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Global Trade Developments

Anwarul Hoda¹

During the last three months, the international political and economic environment witnessed a number of positive developments, which have renewed hopes of progress in the Doha Round of multilateral trade negotiations. First, the mid-term elections in the USA led to the Republicans winning control of the House of Representatives. It is widely believed that with this change, the US president could find a responsive legislature if he takes an initiative on trade.

Second, the Seoul Action Plan approved at the G20 Summit on November 11-12, 2010, reflected a new resolve to conclude the talks successfully. Under the plan, the G20 members stressed “our strong commitment to direct our negotiators to engage in across-the-board negotiations to promptly bring the Doha Development Round to a successful, ambitious, comprehensive and balanced conclusion consistent with the mandate of the Doha Development Round and built on the progress already achieved. We recognize that 2011 is a critical window of opportunity, albeit narrow, and that engagement among our representatives must intensify and expand. We now need to complete the end game. Once such an outcome is reached, we commit to seek ratification, where necessary, in our respective systems. We are also committed to resisting all forms of protectionist measures.”

Third, at the APEC Summit held at Yokohama on November 13-14, 2010, leaders echoed the G20 leaders at Seoul by emphasising their strong commitment to bring the Round to a prompt and successful conclusion and directing ministers to empower their representatives to move towards the end game with a sense of urgency.

Fourth, on November 20, 2010, the joint statement issued after talks at Lisbon between the US President, Herman Van Rompuy, President of the European Council and Jose Manuel Barroso,

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President of the European Commission, reiterated, inter alia, “our strong commitment to direct our negotiators to engage in across-the-board negotiations to promptly bring the Doha Development Agenda to a successful, ambitious, comprehensive and balanced conclusion”.

Fifth, the US leadership is now taking active interest in seeking ratification of the free trade area (FTA) agreements negotiated by the Bush Administration. Earlier, the Obama administration had appeared lukewarm on all trade opening agreements, including bilateral FTAs. There are indications now that this might be changing. The US and Korea have been able to iron out differences and President Obama is expected to seek ratification by the Congress of the KORUS FTA agreement. There are differences within the US on whether the Congress should be approached first for passing the KORUS FTA agreement or whether the agreements with Colombia and Panama should also be put to vote at the same time. The final decision would be based on the strategy that the administration adopts for dealing with the Congress.

Lastly, at the meeting held on November 30, 2010, the Trade Negotiations Committee approved intensification of the meetings of the various Doha Round groups and of senior officials to try to resolve differences. The TNC also approved the notion that the revised negotiating texts would be produced by the end of the first quarter of 2011. The Director General of WTO has set the goal to reach an agreement on the Doha Round package by the middle of the year. The second half of the year would be spent in reviewing and verifying the members’ schedules of specific commitments and the Doha Round would be formally concluded in mid-December 2011 at a WTO ministerial conference.

Whether the programme drawn up by the members would move like clockwork and deliver the package by the middle of the year remains to be seen. Reports from the first set of meetings held during January 2011 do not disclose that any perceptible sense of urgency was shown by key participants. The US continued to harp on the demand on Brazil, China and India for additional concessions in non-agricultural market access (NAMA) and appeared inclined to reopen the Chairman’s text in agriculture on issues that were being regarded as settled. There was no inkling of the commencement of the endgame, when delegations can be expected to start the process of give and take and move from the position of reiterating previously stated positions.

There is divergent assessment on whether there has been any change in the attitude of the USA towards the trade talks. In mid-December, European Trade Commissioner Karel De Gucht observed at Washington that he had discerned a change in the attitude of the United States after the Lisbon Summit and there was now a real commitment to concluding the Doha Round. On the other hand, more recently, the Indian Commerce Secretary has stated that there is still no effective engagement by the United States

Both the G20 and APEC summits have spoken of completing the endgame or moving towards it. What has not been realised is that starting the endgame is not the result of a conscious decision by the participating governments to do so. The endgame can only be triggered through a decision

among key players to resolve a few big issues. This is what happened in the Uruguay Round and the famous Blair House accords on agricultural issues between the USA and the EC started an intensive phase of negotiations. The endgame was finally sparked off as a result of the agreement in mid-1993 at Tokyo among the Quad countries on industrial tariffs. In the Doha Round, the endgame can begin only if some of the critical issues in the areas of agriculture and NAMA are resolved by the leading players. For instance, if the G5 (USA, EC, Brazil, China and India) can resolve the issues of special agricultural safeguards and sector agreements for elimination of duty under NAMA, we are bound to see real intensification in the negotiations.

Another crucial area is trade in services and what is needed here is for the leading countries to agree on a credible package. In this area, it is possible to conceive of a mutually advantageous package comprising binding of the existing level of openness in services in foreign investment by developing countries and concessions in respect of movement of contract service suppliers by developed countries.

The important point being made here is that exhortations by even the heads of state and government made in declarations adopted at summit meetings are likely to be of no avail in activating the end game and leading up to the conclusion of the trade talks. What is needed is hard work among the major players to find compromise solutions on some big ticket issues that lie at the root of the deadlock among them. Once this is accomplished the trade talks will move forward.

