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The "Singapore Issues" in the WTO: Evolution and Implications for Developing Countries

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NOTE

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1 Introduction

THE so-called "Singapore issues" have been perhaps the most contentious of the issues that have been discussed or negotiated in the World Trade Organisation (WTO) since its establishment in 1995. The Singapore issues are investment, competition policy, government procurement and trade facilitation. The first three of these are strictly non-trade issues, and much of the controversy has centred on whether issues that are not directly related to trade should be allowed to be negotiated as subjects of treaties in the WTO, which is after all a trade organisation. It is agreed that the fourth issue is related to trade, and the debate here has been on whether there should be binding multilateral rules in the WTO on this issue.

This paper gives a background to how the issues were introduced in the WTO and their evolution from the WTO's Singapore Ministerial Conference (1996) to the Seattle (1999) and Doha (2001) Ministerial Conferences (Chapter 2). The events at the Cancun Ministerial (2003) are detailed in Chapter 3, and the developments after Cancun up to the decision at the WTO General Council in July 2004 are examined in Chapter 4.

The paper then describes the main features of the four issues and analyses the implications for development if they are introduced as subjects of negotiations and agreements in the WTO (Chapter 5). The paper goes on to explore the prospects of these issues being revived as subjects of negotiations in the WTO or other trade agreements in the future (Chapter 6).

Some interesting documents are also provided as annexes.

2 Initiation and Evolution of the Singapore Issues in the WTO

Before and at the Singapore Ministerial (1996)

BEFORE the establishment of the WTO, there had already been attempts to introduce one of the Singapore issues, i.e., investment, as the subject of a binding agreement as part of the rules of the multilateral trading system. In the Uruguay Round trade negotiations, major developed countries such as the United States attempted to have full-blown rules for investment *per se* within the agreement being negotiated on Trade-Related Investment Measures (TRIMs). The US had proposed that the TRIMs Agreement incorporate rules not only on investment measures, but also on the right to establishment and national treatment for foreign investors. These proposals on investment *per se* were, however, successfully rejected by many developing countries. The scope of the TRIMs Agreement, which, like the other Uruguay Round agreements, became part of the WTO rules, was thus restricted to trade-related investment measures. However, the agreement, in Article 9, mandates that within five years of its entry into force, a review of the operation of the agreement be undertaken, with proposals to be made for amendments. In the course of the review, the WTO's Council for Trade in Goods "shall consider whether the Agreement should be complemented with provisions on investment policy and competition policy."

In 1995 itself, barely after the WTO had been set up, the European Commission (EC, which represents the European Union in the WTO) started consulting developing countries on launching negotiations for a WTO investment agreement. The pressure for this built up during 1996, in the preparatory process for the first WTO Ministerial in Singapore in December 1996.

By mid-1996, two other new issues (competition and transparency in government procurement) had been highlighted by the EC and also the US for possible inclusion on the agenda of the Singapore Ministerial. The final issue (trade facilitation) made its entry later in the process.

Several prominent developing countries (including India, Indonesia, Malaysia and Tanzania) were from the start opposed to the proposals to introduce and to launch negotiations for new agreements on these issues. They argued that the priority in the WTO should be the implementation of the Uruguay Round agreements and to resolve problems arising from this implementation. This would already occupy their scarce time and human resources. It was not the right time to start negotiations that would end up with developing countries having to take on new obligations when they were still unable to understand, let alone cope with, the obligations set by the Uruguay Round that had just concluded.

Despite the clear objections of these developing countries (which had collectively issued a paper rejecting either negotiations or discussions on investment policy in the WTO), the four Singapore issues were brought onto the Singapore Ministerial agenda through the device of a cover letter written by the WTO Director-General to the Trade Ministers, suggesting that while there was no consensus in the WTO General Council on these new issues, the Ministers may still wish to discuss them at the Ministerial.

