TWN Trade & Development Series 16

Dangers of Negotiating Investment and Competition Rules in the WTO

Bhagirath Lal Das

TWN
Third World Network

Dangers of Negotiating Investment and Competition Rules in the WTO

Bhagirath Lal Das

TWN
Third World Network

Dangers of Negotiating Investment and Competition Rules in the WTO

is published by
Third World Network
228 Macalister Road
10400 Penang, Malaysia

Printed by Jutaprint
2 Solok Sungei Pinang 3, Sg. Pinang
11600 Penang, Malaysia.

ISBN: 983-9747-65-7

CONTENTS

1 EXAMINATION, NEGOTIATION, AGREEMENT

Note: This chapter is an edited version of a Third World Network Briefing Paper that was distributed during the 1st WTO Ministerial Conference in Singapore in December 1996, when the issue of investment was sought to be brought up for WTO consideration.

Suggestions are being made that the subject of investment should be taken up for examination in the World Trade Organization (WTO). The countries which see great danger in a proposed multilateral investment agreement curtailing their discretion to guide and control foreign investment, are being persuaded that they should at least agree to have some study and examination of this subject in the WTO.

But a study or examination in the WTO would have some serious implications which must be considered by governments, particularly the governments of developing countries, before they decide to initiate it.

GATT/WTO is a serious body. It does not take up an issue for examination without a definite final objective or without a clear prior indication of the existence of the problems which have to be studied.

Several times in the past, working parties or groups were established in the General Agreement on Tariffs and Trade (GATT) forum to study and examine specific issues relating to the operation and implementation of the agreement. In practice, these exercises were a joint consideration and examination by governments.

To a great extent, this exercise involves negotiations among the interested governments on the identification of issues involving differing interests

and on the possible compromises. By its very nature, the study or examination has been on the subjects which are already well founded in GATT.

Relationship (or Lack Thereof) between Investment and Trade

It will therefore be quite a unique development to initiate an examination of the relationship between investment and trade.

Of course, any subject can be shown to have a relationship with trade by stretching the argument. For example, the internal taxation policy of governments can be shown to have some relationship with trade, as it affects the disposable income of the people and, thereby, their purchasing capacity for foreign goods. Even health and nutrition can be shown to have some links with trade by a further stretch of logic. These affect the physical and mental capacity of the workers to work and thereby affect their output, which may in turn have a link with the cost and quality of production, and thus impact on competitiveness.

All these linkages cannot, however, hide the fact that these subjects, including investment, are in reality external to trade. And initiating an examination on trade and investment in the WTO may in fact prejudice the debate on whether or not a relationship exists.

An examination of an issue in the WTO has to come within the latter's functions which are prescribed in Article III of the Marrakesh Agreement Establishing the WTO. According to this provision, the functions of the WTO are to:

> "facilitate the implementation, administration and operation, and further the objectives, of this Agreement and of the Multilateral Trade Agreements, ... provide the forum for negotiations among its Members concerning their multilateral trade relations

in matters dealt with under (the various existing WTO Agreements, and) also provide a forum for further negotiations among its Members concerning their multilateral trade relations ..."

The functions are all related to the existing WTO agreements or to the multilateral trade relations among Member countries. Hence any subject taken up for examination in the WTO should be related to these matters. The initiation of an examination of investment in the WTO will therefore presume beforehand that a relationship exists between investment and trade.

One may argue that through the subject of trade-related investment measures (TRIMs), investment is already included in the WTO. But this is not really true. The existing Agreement on TRIMs has "investment" only in its name; in fact, it is an agreement clarifying and further enforcing some existing provisions on the trade in goods. It is no more an agreement on investment than the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) can be said to be an agreement on trade. The existence of the word "trade" in the latter does not hide the fact that this agreement is simply an agreement on intellectual property rights protection.[1]

Paving the Way to a New Investment Agreement

Apart from prejudicing the Members that do not want entry of investment into the WTO's ambit, the very process of examination will bind them to the process of negotiation once the examination gets underway in any WTO forum.

Let us consider how this matter will be taken up in the WTO if the Ministers decide on initiating an examination.

