

Developments Since the Fourth WTO Ministerial Conference

The International Centre for Trade and Sustainable Development (ICTSD) and the International Institute for Sustainable Development (IISD)

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Doha Mandates

The Doha Ministerial Declaration provides identical mandates for investment, competition policy, transparency in government procurement and trade facilitation: negotiations will "take place after the fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations."

(Paragraphs 20, 23, 26 and 27 of the Doha Ministerial Declaration)

Each of the mandates also refers to the "need for enhanced technical assistance and capacity building in this area" and commits governments to providing such support. In the case of investment and competition policy, the Declaration adds that such assistance for developing and least-developed countries should include "policy analysis and development so that they may better evaluate the implications of closer multilateral co-operation for their development policies and objectives, and human and institutional development"

(Paragraphs 21 and 24 of the Doha Ministerial Declaration)

The Singapore Issues: Investment, Competition Policy, Transparency in Government Procurement and Trade Facilitation

Background

The 1996 Singapore Ministerial Declaration mandated the establishment of working groups to analyse issues related to investment, competition policy and transparency in government procurement. It also directed the Council for Trade in Goods to "undertake exploratory and analytical work [...] on the simplification of trade procedures in order to assess the scope for WTO rules in this area." Most developing countries were unconvinced of the necessity or value of negotiating multilateral rules on these issues, which they see as being of primary interest to developed economies.

In return for agreeing to a stronger mandate for post-Doha agricultural negotiations, the EU and other main *demandeurs* managed to secure a conditional negotiating track for the 'Singapore issues'. However, stiff opposition from mainly developing countries made any future negotiations subject to a decision to be taken at the next WTO Ministerial Conference, *by explicit consensus*, on their scope and timeframes.

An agreement on modalities before Cancun seems increasingly unlikely given the lack of meaningful progress in ongoing negotiations of interest to developing countries such as special and differential treatment (S&D) and agriculture. While a perception of the Singapore issues as being 'bundled together' persists, trade sources point to the possibility of agreement on 'modalities of negotiations' along different lines.

Mandated Deadline

Fifth WTO Ministerial Conference (10-14 September 2003 in Cancun, Mexico): modalities for all Singapore issues, including when — and whether — to launch negotiations, are to be decided by explicit consensus. The Doha Declaration provides no guidance on how to proceed if consensus cannot be found.

Relationship between Trade and Investment

Paragraph 22 instructs the Working Group on the Relationship Between Trade and Investment to focus on the clarification of seven issues:

- scope and definition;
- transparency;
- non-discrimination;
- modalities for pre-establishment commitments based on a GATS-type, positive list approach;
- development provisions;
- exceptions and balance-of-payments safeguards; and
- consultation and the settlement of disputes between Members.

Some Members have argued that this list is not exhaustive and should, for instance, include performance requirements. The paragraph also requires that the "special development, trade and financial needs of developing and least-developed countries should be taken into account as an integral part of any framework, which should enable members to undertake obligations and commitments commensurate with their individual needs and circumstances."

Current State of Play

The major controversies have revolved around a number of key issues, such as definitions of 'investment' and 'investor' and implications thereof; transparency; technical assistance; development provisions in a possible WTO investment framework and on a GATS-type positive list approach on modalities for pre-establishment commitments.

Technical assistance and capacity-building: The Working Group has reaffirmed the importance of technical assistance and capacity-building in enhancing developing countries' understanding of the implications of a possible WTO investment framework, so that they

can be in a position to make informed decisions when the matter comes up in the Cancun Ministerial. Developing countries have proposed that the technical assistance and capacity building programme should extend beyond technical and training issues and encompass human and institutional capacity-building in developing countries, and address policy analysis and development.

Scope and definition of 'investment' and 'investor': This issue has seen a lengthy debate. Members have discussed a narrow (enterprise- or transaction-based) definition of 'investment', as well as a broader one based on assets, with options to include or exclude various categories of investment. The US and Canada insist on a broad definition (WT/WGTI/W/142 and WT/WGTI/W/113 respectively). There have also been suggestions that a distinction should be made between different types of foreign direct investment (FDI). Some Members believe that the Doha mandate only requires a discussion of long-term investment that contributes to the expansion of trade, while others have proposed that developing countries should be in a position to regulate portfolio investment, which on the whole is seen as a less stable and flightier form of investment than FDI. There is a more general understanding regarding the definitions of 'investor', 'natural persons' and 'legal entities'. This issue is likely to be of little importance if the possible multilateral framework includes a most-favoured-nation (MFN) obligation.

Transparency: Many Members agree that transparency is essential for creating a stable, predictable and secure climate for foreign investment. Japan (WT/WGTI/W/112), the EU (WT/WGTI/W/110) and Taiwan (WT/WGTI/W/129) have made written submissions in this regard. Discussions have mainly focused on the nature and depth of transparency provisions and the scope of their application. Developing countries have expressed concern over possible resource constraints in meeting new transparency commitments in investment, especially given their significant difficulties in complying with existing WTO Agreements.