At the Singapore Ministerial, a small group of about 30 members were selected to conduct informal discussions on a draft Ministerial statement, in which the new issues were included. The Ministerial was controversial, as a majority of the members were not invited or allowed into the small "Green Room" meeting which in effect made the decisions. On the night before the conference was to end, a final draft declaration was presented to an informal meeting of all members, who were requested to adopt it without alteration. Many members who had not been invited to the Green Room meeting raised strong concerns and objections to their lack of participation and to the untransparent process. However, they were persuaded to approve the text, which they had no hand in drafting.

Among the most important aspects of the Singapore Ministerial Declaration was the decision to establish three new working groups in the WTO to start a study process on trade and investment, trade and competition policy, and transparency in government procurement. The Declaration also said that there was no commitment to negotiate (a code for establishing new agreements) on these issues. In particular, any decision to begin negotiations on investment or competition would require an explicit consensus of members. With regard to trade facilitation, discussions would commence within the Council for Trade in Goods (and not in a new working group).

This decision was controversial because many of the developing countries had not been a party to the discussions in the Green Room that led to the text. Moreover, several of the developing countries that were in the Green Room (such as India, Indonesia and Tanzania) had been unhappy with the decision to introduce the subjects in the WTO. They were able to restrict the decision to the launching of discussions or a study process, instead of a commitment to start negotiations towards new agreements. Nevertheless, the developing countries realised that the new issues (later to be dubbed the "Singapore issues") had been allowed to make an entry into the WTO, and that it would be difficult to contain these issues to merely a "study process", as the developed countries were certain to pressurise them to agree to "upgrade" the issues to a negotiating mode for new treaties.

Before and at the Seattle Ministerial (1999)

After the Singapore meeting, in the discussions within the newly formed working groups, it became increasingly clear in what direction the major developed countries wanted to take the Singapore issues. Pressure did in fact build up from 1997 onwards to define the scope and nature of the issues and to bring these issues into the negotiating agenda of the WTO. The next attempt was to place these as negotiating issues in the draft of the Ministerial text for the Seattle conference in 1999.

In the preparatory process towards the Seattle Ministerial, the major developed countries pushed very hard to get the developing countries to accept a decision to launch negotiations on the Singapore issues at the Ministerial, which was to be held in November 1999. However, several developing countries, led by an informal Like-Minded Group of Developing Countries that had formed around early 1999, took a common position against the launch of negotiations.

The draft Ministerial text for Seattle (dated 19 October 1999 and produced in Geneva) fairly laid out the contrasting positions of both the proponents of negotiations (i.e., the developed countries) and the opponents (the Like-Minded Group).

On the investment issue, the developing countries' position was laid out in paragraph 56. It stated that the investment working group shall pursue its present mandate, and further work should focus on issues of interest to developing countries, in particular the effects of foreign direct investment (FDI) (positive and negative) on the development objectives of host countries, the obligations of foreign investors to host countries, and the obligations of home countries in respect of disciplines on their investors. The working group shall report to the next Ministerial Conference on the results of its work. On the other hand, paragraph 41 presented the developed countries' position, that "negotiations shall aim to establish a multilateral framework of rules on foreign direct investment", with eight points on what the framework would contain. The differing positions were similarly laid out for the other three Singapore issues in the draft text.

At Seattle, Green Room meetings were held on the Singapore issues, to which only a few countries were invited (as was also the case with other issues). At these meetings, the developing-country members present were pressurised by the developed countries to agree to launch negotiations on the Singapore issues. However, the Seattle meeting collapsed on the last day, without any declaration being issued, when it became clear that many developing countries would not agree to adopt a last-minute draft which they had not taken part in drafting and which they had not even seen.

Before and at the Doha Ministerial (2001)

After the failed Seattle Ministerial, discussions continued on the Singapore issues in the working groups. As the Doha Ministerial of November 2001 approached, the old contention began anew, with the major developed countries again insisting that negotiations be launched on the Singapore issues as part of a new round of WTO talks, whilst many of the developing countries countered that the time was not ripe for starting negotiations and that the study process should continue.