[1] The question of whether negotiations on an investment agreement should be taken up in the WTO is explored in further detail in Chapter 3, pp. 16-18.

It will first come up for consideration in the General Council, which will have three options before it, viz.: (i) examine the issue in this body, (ii) establish a Committee of the Whole of itself to examine it, or (iii) establish a working party or an expert group to undertake the examination.

These subsidiary bodies will then report to the General Council about the results of the examination. What is to be clearly understood is that it is not an examination by the WTO secretariat but by a political organ of the WTO. (The secretariat may, of course, be asked to make its own technical contribution to the process of examination in these bodies.)

Once the subject is taken up in any of the organs of the WTO, it becomes a political process, in which the question of rights and obligations enters the equation. And thus it is a full process of negotiation, howsoever one may try to hide it by giving it different names.

Hence it has to be understood that initiating an examination of investment in the WTO actually amounts to undertaking an obligation to start negotiations on this subject in the WTO. And past experience has shown that the initiation of negotiations, particularly at the initiative of major developed countries, will finally result in a full-fledged agreement.

It may be relevant to draw on specific experiences of the past. In 1982, strong pressures were built up on developing countries to start negotiations on the subject of services. This was strongly opposed. The final agreement was that countries would take up national examination of services, exchange information among themselves and then consider whether a multilateral framework was necessary and appropriate. This process later led to negotiations in the Uruguay Round and ultimately to a final agreement.

When the subjects of services and intellectual property rights were proposed in the Uruguay Round, the developing countries opposed these issues. However, they thereafter agreed on negotiations, but in-

sisted that when there was an agreement, these subjects would be kept outside the coverage of GATT and there would be no linkage with the trade in goods.

The final result, however, is that goods, services and intellectual property rights have all been integrated in the expanded system of the WTO. And instead of services and intellectual property rights being kept organically separate from goods, there is now a close integration through the provision of cross-sector retaliation (which allows for retaliation against a Member's non-conformity with its WTO obligations in one sector, e.g., services, to be taken in another sector, e.g., goods) in the WTO's Dispute Settlement Understanding.

Dangers of a Multilateral Investment Agreement

Countries may, of course, decide whether it is in their interest to have a multilateral agreement on investment. Perhaps it may be useful among countries which are at almost similar levels of economic development. But it may be dangerous if such an agreement covers countries whose economic levels span a wide range and with widely varying strategies for national development.

For example, an economically mature and strong country may consider that the free flow of investment is good for its economic operators; whereas a country striving for industrial upgradation, technological development and infrastructure development may consider it necessary to be able to direct investments to specific areas.

Any constraint on the rights of the host country to channel investment in desirable directions can cause more harm than good to the process of development. Hence countries have to assess the need for a multilateral investment agreement in the context of their own specific development objectives and priorities.

The issue at present in the Singapore WTO Ministerial Conference is not whether there should be an agreement on investment, but whether simply to have an examination of the relationship between investment and trade in the WTO.

But as explained above, such an examination in the WTO will be *ab initio* prejudicial, and, as past experience has shown, the dynamics of this process in the WTO are likely to lead to negotiations and finally to an agreement.

2 NEW INITIATIVES ON INVESTMENT AT THE WTO

Note: This chapter first appeared as an article in the South-North Development Monitor (SUNS), *No. 4536, 25 October 1999.*

The WTO, in its current preparatory process for the Seattle Ministerial meeting, appears to be considering the manner in which the investment issue should be handled at the Ministerial meeting on 30 November-3 December 1999.

Some developed countries, particularly the European Communities (EC, the name by which the European Union is officially referred to in the WTO), Japan and Switzerland, are in the forefront of a proposal that the Seattle Ministerial meeting should decide to initiate negotiations in the WTO for a multilateral agreement on investment.

Some developing countries, particularly Hong Kong China, the Republic of Korea and Costa Rica, have supported the proposal. Several other developing countries, in particular Association of South-East Asian Nations (ASEAN) countries, the Dominican Republic, Egypt, Jamaica, India and Pakistan, have firmly opposed the initiation of any negotiations on investment in the WTO.

