

Multilateral Framework on Investment

Much Pain Without Gain!

Discussion on a multilateral framework on investment (MFI) is by no means a new issue as it has been on the world-trade agenda since the aborted Havana Charter. Even during the Uruguay Round (UR) trade negotiations, developed countries advanced the idea of framing multilateral rules to further liberalise the foreign investment regime. But the developing countries were opposed to any such idea. Eventually, the developing countries agreed to negotiate on four clusters of investment-related matters. The four sets of agreements under the auspices of GATT that relate to investment issues are –Trade-Related Investment Measures (TRIMs), General Agreement on Trade in Services (GATS), Trade-Related Intellectual Property Rights (TRIPs) and Agreement on Subsidies and Countervailing Measures (SCM).

TRIMs explicitly and exclusively deals with negative investment issues, such as local content requirement, export balancing etc. The Agreement on TRIPs has a bearing on Foreign Direct Investment (FDI) issue in that the definition of these rights and the adherence to the international standards and procedures constitutes part of the framework within which foreign investment takes place. The GATS also relates to FDI issue since it recognises local presence as one of the modes of supplying. With respect to SCM, certain investment incentives lie within the definition of a subsidy.

Besides, the Agreement on TRIMs has a built-in agenda under Article 9 of the agreement, wherein the Members could recommend expansion of the WTO acquis to both investment and competition policy. It was this provision that was invoked to bring the issues of investment and competition policy at the 1st Ministerial Conference of the WTO in Singapore in 1996. Further progress on this issue was made at the Doha Ministerial Conference as the Members agreed to decide on whether and upon what terms to launch negotiations at Cancun.

I. The Doha Mandate

Para 20. Recognising the case for a multilateral framework to secure transparent, stable and predictable conditions for long-term cross-border investment, particularly foreign direct investment, that will contribute to the expansion of trade, and the need for enhanced technical assistance and capacity-building in this area as referred to in paragraph 21, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations.

Para 21. We recognise the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development. To this end, we shall work in cooperation with other relevant intergovernmental organisations, including UNCTAD, and through appropriate regional and bilateral channels, to provide strengthened and adequately resourced assistance to respond to these needs.

Para 22. In the period until the Fifth Session, further work in the Working Group on the Relationship Between Trade and Investment will focus on the 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 between members. Any framework

should reflect in a balanced manner the interests of home and host countries, and take due account of the development policies and objectives of host governments as well as their right to regulate in the public interest. The special development, trade and financial needs of developing and least-developed countries should be taken into account as an integral part of any framework, which should enable members to undertake obligations and commitments commensurate with their individual needs and circumstances. Due regard should be paid to other relevant WTO provisions. Account should be taken, as appropriate, of existing bilateral and regional arrangements on investment.

II. Different Country Positions

The impression emerging from the WTO Working Group discussions pertaining to the MFI proposal indicates that most countries are still struggling to understand what are the contours of an MFI and the implications of the MFI on their national development and industrial policies. Nevertheless, many developing countries are not so enthusiastic about the idea of launching WTO negotiations on an MFI. The most vocal opposition has come from the so-called like-minded group including India, Kenya, Malaysia, Tanzania, Uganda, Zambia and Zimbabwe among others. They are rather adamant about certain issues, which are crucial to them, thus posing a challenge for the future of the discussions. Some of the Latin American countries, on the other hand, are quite sympathetic to the proposal, ostensibly because they believe that developing countries stand to gain from an investment agreement where they would collectively have more influence.

Unlike other countries, which seem ambivalent, India and Malaysia have been steadfast in their opposition to an MFI at the WTO. According to India, investment is not a trade issue, therefore it does not belong to the WTO. It has also argued that there is no evidence that an agreement will bring more investment to developing countries, hence, it would serve no purpose for developing countries. Moreover, India has consistently insisted that Members must discuss the movement of natural persons (labour) in any discussion on capital flows.

Pakistan has also repeatedly stated that it remains unconvinced of the need for an agreement adding that it would weaken the bargaining position of host countries vis-à-vis investors. The EU and Japan have tried to placate India and Malaysia as well as other developing countries by advocating an approach similar to that under the GATS. In their view, this approach would allow governments to open up areas where they want foreign investors and exclude those considered too sensitive for political, economic, or developmental reasons.