Procedural decisions among major players could also move the talks forward. At present one of the most daunting hurdles appears to be the imperative of the 'single undertaking', spelt out in the Doha Ministerial Declaration in the words that - "With the exception of the improvements and clarifications of the Dispute Settlement Understanding, the conduct, conclusion and entry into force of the outcome of the negotiations shall be treated as parts of a single undertaking. However, agreements reached at an early stage may be implemented on a provisional or a definitive basis. Early agreements shall be taken into account in assessing the overall balance of the negotiations."

What this means is that the WTO members cannot pick and choose among the results of the negotiations and they must accept the results as a whole. The approach was designed to facilitate the negotiating process by providing members with opportunities for trade-offs over areas of negotiations. However, given the considerable diversity of economic situations among members, many of them may find individual aspects of negotiated results either irrelevant or of insufficient interest to them. For instance, a small island developing country may not have much interest in the results of negotiations on non-tariff measures on chemicals or on remanufactured goods. There can be myriads of agreements in the WTO, which have relevance to major trading nations but not to the smaller players with very little participation in trade. It is for this reason that many trade policy analysts are advocating agreements based on the support of a critical mass of members. If the major players were to agree on moving ahead on this basis, it could really galvanise the negotiations.

Climate Change after Cancun

Anuradha R.V¹

The 'Cancun Agreements' concluded by over 190 countries in December 2010, represent certain fundamental departures from the existing provisions of the UN Framework Convention on Climate Change (UNFCCC) of 1992 and the Kyoto Protocol of 1997. The principle of "common but differentiated responsibilities", popularly referred to as the CBDR principle, lies at the heart of the UNFCCC. Flowing from this principle, and as further elaborated in the Kyoto Protocol, mandatory emission reduction commitments were applicable only to developed countries. There was also a clear linkage under the UNFCCC between adherence by developing countries to their obligations under the convention and the 'effective implementation' by developed countries of their commitments to provide financial resources and transfer of technology.

With the first commitment period under the Kyoto Protocol ending in 2012, there has been increasing clamour from developed countries that they cannot continue to shoulder the burden of mandatory obligations on their own and developing countries would need to undertake some commitments. The Copenhagen Accord that was concluded in December 2009 reflects this emerging shift in the division of rights and obligations between developed and developing countries and the Cancun Agreements provide the framework for making this operational. While the Cancun texts emphasise the CBDR principle, the axis of the principle has moved from a situation of 'no binding obligations on developing countries' to a progressive build-up of obligations. While developing countries such as India are not yet required to assume any binding emission reduction obligations, they are required to undertake and report certain measures that are geared towards emission reductions. The exact nature of these obligations is discussed in the next subsection.

In contrast, there appears to be a relaxation of the obligations for the developed countries since the Cancun Agreements, unlike the Kyoto Protocol, do not spell any binding emission reduction targets on them. The Cancun texts only "urges developed country parties to increase the ambition of their economy-wide emission reduction targets", but is silent on what those targets should be.

The next meeting of the Conference of Parties (COP) is scheduled to be held in South Africa later this year, where the future of the Kyoto Protocol and further provisions relating to implementation and enforcement of obligations is expected to become clearer.

What do the Cancun Agreements Mean for India?

The key obligation on a developing country like India is to undertake "nationally appropriate mitigation actions" ('NAMA') aimed at achieving "deviation in emissions relative to business as usual emissions in 2020". As explained above, there is no binding emission reduction commitment

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on India or any other developing countries. The obligation to undertake “NAMA” essentially means that a developing country needs to adopt and report its commitment to policies and actions that it plans to undertake in order to ensure some reduction in green-house gas emissions. In essence, a NAMA commitment does not require India to commit to any specific emission reduction targets. However, India would be required to ensure that it undertakes and reports its actions aimed at reducing some green-house gas emissions, subject to an overall qualification that this should represent “deviation from business as usual emissions in 2020”. Through a series of provisions which will be discussed below, the Cancun Agreements seek to subject such reported actions to scrutiny by the COP.

It is important to note that there is as yet no agreed or common understanding of what ‘NAMA’ means. India had earlier argued that NAMA means voluntary reductions by developing countries that require to be supported and enabled by technology transfer from developed countries. The Cancun Agreements, following from the Copenhagen Accord, emphasise that some NAMA would be supported by external funding while a developing country would be required to undertake others on its own and that each set of actions would be subject to some degree of external scrutiny.

The Cancun Agreements also recognise differences in understanding NAMA and call for workshops to understand the diversity of mitigation actions submitted, the underlying assumptions and the support needed to implement these actions. It is critical to be clear on the scope and ambit of NAMA before the next COP in South Africa since all NAMAs are to be subject to some form of international scrutiny and assessment.

The specific obligations that would fall upon a developing country like India under the Cancun Agreements can be summarised as follows:

1. Voluntarily provide information on NAMA which are required to be “measured, reported and verified” (‘MRV’) at the national level, for which guidelines are to be developed under the UNFCCC.
2. Identify the NAMA for which it would require international support and costs for the same. All internationally supported action will be subject to “international MRV”, guidelines in respect of which also are to be developed.
3. Ensure periodic national communications based on the format to be notified. The Agreements specify that there will be “international consultation and analysis” (‘ICA’) of reports made to the technical body of the UNFCCC, which would involve “analysis by technical experts in consultation with the Party concerned”, and “result in a summary report.”