The US, which has been lukewarm in the past about initiating investment negotiations in the WTO, has recently come out more clearly opposing it in the structured informal discussions in the world trade body. It has been reported as saying that it is not interested in any investment agreement

in the WTO and that it does not support negotiations in the WTO on this subject.[2]

The subject of investment was introduced in the WTO in the Singapore Ministerial meeting in December 1996, when some developed countries wanted to start negotiations in this area aimed at having a multilateral agreement. The developing countries firmly opposed it. Finally, it was decided to have a working group in the WTO to study the relationship between investment and trade.

Now some countries, particularly some developed countries, as mentioned above, say that the study process should be ended and negotiations should start; whereas some other countries, particularly a number of the developing countries, firmly oppose the launch of any negotiations in this area and suggest that, at best, the study process should be continued.

Developing-Country Concerns

The main concern of the developing countries is that the proposed negotiations are not about enhancing investment but about ensuring freedom of operation of foreign investors and protecting their rights. Any agreement in the WTO geared towards this, they fear, is likely to constrain the role of host countries in channelling investment into priority sectors, appropriate regions and activities beneficial for their development process. It may also restrict their discretion to put conditions on foreign investors in respect of dissemination of technology, linkages with domestic economic activities and transfer of funds. Besides, investment in non-priority areas may result in a drain on their foreign exchange through the repatriation of profits and dividends, creating balance-of-payments problems.

[2] The US has subsequently softened its stand. It now seems to be indicating that it will not oppose negotiations on investment.

The developing countries feel that a multilateral agreement will not enhance the flow of foreign investment; rather, it will tie them down to commitments which they cannot retract. They think that instead of joining a multilateral agreement, they will be better able to attract foreign investment by adopting appropriate domestic policies and improving their infrastructure. Such a strategy would give them the benefits of enhanced investment without the burden of multilateral commitments.

Potential Hazards of EC Proposal

The EC, being the main proponent of this proposal, has been expressing its objectives and expectations thereon from time to time. It placed a proposal on this subject in the beginning of July which appears to be somewhat softer than its earlier pronouncements. This paper (circulated as a WTO paper on 9 July 1999) should be analyzed carefully as it gives an indication of the EC's latest position on this subject.

This new proposal does have some positive elements in the sense that it has tried to accommodate some concerns of the developing countries. In essence, however, it still fails to assuage the developing countries' apprehension about the dangers which could arise should negotiations on investment take place in the WTO.

Both the positive elements and the dangers are analyzed below.

The EC paper limits the coverage of the proposed negotiations to the area of foreign direct investment (FDI). This appears to be an improvement from the angle of the developing countries, as the earlier proposals were for a wider coverage.

But this improvement may be illusory as the coverage of FDI itself may be a broad one. The paper mentions the difficulty in drawing precise distinctions between various forms of investments and says that the

proposed framework should "focus" on FDI "to the exclusion of short-term capital movements". But what would be covered under the heading "FDI" has not been made clear, thus leaving the door open for a broad definition. Indeed, many expert studies have brought out that in the present world of globalized finance and derivative instruments, the earlier distinctions between FDI, portfolio investment, short-term flows, etc. are now not so clear-cut.

There are some positive features in the proposed contents of the possible rules in this area, even though there are some important omissions. For example, the paper says that the multilateral rules on investment should preserve the ability of the host countries to regulate the activities of investors, including the responsibilities of foreign investors. It keeps the door open for the countries to lay down disciplines and parameters of operations for the investors.

But it does not clearly envisage the multilateral rules themselves having provisions for disciplines and limitations on the operations of the investors, nor for home countries to assume obligations to discipline their investors. Thus, it appears to absolve the multilateral system of the role of directly preventing the anti-competitive practices of foreign investors.

The paper goes on to say that the rules must respond to concerns over the impact on the environment and labour conditions. Further, it notes the concerns of the developing countries about ensuring the compatibility of foreign investors' activities with developmental policies and objectives.

But unlike the concerns for the environment and labour standards, it does not suggest any action in the multilateral rules to take care of the concern for development. It gives the impression of being neutral and passive towards the developmental policies and objectives of the developing countries.

