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The WTO "Singapore Issues": What's at Stake and Why it Matters

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Whether or not to commence negotiations on the "Singapore issues" will be the most important decision for the Cancun Ministerial Conference to make. If these talks are launched according to the developed countries' wishes, the resulting new WTO disciplines on investment, competition, government procurement and trade facilitation could deal a serious blow to the economic and social development of the South.

1. The Background

Cancun's most important decision will be whether or not to launch negotiations on the "new issues" or "Singapore issues": investment, competition, transparency in government procurement, trade facilitation. Ministers have a choice between two options: (1) Launch negotiations now and complete the agreements at superspeed by Jan. 2005; or (2) Continue discussing (and "clarifying" the issues back in Geneva. These two options are in the draft Cancun Declaration.

The EC, Japan and other developed countries will push very hard for Option 1. Most developing countries are for Option 2. Ministers of ACP Group, LDC Group, African Union and Carribean countries have proclaimed at their own regional meetings that they do not want negotiations to start but instead want the discussions (i.e., no commitment to new treaties) to continue. They are joined by most Asian countries (including India, Malaysia, China, Indonesia, Bangladesh, Philippines, etc.) Together they form at least 70 developing country members of WTO.

If democracy, the will of the majority and the consensus principle prevail, Cancun cannot launch negotiations on these issues. However, there is the fear that once again in Cancun, as in Doha, developing countries will be subjected to tremendous pressures and manipulative tactics into accepting something they really do not want. This is due to the undemocratic and untransparent way in which WTO Ministerials operate.

Before Doha (November 2001), the developing countries argued that the WTO should focus on resolving the problems arising from the Uruguay Round, but the developed countries pushed for the WTO expand its mandate to the new issues.

Manipulative tactics were used to exclude many developing countries' from drafts of the Ministerial Declaration. The final draft implies that negotiations on the four Singapore issues would begin after the 5th Ministerial on the basis of an explicit consensus on 'modalities' of negotiations.

However, due to objections by many developing countries at the last 'informal' session at Doha, the

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Declaration was tempered by a clarification by the Conference chairperson that the consensus referred to would be required for negotiations to begin (the implication being that the required consensus would not be only for modalities). Also, any one member can prevent an "explicit consensus" and thus stop the launch of negotiations.

2. North-South Battles over Consensus and Modalities

Cancun will see big North-South battles over whether a decision was already made to launch negotiations, and over the meaning of "modalities" on which there must be "explicit consensus". The EU and Japan insist that Cancun must launch negotiations, because the Doha Declaration said so, and all that's needed is a consensus on negotiations.

Most developing countries insist that in Doha they only agreed to negotiations if there is an explicit consensus on modalities; so far there is no such consensus as countries are hopelessly split on what they understand of the issues; therefore negotiations cannot start; and instead further clarification of the issues is needed.

Another conflict in Cancun will be over the meaning of "modalities." The EU and Japan conveniently define it (implicitly) to mean procedural matters (such as the deadlines for negotiations and how many meetings to have) and a mere listing of principles or issues. With such a superficial concept of modalities, they hope to get an easy consensus and thus launch negotiations.

But developing countries have strongly criticized this approach. For them, modalities mean the scope and definition, the issues to be covered, the obligations to be undertaken under each issue, and the substance of each of these (not only a mere list). They point to the current negotiations on agriculture and non-agriculture products, where "modalities" take on this substantive meaning. Only if the substance of modalities (and not only the procedure and listing) is known and agreed to, can the developing countries decide whether to commit the WTO and themselves to new rules in the four new areas.

3. Does it Matter, and What is at Stake?

Does it really matter one way or other? It certainly does, as a lot is at stake. If the Ministers do decide to go ahead with negotiations, it would probably lead to new agreements that would expand the mandate and authority of the WTO many times. These new rules will result in much greater damage to development and to social rights. They are equally or more dangerous than those existing rules that are already causing damage, e.g. in TRIPS and agriculture.

The common theme of three of the issues (investment, competition, government procurement) is to maximise the rights of foreign enterprises to have market access to developing countries through their products and investment; to reduce to a minimum the rights of the host government to regulate foreign investors; and to prohibit government from measures that support or encourage local enterprises.

If these agreements come into the WTO, developing countries will find it increasingly difficult to devise their own policies for development and for the building up of their local enterprises to be competitive. The rich country governments will press for the principle of "national treatment" to be applied to these new areas. Developing countries would no longer be allowed to support their local industries. Many local companies may not survive, and millions of workers would lose their jobs.

