

## 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

## Prospects for Cancun

Despite the substantive discussions that have taken place in the various working groups since the end of the Doha Ministerial Conference, an agreement on modalities for negotiations before Cancun would be a tough order, primarily due to a lack of agreement on what the term implies. While a perception of the Singapore issues as being 'bundled together' persists, trade sources point to the possibility of agreement on discrete sets of modalities for each of the four issues. While many developing countries have stated that they would consider the merit of the Singapore issues individually, others have drawn a link to negotiations in other bodies, notably those dealing with agriculture, implementation and special and differential treatment (S&D) which have seen a lack of meaningful progress to date. Thus, any developments deemed significant in other negotiating bodies, such as agriculture, might well trigger momentum towards consensus on the Singapore issues, particularly among those more amenable to an agreement on "modalities".

## 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. Many see them as being of primary interest to developed economies. Others firmly reject the notion of negotiating *new* issues when many of the most mature GATT/WTO subjects — including primary liberalisa-

tion in certain sectors — still need to be adjusted or simply implemented to better serve developing countries' commercial and public interests. In addition, they feel that the multilateral trade system is not equipped, in the current era of globalisation, to deal with core challenges related to foreign investment or the dynamic forms of production, supply and distribution that require the use of competition policy.

Finally, tactics in the quid-pro-quo game of negotiations have made these issues a bargaining chip played by both the *demandeurs* — most notably some OECD members — and their opponents. In return for agreeing to a stronger mandate for post-Doha agricultural negotiations, the EC and others managed to secure a conditional — but only conditional — negotiating track for the 'Singapore issues'.

## Mandated Deadline

At the fifth WTO Ministerial Conference (10-14 September 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.

### **Explicit consensus on modalities:**

"Explicit consensus on modalities" is the main pre-condition for talks on the Singapore issues. The question of what, exactly, constitutes "modalities" has resurfaced as the main point of contention prior to Cancun. The EC, like most of the proponents of the Singapore issues (WT/GC/W/491), interpreted the term to denote: procedural aspects (number of meetings, timing, internal deadlines for tabling proposals, legal texts, etc); the scope and coverage of the negotiating agenda (the elements and issues to be included and how to structure obligations); and elements of S&D for developing countries. Many developing countries disagreed. In a

response to the EC submission, twelve developing countries — Bangladesh, Cuba, Egypt, India, Indonesia, Kenya, Malaysia, Nigeria, Pakistan, Venezuela, Zambia, and Zimbabwe, stressed that “explicit consensus” among Members did not exist. In their submission (WT/GC/W/501) they called for a substantive definition of modalities, including the nature and direction of the obligations involved. Thus, while developing countries on a whole believe that convergence on some of the substantive aspects of the issues is a precondition for consensus itself, most of the *demandeurs* are of the view that it is something best left to the negotiations.

The reports (2003) of the various working groups submitted to the General Council in July (Trade and Investment — WT/WGTI/7, Trade and Competition Policy — WT/WGTCP/7, Transparency in Government Procurement — WT/WGTGP/7) and the updated 2002 Report of the Goods Council on trade facilitation captured the main elements of the substantive discussions held in the various groups. In some cases they also outlined proposals made by Members on the way forward, but on the whole they provided little or no indication of convergence on the substantive aspects of these issues.

The draft text of the Cancun Ministerial Declaration JOB (03)/150, released on 18 July, provided — in bracketed text — either for the adoption of modalities by explicit consensus (modalities to be listed in a separate document), or for Members to decide other options.

#### **The main fault-lines:**

(i) *Disagreements on scope and definition:* While many proponents of the Singapore issues are seeking a broad scope for the application of rules, many opponents would like to restrict the scope and define it narrowly.

(ii) *Resource constraints and administrative burdens:* Many developing countries remain unconvinced of the benefits of binding rules, and instead point to the costs and burdens of implementing the disciplines.