The paper adds emphatically that the multilateral rules should ensure the

right conditions for international investment to be conducive to sustainable development. On the face of it, this stipulation appears positive, but it has several implicit dangers.

Firstly, the concept of sustainable development in the major developed countries is different from that in the developing countries. The stipulation in this paper about the investment being conducive to sustainable development may thus not cater to the objectives of the developing countries. This fear is strengthened by the assertion in the paper of the link between investment and growth in the home country.

Secondly, it says that the traditional framework of special and differential treatment of the developing countries may no longer suffice, and suggests that the dimension of sustainable development should be built into the basic rules which should be implemented by all Members.

Clearly, the implication is that the proposed rules should have obligations on the developing countries in this regard. In the absence of full clarity on the features of sustainable development, there is reasonable apprehension that the proposal envisages enhanced constraints on the discretion of and enhanced burdens on the developing countries.

Thirdly, the talk of ensuring the right conditions for international investment to be conducive to sustainable development could imply constraining the developing countries in respect of channelling investment (both foreign and domestic) into certain areas which they consider appropriate but which are considered by other countries as not conducive to sustainable development.

These considerations show that the provision regarding sustainable development in the EC paper may have some serious potential pitfalls.

By suggesting that the rules should be based on the "positive-list" model as in the General Agreement on Trade in Services (GATS), the paper

appears to initiate a constructive approach in this area. This approach implies that the disciplines will not stretch to all sectors and all areas automatically; instead, a country will be able to specify the sectors where it will be assuming obligations and also the types of obligations it will assume.

On the face of it, this approach appears preferable in case multilateral rules do get negotiated in this area. But the experience of GATS has demonstrated the limitations of the positive-list approach in providing protection and comfort to the developing countries. During the GATS negotiations as also the negotiations for specific sectoral agreements in services, e.g., those on financial services and telecommunication services, the developing countries faced intense pressures to include wider areas and measures into the services disciplines. This was despite the positive-list approach and the mandatory provision in GATS that the developing countries could liberalize fewer sectors and fewer transactions.

When the whole objective of the proposed multilateral agreement on investment is to ensure comparatively free operation for foreign investors in the developing countries, there is thus a natural suspicion that even an architecture like the positive-list model may not be capable of providing protection to the developing countries against pressures for undertaking a high degree of commitments in the area of investment.

The most serious part of the EC paper lies in the stipulation that the rules should preserve the ability of host countries to regulate investment in accordance with the basic principles of the WTO.

While recommending the WTO as an appropriate forum for negotiations on investment, the paper mentions the principle of non-discrimination and also says that the WTO has a well-established framework, including the Dispute Settlement Understanding (DSU).

Clearly the paper is proposing to incorporate the principles of non-discrimination, i.e., most-favoured-nation (MFN) treatment (non-discrimination as between the home countries of the investors) and national treatment (non-discrimination as between the foreign investor and the domestic investor), as well as the enforcement mechanism of the DSU, which implies, among other things, cross-retaliation, e.g., retaliation through restraints on goods imports for violation of commitments in the area of investment.

These are precisely the points of concern to the developing countries as they consider whether to initiate negotiations on investment in the WTO framework.

National treatment, even if it is applicable only post-entry, may pose severe problems for the developing countries. Firstly, it will take away the right of the host country to provide special concessions and facilities to domestic investors if these are not simultaneously provided also to foreign investors. Secondly, it will prohibit the host country from putting discriminatory conditions on the operations of foreign investors, which may often be necessary in view of the fact that they take away foreign exchange in the form of profits and dividends. Exceptions to national treatment will presumably have to be negotiated as in GATS and will be extremely difficult to secure.

Similarly, the MFN principle will take away the right to give preferences to particular countries, which a host country often does for various considerations, including special economic relationships, particularly special linkages in the areas of industry, finance and technology.

The application of the DSU is likely to keep the developing countries under constant fear of restraints on their goods trade. Defending oneself in the WTO dispute settlement proceedings is complicated and costly, as several developing countries have experienced in the last five years of the operation of the DSU.