Development provisions in a multilateral framework for investment: Members view development provisions as a horizontal issue, i.e., one that would have an effect on the other subjects set out for clarification by the Working Group. India has strongly supported the need for 'policy flexibility' for developing countries to be able to determine the form of investments that would contribute to the expansion of trade in the light of national interests (WT/WGTI/W/148). In substance, Canada (WT/WGTI/W/131) and Switzerland (WT/

WGTI/W/133) have agreed with India's assertions. On the strength of certain studies showing that foreign investment can reduce host country welfare, developing countries have advocated for the introduction of exceptions to take their needs into account. Suggestions have been made to the effect that a GATS-type positive list approach to undertaking commitments is more flexible and development-friendly than a negative list approach of scheduling specific exceptions to general obligations (Canada, WT/WGTI/W/130). Others have proposed a dedicated 'Development Clause' in the substantive part of any investment agreement, which would carry more weight than declaratory preambular language.

Consultations and the settlement of disputes: Members differ on the need to anchor any prospective investment agreement to the WTO dispute settlement system. Canada, for one, has suggested that the Dispute Settlement Understanding (DSU) should apply to investment disputes under the new agreement (WT/WGTI/W/147). Others have raised the need to identify ways of strengthening the consultation phase of the dispute settlement system so that it would effectively serve the needs of host and home country interests (EU, WT/WGTI/W/141). Concerns have also been raised about the scope for non-violation complaints if an investment dispute was brought under the DSU.

Another fairly controversial issue involves the remedies that should be awarded to a party successful in an investment dispute. Members have noted that in the case of international investment agreements that include investor-to-State arbitration, if a host State is found to be in breach of the agreement, the tribunal is typically empowered to order that the investor be awarded monetary damages and/or restitution of property with applicable interest. The arbitral tribunal cannot, however, order a host State to revoke or modify an inconsistent measure or policy. This differs a great deal from the WTO dispute settlement system, where neither panels nor the Appellate Body can recommend the payment of monetary damages.

FDI and technology transfer: Discussions have focused on the different ways that technology is transferred by multinational firms: through internal transfers between a parent company and its foreign affiliate, external transfers from a multinational enterprise to a firm that it does not own or control, through licensing, minority joint ventures or technical co-operation. Members have noted that the impact of FDI on technological development depends not only upon the formal transfer of technology by multinational firms to its

affiliates or partners, but also upon the ability of economies to absorb technology as a result of various types of knowledge 'spillover effects'.

General and Balance-of-payments safeguards: Members broadly share the view that the kind of general and security exceptions usually found in WTO Agreements would also apply in any future investment framework (Canada, WT/WGTI/W/146; Korea, WT/WGTI/W/143; and Japan, WT/WGTI/W/146). The flexibility for governments to respond to public, security, or balance-of-payments concerns should be an integral part of any investment framework, reflected in its basic structure, as well as its relevant provisions. At the same time, as in the relevant GATT and GATS Articles, Members feel that there must be clear conditions attached to these provisions to ensure that they do not involve arbitrary or unjustifiable discrimination, or create disguised restrictions. As in the GATT and the GATS, additional flexibility should be provided to developing countries in meeting those objectives.

*Proposals and other documents can be found at <http://docsonline.wto.org/> under WT/WGTI/**

Interaction between Trade and Competition Policy

Paragraph 23 of the Doha Declaration recognises that a multilateral framework could enhance the contribution of competition policy to international trade and development. Para. 25 provides for the Working Group on the Interaction between Trade and Competition Policy to focus on the clarification of:

- core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels;
- modalities for voluntary co-operation; and
- support for progressive reinforcement of competition institutions in developing countries through capacity building.

Current State of Play

Discussions thus far have revealed a wide rift between the *demandeurs* of a multilateral framework on trade and competition policy, such as the EU and Japan on the one hand, and developing countries like India on the other. There are, however, differences even among the supporters of a multilateral framework, mainly centred on the scope and nature of exceptions that could be built in. Korea, for instance, wants MFN exemptions to be considered, especially in the context of regional trade agreements (WT/WGTCP/

W/212), while the EU is not happy with watering down the 'core principle' of non-discrimination (WT/WGTCP/W/222). Costa Rica is among the few developing country *demandeurs* for multilateral competition policy disciplines.

