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
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, majority 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/144). 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.

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). Although 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’ for the ‘development dimension’ as valid grounds for differential treatment for countries with different capacities.

Attemping 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).

Proposals and other documents can be found at http://docsonline.wto.org/ under WT/WGTCP/*.
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 fulfill the objectives of a potential agreement (WT/WGTGP/N/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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