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The Implications of the New Issues in the WTO

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1 Introduction

New issues have frequently entered the ambit of the GATT/WTO (General Agreement on Tariffs and Trade/World Trade Organisation) system over the last two decades, invariably at the instance of major developed countries. Some important new issues currently under consideration are: investment, competition, government procurement and electronic commerce.

There are different levels of objectives and scope of consideration in these subjects. In the area of government procurement, the exercise is aimed at developing elements for an agreement on transparency, whereas in the areas of investment and competition policy, the exercise is limited to the study of their relationship with trade. In the case of competition, the study process will examine the issues raised by countries on the relationship.

In electronic commerce, an agreement was reached in May 1998 to have a standstill on duty (meaning zero duty) for 18 months. The exercise now will be to decide whether this agreement should be extended further.

Comprehensive examination by developing countries of the three areas under study (investment, competition and government procurement) in the WTO should naturally be aimed at:

- providing effective inputs to the study process;

- clarification of their own ideas and objectives in these areas, and development of a possible coordinated approach in relation to their domestic policy alternatives and multilateral consideration; and

- being in full readiness, in case of any sudden upgradation of the consideration of these subjects in the WTO.

LONG-TERM IMPLICATIONS

The examination of the implications of the new issues should be based not only on the immediate indications of the objectives of the developed countries, which were the main proponents of these subjects, but also on their declared long-term expectations in these areas. For example, in the area of government procurement, though they have reluctantly limited the exercise to the matter of transparency, they have often made it clear that their aim is to enhance market access for their goods and services.

It is necessary to keep all these aspects in view while considering each of these areas.

2 Investment

Foreign investment may in some circumstances be useful, particularly in developing countries, but the objectives of the major developed countries in introducing this subject in the WTO do not appear to be aimed at enhancing investment in developing countries. These are, in fact, aimed at restraining the discretion and flexibility of developing-country governments in respect of putting conditions on foreign investments, thereby ensuring foreign investors' free and unfettered operation in developing countries. The developed countries' aim appears to be centred on protecting the rights of foreign investors, rather than ensuring the flow of investment into the developing countries.

Foreign investment may be necessary and useful in developing countries for: (i) augmenting investment, (ii) supplementing the inflow of foreign exchange, and (iii) rapid upgradation of technology. There are, apart from foreign aid, three broad channels for achieving such purposes, viz., loans, portfolio investment and foreign direct investment (FDI). The last may sometimes be preferable to the first two, mainly for two reasons. Firstly, loans have to be repaid and thus involve the outflow of foreign exchange at a later date. Secondly, portfolio investment, by its very nature, may not be stable and dependable.

CAUTIONS

But while preferring FDI, a country has to be cautious about the following implications:

- FDI also involves the outflow of foreign exchange through the repatriation of profits. In fact, within a short span of a few years, the one-time inflow of FDI may already be balanced by the outflow of profits; and thereafter, it will be a situation of net outflow from year to year for any particular investment.

- FDI may not be as stable as it was earlier thought to be. Now, experts say that the operations of the trade in derivatives make FDI vulnerable to considerable instability.

- FDI can still be very useful and the adverse implications mentioned above can be mitigated to a great extent if it is put to use for some long-term gain, for example:

  (i) if it helps in the rapid development of technology;

  (ii) if it develops infrastructure and infuses basic strength into the domestic economy;

  (iii) if it substantially enhances export production, directly or indirectly.

But all this will not come about automatically. These objectives may not be in consonance with the choice of the investors, whose main objectives naturally are: (i) quick and assured profits from investment, and (ii) production with the least of worries. Their choice of product and of the location of the production unit will be guided by their own objectives. Often, this may result in: (i) production in non-priority sectors, and (ii)

units located in already developed regions. The consequences will thus be wastage of foreign exchange and regional disparities in development.