The developing countries were pressing their case that priority should be given to redressing the imbalances in the existing WTO rules arising from the Uruguay Round and their implementation, rather than embarking on new rules which would make the imbalances even worse. They made a strong demand for the "implementation issues" to be resolved as first priority. However, the developed countries did not see the need for "rebalancing" the rules and would not meet the requests to resolve the implementation issues first. Instead, they revived their push for the new issues to be negotiated with a view to formulating new treaties.

This attempt at expansion was strongly resisted by a majority of developing countries (mainly from Asia, Africa, the Caribbean and Central America as well as the Group of Least Developed Countries (LDCs)), which argued that: (a) they were not yet ready to enter negotiations or consider agreements on these issues; (b) they did not adequately understand the implications of the proposed issues; and (c) from the limited understanding they did have, they were concerned that new agreements or rules in these areas would add to their already heavy obligations and would further restrict their development policy options and undermine their development prospects. They therefore proposed that these new issues continue to be studied or discussed but not be accorded the higher status of "negotiations" as this would imply agreeing to establish new agreements or rules.

Due to a series of unusual or even unique procedures, the views and positions of many of the developing countries in key areas (including the Singapore

issues) were not adequately reflected (or not reflected at all) in the drafts of the Ministerial Declaration that were prepared in Geneva and transmitted to the Doha meeting. On the Singapore issues, the Geneva draft committed members to starting negotiations. This failure to reflect their views added to the frustration of the developing countries, which felt that the drafting process was untransparent and the drafts were unrepresentative. They requested that the draft to be transmitted to Doha should contain the different positions of various countries or groupings (instead of being a "clean draft" which would give the mistaken impression that it was a consensus document) or that these differences be at least made clear in a covering letter. However, these requests were rejected and a "clean text" that reflected the views of the proponents of the new issues became the basis of negotiations in Doha, placing the developing countries at a great disadvantage. This procedure of "sending a clean text to the Ministerial" was in contrast to the practice before Seattle, when a text denoting differing positions had been prepared, which was a more honest presentation, giving a chance for the different positions to be reflected in the text and thus to be considered in the negotiations at the Ministerial.

At Doha many developing countries again stated (in their Ministers' statements presented at the official plenary, and during informal consultation meetings) their opposition to the draft declaration committing the WTO to negotiating the Singapore issues. However, once again such a negotiating commitment was placed in two further drafts during the conference. The final draft, which the Secretariat released on the conference's last morning on 14 November, contained the provisions that Ministers agreed, on all four Singapore issues, that negotiations would take place after the Fifth Ministerial Conference (scheduled in 2003) on the basis of a decision to be taken by explicit consensus at that conference on modalities of negotiations. This final draft was produced after a marathon exclusive Green Room meeting to which only a few countries were invited, and at which opponents of negotiations on the Singapore issues were heavily criticised by the major developed countries and the WTO Director-General.

In the operational part of the relevant paragraphs (paragraph 20 on investment, 23 on competition, 26 on transparency in government procurement and 27 on trade facilitation) the wording was as follows: "… *we agree that 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.*" This implied that a decision had already been taken in principle to start negotiations towards new agreements, and only the *modalities* of the negotiations had to be agreed to.

Several developing-country delegations, particularly India, were unhappy with the turn of events and with the text, as they believed it did not reflect their position and would push them firmly along the road to negotiations for new agreements. In a final informal meeting of heads of delegation on the same afternoon, more than 10 developing countries suggested that the text be changed to remove the commitment to negotiations on the four issues. India indicated it could not agree to the declaration unless amendments were made.

Eventually a compromise was worked out, in which at the formal closing ceremony the conference Chairman, Youssef Hussain Kamal, the Minister for Finance, Economy and Trade of Qatar, read out a "Chairman's understanding" that in relation to the four issues, a decision would indeed need to be taken at the Fifth Ministerial Conference by explicit consensus, before negotiations could proceed on the four issues. He also clarified that this would give each member the right to take a position on modalities that would prevent negotiations from proceeding until that member was prepared to join in an explicit consensus.