Finally, the paper says towards the end that difficulties in obtaining knowledge of the laws and regulations of the host country have been identified by international investors as an important brake to their investment abroad. This appears too simplistic.

Investors are attracted by the level of infrastructure, smooth and easy approvals wherever these may be needed, availability of trained workers and large domestic markets. These are the factors which are within the domestic domain of a country, and can be improved if the country has the will and the resources.

The availability of knowledge about the laws and regulations can, of course, be easily assured by a country welcoming investment. A country does not have to join any international agreement for this purpose; indeed, no international rules are needed in this regard at all.

From what has been said above, the EC proposal, though appearing to be somewhat soft and mentioning development at several places, contains almost all the dangers inherent in negotiating on investment in the WTO.

3 PITFALLS IN PLURILATERAL PATH ON INVESTMENT AND COMPETITION ISSUES

Note: This chapter appeared as an article in the South-North Development Monitor (SUNS), *No. 4840, 21 February 2001.*

A New Initiative

Recently a proposal has been informally mooted in the WTO circuit for initiating negotiations and possible agreements on two new subjects, viz., investment and competition, on a plurilateral track. The suggestion is that negotiations should start in these areas in the WTO, and whichever country wishes to participate in them should do so. Finally, when agreements are reached, the countries wishing to be parties should sign on and participate in them. It is thus suggested that the other WTO Members need not have any apprehension of harm as they will be free to keep themselves out of the agreements, and even out of the negotiations, if they so decide. The proposal put forward in this way may perhaps appear innocuous, but it involves severe problems and risks, as will be explained below.

The proposal has been initiated by a few major developed countries on the ground that they need agreements on investment and competition in order for them to undertake commitments in other areas, particularly agriculture and textiles. Some reports have indicated that they are keen on starting negotiations in these new areas even if there is no formal launching of a new round of trade talks in the WTO.

Since a large number of the developing countries are opposed to taking up negotiations in these areas in the WTO, the proponents have come up with this seemingly practical approach to get around the problem. Their

line of argument is that the developing countries should not block the negotiations; rather, they should just step aside and clear the way if they do not like these negotiations and the resulting agreements.

Some other seemingly reasonable initiatives have also been advanced. For example, some type of assurance has been held out that the proposed agreement on investment will not be about the freedom of entry of investors but only about their operations after they have entered the host country. In this manner, it is suggested that the policies of the host country for putting conditions on the entry of investment will not be fettered. Also, an assurance is made that the development objectives of the developing countries will be taken into account in the possible agreement.

There are, however, serious flaws in the suggestion for the plurilateral route. It might have been worth considering if the developing countries were indifferent and neutral to the new issues being taken up in the WTO. In that case, the advice to them to step aside and not block the process might have been relevant. But as the situation stands at present, a large number of developing countries are strongly opposed to initiating negotiations on the new subjects in the WTO. They are far from being neutral and indifferent; they are actively opposing negotiations and agreements on the new issues.

It is useful now to consider the two subjects, viz., investment and competition, separately.

Initiative Involves Amendment of WTO Agreement

On the subject of investment, the basic opposition to launching negotiations thereon lies in the fact that it does not come within the scope of functions of the WTO in accordance with the Marrakesh Agreement Establishing the WTO (WTO Agreement). Article III of the WTO Agree-

ment, which defines the functions of the trade body, says that "(t)he WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements" which are currently in existence. For future subjects of negotiations and agreements, it goes on to say that "(t)he WTO may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference".

The subject of investment is not a part of "multilateral trade relations", to which future negotiations in the WTO have been limited. Hence negotiations on investment do not fall within the purview of the functions of the WTO.

Of course, the WTO's Agreement on TRIMs, in its Article 9, provides for a review of the operation of that agreement and says that the WTO Council for Trade in Goods "shall consider whether the Agreement (on TRIMs) should be complemented with provisions on investment policy and competition policy". But this provision of review appears to be too thin a peg to support the massive exercise of negotiations for an investment agreement. And, in any case, a review in the Council for Trade in Goods cannot be a plurilateral exercise as it is a full-fledged multilateral organ of the WTO system. Besides, this provision only mandates the Council to "consider" whether the agreement should be "complemented with provisions on investment policy". It does not appear reasonable to stretch this to mean a mandate for launching negotiations on investment.