These and other adverse effects can be minimised if the host governments exercise their discretion to:

- select the priority sectors which they will allow FDI to enter;
- guide the choice of location of the production units;
- lay down appropriate conditions regarding dissemination of technology, business practices, linkages with local economic activities, etc.

The main aim of the developed countries in proposing the subject of investment for negotiation in the WTO (beyond the present study process) is to curtail this very discretion of the host countries, so that the foreign investors have total freedom of operation. If such a move does succeed, the developing countries will be exposed to the dangers mentioned above.

As mentioned earlier, the proposals for negotiations on investment in the WTO are not really aimed at enhancing investment in developing countries, for which quite different steps are needed; instead, the main objective is to ensure and protect the rights of investors through multilateral binding commitments which would be enforceable through the Dispute Settlement Understanding of the WTO, particularly through the provision of cross-retaliation.

To attract FDI, it is not necessary for developing countries to participate in a multilateral investment agreement. What is really needed is for them to have national legislation and procedures providing security for and facilitating foreign investment, and develop basic infrastructure in their countries for the installation and operation of production units.

3 Competition Policy

Healthy competition is very much desirable, but the objective of the major developed countries in bringing this subject into the folds of the WTO seems to be aimed more at ensuring free and unhindered operation of their firms in developing countries, which may be harmful to the interests of developing countries.

Healthy competition is desirable as it facilitates the availability of goods and services of better quality at cheaper prices, and encourages producers and distributors to improve productivity and supply.

CONFLICTING INTERESTS

Behind these simple features, however, there are certain conflicting interests, some illustrations of which are given below:

- There is naturally a conflict between the interest of the consumer and the short-term interest of the producer.
- There is also a conflict of interest between a big and established producer on the one hand and a new entrant or a small producer on the other.
- Besides, there is conflict between the interests of foreign firms and those of domestic firms.

There has to be an appropriate balance in all these cases of differing interests, and this balance should be worked out by various countries in the context of their own national objectives and priorities. Standards of competition in developing countries need not be similar to those in highly developed countries. The developing countries should formulate these policies based on their own development objectives and priorities and on their own perception of the balance between the needs of the consumers and the imperatives of the firms in their growth process.

The main objective of the proponents of this subject in the WTO appears to be to restrain the discretion of individual countries and lay down rules for certain minimum standards of competition policy, particularly in developing countries. The possible implications are the following:

- These standards of competition policy may be aimed at permitting the big foreign firms to operate without any inhibitions in developing countries.

- The domestic firms may be constrained in their growth process in this manner, and may not be able to work towards reaching levels of international competitiveness.

- And gradually, the domestic firms may die out totally, leaving the field free for the operations of the foreign firms.

In this background, it appears necessary for the developing countries to retain their discretion and flexibility to:

- lay down conditions on the operations of the foreign firms so that they do not resort to restrictive or other practices which are prejudicial to the interests of the host country;
  (Some of these practices are: transfer pricing, predatory pricing, collusive tendering, private sharing of markets, tied purchases and

sales, formation of export cartels and import cartels, restrictive strategic alliances among firms, etc.)

- protect domestic firms against intense and severe competition from the big foreign firms, as considered necessary by the host government; and

- encourage domestic firms to grow into international competitiveness.

POINTS FOR ATTENTION

Apart from consideration by host governments of these domestic implications, the competition policy initiatives in an international or multilateral forum must concentrate on anti-competitive policies in relation to international trade. In particular, the following features need attention:

- If such a forum takes up this subject, it should work out ways for checking the anti-competitive and prejudicial practices of big multinational firms. Any possible multilateral framework on competition policy must have its own effective role in this exercise and also provide for the obligations of the firms and the home governments of these firms. Multilateral surveillance of the operations of big multinational firms and consequent corrective actions should be an essential part of this exercise.

- At present, there is a situation of near-monopoly in several sectors where only a very limited number of firms are engaged in international operations or a vast proportion of the activities is carried out by only a limited number of entities in the world. This should justifiably attract multilateral attention, and ways should be found to curb anti-competitive practices in such situations.