Scrutiny and assessment of mitigation action that have availed of international funding is a perfectly understandable requirement. The concern with the Cancun Agreements, however, is with regard

to the overarching requirement for assessment of all domestic actions. Until the standards and parameters for MRV and ICA are put into place, this is likely to remain an issue of concern. Therefore, it would be critical that negotiations towards the next Conference of Parties (COP) scheduled to be held at South Africa towards the end of 2011, take into account the following aspects:

1. The guidelines for measurement, reporting and verification (MRV) for domestic actions that are not supported by international support should be confined only to those nationally appropriate mitigation actions (NAMA) which a developing country has voluntarily reported to the UNFCCC. This aspect is not clear from the existing language of the Cancun texts and needs to be clarified.
2. A country like India would need to ensure that any voluntary reporting of NAMA is kept at a modest level, so that the MRV process does not translate into any intrusion into sovereign decision-making processes relative to voluntary actions. Further, MRV in relation to such NAMA should be essentially in the nature of reporting, with no legal consequences attached to any non-compliance. The meaning of 'measurement' and 'verification' in respect of such actions would need to be carefully considered and articulated.
3. The principles for international consultation and analysis (ICA) developed and the summary report resulting from such ICA would need to ensure due consideration for the various economic, political and environmental realities of a developing economy.
4. The procedures and methodology for adhering to the commitment for national communication would need to be set forth in terms that would not be administratively cumbersome.

Finances and Technology

The other critical elements of the Cancun Agreements are those dealing with finances and technology, both of which are critical for developing countries that face the dual challenge of 'development' and 'climate change'. Inadequate flow of finances and technology has been one of the major criticisms of the UNFCCC so far. Under the Copenhagen Accord, developed countries had committed to achieving a goal of jointly mobilising US\$100 billion per year by 2020 to address the needs of developing countries. The Cancun Agreements emphasise that a significant proportion of the finances should flow through the "Green Climate Fund", which is to be established as the operating entity for the financial mechanism. There is, however, no obligation on specific amounts to be contributed by developed countries to the Fund. This obligation needs to be articulated in clear terms in order to ensure that the target is viable.

On the issue of technology, there is universal recognition of the need for widespread diffusion of low-carbon technologies in order to redefine approaches to economic growth. The Cancun Agreements propose the creation of an international Technology Mechanism that seeks to facilitate

the process of clean technology knowledge sharing among all countries with particular focus on developing countries. The effective implementation of this mechanism is another crucial element that will determine the effectiveness of the climate change regime.

The Concern about Border Measures

Another issue of critical importance that needs to be addressed before the next COP at South Africa is the extent to which unilateral options are available for countries. This is because the ongoing legislative efforts in the U.S. and the EU to cap greenhouse gas emissions also contain provisions that provide the ability to impose unilateral trade measures on imports from countries which do not have comparable emission reduction norms. The key concerns driving such measures are two-fold: first, the need to address carbon leakage and, related to that, the need to address domestic industry's competitiveness.

Any unilateral action would have serious implications for the balance of rights and obligations that a multilateral agreement may hope to achieve under UNFCCC. It is important to bear in view that the UNFCCC itself envisages the possibility of unilateral measures under Article 3.5, though it potentially leaves open a wide policy space for such measures and is silent on the actual triggers that would justify implementing these.

Both the US and EU proposals have been analysed by several scholars, who acknowledge the inevitability of disputes under the WTO framework if countries exercise unilateral trade measures under such laws. A WTO dispute, however, is unlikely to provide a long-term solution since the current nature of WTO jurisprudence on the trade-environment interface seems to provide a host of equally persuasive arguments for both sides.

Addressing the issue of unilateral trade measures within the framework of the UNFCCC is, therefore, necessary to ensure clarity on the circumstances under which such measures would be justifiable. These could include, for example, the use of trade measures only in respect of non-parties to the UNFCCC or any successor protocol to the UNFCCC or restricting the use of trade measures against parties only if a multilateral assessment reveals non-compliance with obligations under the UNFCCC.

The negotiating texts for the COPs held at Copenhagen (December 2009) and Cancun (December 2010) comprised of discussions on options on the issue of unilateral measures, especially trade measures, under Article 3.5. The issue, however, remains highly contentious and unresolved. It is expected to form a part of the discussions for the COP at South Africa. How this is addressed will be of tremendous importance, especially in view of the evolving set of obligations for developing countries like India discussed above.

Towards a Region Wide FTA in Asia

Anwarul Hoda

At the APEC Summit held on November 13 and 14, 2010, the leaders of 21 nations gave a call for the realisation of a Free Trade Area of the Asia-Pacific (FTAAP). This step epitomises a major change in the thinking in the region that has taken place in the past three decades. There was a time when most major Asian economies shunned economic integration arrangements. In the mid-1980s, when the Uruguay Round began, a Friends of the MFN Group was formed to improve the multilateral framework for the conduct of world trade and to make it harder to create customs unions and free trade areas (FTAs). The group included Japan, Australia and New Zealand. The efforts of this group of countries made little headway. In fact the move towards the formation of regional trading blocs gathered pace; the integration in Europe was broadened and deepened and the US pushed forward to form the NAFTA. In Asia too, the ASEAN Preferential Trading Arrangement was deepened to establish the ASEAN FTA in 1992 while the SAARC Preferential Trading Arrangement (SAPTA) was established in 1993.