Actually, these issues do not belong to the WTO as they are not directly trade issues. The developed countries want to place them in the WTO so that they can use the trade sanctions mechanism to enforce rules that suit their interests. This is why the WTO has become a favourite vehicle for their global economic governance. But the results would be very damaging. The application of "national treatment" to these issues is inappropriate as it would prevent or hinder governments from adopting policies and measures needed for development and other national goals such as nation building and harmony among ethnic communities.

Thus, many developing countries have taken the position that negotiations should not start on these issues. In WTO, the term "negotiation" especially applied to "new issues" implies that a commitment has been made to establish new rules or agreements. Historical record shows that during the negotiations, the developed countries have tremendous advantages to shape the agenda, principles and provisions of the issue and the agreement, and that the final outcome may not be in the interests of developing countries. It is thus important to prevent issues that are not appropriate from coming under a decision to start negotiations.

Below is an analysis of each of the Singapore issues.

4. Trade and Investment

The proponents of an investment agreement ultimately want international binding rules that give foreign investors the rights to enter countries without conditions and regulations, and to operate in the host countries without most conditions now existing, and be granted "national treatment" and MFN status. The principles of "non-discrimination, MFN and national treatment" were created in the context of trade in goods. They are inappropriate when applied to investment.

When "national treatment" is applied to investment at the pre-establishment phase, it curtails or prohibits developing countries' control over the entry of foreign investors and types of investments. And if national treatment is applied at the post-establishment phase, it would also impede the ability of government to give preferential treatment to local firms, or to channel foreign investment in certain desired directions. If the "scope and definition" of an agreement goes beyond foreign direct investment (which is what the US insists), then there are even more serious implications for financial stability as the road is opened for more volatile and potentially damaging forms of investments and investors to enter and operate with reduced regulation. This may include portfolio investment, loans and investment funds.

Performance requirements (e.g., equity ownership restrictions, obligations on technology transfer, export orientation, geographical location, etc.) and restrictions on movements of funds can also be expected to be prohibited or restricted under a multilateral investment agreement. Foreign investors would also be given the freedom and right to transfer funds into and out of the country without restrictions. There would also be strict standards of protection for investors' rights, for example in relation to "expropriation" of property. (A wide definition could be given to expropriation; the NAFTA experience is worth noting, where expropriation includes government policies such as health or environmental measures that affect the future earnings and profits of an investor; and compensation to the investor is required).

An international agreement on investment rules of this type is ultimately designed to maximise foreign investors' rights whilst minimising the authority, rights and policy space of governments and developing countries. This has serious consequences in terms of policy making in economic, social and political spheres, affecting ability to plan in relation to local participation and ownership, balancing of equity shares between foreign and locals and between local communities, the ability to build capacity of local firms and entrepreneurs, and the need for protecting the balance of payments and the level of foreign reserves. It would also weaken the bargaining position of government vis-a-vis foreign investors (including portfolio investors) and creditors.

What Should Be Done?: An investment agreement in WTO will be damaging to development options and interests. Investment is not a trade issue, and thus bringing it within the ambit of WTO would be an aberration and could cause distortion to the trade system. It is certainly not clear that the principles of WTO (including national treatment, MFN) that apply to trade in goods should apply to investment nor, that if they were applicable, that they would benefit developing countries. Traditionally developing countries have had the freedom and right to regulate the entry and conditions of establishment and operation of foreign investments, and they should retain this right. The discussions so far in the WTO show that there is no consensus on modalities of negotiations, nor even on the principle of whether there should be an agreement in WTO, and that therefore there should not be a decision to start negotiations at the Fifth Ministerial meeting of 2003.

5. Trade and Competition Policy

There is no common understanding let alone agreement among countries on what the competition concept and issue means in the WTO context, especially in terms of its "interaction" with trade and its relationship with development. The whole set of issues of competition, competition law and competition policy and their relation to trade and to development is extremely complex. Proponents of a WTO agreement is to have multilateral rules that discipline Members to establish national competition law and policy. These laws/policies should incorporate the "core principles of WTO", defined as transparency, non-discrimination (MFN and national treatment.) Thus, locating competition negotiations within the WTO will bias the manner in which the subject is treated and the type of agreement that will emerge. Most importantly, the "core WTO principles" would be applied to competition.