The Chairman's statement that was read out at the closing session was as follows: *"I would like to note that some delegations have requested clarification concerning Paragraphs 20, 23, 26 and 27 of the draft declaration. Let me say that with respect to the reference to an explicit consensus being needed in these paragraphs, for a decision to be taken at the Fifth Session of the Ministerial Conference, my understanding is that at*

that session a decision would indeed need to be taken by explicit consensus, before negotiations on trade and investment and trade and competition policy, transparency in government procurement, and trade facilitation could proceed. In my view, this would also give each member the right to take a position on modalities that would prevent negotiations from proceeding after the Fifth Session of the Ministerial Conference until that member is prepared to join in an explicit consensus."

This statement gave greater protection to the developing countries that did not want to commit to negotiations. The text of the declaration stated that negotiations would begin after the Fifth Ministerial on the basis of an explicit consensus on the *modalities* of the negotiations. However, the Chairman's statement clarified that a decision by consensus needed to be taken before negotiations could proceed. By not stating that the required decision was on the modalities, the implication of the statement was that a consensus was needed on whether there should be negotiations.

Did the Chairman's statement have legal status? International trade expert Bhagirath Lal Das gave this opinion: "The Chairman has termed the first part of his statement '(his) understanding'. Normally a Chairman arrives at such understanding by a process of consultations with the participants in the meeting and he/she includes agreed formulations in his/her understanding. If there is no objection or reservation from the participants after the Chairman has expressed his/her understanding, it is considered to be the collective wish of the meeting. In this plenary during this Conference, there was no objection or reservation from the participants after the Chairman expressed his understanding. All this makes this part binding on the WTO process unless it is modified by a later WTO Ministerial Conference." (Bhagirath Lal Das (2003), *WTO: The Doha Agenda — The New Negotiations on World Trade*, London and New York: Zed Books and Penang: Third World Network)

The Doha Declaration also laid out a work programme for the next two years for the four issues, with an agenda of specific topics that appeared to be in the pre-negotiations mode. In the area of investment, work would

focus on scope and definition, transparency, pre-establishment commitments, exceptions and dispute settlement, among other things. On trade and competition policy, the working group would focus on clarification of: (a) core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; (b) modalities for voluntary cooperation; and (c) support for progressive reinforcement of competition institutions in developing countries through capacity building.

3 Before and at the Cancun Ministerial

FOLLOWING the Doha meeting, the working groups met several times to discuss the items specified in the Doha Declaration. From the beginning of 2003, the major developed countries, in particular the European Union and Japan, increased their pressure for the Cancun Ministerial, which was to be held in September of that year, to launch negotiations on all the four Singapore issues. However, it was clear that there were serious disagreements among the WTO members (mainly along North-South lines) on how to treat each of the issues. Many of the developing countries then argued that there was no consensus in the working groups on the elements or items that had been discussed after Doha, and thus it was not possible before Cancun to obtain an explicit consensus on modalities. A Ministerial meeting of the large African, Caribbean and Pacific (ACP) Group of countries in August 2003 concluded that negotiations on the Singapore issues should not commence.

At the WTO, the major proponents of the Singapore issues, especially the EU and Japan, issued proposals for launching negotiations, including modalities for investment and competition. However, meetings at the heads-of-delegation level in the second half of August showed up continuing disagreements. A heads-of-delegation meeting on investment on 23 August had two opposing papers on the table. One was by 11 African countries on the Singapore issues, proposing text that negotiations should not begin on all the issues and that clarification of the issues should continue. The other was by the EU, Republic of Korea, Switzerland, Taiwan and Japan, with proposed text to begin negotiations on investment and containing their version of modalities for the negotiations.

A draft of the Cancun Ministerial text was issued in Geneva before the Cancun meeting. The two contrasting positions — to start negotiations, or to only continue discussions — were placed as options in the draft. But the "start negotiations" camp had an unfair advantage in that their version of modalities for future negotiations on these issues was included in annexes, even though this was objected to by developing countries.