Hard-core cartel rules: Even if most developing countries concede vulnerability on 'hard-core' cartels,¹ the EU is the only Member to actively support a WTO agreement on competition policy banning such practices. In contrast, other developed countries — notably the US, Canada and Japan — as well as Thailand and Korea emphasise the importance of promoting voluntary co-operation. India, supported by Pakistan, Malaysia, Cuba and Venezuela and Hong Kong, has stressed that other multilateral rules and agreements offer better guidance for dealing with restrictive business practices. Some Members have also called for a clearer definition of 'hard-core cartels', as well as the extent to which some of them could be defended on efficiency grounds.

Core principles of competition policy: New Zealand has requested adding 'comprehensiveness' (WT/WGTCP/W/210), while Thailand has insisted on the inclusion of 'special and differential' treatment for developing countries to the core principles of competition policy (WT/WGTCP/W/215). Many developing and even developed countries have singled out 'flexibility' and 'differentiation', as well as assistance and positive measures. India (WT/WGTCP/W/216) and Thailand (WT/WGTCP/W/21) have called for differentiation in treatment for domestic firms as opposed to big multinational companies, and several other Members have proposed affirmative action to ensure the viability, development and efficiency of local firms and institutions in developing countries.

Switzerland has suggested an interpretation of the 'national treatment' principle subject to transparency and the rule of law, which could allow in specific instances the use of industrial policy based on a public benefits test (WT/WGTCP/W/214). India does not support unconditional and unqualified 'national treatment' either, citing the 'development dimension' as valid grounds for differential treatment for countries with different capacities.

Attempting to respond to some of these concerns, the EU has argued that a framework agreement would not require a harmonisation of domestic competition laws (WT/WGTCP/W/222). According to the paper, the WTO should avoid a detailed definition of the substantive scope of domestic competition laws (except for basing them on the core principles and banning hard-core cartels), and least-developed countries and smaller economies should be

allowed to adopt any new WTO obligations regarding a domestic competition regime in a flexible and progressive manner. In addition, the EU stresses the need to include the principle of non-discrimination in any framework agreement on competition through a separate specific provision that would take into account the peculiarities of national circumstances.

While Korea has recognised that the alleviation of regulation and technological developments have made competition possible in areas where corporations previously enjoyed a monopoly, it has also pointed out that many Members have exempted public service industries such as telecommunications from competition law obligations on the understanding that such sectors have inherently monopolistic aspects (WT/WGTCP/W/189).

Technical assistance: The inclusion of technical assistance provisions in the Doha Declaration (see mandate above) was one of the key elements that made it possible for many developing countries to accept potential WTO negotiations on competition policy, and both developed and developing countries have recognised the need for technical assistance in post-Doha Working Group discussions. The US would like to focus such assistance on the development of sound domestic competition policies and institutions while Canada has proposed economic efficiency and the protection of competition and the competitive process as two principles of technical assistance. However, many countries including the US, Japan and Egypt, have recognised that technical assistance should be tailored according to the diversity of needs and distinct national conditions. The EU has also recognised that certain aspects of transparency requirements would entail administrative costs and called for their progressive introduction while identifying them as a priority for technical assistance programmes (WT/WGTCP/W/222).

*Proposals and other documents can be found at <http://docsonline.wto.org/> under WT/WGTCP/**

Transparency in Government Procurement

Transparency is one of the three areas of work being done in the WTO on government procurement. The other two relate to (i) government procurement in services (discussed in the Working Party on GATS Rules) and (ii) the 25 Member Plurilateral Government Procurement Agreement, initially negotiated during the Tokyo Round and subsequently consolidated (with expanded sector coverage) during the Uruguay Round.

The multilateral Working Group on Transparency in Government Procurement established by the Singapore Ministerial Conference is mandated to conduct a study on transparency in government procurement practices, taking into account national policies and, based on this study, to develop elements for inclusion in an 'appropriate agreement'.

Para. 26 of the Doha Declaration recognises the "case for a multilateral agreement on transparency in government procurement and the need for enhanced technical assistance and capacity building", taking into account the development priorities of participants, especially least-developed countries. The Declaration also clarifies that the negotiations "shall be limited to the transparency aspects and therefore will not restrict the scope for countries to give preferences to domestic supplies and suppliers." In addition, Members committed themselves to "ensuring adequate technical assistance and support for capacity building both during the negotiations and after their conclusion."

Current State of Play

Apprehensive over the 'intrusiveness' of new rules, many developing countries support India's attempt to limit the scope of the discussions in this area. The US, the EU and Switzerland on the other hand are seeking as broad a range as possible. While India has underlined the importance of using government procurement as one of the few policy tools available for achieving socio-economic objectives, the US maintains that greater transparency would not diminish that function.

Australia has outlined a widely supported non-prescriptive approach to procurement methods, leaving it up to the discretion of each government to decide what method to use (WT/WGTGP/W/31). With respect to information on national legislation and procedures, Brazil has noted that its procurement laws and regulations are already available on the Internet. Like India, it is opposed to any obligation to notify Members of all tenders or to translate them into the official languages of the WTO, as well as to WTO reviews or examination of domestic laws and regulations.