Competition law and policy, in appropriate forms, are beneficial, including to developing countries. However each country must have full flexibility to choose a model which is suitable, and which can also change through time to suit changing conditions. Having an appropriate model is especially important in the context of globalisation and liberalisation

where local firms are already facing intense foreign competition. In particular, developing countries must have the flexibility to choose the paradigm of competition and competition policy/law that is deemed to be more suitable to their level of development and their development interests.

The EU proposal for competition policy to provide "effective opportunity for competition" in the local market for foreign firms, and thus to apply the WTO "core principles" to competition law/policy would affect the needed flexibility for the country to have its own appropriate model or models of competition law/policy. Even if a WTO agreement is confined to "hard core cartels", the principle of non discrimination would be applied to all other issues as well in a member country's competition law and policy. This would unnecessarily restrict the policy space of developing countries. Moreover, the coverage of a WTO agreement may begin with cartels, but it could well expand to cover many other areas through future negotiations.

Competition can be viewed from many perspectives. From the developing countries' perspective, it is important to curb the mega-mergers and acquisitions taking place, which threaten the competitive position of local firms in developing countries. Also, the abuse of anti-dumping actions in the developed countries is anti-competitive against developing countries' products. The restrictive business practices of large firms also hinder competition. However these are not the issues desired by the rich countries. If negotiations begin, the EU interpretation of competition; i.e., the need for foreign firms to have national treatment and a free competition environment in the host country, could well prevail, especially given the unequal negotiating strength which works against the developing countries. The likely result is that developing countries would have to establish national competition laws and policies that are inappropriate for their conditions. This would curb the right of governments to provide advantages to local firms, and local firms themselves may be restricted from practices, which are to their advantage.

What is required is a paradigm to view competition from a development perspective. Competition law/ policy should complement other national objectives and policies (such as industrial policy) and the need for local firms and sectors to be able to successfully compete, including in the context of increased liberalisation. From a development perspective, a competition and development framework requires that local industrial and services firms and agricultural farms must build up the capacity to become more and more capable of competing successfully, starting with the local market, and then if possible internationally. This requires a long time frame, and cannot be done in a short while. It also requires a vital role for the state, which has to play the role of nurturing, subsidising, encouraging the local firms. The build up of local capacity to remain competitive and become more competitive also requires protection from the "free" and full force of the world market for the time it takes for the local capacity to build up. This means that development strategy has to be at the centre, and competition as well as competition policy has to be approached to meet the central development needs and strategy.

Therefore some of the conventional models of competition may not be appropriate for a developing country. On the other hand other models may be more appropriate, but their adoption may be hindered or prohibited by a WTO agreement on competition that is based on the "core principles of WTO".

What Should Be Done?: There is not a convincing case for a multilateral set of binding rules to govern the competition policies and laws of countries; and there are especially justified grounds for serious concern if such an agreement were to be located within the WTO, as it is likely to be skewed in a way that is inappropriate for the development interests of developing countries as a result of the attempt by proponents to apply the "core principles" of WTO to the issue and to the agreement. If a multilateral approach is needed, there are other venues that are more suitable, for example, UNCTAD already has a Set of Principles on Restrictive Business Practices. Moreover, if the objective is to arrange for cooperation among competition authorities of countries, then it is unnecessary and inappropriate for the WTO to be the venue. Negotiations should not begin on this issue.

6. Transparency in Government Procurement

The Singapore WTO Conference (1996) agreed "to establish a working group 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". The decision does not specify that there must result an agreement; it only commits Members set up a working group to study the subject of transparency and based on this study to develop the elements to include in an appropriate agreement. It is thus important to discuss what an appropriate agreement, if any, should be like, from the perspective of the interests of developing countries and also their need for policy flexibility.

The study in the working group, and the agreement, is only mandated to cover transparency (and not the practices themselves), and this limited scope has been reaffirmed by the Doha Declaration. However, the major countries had made clear their ultimate goal to fully integrate the government procurement market into the WTO rules and system. At present, WTO Members are allowed to exempt government procurement from WTO market access rules, excepting Members who joined the WTO's plurilateral agreement on government procurement. Hardly any developing country is a member. Since developing countries have found it unacceptable to integrate government procurement and its market access aspect into the WTO, the major countries devised the tactic of a two-stage process: firstly, to draw in all Members into an agreement on transparency; and secondly, to extend the scope to market access, MFN and national treatment for foreign firms.

If the integration of procurement into WTO eventually takes place, governments in future will not be allowed to give preferences to local companies for the supply of goods and services and for the granting of or concessions for implementing projects. The effects on developing countries would be severe.

