the areas of services and intellectual property.

There are set procedures for taking action against any country. But one point is clear: there can be no retaliatory restraining action in these areas for any perceived grievance which is external to these areas. Hence no country can penalise another country in the sectors of goods, services and intellectual property rights for not participating in the new negotiations on investments or for not undertaking any new disciplines in investment which is not a part of the WTO Agreement.

Any restraining action in respect of goods, services and intellectual property rights can be taken only in accordance with the Understanding on Rules and Procedures Governing the Settlement of Dispute (DSU) contained in the WTO Agreement.

The WTO Agreement contains a number of agreements which establish the rights and obligations of the Members of WTO. Article 23 of DSU prescribes that Members, while seeking redress of violations of obligations under these agreements, shall abide by the DSU. A Member may take countermeasure against another Member, if it is established in the DSU that the other Member has either violated its obligations, or nullified or impaired the benefits of the complaining Member or has impeded the attainment of any objective of these agreements.

No Member can take action in the DSU against any other Member just because the latter has not agreed to have a multilateral investment discipline or any other discipline for that matter, if such a discipline is not included in the WTO Agreement.

If a Member takes a trade restrictive measure against another Member for any extraneous consideration, it will be violating its obligation under the WTO Agreement and will be subject to action under the DSU. Thus unilateral trade action against a

country refusing to negotiate a multilateral investment treaty or not abiding by a treaty outside the framework of the WTO Agreement, or dubbing the country as engaged in "unfair" trade by not providing freedom to foreign investors, cannot be taken by any Member country which has committed itself to upholding the sanctity of the WTO Agreement.

There is another side too. No special benefits in the frame of the WTO Agreement can be given exclusively to a Member that has negotiated or joined an investment agreement. Any benefit by a Member to another in the areas covered by the WTO Agreement has to be extended to all Members based on the Most Favoured Nation treatment (MFN) principle—except where a departure is expressly provided in the Agreement. No discrimination can be made between those who negotiate and join an investment treaty and those who do not.

- But will the proposed treaty enhance the flow of investments?

The answer is both YES and NO.

With the removal of all national constraints on foreign investment, the total FDI flows to a country may increase. But the increase in investment may not be in sectors where the host country would like the investment to come. On the other hand, the increase may be in sectors where foreign investment is not desirable. For example, it may come in sectors which do not directly or indirectly enhance exports, infrastructure capacity or technological capacity, and yet by domestic sales, the investment may earn profits which will be repatriated, thus reducing the foreign exchange stock. In fact the flow of FDI to desirable sectors can increase if the government itself removes all restraints on such investment in

these sectors. It does not have to go through any multilateral investment agreement for this purpose.

● Will an MIA obviate the need for competitive offers among developing countries to attract FDI?

Once developing countries join the proposed MIA and agree to a totally free access for foreign investors and to full national treatment, and thus create a "level playing field" with the same rights available in all countries, incentives based on access to investors or national treatment will disappear.

But the FDI will go to countries where the investor sees the greatest benefit to itself, and not necessarily to those countries needing it. The latter will then find themselves forced to offer some other incentives to attract FDI and there will be just a new range of competitive offers of "incentives".

● Is it necessary to pre-empt the OECD exercise?

NO. Countries which are members of OECD negotiate various agreements among themselves. These are suitable among countries at almost similar levels of development. If developing countries do not consider some of these agreements appropriate, there is no reason why they must start negotiating such agreements multilaterally in the WTO. Later, if it is proposed for negotiation in a multilateral forum, developing countries may decide whether to participate in it or not.

Developing countries cannot be forced to participate in any negotiation or any treaty, if they themselves are not willing to do so. Perhaps a single country may find it difficult to resist, but if a

large number of countries decide not to participate in a negotiation on a new subject, there is no way of forcing them.

3 New Issues and Challenges for the South in the WTO

Nearly three years after the conclusion of the Uruguay Round, and in preparation for the first Ministerial Meeting of the newly established World Trade Organisation (WTO), developing countries are facing some major challenges.