Canada has stated that while Members require flexibility to choose criteria for awarding contracts, as well as for separate qualification or registration process, decisions should be transparent (WT/WGTGP/W/36). Information on the criteria as well as decisions taken should be made available to suppliers, but governments should not be obliged to disclose confidential information. The US

has proposed four categories around which to organise the elements of an agreement: general parameters of a potential agreement; transparency of procurement systems; transparency of specific procurements; and operational provisions to fulfil the objectives of a potential agreement (WT/WGTGP/W/35). While countries such as Japan want a legally-binding and effective transparency agreement (WT/WGTGP/W/37), most developing countries feel this area should not be open to dispute settlement proceedings.

*Proposals and other documents can be found at <http://docsonline.wto.org/> under WT/WGTGP/**

Trade Facilitation

Para. 27 of the Doha Declaration provides that until the fifth WTO Ministerial Conference, the Council for Trade in Goods “shall review and as appropriate clarify and improve relevant aspects of Articles V (Freedom of Transit), VIII (Fees and Formalities Connected with Importation and Exportation) and X (Publication and Administration of Trade Regulations) of the GATT 1994 and identify the trade facilitation needs and priorities of members, in particular developing and least-developed countries.”

The post-Doha work programme has been organised around the following three ‘core’ agenda items: (i) GATT Articles V, VIII and X each to be addressed in consecutive meetings (ii) trade facilitation needs and priorities of Members, particularly developing and least-developed countries and (iii) technical assistance and capacity building. Of these points (ii) and (iii) were to be addressed as standing items.

So far, proposals have mainly been submitted by developed countries. Pointing to limited implementation capacities of a number of Members, many developing countries continue to question the need for further rule-making. In the spirit of para. 27 of the Doha Declaration, Uruguay, Pakistan, Malaysia, India, Indonesia and Cuba

have reminded Members that the exercise consists merely of a review and not negotiations.

Brazil has suggested that refraining from the abusive and protectionist use of trade instruments, as well as completing the WTO harmonisation work programme on rules of origin (i.e. harmonising the diverging methodologies in use for calculating the origin of a good), could also be included in trade facilitation, adding that the best way to facilitate trade for developing countries would be to eliminate trade barriers to their products. Responding specifically to an EU paper (G/C/W/363), Brazil noted that a sufficient case had not been made of GATT Article X’s (Publication and Administration of Trade Regulations) inadequacy to warrant amending the provision. The EU paper along with submissions from Japan, Canada and Korea called for widening the scope of information to be published, a consultation mechanism for affected parties prior to the finalisation of customs regulations, the legal right of appeal against customs decisions, a single inquiry point for trade-related information and expanded technical assistance to developing countries.

Most developed countries, including the EU (G/C/W/394) and Japan (G/C/W/401), have called for streamlining the processing of imports under Article VIII (Fees and Formalities Connected with Importation and Exportation). The EU considers this article to be at the heart of trade facilitation and wants ‘operational’ rather than ‘aspirational’ rules. An agreement on trade facilitation would ensure a ‘locking-in’ of reforms that would make WTO rules on customs procedures ‘irreversible’. Mirroring the trend in the other Singapore issues, developing countries such as India and Brazil question the need for new binding obligations on Article VIII, with Brazil expressing particular concern over the potential benefits of ‘excessive disciplines’ in comparison with the costs.

Broader potential for agreement exists on issues related to transit, especially for

land-locked countries. The EU and some other WTO Members have noted that new problems and difficulties have arisen since GATT Article V (Freedom of Transit) was originally drafted in the 1940s. As an example of unjustified restrictions, the EU has pointed to more onerous customs procedures for goods intended for transit than for those destined for immediate import. Consequently, it has called for improving and clarifying Article V especially through the application of non-discrimination with regard to modes of transport, individual carriers and types of consignment among others EU (G/C/W/222).

Many developing countries prefer trade facilitation measures to be taken autonomously. The need to address the implications of binding rules on human and financial resources, as well as differences in levels of development, has been stressed by some delegations. In response, the EU has outlined elements of special and differential treatment with regard to implementation of future WTO commitments in trade facilitation to help reduce some of these burdens. These include differentiation in commitments particularly for least-developed countries, transition periods to enable progressive implementation and technical assistance (G/C/W/222).

Endnote

- 1 The OECD defines hard-core cartels as anticompetitive agreements, anticompetitive concerted practices or anticompetitive arrangements by competitors “to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories or lines of commerce.” (OECD Recommendation of the Council Concerning Effective Action Against Hard Core Cartels; March 25, 1998).

For an overview, see *Review, Clarification and Improvement of GATT Articles V, VIII and X – Proposals made by Delegations* (G/C/W/434).

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