In 1991, when the Uruguay Round was floundering, there was some agonizing among trade policy experts on the prospect of the end of multilateralism and the world being divided up into economic integration arrangements. The Uruguay Round eventually succeeded and the WTO was established in 1994 providing reassurance that the multilateral trading system was alive. Nevertheless, the world moved further toward economic integration arrangements with redoubled vigour.

There was also an increase in the level of ambition and many of these agreements covered goods and services as well as investment. These came to be known as the comprehensive economic partnership agreements (CEPAs). Initially, geo-political dynamics was the main factor underlying these arrangements as was discernible in the European integration and such other major integration initiatives as the NAFTA, MERCOSUR and ASEAN. Later, however, the motivation for economic integration transcended the inter-regional divide as nations strove to establish a foothold in individual countries in other regions. Eventually many nations were seeking free trade agreements with trading partners all over the world with the overriding objective of gaining access to markets on a WTO plus basis. Trade policy practitioners have now accepted regional economic integration as a reality and are engaged in devising ways in which FTAs and CEPAs can contribute more to advance the economic interests of constituent countries.

After initial hesitancy, the countries in the Asian region also fell in line with the world-wide trend towards economic integration arrangements. In fact, the past few years have seen an

intensification of negotiations for the formation of bilateral and plurilateral FTAs and CEPAs. In addition, a number of preferential trading arrangements (PTAs) have also come into existence, without a credible plan to move towards free trade areas.

A feature of economic integration arrangements in Asia is that bilateral agreements outnumber plurilateral agreements. One count is that of 216 FTAs, PTAs and CEPAs in Asia in 2009, 166 were bilateral and 50 plurilateral. The ASEAN has emerged as the principal hub and has concluded agreements with all major economies of the region, namely China, Japan, India, South Korea, and Australia-New Zealand. Another notable feature is that in parallel with the broader agreement with the ASEAN as a group, these economies have concluded or are in the process of concluding agreements with the member countries of the ASEAN as well, with the result that trade between the same countries is being governed by more than one agreement. Independent of their relationship with the ASEAN, other major Asian countries are also entering into FTAs with one another. India has already signed up with Korea and concluded negotiations with Japan. To complete the picture, we must mention also the South Asia Free Trade Agreement as well as bilateral agreements between India and some of the South Asian countries, such as Nepal, Sri Lanka and Bhutan.

Multiple FTAs would normally have been expected to offer traders the choice of picking between alternative arrangements on the basis of the most advantageous tariff rates. However, in fact the matter is complicated by the differing rules of origin and the trader gets confused on which arrangement would yield greater benefit. There is also the consideration that the smaller the FTA the greater the chances of trade diversion, which is the main reason why economists and trade policy officials prefer the multilateral approach.

A big challenge before the Asia-Pacific region is how to ensure that the large number of FTAs, RTAs/PTAs and CEPAs coalesce into one big region-wide, economic integration arrangement, embracing trade in goods and services as well as investment. Such an arrangement will eliminate the overlap and minimise the chances of trade diversion. Its realisation will not be easy as such arrangements can flourish only on a foundation of political harmony among the peoples and governments of the constituent territories. Such harmony does not exist among many countries.

The real challenge is how to accomplish this goal of a region wide economic integration arrangement. A recent ADB paper speaks of two routes, consolidation and expansion. Consolidation will involve “concluding several bilateral agreements between major concerned parties, harmonising them, and then creating one region-wide agreement covering all concerned parties, which may be followed by the suspension of old bilateral agreements” Expansion will

imply that a few countries first form an FTA or CEPA; then others join in through accession procedures, as can happen if the Trans-Pacific Partnership initiative succeeds. The Trans-Pacific Partnership Agreement (TPPA) was originally signed in 2005 among four countries – Brunei, Chile, New Zealand and Singapore. Five other countries – Australia, Malaysia, Peru, the United States and Vietnam – are currently participating in negotiations to join the group and the United States has put its weight behind broadening the membership of the TPPA.

Coming back to the FTAAP idea of the APEC Summit at Yokohama it is seen that they too envisage the exploration of alternative consolidation and expansion routes, building on existing arrangements such as ASEAN +3, ASEAN +6 or the Trans-Pacific Partnership.

It is important to note that the APEC leaders are thinking of the Free Trade Area to include Asia as well as countries on the eastern rim of the Pacific. If we do include them the resulting pact will be inter-regional rather than regional. Both the US and the EU have made overtures for concluding FTA type deals with the ASEAN and they have both succeeded in concluding such deals with Korea, although these agreements have not entered into effect.

In principle, a broader economic integration arrangement serves the interest of the constituent territories better as it minimises the chances of trade diversion. However, we have to reckon with the fact that if we have too many member countries trying to negotiate at the outset, it would slow down the process. Further, there is the problem that the USA is likely to seek the inclusion of stringent provisions on social and environment standards as well as the adoption of high standards of intellectual property rights. Such US demands are likely to impede progress. It may, therefore, be a better idea for the Asian countries to opt in favour of a region-wide FTA confined to the countries of the Asian region. In practical terms, the best route appears to be to work around the ASEAN+6 with the six entering into FTAA or CEPA among themselves as an intermediate step. As noted earlier, this is a process that has already started.