(iii) *Binding vs non-binding rules:* Most developing countries question the need for enforceable rules. They feel that non-binding, national and regional policy and regulatory frameworks in some of these areas (competition policy, trade facilitation) might be more adequate to address development needs.

(iv) *Implications for ‘policy-space’:* Notwithstanding reassurances regarding S&D, technical assistance and flexibility (including GATS-type exemptions), many developing countries are concerned

about the effects of a multilateral framework on their industrial, development and other policies. While many countries have not questioned the benefit of certain policies related to the Singapore issues, they have queried the appropriateness of the WTO as a forum because of power asymmetries among Members, including with regard to the enforcement of obligations.

**The “Friends of the Chair” process:** The outcome at Cancun seems likely to hinge on the process of informal consultations convened by four so-called “Friends of the Chair” — namely the chairs of the working groups on investment (Luiz Felipe de Seixas, Brazil), competition policy (Frederic Jenny, France), transparency in government procurement (Ronald Saborio Soto, Costa Rica) and trade facilitation (Milan Hovorka, Czech Republic), working closely with General Council Chair Carlos Perez del Castillo.

## **Relationship between Trade and Investment**

Paragraph 22 of the Doha Declaration lays down the mandate for the Working Group on the Relationship Between Trade and Investment to clarify 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.

In subsequent discussions, other issues have also emerged as relevant, including the relationship between a multilateral framework and the GATS Agreement.

#### **Current State of Play**

The major controversies have revolved around a number of key issues, such as: definitions of ‘investment’ and ‘investor’; transparency; technical assistance; development provisions; and a ‘GATS-type positive list’ approach to modalities for pre-establishment commitments.

Some countries, namely Canada, Korea and Costa Rica (WT/WGTI/162), supported by the EC, US, Japan, Norway, Switzerland, Australia and Hungary, advocated moving beyond the analytical phase to negotiations. Some developing Members, notably Chile, Chinese Taipei and Hong Kong,

also supported the launch of talks. Others considered negotiations premature, pointing to a lack of clarity on the substance, implications and rationale for a possible agreement (WT/WGTI/7).

**Technical assistance and capacity-building:** Developing countries have proposed extending the technical assistance and capacity building programme beyond technical training issues to encompass human and institutional capacity-building in developing countries, and to address policy analysis and development.

#### **Substantive Issues:**

**Scope and definition of ‘investment’ and ‘investor’:** Members have discussed a narrow (enterprise- or transaction-based) definition of ‘investment’ and a broader definition based on assets, as well as different categories of investment, namely long-term Foreign Direct Investment (FDI) versus short term portfolio investment.

**Transparency:** Discussions have mainly focused on the nature and depth of transparency provisions and the scope of their application, including ways to administer rules and regulations. Developing countries have expressed concern over possible resource constraints in meeting new transparency commitments and have called for obligations on investors and on home and host countries (WT/WGTI/W/152).

**Development provisions:** Development provisions are considered a horizontal issue affecting the other subjects set out for clarification by the Working Group. Both developing countries such as India (WT/WGTI/W/148) and developed countries such as the Canada (WT/WGTI/W/131) and Switzerland (WT/WGTI/W/133) called for ‘policy flexibility’ that would allow developing countries to regulate investments in the light of national interests. The EC, in a concept paper on “policy spaces for development” (WT/WGTI/W/154) advocated a GATS-type positive list approach - which it claimed would provide scope for “policy spaces for development” - rather than a general liberalisation approach and the scheduling of specific exceptions to general obligations (Canada, WT/WGTI/W/130). Some developing country delegates expressed concern about the “progressive liberalisation” concept embodied in the GATS and the difficulties in backtracking on commitments once made.

**Consultations and the settlement of disputes:** Issues and concerns raised have included the need to anchor any prospective investment agreement to the WTO dispute settlement system. The EC called for strengthening the

consultation phase of the dispute settlement system to effectively serve host and home country interests (WT/WGTI/W/141). Other issues raised include non-violation complaints and differences between the investor-state arbitration system and the WTO state-to-state dispute settlement mechanism.