This draft prompted an influential group of developing countries to come up with their own paper, proposing that the study process continue on all the four issues (instead of launching negotiations). The paper also contained annexes which (instead of modalities for negotiations) described the questions that required further clarification and discussions in the respective working groups. This paper was prepared and submitted by a "core group" of developing countries on the Singapore issues and supported by other countries. These developing countries requested that their paper be considered as a basis for discussion together with the draft Ministerial text.

The stage was thus set for a battle in Cancun. By the time of the Ministerial, the ACP Group, the African Union and the LDC Group (which together formed an alliance of about 70 members of the WTO) had also taken the position against launching negotiations on the Singapore issues. Asian countries including India, Indonesia, Malaysia and the Philippines were also opposed to launching negotiations.

The widespread opposition crystallised in a systematic way at the start of the Cancun Ministerial in the form of a joint statement and press conference on 11 September. Ministers representing 70 developing countries issued a statement that there was no explicit consensus on commencing negotiations on modalities on the Singapore issues. The countries were Bangladesh (on behalf of the LDC Group), Botswana, China, Cuba, Egypt, India, Indonesia, Jamaica (on behalf of the Caribbean Community), Kenya, Malaysia, Nigeria, Philippines, Tanzania, Venezuela, Zambia and Zimbabwe.

The statement read as follows: "We express concerns about the impact of multilateral rules on these new issues on our domestic policies and are yet to fully understand the implications of having WTO rules on these issues. The

issues are technical and complex and some of them are quite unrelated to trade. Many developing countries do not have the capacity to implement obligations arising out of commitments such multilateral rules will entail, and there are also doubts on the benefits of WTO frameworks on the new issues. As such there is no explicit consensus on the commencement of negotiations on modalities. We agree to transmit these views to the facilitator for the new issues [Canadian Trade Minister Pierre Pettigrew had been appointed 'facilitator' at the Cancun conference], together with a proposed language for the continuation of the clarification process to be incorporated into the Final Text emanating from the Fifth Ministerial."

The developing-country group held a press conference on 11 September afternoon, at which Ministers from Malaysia, India, Zambia, Indonesia, Philippines, Nigeria, Venezuela, Tanzania and Zimbabwe were present on the podium. The Malaysian International Trade and Industry Minister, Rafidah Aziz, said that more than 70 countries (which included the LDC Group and the Caribbean regional grouping) had the same views expressed by the Ministers at their meeting. She stressed that "in Cancun there cannot be any launch of negotiations, and the issues should be referred back to Geneva for the clarification process before we can decide in future one way or other." To a question as to whether the group could accept a "third option" of having soft agreements, Rafidah said: "No, we don't agree to launching any negotiations, there is no explicit consensus and there is need for further clarification of these issues." Rafidah added that many countries believed there should not be universal rules on investment. Some wanted their nationals to have preferences. While there was an argument that the private sector wanted clear rules, there was no need for them to be multilateral rules. It was wrong to have universal rules that were similar when conditions were different in different countries. There was no "right time" to have universal rules as the conditions would always be different. To a question on the African countries' position, the Zambian Trade Minister said: "The Ministers in the African Union have said they don't want a launch of negotiations on these issues. More work is required. We also don't want linkage between these issues and other issues. Moreover, an explicit consensus is needed to launch negotiations, not an implied consensus."

On 12 September, the 70 countries formally presented a letter (signed by the Trade Ministers of India and Malaysia on their behalf) to the facilitator of the Singapore issues (Pierre Pettigrew) and the Chairman of the Cancun conference (Mexican Foreign Minister Luis Ernesto Derbez) stating they were "of the firm view that there is no option to pursue other than the continuation of the clarification process." Attached to the letter were annexes with language on each issue stating that in the absence of explicit consensus, there was no basis to commence negotiations on the four issues and clarification should continue. The developing countries' annex (which constituted an alternative text on the Singapore issues for the Cancun Ministerial Declaration) stated in summary: "We take note of the discussions since the Fourth Ministerial Conference. Given the absence of explicit consensus, there is no basis for commencement of negotiations in this area. Accordingly we decide that further clarification of issues be undertaken in the working group….Recognising the needs for enhanced support of technical assistance and capacity building, we shall continue to work (with other agencies and appropriate channels) to provide strengthened and adequately resourced assistance to respond to these needs."