WTO Negotiations on GATS Rules - An Assessment

Anwarul Hoda

The WTO General Agreement on Trade in Services contains several elements of built-in-agenda for negotiations. Market access negotiations constitute the most important component and these have also been included within the scope of a single undertaking in the Doha Round. In addition, the Council on Trade in Services is required to develop necessary disciplines on domestic regulations with a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade. The negotiations on domestic regulations are being held separately from the Doha Round (in the Working Party on Domestic Regulations) but at Hong Kong, the ministers decided that these must conclude at the same time as the Doha Round. The GATS also envisages negotiations on three GATS rules viz., emergency safeguard measures, subsidies and government procurement. These negotiations too are not linked to the Doha Round and are also being carried out on a stand-alone basis in a separate Working Party on GATS Rules. The initial target dates fixed for completing the negotiations on emergency safeguard measures could not be adhered to and now the negotiations on all the GATS rules are being held without a finite time frame. This piece evaluates the current status of negotiations on GATS Rules. .

Emergency safeguard measures

The GATT 1947 safeguards provision and the WTO Agreement on Safeguards

Article XIX of GATT 1947 provided that if a surge in imports of a product on which a tariff concession has been made caused or threatened serious injury to the domestic industry, the country concerned could take safeguard measures and impose a quantitative restriction or enhance the tariff above the bound level. The idea was to provide the domestic industry with breathing space to enable it to take a decision on whether to adjust in or adjust out in the face of increased competition. Two important requirements were that the safeguard action should be non-discriminatory in application and temporary in duration. There was an obligation on the country taking the measure to notify the measure and to hold consultations unless the matter was urgent and, in the absence of agreement, the affected country had the possibility to take retaliatory action. In the WTO Agreement, Article XIX has been developed into a separate Agreement on Safeguards in which basic GATT principles have been reemphasised and amplified and procedural requirements added. Safeguard action can be taken only pursuant to a formal investigation at which the serious injury should be demonstrated and a causal link between the increased imports and serious injury established. The provisions regarding retaliation and compensation have been elaborated upon and an important provision added placing a limitation on retaliation by the affected country.

There is a provision for a cooling off period after the duration of a safeguard measure during which imposition of another safeguard measure is impermissible. GATS mandate on emergency safeguard measures

GATS mandate on emergency safeguard measures

The GATS does not contain any operational safeguard provision, but Article X provides as follows:

“There shall be multilateral negotiations on the question of emergency safeguard measures based on the principle of non-discrimination. The results of such negotiations shall enter into effect on a date not later than three years from the date of entry into force of the WTO Agreement.”

Highlights of discussions in the Working Party on GATS Rules

These negotiations began immediately after the establishment of the WTO but so far they have languished because of lack of interest on the part of most WTO members and opposition by major industrialised countries. The ASEAN group of countries are the only ones persevering in the pursuit of an agreement in the area and they have some amount of support from China. They have elaborated on the provisions of a possible safeguard measure on trade in services mirroring the elements of the WTO Agreement on Safeguards governing goods. Thus there is need for investigations to demonstrate serious injury, the requirement for the measure not to exceed a period of three years and the stipulation of a cooling off period of two years. There are notification and consultation requirements as well, together with the possibility of retaliation by the affected country. The ASEAN Group has also broached the idea of a limited window whereby access to safeguard measure is limited for a certain period, say 10 years, after the concession has been made. China supports the negotiation of an agreement on emergency safeguard measures but it is against the idea of a limited window on the ground that, in the goods area, there is no such notion in the WTO Agreement.

A criticism that would be relevant is that the ASEAN paper does not adapt the proposed elements to the architecture of the GATS or to the nature of transactions in services on which concessions have been made. For instance, it is stated that “the safeguard measure shall first be targeted at providing support to the domestic service suppliers through differential positive measures such as grants, differential tax regimes or other support measures so that domestic services suppliers can adjust themselves to the new competitive environment. Only as a last resort will measures relating to suspension of market access commitments be undertaken but such a measure shall observe economic rights already exercised by services suppliers in the territory of the invoking Member”. This suggestion overlooks the distinction in the four modes of supply. It also does not

take into account the fact that specific commitments have been made in terms of restrictions and qualifications on market access and national treatment. There is recognition, however, among the proponents of the importance of the concept of domestic industry for the purpose of determining serious injury or threat thereof and proposals have been made by them and discussions held on the use of the criteria of ownership and control and registration for defining domestic industry. One other problem that has come to the fore in this context is that of adequacy and availability of services data and statistics on the basis of which the investigating authorities could come to a conclusion on the existence of a surge in imports and on the effect of such an increase on domestic industry. The Working Party is yet to discuss this aspect in detail.

The major players such as the US and the EC have been firm in their opposition to the idea of an agreement on emergency safeguard measures. According to them, the WTO members have the opportunity to select the service sectors and modes of supply on which they undertake progressive liberalisation and, therefore, emergency safeguard measures may not be desirable in the area. This argument is not very convincing because the WTO members also have had the possibility of selecting products for inclusion in their list of concessions for goods right up to the Uruguay Round and yet they have provided for recourse to safeguard action in this area.

The industrialised countries also maintain that they are not convinced of the feasibility of safeguard action in the area of services. We have argued above that safeguard measures have to be designed carefully in order to take into account the modes of supply and the nature of specific commitments in GATS and more discussions are needed before we can come to a firm conclusion that such measures are not feasible in the area of services. At the same time, it must be acknowledged that the GATS language is quite tentative on whether the members are convinced about the need for an agreement in the area. Article X says only that “there shall be multilateral negotiations on the question (emphasis added) of emergency safeguard measures...” The Hong Kong Ministerial Declaration was also not very firm on this point as it provided merely that “Members should engage in more focused discussions in connection with the technical and procedural questions (emphasis added) relating to the operation and application of any possible emergency safeguard measures in services”.