**FDI and technology transfer:** Members have discussed different ways that technology is transferred by multinational corporations, and the ability of different economies to absorb technology.

**Non-discrimination and modalities for pre-establishment commitments:** With its implications for a host country's ability to discriminate in favour of domestic firms, and screen FDI, this issue has seen extensive discussion and written submissions from India (WT/WGTI/W/49), the EC (WT/WGTI/W/150) and Canada (WT/WGTI/W/157). The discussions have not led to any significant substantive agreement.

**Investor and home government obligations:** A joint submission from China, Cuba, India, Kenya, Pakistan and Zimbabwe (WT/WGTI/W/152) argued for greater attention to the subject of investor and home country obligations. Specific obligations suggested for investors included technology transfer as well as responsibilities vis-à-vis consumers and environmental protection.

**Relationship between a Multilateral Investment Framework and the GATS:** This issue was identified as requiring further consideration and saw written submissions solely from Japan (WT/WGTI/W/156 and WT/WGTI/W/158). Discussions centred on the extent to which disciplines on GATS and investment were complementary, particularly in terms of coverage, and on how to avoid an overlap between any future rules on investment and the GATS (Doha Round Brief No. 3).

**General and balance-of-payments safeguards:** Members broadly share the view that general and security exceptions found in other WTO Agreements should also apply to any future investment framework, and should include flexibility to meet public, security, or balance-of-payments concerns as well as safeguards to prevent abuse.

*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 while Para. 25 provides the mandate for the Working Group on the issue.

### Current State of Play

**Substantive Issues:** (i) Elements contained in Para 25 of the Doha Ministerial Declaration, including matters and questions posed in 2002 to which delegations wish to revert (ii) the nature and scope of compliance mechanisms that might be applicable under a multilateral framework on competition policy and (iii) possible elements of *progressivity* and flexibility that might be included in an eventual multilateral framework on competition policy.

Discussions thus far have revealed a wide rift between the *demandeurs* of a multilateral framework, such as the EC and Japan on the one hand, and mainly developing countries like India on the other. There are, however, differences even among the supporters of such a framework, mainly centred on the scope and nature of exceptions that could be built in, as well as substantive aspects of issues such as non-discrimination (Korea-WT/GTCP/W/212 and EC-WT/WGTCP/W/222).

**Hard-core cartel rules:** The EC is the only Member so far to actively support a WTO agreement on competition policy banning such practices. Most developed and developing countries - while conceding vulnerability on 'hard-core' cartels - have emphasised the importance of voluntary cooperation as well as multilateral rules and agreements outside the WTO. Some Members have also called for a clearer definition of 'hard-core cartels', as well as clarification of the extent to which they could be defended on efficiency grounds.

**Other core principles of competition policy:** A New Zealand submission called for the inclusion of "comprehensiveness" (WT/WGTCP/W/210), which would require that exemptions and exceptions be implemented in a way that minimises economic distortions. These should be re-examined from time to time in terms of the general frameworks that apply for competition policy and law. Thailand insisted on the inclusion of 'special and differential' treatment for developing countries in the core principles of competition policy (WT/WGTCP/W/215).

**Special and Differential Treatment:** Many countries, both developing and developed, have emphasised 'flexibility' and 'differentiation', as well as assistance and the design of positive measures. Developing country submissions include one from India (WT/WGTCP/W/216) and Thailand (WT/WGTCP/W/213/Rev.1).

**Non-discrimination:** Some developed countries, such as Switzerland (WT/

WGTC/W/214), and developing countries like India, suggested exceptions to the non-discrimination principle on grounds of "public benefits", industrial policy, and development. Attempting to respond to some of these concerns, the EC has argued that a framework agreement would not require a harmonisation of domestic competition laws. The EC (WT/WGTCP/W/222) also suggested "individualised" timeframes for developing countries in setting up competition regimes and specific provisions taking into account national circumstances.