Most developing countries are in favour of including a narrowly defined and long-term foreign investment i.e., FDI, in the possible MFI if there is to be one at all. The US has not been an enthusiastic supporter of an MFI as it thinks that the present approach of bilateralism is working quite well for it. However, it may support the EU if the proposed framework is of its liking. According to the US, a broad-based and open-ended definition (which includes portfolio investment) and pre-establishment rights are necessary to maximise the benefits of investment liberalisation and protection. Australia suggested the idea of having a narrower definition for entry (pre-establishment treatment), and a broader definition for post-establishment treatment, in part for consistency with BITs. Canada, which supports an MFI as it feels that it can fill the gaps on WTO rules which only covers investment in services and not in goods, believes that the concept of investor has to be sufficiently broad and should apply to the investor while in the process of investing (before and after the point in time at which the act takes place) as well as during the life of the investment.

Taiwan has been controversial by suggesting that Members should consider provisions for investor-state disputes through the dispute settlement system patterned after the Independent Entity Scheme for WTO Pre-shipment Inspection disputes. Most countries including Malaysia, Hungary, New Zealand, Hong Kong and China have objected to this proposal on the ground that it is beyond the Doha remit. The sentiment, however, is shared by most countries as they argue that the WTO was created for Members and not for private parties. Canada has suggested that a distinction would be drawn between agreements covering some investment provisions like GATS, TRIPs, and TRIMs and a new form of dispute settlement.

India has also made submission, along with Cuba, China, Kenya, Pakistan and Zimbabwe spelling out investors' and home governments' obligations which includes preventing cases of corrupt corporate practices, fraud, and bankruptcies. They could also be

used to protect the environment, bring transparency in the corporate world and control restrictive business practices, it has argued.

III. The Current State of Play

There has not been much change on the ground since the Doha Ministerial as far as the positions of countries are concerned. According to the Doha Declaration, the Working Group on Trade and Investment was to work further on the clarification of the proposed elements, like scope and definition; transparency; non-discrimination; modalities for pre-establishment commitments based on a GATS-type, positive list approach etc.. However, these remain as complex as before to many of the developing country members and other stakeholders. The Declaration also talked about possible modalities, consensus on which was essential to launch negotiation on the issue. But the issue of modalities was hardly discussed. The EU, Japan, Korea and Switzerland have floated a draft note on modalities on investment agreement at the WTO very recently.

However, the draft hardly goes beyond on what has already been said in the Doha Declaration. Para 2 of the draft says that paras 45 through 51 of the Doha Declaration shall apply to the negotiations. Moreover, para 3 says the negotiating group on investment will have its first meeting within a month of the decision, and the Chair will conduct negotiations with a view to presenting a draft text by 30th June 2004. This means that negotiations and outcome will be linked to the Doha Work Programme and will be part of single undertaking. This is quite unreasonable as the negotiations on the Doha Work Programme started immediately after the Doha Ministerial, whereas the negotiations on investment is yet to begin. This seems to be quite unrealistic even in absolute term as there would barely be nine months to negotiate on such a controversial issue. Expectedly, some developing countries have even refused to discuss the draft.

There remains wide divergence of views as before. This can be seen from the wording of the draft Ministerial Declaration that is in circulation. For all the four Singapore issues, it envisages two scenarios. In the first scenario, the Members agree to commence negotiations on the basis of modalities set out in annexures. In the alternative scenario, the members recognize that the situation does not provide a basis for the commencement of negotiation in these areas. Nevertheless, India and some other developing countries have criticized as the said annexures have not been discussed adequately. Neither they have been circulated to the members. Interestingly, China is one of the countries that has put its weight behind India on this issue.

IV. Conclusions

Among the four Singapore issues, investment is the most controversial. The recent suggestion by the US to unbundle the Singapore issues gives an indication that US would probably not like to negotiate on an MFI immediately. Interestingly, the demand for unbundling these issues was raised in several quarters who thought that progress on other issues might be good for the multilateral regime and hence should not be mortgaged to the progress on the controversial issue of investment. Cracks might develop even within

the EU with Germany already having expressed concerns over launching negotiations on the issue. Similarly, sentiments against launching negotiations on investment have surfaced even within UK government circles. Thus, the possibility of an immediate launch of negotiations on investment seems to be rather weak..

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