If this provision is so stretched, it will straight away come into conflict with Article III of the WTO Agreement quoted above, which restricts the WTO's ambit to "multilateral trade relations". And in case of such a conflict, Article XVI(3) of the WTO Agreement will come into play which says that "in the event of a conflict" between a provision of the WTO Agreement and a provision of any of the multilateral trade agreements

(e.g., the TRIMs Agreement), the provision of the WTO Agreement "shall prevail to the extent of the conflict".

All this suggests that conducting negotiations on investment in the WTO would require an amendment of Article III of the WTO Agreement, which is a very basic and fundamental provision.

If the WTO is now expanded to cover investment, the next candidates for entry may be domestic taxation policy and, further down the line, domestic macroeconomic policy. Some other subjects, like security policy, social policy, etc., may not remain far behind. In this way, there will be no end to the expansion of the WTO and its remit.

If the developed countries pushing this proposal are really serious about having a multilateral discipline on investment, they should sponsor it in some more appropriate forum, e.g., the United Nations.

Crowding Out Important Subjects

Apart from the fundamental and basic problem discussed above, there is also a practical problem arising out of past experience in the GATT/WTO. If new subjects like investment and competition are taken up for negotiation in the WTO, whether on a plurilateral or a multilateral track, the old subjects of interest to the developing countries will be crowded out of the priority work. This has invariably been the experience so far, and there is no reason to expect that the situation will change in the near future. The developing countries have put forth a number of proposals for the removal of deficiencies, imbalances and inequities in the current WTO agreements. These proposals have emerged out of their experience of the workings of the WTO for the past five years. This is of the highest importance to them at present. Then, there are also the mandated negotiations on agriculture and services, where the developing countries have put forth a number of important proposals.

All these are likely to get derailed if the WTO system is saddled with negotiations on further new subjects.

Imbalanced Initiative

The proposed negotiations on investment are not for enhancement of foreign investment in the developing countries, but for the protection of the rights of investors. It is very much along the lines of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which is for protecting the rights of intellectual property holders. The developing countries have very few intellectual property holders; thus, that agreement is almost exclusively for the benefit of the developed countries. The developing countries have still fewer investors to invest in foreign countries. Mostly it is the investors of the developed countries that invest abroad. Hence the proposed negotiations for the protection of investors' rights are mostly for the benefit of the developed countries.

The proposed negotiations and agreement on investment are also against the principle of having "reciprocal and mutually advantageous arrangements" as mentioned in the Preamble to the WTO Agreement. Reciprocity and mutuality of advantage will just not be possible in such an agreement. As mentioned above, it will be the developed countries that will mostly gain and the developing countries will derive no benefit. In fact, as is explained below, the developing countries will be exposed to risks and dangers by such an agreement.

Illusory Inducement

The developing countries see no reason why there should be this extraordinary step of including for negotiation in the WTO a subject like investment which is not within its current functions. The main propo-

nents say it will make it possible for them to make some moves (of liberalization and improved market access) in areas like agriculture and textiles.

In respect of textiles, this is a totally wrong inducement, one that even verges on being misleading. Already there are commitments of the developed countries in the area of textiles and clothing which they have to implement. The developing countries do not have to make further concessions to ensure the implementation of these commitments.

In the area of agriculture, this type of hope and linkage is misplaced. Negotiations have already been started in this area, as called for in the Agreement on Agriculture. The course of these negotiations will have its own momentum and dynamics.

The experience of the Uruguay Round negotiations has shown that the major developed countries liberalize their agriculture sector mainly on the basis of internal pressures and because of the mutual pressures among them. The main proponent of the negotiations on investment, the EC, is likely to be guided in the agriculture negotiations by the differing views of the various countries which it represents and also by the amount of pressure which the US exerts on it. This is precisely what happened in the Uruguay Round. Pressures and persuasion by other countries and the concessions made by them had hardly any role in motivating the EC to liberalize agricultural trade.