**Compliance mechanisms:** The Report of the Working Group to the General Council (WT/WGTCP/7) listed some of the important submissions on this issue. The US, Japan, Korea and Australia supported a voluntary peer review system, while the EC preferred a combination of peer review and WTO dispute settlement. India continued to oppose dispute settlement and preferred any peer-review process to be established under the auspices of UNCTAD.

**Progressivity and Flexibility:** This concept is reflected in Para. 25 of the Doha Mandate. Discussions have centred on the application of a multilateral framework on competition policy to developing countries, and, in this context, on specific elements of flexibility such as exceptions, exemptions, the compatibility of a multilateral framework on competition policy with Members' industrial and other policies, S&D and core principles, costs of compliance with a multilateral framework and S&D and hard core cartels.

**Technical assistance:** Both developed and developing countries have recognised the need for technical assistance, despite differing priorities and principles. Many countries, including the US, Japan and Egypt recognised the need to tailor TA according to the diverse needs and national conditions of the recipients. The EC 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 three areas of work 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 by taking into account national policies and. Based on this study, it is to develop elements for inclusion in an 'appropriate agreement'. Para. 26 of the Doha Declaration sets forth the mandate on transparency in government procurement.

### Current State of Play

Discussions in the Working Group have focused mainly on the definition and scope of government procurement, domestic review procedures, dispute settlement procedures, technical cooperation and S&D.

The EC, supported by Poland, Switzerland and the US, outlined some of the positive benefits of an agreement on transparency, such as greater efficiency through legal certainty and a reduction in corruption (WT/WGTGP/W/41). However, many developing countries worried about the intrusiveness of such a policy as well as the burdensome obligations, and limitations that an agreement could place on the use of procurement as a tool for development, and preferred restricting the scope of discussions. They also questioned the need for binding dispute settlement rules in this area, which the *demandeurs* of talks preferred. While a clear North-South dichotomy was not evident from the Chair's report, it did emphasise that developing countries lacked sufficient skills to properly participate in the negotiating process and wanted clarity with regard to an agreement's implications before they would consider negotiating one. An agreement would have to be win-win; truly balanced and beneficial to all.

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

### Trade Facilitation

Para. 27 of the Doha Declaration provides the mandate for the Working Group on Trade Facilitation.

The post-Doha work programme is 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) are to be addressed as standing items.

### Current State of Play

So far, proposals have mainly been submitted by developed countries. Mirroring the trend in the other Singapore issue groups, developing countries such as India and Brazil have raised the issue of limited implementation capacities, and questioned the need for new binding obligations and whether the benefits of an agreement would exceed the costs. Brazil stressed the need to remove trade-barriers, including abuse of trade-instruments, and harmonising rules of origin as the best way to facilitate trade for developing countries. Pakistan, Malaysia, India, Indonesia and Cuba reminded Members that the exercise consisted merely of a review and not negotiations. Many developing countries advocated national and regional efforts at trade facilitation rather than binding and harmonised multilateral rules.

Most developed countries, including the EC (G/C/W/394) and Japan (G/C/W/401), called for streamlining the processing of imports under Article VIII (Fees and Formalities Connected with Importation and Exportation). The EC considered this article to be at the heart of trade facilitation and wanted

'operational' rather than 'aspirational' rules. Broader potential for agreement existed on issues related to transit, especially for land-locked countries. The EC and some other WTO Members noted that new problems and difficulties had arisen since GATT Article V (Freedom of Transit) was originally drafted in the 1940s.

In response to developing country concerns, the EC (G/C/W/222) and the US (G/C/W/451) outlined elements of S&D with regard to the implementation of future WTO commitments in trade facilitation, aimed at reducing the burden of complying with disciplines. These included differentiated commitments particularly for least-developed countries. The US stated that achieving an agreement on trade facilitation could be one of the most important development-related achievements emerging from the Doha Round of trade negotiations.

*Proposals and other documents can be found at <http://docsonline.wto.org/> under G/C/W/\**

### 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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