Government procurement and policies related to it have very important economic, social and even political roles: (a) The level of expenditure, and the attempt to direct the expenditure to locally produced materials, is a major macroeconomic instrument, especially during recessionary periods, to counter economic downturn. (b) There are national policies to give preference to local firms, suppliers and contractors, in order to boost the domestic economy and participation of locals in economic development and benefits. (c) There is specification that certain groups or communities, especially those that are under-represented in economic standing, be given preference (d) For procurement or concessions where foreign firms are invited to bid, there could be a preference to give the award to firms from particular countries (e.g., other developing countries, or particular developed countries, with which there is a special commercial or political relationship).

Should government procurement be opened up through the national treatment and MFN principles, the scope and space for a government to use procurement as an instrument for development would be severely curtailed. For example: (a) If the foreign share increases, there would be a "leakage" in government attempts to boost the economy through increased spending, during a downturn; (b) The ability to assist local companies, and particular socio-economic groups or ethnic communities would be seriously curtailed. (c) The ability to give preferences to certain foreign countries would similarly be curtailed.

Given the great importance of government procurement policy as an important tool required for economic and social development and nation building, it is imperative that developing countries retain the right to have full autonomy and flexibility over its procurement policy. The attempts to draw this issue into the WTO are thus of grave concern.

Given the ambitions of the major countries, it is realistic to anticipate that following the establishment of an agreement on transparency, there will be strong pressures to extend its scope to also cover market access, or the rights of foreign companies to compete on a "national treatment" basis for the procurement business. Thus, the discussions on "transparency" and on a "transparency agreement" should be seen in the light of the strategic objective of the majors to draw in the developing countries into the real goal of market access and full integration of procurement practices. Therefore if there is an agreement on transparency, it is likely to be the start of a slippery slope that could lead, in years ahead, to a full market-access agreement.

What Should Be Done?: Cancun should not agree to begin negotiations in this subject. A major strategic decision should be taken to prevent the issue of government procurement from entering the WTO as a negotiating topic. If so, then even a transparency agreement should not be welcomed. It should be recognised that the existence of a transparency agreement would make an eventual market-access agreement very difficult to stop.

7. Trade Facilitation

A decision on whether to begin negotiations in this subject will also be taken at Cancun. The Doha Declaration (para 27) states that until the Fifth Ministerial the Council for Trade in Goods shall review and as appropriate clarify and improve relevant aspects of Articles V, VIII and X of GATT 1994 and identify the trade facilitation needs and priorities of Members, particularly developing and least developed countries. [Article V is on freedom of transit, Article VIII is on fees and formalities connected with import and export and Article X is on publication and administration of trade regulations.]

Although the term "trade facilitation" may seem innocuous, the establishment of multilateral rules in this area may be disadvantageous to developing countries as they may find it difficult to adhere to

the standards or procedures envisaged. According to Das (2000): 'There are grave dangers involved in the potential agreements in this area if the proposals of the proponents are incorporated in the form of binding commitments. The main objective of the proponents is to have the rules and procedures similar to theirs adopted by the developing countries. It ignores the wide difference in the administrative, financial and human resources between the developed countries and developing countries. Also it does not give weightage to the wide difference in social and working environment'. For example, it may be proposed that physical examination of goods by the customs authorities should only be in a small number of cases selected on a random basis to improve the flow of goods through the customs barrier. But this increases the risk of avoidance of payment of adequate customs duties. Such a practice may be appropriate for the major developed countries where the chances of leakage is negligible, but it may not be appropriate for the developing countries where leakage is higher.

Improvement in trade facilitation should be a subject of international cooperation and aid, through institutions such as the World Customs Organisation. Developing countries can be assisted technically and through finance to upgrade their facilitities in appropriate ways. Trade fracilitation should not be the subject of legally-binding rules and obligations in the WTO, for it would then impose obligations on developing countries to undertake expensive programmes that they can ill afford and which is nlot in their priority list. And some of the obligations may also not be in their interests.

What Should Be Done?: There is no need for binding multilateral rules on trade facilitation. Negotiations should not start on trade facilitation after the Fifth Ministerial. Clarification and improvement of the rules in these areas will add to the commitments of the developing countries in the WTO, adding new burdens and may have adverse implications too. Improvements in trade facilitation should be made through national efforts aided by technical assistance, rather than through imposing additional obligations in the WTO.

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