Moreover, the main proponents are grossly distorting agricultural trade by way of high tariffs, high domestic subsidies in various forms and high export subsidies. It is only fair that they remove these distortions. It is grossly unfair of them to expect the developing countries to make concessions, e.g., by accepting to negotiate investment and competition agreements in the WTO, in return for an offered hope of their reducing agricultural trade distortion. Past experience shows that it will be totally futile for the developing countries to make concessions in other areas to

encourage some major developed countries to liberalize their agricultural sectors. It will be an entirely misplaced sacrifice on the part of the developing countries.

Dangers for Developing Countries

For the developing countries, a WTO agreement on investment, which is really for the protection of investors' rights, involves danger without benefits. The agreement could constrain the policy flexibility of the host country in various ways. At present, the host country has the right to channel and guide foreign investment in support of its development, to prevent investments which can disturb its economy, to provide guidelines to investors in their operations so that these are not injurious to the country, to ensure that the foreign investment enhances local economic activities, to give special treatment to domestic investors over foreign investors, etc. The insistence on having an agreement on investment in the WTO is aimed at constraining these options of the host country.

Assurances have been held out that the entry stage of investment will not be covered by the agreement and that it will be limited to the post-entry phase. But this does not help much. The danger still remains that the host country's options for guiding the post-entry operations of the investment will be constrained. And this can have an injurious effect on the development process.

All this indicates that there is serious apprehension of losses for the developing countries through negotiations and agreement on investment in the WTO.

No Benefits to Developing Countries

And there are no real benefits to the developing countries from such an

agreement in the WTO. The proponents say that it will enhance foreign investment into the developing countries. Current experience, however, does not bear out this proposition. It is well known that a large number of countries which allow totally free entry for investment and impose absolutely no restriction on its operation have not attracted much investment, while some countries having restrictions and controls on investment have got high levels of investment. Experience shows that investors are attracted mainly by the infrastructure, facilities and other conveniences as well as opportunities in the host country, rather than by total liberalization of entry and operation. In any case, if a country assesses that liberal entry and operation rules and processes will encourage investment, it can effect these on its own by adopting appropriate domestic regulations and procedures. An agreement and a commitment in the WTO is not necessary for that purpose. The problem with such a commitment is that it binds a country for all time, and the country loses its policy options and flexibility.

Thus, having a WTO agreement on investment is a "no gain-only loss" proposition for the developing countries.

Competition

The subject of competition may technically come within the folds of "multilateral trade relations". Hence, unlike the situation with investment, starting negotiations and concluding an agreement in this area will not be considered as violating the WTO Agreement's provision on the functions of the WTO. However, most of the other elements of risk mentioned above apply also to starting negotiations on competition in the WTO.

Being a new subject of negotiations sponsored by the major developed countries, it is also likely to crowd out consideration of the other subjects which are of interest to the developing countries. The main aim of the

sponsors in proposing negotiations in this area is to have an agreement which will facilitate the entry and operation of foreign firms in the developing countries. In the name of free competition, it is likely to place constraints on the developing countries in their policies of supporting their domestic firms. It is very unlikely, though, that the agreement will put any enforceable burden on the major developed countries to control the anti-competitive actions of their firms in the developing countries. It is also unlikely that it will control the anti-competitive nature of the wave of mergers taking place in the world economy.

Thus, there is serious apprehension that negotiations and an agreement in the field of competition will put constraints on the developing countries in their path of development without giving them benefits.

Conclusion

The developed countries use various methods to push the developing countries to toe their line. Sometimes, they apply bilateral, regional and multilateral pressures; on other occasions, they resort to persuasion through inducement. The current proposal by some major developed countries has been put in a persuasive form. But as has been explained above, whatever the form of persuasion, the proposal involves risks for the developing countries without any benefits. The plurilateral route does not make the proposal innocuous and acceptable, as has been explained above. There may also be an effort to suggest that the developing countries should just agree to start the negotiations without any commitment at this stage to having an agreement. But past experience has shown that a process of negotiation started at the initiative of the major developed countries generally ends with agreements that are in accordance with their aims.