Despite this strong showing of organised and systematic opposition to the launch of negotiations, the facilitator and the Chairman of the conference chose to ignore the views of this grouping of developing countries. A revised Cancun Ministerial text (known informally as the Derbez text after the Chairman) was issued on 13 September, the penultimate day of the conference. The draft mandated that negotiations clearly begin on two issues, i.e., transparency in government procurement (paragraph 16) and trade facilitation (paragraph 17). And negotiations were also to be launched in a thinly disguised way on the other two issues, i.e., investment and competition. The timing for commencing negotiations on investment would be linked to the time when modalities of the ongoing negotiations under the Doha work programme for agriculture and non-agricultural market access (NAMA) were finalised. The text on competition also half committed the members through an indirect route to eventual negotiations.

On investment (paragraph 14), there was a pretence that the draft did not launch negotiations, but in fact it did. This was by virtue of: (a) the convening of the working group in *special session* (the term "special sessions" in the WTO connotes that negotiations are involved); (b) mention that consideration was given to the relationship of *negotiations to the Single Undertaking*; and (c) mention that modalities allowing *negotiations* on a multilateral investment framework shall be adopted by an unspecified date.

Moreover, a significant footnote said this date coincided with the dates for agreeing on agriculture and NAMA modalities. This footnote thus directly linked the agriculture, NAMA and investment issues. This linkage was strongly objectionable to developing countries as most of them had made it clear that the investment issue should be considered on its own merit and should not be linked to other issues. The linkage dangerously implied that there would not be progress in developed countries' commitments to reduce or eliminate their protection in the agriculture sector unless and until they got the modalities for an investment agreement that they wanted. The text therefore not only mandated negotiations on investment but also established a linkage so that progress in the agriculture negotiations would be held hostage to the establishment of modalities for an investment agreement that the developed countries wanted.

On competition (paragraph 15), the tricky wording also implied a push towards negotiations was mandated through mandating consideration of modalities for negotiations by a certain date which, through another footnote, was also linked to coincide with the date for agreeing on agriculture and NAMA modalities.

Moreover, Annexes D and E of the draft contained so-called "modalities" for government procurement and trade facilitation that had never been discussed, let alone accepted by members. They also dealt merely with procedures and very little with substance, and thus on many counts failed the test of even being actual "modalities", let alone the required test of enjoying explicit consensus on modalities. Moreover, the annexes were even worse than the versions in the first revised text of 24 August.

In Annex D (transparency in government procurement), it was mentioned that any coverage of the agreement beyond goods and central government entities was not prejudged. The applicability of the WTO Dispute Settlement Understanding (DSU) was not prejudged. Transparency of domestic review mechanisms would be included. These went against the views of many developing countries in the working group discussions that any possible framework should be confined to goods and central government, domestic review mechanisms should not be included and the DSU should not apply. The annex certainly did not contain modalities on which there could be any consensus.

Many developing countries reacted with disappointment and even outrage at the Derbez text on the Singapore issues as it evidently went against their clearly expressed opposition to negotiations. It went against the principle that negotiations would only be launched if there was an explicit consensus, at least on the modalities. There was obviously no such consensus. The anger of many of the developing countries was evident in an informal meeting of all heads of delegation held on the last night before the close of the conference, which provided an opportunity to air views on the text. The atmosphere was on the boil when, one by one, the developing countries took the floor to criticise the text. At earlier meetings of some of their regional groups, expressions of their dissatisfaction were even more pronounced.