Subsidies

Subsidies in GATT 1947 and in the WTO Agreement

GATT 1947 initially provided very rudimentary rules on subsidies, imposing only a notification and consultation requirement on contracting parties. It further provided that if a subsidy was found to be causing serious prejudice to the interest of another contracting party, the contracting party granting the subsidy was obliged upon request to discuss the possibility of limiting the

subsidisation. In another provision, contracting parties were permitted to impose countervailing duties to offset subsidies if the subsidised imports were found to be causing material injury to domestic industry.

Over time, the original GATT 1947 disciplines on subsidies were gradually enhanced, culminating during the Uruguay Round in the WTO Agreement on Subsidies and Countervailing Measures (ASCM), which applies only to goods. This Agreement builds on the GATT 1947 provision and contains clarifications and additional substantive provisions with respect to subsidies on non-agricultural goods. Agricultural subsidies are governed by the provisions in the Agreement on Agriculture.

One of the most important provisions in the ASCM is on the definition of subsidies. A subsidy is deemed to exist if there is a financial contribution by a government or any public body and a benefit is thereby conferred. A subsidy, so defined, is subject to the disciplines of the Agreement on Subsidies only if it is specific to an enterprise or industry or group of enterprises or industries.

The ASCM follows the traffic light approach by prohibiting some categories (red), making other categories actionable (amber) and others non-actionable (green). Subsidies contingent upon export performance and subsidies contingent upon the use of domestic over imported goods are prohibited. Subsidies, which can potentially cause adverse effects on the interests of other members, are not impermissible but are actionable if they do cause such effects. The original ASCM had a listed category of non-actionable subsidies, but the relevant provision has lapsed and has not been revalidated. Now, only non-specific subsidies are non-actionable.

Apart from the possibility of imposing countervailing duties where subsidised goods are imported in their territory, WTO members may also take action on the alternative track of raising disputes against the subsidising member. The Agreement on Subsidies provides a mechanism for expedited resolution of disputes relating to subsidies.

As in the case of GATT 1947, the original GATS provision on subsidies contains only a notification and consultation requirement. Members recognise that in certain circumstances, subsidies may have distortive effects on trade in services and Article XV mandates them to "enter into negotiations with a view to developing the necessary multilateral disciplines to avoid such trade distortive effects." The Article also requires that the negotiations must address the appropriateness of countervailing procedures. The provision further recognises developing countries' need for flexibility in the use of subsidies. It also stipulates that for the purpose of these negotiations, WTO members must exchange information concerning all subsidies related to trade in services that they provide to their domestic service suppliers.

The basic GATT obligation of MFN applies to subsidy measures taken by WTO members on trade in services even though this is not specifically mentioned. Similarly the national treatment obligation applies unless limitations have been imposed on such treatment in the Schedules of members. Subsidy related entries have been made by 35 members and the general pattern in the Schedules of members is that the subsidies are either unbound or there is a limitation on national treatment and eligibility is restricted to domestic service enterprises or citizens.

Highlights of discussions on subsidies in the Working Party on GATS Rules

The discussions so far have been focussed on the working definition of subsidies and information exchange, which is mandated in Article XV. Based on the definition of subsidies contained in the ASCM, a group of members (Chile, Hong Kong China, Mexico, Peru and Switzerland) have proposed a provisional definition to enable work on information exchange to go forward. Hong Kong China and Mexico have also made proposals on the notion of non-actionable subsidies, based on the elements of non-actionable subsidies contained in the now defunct Article 8 of the ASCM and on the list of subsidies in the Green Box in the Agreement of Agriculture. Switzerland has proposed that all programmes, which could be characterised as export subsidies, should be prohibited.

While a number of leading developing countries such as India are interested in pushing ahead with technical work in the area, there is lack of engagement and even soft-peddling by major players like the USA and Canada. One reason given for this by the USA is that subsidies are not causing significant trade effects and, for this reason, the private sector has shown no interest on the issue of subsidies on services. There has not been a significant amount of commercial complaints with respect of subsidies in the area of services. The minutes of the Working Party reflect the US comment that “the Working Party should not be working on a remedy in search of a problem”.

The Working Party started work early on the mandate contained in Article XV for information exchange. In 1997, it had agreed that members would furnish written replies to a list of questions drafted by the WTO secretariat. However, only five members responded to the questionnaire. This matter was discussed again during 2010 and members were requested to furnish information by July 2010 on their subsidy practices in accordance with the 1997 questionnaire. This time the response has been better and 15 members including major players such as the USA, the EC, Japan and India have given the information.

Government Procurement

Government Procurement in GATT 1947

Article III of GATT 1994 on national treatment stipulates non-discriminatory treatment of imported and domestically produced products not only with respect to internal taxes and charges but

also with respect to laws, regulations and requirements affecting internal sale, offering for sale, purchase, transportation, distribution or use. However, a provision exempts "all laws, regulations or requirements governing the procurement by government agencies of products purchased for government purposes and not with a view to use in the production of goods for commercial resale". This exemption enables the WTO members to accord preferential treatment to domestic suppliers in purchases of goods for consumption in government, without deviating from their obligations under GATT 1947.