- There are instances of mergers of big firms which may result in considerable reduction in competition in the particular sector. Multilateral attention should be devoted to overseeing such mergers.

Then there are also the actions of governments which restrict competition. For example, governments impose restrictions in the form of countervailing duties, anti-dumping duties and safeguard actions. There have been numerous cases of other restrictive measures in the past, e.g., grey-area measures and special sectoral arrangements. There is a need for consideration of all these matters in any possible multilateral framework on competition policy. Ways will have to be found to ensure that the former set of measures does not become a source of unnecessary harassment of developing countries and that the latter set of measures does not occur at all in future.

The current study process in the WTO should include all this in its consideration, and should have specific provisions relating to all these concerns in any operative conclusions, suggestions and actions.

4 Government Procurement

The current exercise on this issue in the WTO covers the study of transparency in government-procurement practices and developing elements of an appropriate agreement on transparency. However, there are clear indications that major developed countries consider this only as an initial and interim step; for them, the real aim is to expand the market access of their entities in the area of government procurement. Hence, a good deal of caution is needed in handling this subject.

Transparency in government procurement is desirable, particularly in developing countries, as it will help the process of widening the supply base and bring about improvement in the internal decision-making process in this area. However, special care needs to be taken by the developing countries on the following points in this exercise in the current WTO process:

- Whatever elements for an agreement on transparency are developed, these should all be in the nature of guidelines and not binding obligations, particularly on developing countries.

- Developing countries should not undertake an unnecessarily heavy burden for providing unreasonably detailed information on evaluation of tenders. The elements relating to the provision of such information should be limited to what is essentially required for the tenderers to seek relief against grievances.

- There may be the requirement of providing a certain degree of detailed information to the bidders, but there should only be a limited requirement of provision of information on a wider basis.

- There should be a substantial difference in what is expected of developed countries and of developing countries in respect of transparency, considering the gaps in resources available to these sets of countries.

- The exercise must be limited to the elements of transparency, i.e., to the dissemination of information about actions; the exercise must not extend to the actions themselves.

NO PARTICULAR ADVANTAGE

A general point of caution is that this exercise should not be allowed to expand or be transformed into one on market access for the goods of developed countries. In this connection, it is important to note that the developed countries would very much like to introduce the obligations of most-favoured-nation (MFN) treatment and national treatment in this area. This is of no particular advantage to developing countries for the following reasons:

- The developing countries have very limited capacity for supply of goods for government procurement in developed countries.

- Even if they do have some supply capacity in some areas, they may find it difficult to tide over the procedural problems which often exist in such matters.

- Most of them do not have any trade links for government purchases in developed countries at present.

Hence, even if the facility is given to them to participate in the tenders for supply of goods for government procurement in developed countries, they will hardly be able to take advantage of it.

On the other side, there are certain distinct disadvantages of introducing the principles of MFN treatment and national treatment in their government-procurement process. Some of these are the following:

- The principle of MFN treatment, i.e., non-discrimination as between the suppliers of various countries, will impose restrictions on the developing countries regarding the choice of suppliers. Sometimes, various points are taken into consideration while making this selection, e.g., financial assistance from other governments, dissemination of technology, other facilities provided by the suppliers or their governments, etc. Introduction of the principle of MFN treatment will remove the flexibility to apply these considerations.

- The principle of national treatment, i.e., non-discrimination as between domestic and foreign suppliers, will make it impossible to give any special benefit to domestic suppliers and domestic products. It may result in serious damage to the domestic firms, which may find it difficult to compete with big foreign firms in supplies for government procurement.

It is worth remembering that the exclusion of government procurement from the MFN-treatment and national-treatment obligations is a part of the current rights and obligations in GATT 1994 (Article XVII.2 and Article III.8(a)). As the developing countries are clearly not going to gain from introducing these provisions into the area of government procurement, they do not have to relinquish these rights.