Negotiations and agreements on investment and competition in the WTO involve serious risks for the developing countries without any

gains. There are no benefits, only dangers. Further, initiating negotiations on investment will require amending the WTO Agreement to expand the functions of the WTO. An added danger is that it may give rise to pressures for inclusion of other areas in the ambit of the WTO in future, e.g., domestic taxation, macroeconomic policy, etc.

It is advisable that developing countries not start negotiations on investment and competition in the WTO.

Titles in the TWN Trade & Development Series

No. 1 From Marrakesh to Singapore: The WTO and Developing Countries *by Magda Shahin*
(48 pages US$6.00)

No. 2 The WTO and the Proposed Multilateral Investment Agreement: Implications for Developing Countries and Proposed Positions *by Martin Khor*
(40 pages US$6.00)

No. 3 Some Key Issues Relating to the WTO *by Bhagirath Lal Das*
(40 pages US$6.00)

No. 4 The New Issues and Developing Countries
by Chakravarthi Raghavan
(48 pages US$6.00)

No. 5 Trade and Environment in the WTO: A Review of its Initial Work and Future Prospects *by Magda Shahin*
(68 pages US$6.00)

No. 6 Globalisation: The Past in our Present *by Deepak Nayyar*
(40 pages US$6.00)

No. 7 The Implementation of the WTO Multilateral Trade Agreements, the 'Built-In' Agenda, New Issues, and the Developing Countries *by Xiaobing Tang*
(68 pages US$6.00)

No. 8 Strengthening Developing Countries in the WTO
by Bhagirath Lal Das
(48 pages US$6.00)

No. 9 The World Trade Organization and its Dispute Settlement System: Tilting the balance against the South
by Chakravarthi Raghavan
(48 pages US$6.00)

No. 10 Negotiations on Agriculture and Services in the WTO: Suggestions for Modalities/Guidelines
by Bhagirath Lal Das
(24 *pages US$6.00*)

No. 11 The Implications of the New Issues in the WTO
by Bhagirath Lal Das
(*20 pages* *US$6.00*)

No. 12 Developing Countries, the WTO and a New Round:
A Perspective *by Ransford Smith*
(*40 pages* *US$6.00*)

No. 13 Review of the TRIPS Agreement: Fostering the Transfer of
Technology to Developing Countries
by Carlos M. Correa
(*48 pages* *US$6.00*)

No. 14 The Proposed New Issues in the WTO and the Interests of
Developing Countries *by Martin Khor*
(*32 pages* *US$6.00*)

No. 15 WTO: Challenges for Developing Countries in the
Near Future *by Bhagirath Lal Das*
(*24 pages* *US$6.00*)

No. 16 Dangers of Negotiating Investment and Competition Rules in
the WTO *by Bhagirath Lal Das*
(*32 pages* *US$6.00*)

DANGERS OF NEGOTIATING INVESTMENT AND COMPETITION RULES IN THE WTO

Among the new issues which some developed countries are pressing the World Trade Organization (WTO) to take up are investment and competition, the aim being to secure full-fledged agreements on these subjects.

In this compilation of articles, the author warns that the rules which would emerge from such a process are likely to come in the way of developing countries' regulating and guiding the activities of foreign investors and firms in the interests of national development. However they are pursued, be it through coercion or persuasion, the attempts of developed-country advocates to launch negotiations within the WTO on these issues could ultimately result in binding commitments on developing countries which harm their development prospects.

This collection complements two other papers by the author, both of which are also published by the Third World Network, which further elaborate on and explain in detail the implications of negotiations and agreements on investment and competition: *The Implications of the New Issues in the WTO* and *New Issues and New Round in the WTO*.

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 organizations.*

TWN TRADE & DEVELOPMENT SERIES

is a series of papers published by **Third World Network** on trade and development issues that are of public concern, particularly in the South. The series is aimed at generating discussion and contributing to the advancement of appropriate development policies oriented towards fulfilling human needs, social equity and environmental sustainability.