Article I of GATT 1947 on most-favoured-nation (MFN) treatment requires any advantage, favour, privilege or immunity granted by a member to any product of any other country to be accorded "immediately and unconditionally" to the like product of any other member. There is no explicit provision excluding government procurement from the application of the MFN obligation contained in this Article but, in practice, it has not been subject to the MFN clause.

As a result, government procurement remained excluded from the mainstream of liberalisation in successive rounds of multilateral trade negotiations during the first three decades of the existence of GATT 1947.

The GATT and WTO Agreements on Government Procurement

A beginning was made in the Tokyo Round Agreement on Government Procurement (GPA 1981) for applying the above fundamental principles to this area. The most important substantive commitment in GPA 1981 was that the parties agreed to extend both national and most-favoured-nation treatment to other parties in respect of government procurement on an immediate and unconditional basis. The explicit exclusion of government procurement from the national treatment obligation, and its de facto exclusion from the most-favoured-nation clause, was negotiated away among the parties in respect of the entities annexed to the Agreement. However, from the outset, the Agreement on Government Procurement remained only a plurilateral agreement, with a limited membership. After its entry into force in 1981, the Tokyo Round Agreement (GPA 1981) went through the process of revision twice during 1983-86 and again in 1988-96. In 1995, a new Agreement on Government Procurement was drawn up as one of the four plurilateral agreements within the overall framework of the WTO Agreement. One of the most significant elements introduced during the revisions both before and during the Uruguay Round is that the coverage of entities has been broadened to include government procurement of services.

The WTO Agreement on Government Procurement has been further revised and the revised text adopted on a provisional basis in December 2006. The definitive adoption of the revised text awaits the conclusion of the negotiations on expanded coverage.

Government Procurement in GATS

As in the case of goods, there was a general disposition among the countries participating in the Uruguay Round to exclude government procurement from the applicability of unconditional MFN treatment (Article II) and also from the coverage of specific commitments under market access (Article XVI) and national treatment (Article XVII). At the same time the GATS mandated multilateral negotiations on government procurement within two years of the date of entry into force of the WTO Agreement.

Article XIII of GATS provides as follows:

1. Articles II, XVI and XVII shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale.
2. There shall be multilateral negotiations on government procurement in services under this Agreement within two years from the date of entry into force of the WTO Agreement.

Highlights of discussions on Government Procurement in the Working Party

From the outset, progress in the negotiations in this area has been impeded by the difference of opinion on the scope of the mandate in Article XIII. The EC has been proactive in proposing an alternative framework of negotiations for the liberalisation of government procurement in services following the format of the WTO Agreement on Government Procurement. It has proposed an Annex to the GATS, which would set out the procedural rules for government procurement and provide the possibility of making specific commitments, gradually opening up individual sectors and sub-sectors to international competition. The main discipline that would apply to government procurement included in the specific commitments would be national treatment, which would apply subject to limitations in the member's schedule. The MFN obligation would apply across the board but the proposal envisages a one-off possibility of MFN exemptions. In addition it provides that the more favourable treatment that the WTO Agreement on Government Procurement Parties accord to each other in the framework of that agreement would not be extended on an MFN basis to members who are not Parties to that agreement.

While some members are willing to discuss the proposal made by the EC, others like Brazil have expressed the view that the mandate contained in Article XIII did not envisage that Articles II, XVI and XVII would be a part of the negotiations. On account of the fundamental difference on the ultimate objective of the negotiations mandated under Article XIII, there has been lack of substantive agreement among WTO members in the negotiations in the area, despite the fact that an elaborate proposal has been made.

Assessment of work in the Working Party on GATS Rules

The 15 year negotiations in the Working Party have very little to show by way of concrete results. On emergency safeguard measures, a number of members continue to express doubts on the desirability and feasibility of an agreement in the area. On subsidies, some members feel that the current subsidy practices have not resulted in any significant trade effects and consequently there was no problem for which a remedy needed to be sought. In government procurement, negotiations have been stymied by differences in the interpretation of the mandate.

Lack of Regulation a Key Impediment to Services Sector Growth

The Case of Direct Selling

Divya Satija¹

Contributing more than 55 per cent of the Indian GDP for almost two decades now, the services sector has been consistently growing ahead of the agriculture and industry sectors. This sector indeed is a key driver of GDP growth. Hence, to leverage the GDP growth further, stimulating and sustaining the services sector growth is important, particularly for the sub-sectors that account for a high proportion of the GDP and have displayed dynamism in growth over the past five years. Some of these include trade, hotels, transport and communication and financing, insurance, real estate and business services.

Despite the importance of the services sector in the Indian economy, growth of many of these sub-sectors is impeded by several obstacles. The absence of streamlined and appropriate regulations for these sub-sectors exacerbates the situation. A prime example is the retail sector, which suffers from the absence of sector-specific regulations, even though it is a booming sector.

Over the past decade, the retail sector has been one of the major contributors to GDP on the whole and the services sector in particular. In 2008-09, the contribution of trading in GDP was over 15 per cent. Given that the share of wholesale trade is around 4 per cent, it is estimated that the share of retail is approximately 11-12 per cent. According to estimates by AT Kearney, the Indian retail market was valued at US\$410 billion in 2010. The retail sector is expected to grow to \$535 billion by 2013.