One of the main objectives of the proponents of the Uruguay Round was to obtain concessions and commitments from developing countries. And developing countries did make massive concessions and significant commitments in the Marrakesh Agreement.

As a result, the Uruguay Round ended with highly unbalanced agreements, from the point of view of developing countries. But this is no reflection on their negotiators. In the course of the negotiations, all important developing countries were under tremendous pressure from major developed countries; and they were tackled one by one.

The South countries were not able to utilise their collective strength on any issue—whereas on most issues, some major developed countries were united in pressurising them. It was expected that after this major negotiation, there would be some respite for the developing countries. But it was not to be.

The "laundry list" of Marrakesh—issues raised by one or another minister at Marrakesh, and merely mentioned in the concluding statement of the chairman of that meeting, but with no consensus on taking up any of them—was not followed up uniformly across the board.

Some subjects have been pursued selectively, while others have been ignored. In particular, subjects of interest to developing countries were not taken up with vigour and enthusiasm. Developing countries themselves could not keep up the pressure. They were not able to provide adequate back-up through supportive intellectual exercise and tabling of concrete proposals.

And going beyond the "laundry list", new subjects have been added, with the result that now we have environment, social clause, competition policy, corruption and investment. All this has caused a lot of confusion in developing countries. The implementation of the Uruguay Round is still in a preliminary stage, and involves commitments with serious and far-reaching implications. These are yet to be fully understood and evaluated.

In fact, the world trading system has not yet recovered from the shock of this major event. But already, the developed countries have started pushing hard on new proposals which have serious implications, are of doubtful utility and have the potential of bringing damage to developing countries.

This process has diverted attention from the main issues of interest to developing countries. A lot of resources are being employed just to prepare to respond to these proposals. The natural question is what is behind all these. The answer is both simple and complicated.

Major industrialised countries have already acquired for themselves all the space in the super hi-tech industries and services. They are desperately trying to hold on to the traditional industries in which they are fast losing competitiveness. They are not able to adjust to competition from outside. And their skewed internal policies are causing unemployment for which the blame is easily assigned to imports from the developing countries. The new proposals are aimed at resolving these problems.

The strategy of major industrialised countries is to raise the level of the playing field so high that developing countries are not even able to climb on to it, leave aside play in it. And they also intend to bring all these subjects into the folds of the integrated dispute settlement process of the WTO so that implementation can be assured through the threat of action on the import of goods.

A brief examination of the new issues would indicate that the fears of developing countries are rational and justified.

New Issues

(i) For environmental protection the proposal is to allow countries to restrict imports as a means of implementation of multilateral agreements on environment. The fear is that such an automatic discretion may be misused by countries to protect their industries against imports.

Already there is provision in the General Agreement on Tariffs and Trade (GATT) 1994, under Article XX, to take trade restrictive actions for protection of environment. There is no reason why, in the name of environment, countries should need any more authority. The existing safeguards against arbitrary use of the provision is that the necessity and reasonableness of the action is subject to multilateral scrutiny in the WTO. Any wider subjective discretion may result in misuse.

(ii) Similar is the apprehension about the labour standards. The proposal is to enforce labour standards through the machinery of the WTO, which in the real sense means that imports may be restricted if a country is considered to deviate from these standards. The adherence to labour standards is no doubt a laudable objective, but linking it to trade sanctions is not

reasonable at all. It should be best left to the International Labour Organisation (ILO) to handle it.

A tenuous link is sought to be identified between trade and labour standards by arguing that non-adherence to certain minimum standards gives a country unfair advantage in competitiveness. But such links can be extended further. If low wage and lower levels of facilities for labour are an unfair advantage and trade distortive, low cost of capital, easy availability of technology and highly developed infrastructure in industrialised countries are causes of much more unfair advantage and are more trade distortive,

(iii) In respect of the proposals relating to competition policy, any action against anti-competitive behaviour is welcome. But the fear is that the main intention of the proponents is to check the growth of firms in developing countries and prevent them from developing into competing multinationals.