5 Electronic Commerce

Yet another new subject, electronic commerce, has jumped onto the bandwagon of the WTO. A major developed country brought up this subject during the WTO Ministerial Conference in Geneva in May 1998 and an interim agreement was reached for zero duty as mentioned earlier. Pressure will now be exerted to continue with this agreement of zero duty for an indefinite period.

MISSING THE POINT

Some trade in tangible goods is already taking place with the help of the electronic medium, e.g., ordering certain goods and making payment for them through this medium. But in such cases, there is a tangible object, viz., the product in consideration, which physically crosses the border; hence, the normal rules of the WTO will apply.

There are, however, certain types of commercial transactions which do not necessarily entail crossing the border physically, e.g., the supply of the architectural design of a building or the engineering design of a machine through the electronic medium, etc. This is the type of transaction which is the subject of this new proposal in the WTO. The suggestion is that governments should undertake a commitment to not impose duties on such transactions. The rationale therefor is not quite clear. One point which has been made is that governments do not in any case impose taxes on such transactions at present; hence, it is argued that little will change if a commitment is made to continue this practice in future. This argument, however, misses the point that a commitment in the WTO will

curtail the discretion to tax such transactions in future, and as such it is a specific concession.

For developing countries, in fact, there is a good rationale for imposing entry taxes on such transactions. Some relevant points are given below as examples:

- In these activities, it is more likely that the developing countries will be the importers and there is hardly much chance of their being the exporters; hence, it makes good sense in terms of trade policy to impose an entry tax, subject, of course, to overall economic policy.

- There is likely to be high growth in such trade; a tax on it is thus likely to bring considerable revenue to the developing-country governments in future, which will help them add to their scarce resources.

- The section of the population which will be benefiting from electronic commerce in developing countries is generally those in the higher-income bracket. Hence, it is prudent and justified to tax these transactions in the interest of equity.

One important technical point which has to be noted is that the current proposal addresses itself not to any particular goods or services sector; it is targeted, rather, at a specific mode of conducting commercial transactions in goods and services. It therefore opens an entirely new chapter in the scope of work of the WTO. It does not appear desirable when so many subjects of the past have to be attended to in the world trade body and with the system quite strained by the load.

What is even more relevant is that the country making this request has not so far placed any offer on the table as a reciprocal concession in return for zero duty on electronic commerce. In the usual GATT/WTO practice, the country concerned should make some offers of eliminating its duties on some products of interest to the others. In fact, the developing countries

may themselves ask this country to eliminate its duties on the products of interest to them. If such offers are made, the countries can then enter into serious negotiations.

Right now, however, it is a totally one-sided affair which appears very unfair and un-GATT-like. Thus, instead of asking the developing countries to agree to continue the zero duty, the proponent country should make a reciprocal offer, following which negotiations can take place. If developing countries agree to extend the current agreement without obtaining anything in return, it will be a totally one-sided concession to the developed country which made this proposal. It will be special and differential treatment in reverse.

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THE IMPLICATIONS OF THE NEW ISSUES IN THE WTO

New issues have frequently entered the ambit of the multilateral trading system over the last two decades, invariably at the instance of major developed countries. Before possible commitments and obligations on these issues are set in the World Trade Organisation (WTO), developing countries, this paper advises, have to examine the motives of developed-country proponents in introducing these subjects, and clarify their own ideas and objectives thereon.

This paper looks into four important new issues currently under consideration in the WTO: investment, competition, government procurement and electronic commerce. It cautions developing countries to be on guard against possible moves to negotiate rules in these areas that would constrain their domestic policy options and discretion to guide the process of national development. Third World countries should, suggests the author, promote matters of interest to them in discussions on these new issues, ensuring that their development concerns and objectives are adequately addressed.

About the Author:
Bhagirath Lal Das *was formerly India's Ambassador and Permanent Representative to the General Agreement on Tariffs and Trade (GATT) 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.*

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