Various store and non-store retail formats have developed under the domain of the retail sector. While stores can be of different types like department stores, super market and exclusive branded outlets; non-store retail involves selling products away from fixed stores/retail outlets. It includes formats like telemarketing, e-retailing, catalogue selling and direct selling. In fact, direct selling is among the oldest forms of non-store retail formats and involves selling of goods or services away from a fixed store or retail outlet through person to person demonstration.

In India, the growth of the direct selling sector gained momentum in the early 1990s soon after the country liberalised. In 2008-09, the share of direct selling was the highest among all the non-store retail formats with a size of \$0.694 billion. One of the first companies to start operations in

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this sector was Eureka Forbes (India), which launched vacuum cleaners for the first time in the Indian market through this mode. Thereafter, many foreign and Indian companies entered the Indian market in various product segments like health and wellness products, cosmetics and consumer durables.

Despite its impressive performance in the past it cannot be said with confidence that direct selling has a bright future in the country. The sub-sector is riddled with ambiguities and there is no regulatory mechanism in place to provide a sustainable operating environment for its long term growth. The root cause is the absence of a clear-cut definition of direct selling in government policies that lack a holistic approach. On the one hand, non-store retail format, despite being a sub-segment of retail, is classified under wholesale trade for foreign direct investment (FDI) purposes; on the other hand, it is classified under retail according to the National Industrial Classification (NIC) of India. In addition, while 100 per cent FDI in wholesale trade is allowed, FDI in retail is restricted to only 51 per cent in single-brand retail. The lack of clarity in government classification arises because direct selling incorporates both business to consumer (B2C) and business to business (B2B) components.

Definitional ambiguities have fostered the emergence of a grey area within this sector. Various fraudulent companies, based on ponzi- largely involves money circulation without sale of goods and services and pyramid- based on networking in which commission can be earned without actual sales of goods and services; scheme models, are engaged in money laundering. Since they claim to operate under the umbrella of direct selling, they have eroded consumer confidence in the direct selling sector. This has affected the growth of the sector since this format of retail is based on network marketing and the underlying premise of this is consumer confidence.

In addition, the direct selling industry is evolving with rapid technological development and many new non-store formats like e-tailing, catalogue selling, mail order selling and tele-marketing are developing. These are often linked to direct selling as it involves booking orders through phone calls and demonstrations through catalogues.

The growth of competitive formats has adversely affected the stakeholders, including direct sellers, direct selling companies and the socio-economic groups including women. It has also diluted the positive socio-economic impact of the growth of this sector. A recent study by ICRIER found that the direct selling sector, which is labour-intensive, has had a positive socio-economic impact in India in terms of employment opportunities created, empowerment of women, technology percolation and local sourcing by foreign companies.

Against this backdrop, government intervention in four broad areas is of utmost importance. These include: (a) providing a clear definition of direct selling, (b) streamlining of the FDI policy (c) the enactment of a governing legislation for the sector and (d) the establishment of a nodal ministry or single point of contact.

A definition of direct selling is needed which makes a clear-cut classification of the sector and demarcates fraudulent from non-fraudulent practises. This can be accomplished by linking the definition of direct selling in India with international definitions like the one laid down under the United Nations Provisional Central Product Classification (UNCPC) classification.

Streamlining the FDI policy must follow once the definition and classification of direct selling has been made clear. This is needed to check foreign companies from entering India through back door entry routes such as test marketing, sourcing from small and medium enterprises (SMEs), franchising, wholesale cash and carry, 51 per cent FDI in single-brand retail and setting up of manufacturing facilities. One way to overcome this problem can be by classifying direct selling on a sui-generis basis as it has components of both B2B and B2C and designing FDI policy specifically for this sector.

A governing legislation is essential in order to streamline regulations, which will outline the operating framework for this sector. This is also needed to generate market confidence in the sector, which is lacking at present. Regulations are also needed to differentiate between legitimate and non-legitimate direct selling companies, check fraudulent practises and for consumer protection. This can be done by adopting best international practices for streamlining the regulatory mechanism both at the centre and at the state level. While regulations can be drafted at the central level, by a nodal ministry, which will be the single point of contact, they can be implemented at the state-level. It is important to develop comprehensive regulations conducive to the growth of direct selling instead of being overly concerned with only consumer protection as is the case in Singapore. Malaysia is one of the few countries, which has a comprehensive act relating to the direct selling sector – Direct Sales Act 1993 (Reprint 2002). All door-to-door sale and mail order selling (including selling by telephone) in Malaysia is subject to this act, which bans pyramid schemes and provides for licensing of persons carrying on direct sales business. It lays down the conditions under which business may be conducted, defines the requirements of direct sales contracts, mentions conditions under which licenses may not be granted or revoked and spells out penal provisions for frauds, For consumer protection, the Act provides a cooling-off period of ten days after the date of making of direct sales contract, during which consumers can return the goods purchased.

The direct selling sector is just one of several sectors that have found their growth stunted because of lack of regulations. There are other sub-sectors like logistics, microfinance, postal services, etc. whose growth has been similarly stymied in the absence of a governing regulation. Thus, it is important to regulate not only non-store format retail but also other sub-sectors in the services sector so as to harness their full potential.



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