(iv) On investment, the proposals need a little more elaborate consideration in view of the latest initiatives of some major industrialised countries and the dangers inherent in these proposals. The proposals will allow foreign investors full freedom to invest in a country, and thus curtail the role of the host country in choosing the appropriate sectors for investment and in ensuring checks on harmful outflow of foreign exchange. The main concerns of the host countries are higher production, development and absorption of technology, development of infrastructure and the survival of domestic investors. These are being totally ignored in the proposals which seek to take care of only the interests of the investors.

Precautions

The proponents of the proposals use various arguments to persuade the developing countries. One argument is that we may just start 'the education process' by examining the subject in the WTO; and another is that during negotiations various types of interests will be taken into account. The process of GATT/WTO does not inspire confidence in these arguments. The persistent experience so far, whether in the Tokyo Round or Uruguay Round, has been totally different.

Nothing has happened over these two years to change this perception. Hence this trap must be avoided. Further, the international community has recently decided to examine the subject in the United Nations Conference on Trade and Development (UNCTAD). There is no reason to duplicate the examination by considering it simultaneously in the WTO.

When these new proposals are so untimely and unreasonable, and in fact harmful, why should these be entertained at all? One motive may be to avoid annoying the powerful industrialised countries. But there is no limit to their demands. In 1982, they demanded the inclusion of services in GATT. In 1986 again they pushed for services, and in addition for investment and intellectual property. And now in 1996 we have all these further new subjects being championed. At this rate in 1998 we may have yet other new subjects, like harmonisation of taxes etc. There will perhaps be no end. Hence the process has to be stopped at some stage, and developing countries have to say 'no' at some stage.

Another reason for agreeing to the new proposals could be the fear of the threat of retaliatory action from major industrialised countries, if they become unhappy. But no action can be taken in the WTO, as the Dispute Settlement Process of the WTO has definite pre-requirements, and a country, however powerful, cannot take action against another country, howsoever weak, for not agreeing to negotiate on new issues. Action in

areas outside the WTO is also very doubtful. There is no likelihood of action regarding aid, as it involves varieties of considerations, and it is unlikely to be affected by a country not joining new negotiations.

Strategies

This raises the question of what strategy developing countries should adopt in not allowing new issues to enter the WTO. There is no likelihood of any major industrialised country pressing for voting, as it will have serious implications for the future. For this reason they have been consistently preferring decisions in the GATT/WTO by consensus. And in the WTO, even one country can formally stop consensus.

This may be difficult politically. But it is practicable, and certainly it will be very effective, if some countries, even five to ten, explicitly oppose the proposals. If five to ten countries strongly and openly want to stop the entry of new subjects in the WTO, it can certainly be stopped. What is needed is for them to make clear and open statements in formal and informal meetings.

It has to be kept in mind that the GATT/WTO negotiations are not polite exercises of the 19th century diplomacy; these are straightforward, and hard hitting. Developing countries will also have to guard against disinformation, as it is an effective tool adopted by adverse interest groups. Sometimes even malicious campaigns are launched against individuals and countries taking tough stands. All this has to be countered and neutralised.

The best way is to have constant exchange of information among interested developing countries. Open conversations, frequent meetings and telephonic contacts between capitals will be helpful. Similarly, contact between the capital and its Geneva negotiators is important, as attempts

are often made by adverse interest groups to create misunderstandings between them.

The real key lies in deciding whether a particular proposal is beneficial, neutral or harmful; and if it is found harmful, it must be opposed. Fears of isolation and reprisals are often illusory. And if five to ten countries are fully consolidated in their views and presentation of such views, such fears will vanish altogether. Considering past GATT experience, it is almost certain to be effective.

At the same time, there must be a strengthening of capacities in developing countries in order to enhance analytical capability. Interaction among various interest groups within countries, and among countries, has also to be increased. Joint efforts of some interested developing countries in this regard will be useful.

Developing countries have to recognise their own potential as important actors in the international economic scene in the world. Some of them have had impressive economic growth, some have rich natural resources, some have a vast wealth of technically trained personnel, and all of them together provide great prospects for future growth of the market.

What is needed is a full realisation of these potentials, synergic combinations of these positive factors and a new confidence about their role in the international economy.