The Botswanan Minister Jacob Nkate, speaking on behalf of the Alliance of ACP, African Union and LDCs, said in a statement to the heads-of-delegation meeting that the text fell far short of the countries' expectations and did not address their concerns. The text was creating an imbalance in the delicately negotiated Doha work programme. On the Singapore issues, the text had departed from the Doha mandate on the explicit-consensus requirement. "What it represents is unacceptable to us since it is not based on explicit consensus. Therefore there cannot be negotiations on these issues. Further, the linkage to other issues is surprising and also totally unacceptable to us," he said, referring particularly to the linking in the text between agriculture modalities and the Singapore issues.

The Indian Minister Arun Jaitley said that with this text the pretence of development dimensions of the Doha agenda had finally been discarded and shown to be mere rhetoric. On the Singapore issues, Jaitley criticised the Chairman for ignoring the views of a majority of members who had rejected launching negotiations. "It would appear that the views expressed by a large number of developing countries on the need for further clarification have been completely ignored. This is yet another instance of the deliberate neglect of views of a large number of developing countries. It represents an attempt to thrust the views of a few countries on many developing countries."

The Barbados Minister Billie Miller, speaking for the Caribbean Group, said the text fell short of the Caribbean's requirements and was not development-oriented. On the Singapore issues, Caribbean countries opposed launching negotiations on government procurement and trade facilitation as all countries in the region were already overburdened with negotiations and were concerned about the potential negative effects of these issues and no explicit consensus on modalities existed.

The Antigua and Barbuda Minister Sir Ronald Sanders said his delegation attended the sessions on many issues. He added: "But we do not recognise in this text the consensus we heard articulated in those groups on the development issues, small economy issue and Singapore issues. What we see in this text is unsatisfactory and disappointing…During this conference, we also made it clear that regarding Singapore issues we are gravely constrained. Therefore we cannot agree to Annexes D and E nor to paras 14, 15 of the text. We did not hear any explicit consensus on these matters and reject absolutely any proposal that any negotiating group on these issues should be appointed."

The strong opposition came as a surprise to the major developed countries, which had taken the position that only a handful of developing countries were opposed and had not anticipated such a widespread and vocal opposition to negotiations.

In the early hours of 14 September, the last day of the conference, a meeting of nine Ministers (from the US, EU, Mexico, Brazil, China, India, Malaysia, Kenya and South Africa) was convened by Derbez to discuss the Singapore issues, at which the countries reportedly kept to their known positions. Later that morning, a larger Green Room meeting of about 30 Ministers was convened. It was meant to discuss all the outstanding issues of the conference with a view to resolving the differences. Derbez decided to start with the Singapore issues. He would later explain at a press briefing that he chose this as the first item because it had become the main issue of contention, judging by the reactions to the revised Ministerial text at the previous night's heads-of-delegation meeting.

At the Green Room meeting, the developing countries opposed to starting negotiations reiterated their position that further clarification of all the issues should be undertaken. Derbez reportedly proposed that for two issues (trade facilitation and government procurement) negotiations could begin, but that the other two issues (investment and competition) would be dropped from the agenda. The EU Trade Commissioner Pascal Lamy reportedly agreed that the two issues of investment and competition could be dropped, giving the impression that these would be removed from the WTO altogether (and not just from the Doha mandate of starting negotiations on the basis of consensus). The other two issues would then proceed to negotiations. However, many countries said they had difficulty accepting negotiations on trade facilitation and government procurement. It was suggested that government procurement could also be dropped from the agenda. A draft text to the effect that three of the Singapore issues would be dropped "from the WTO agenda" was made available to members of the Green Room meeting. Derbez then adjourned the meeting for more than an hour to enable Ministers to consult with their constituencies on whether they could accept this formula of dropping three issues and starting negotiations on one.

During the break, a combined meeting of the ACP, LDC and African Union members decided that they would not change their stance that negotiations should not start on all four issues. When the Green Room reconvened, some

developing-country Ministers (including those representing the ACP-LDC-AU groupings) reported they were unable to accept negotiations on any of the issues. Korea reportedly said it could not accept the dropping of any issue. Derbez then said a consensus could not be reached on the Singapore issues, and thus there was no consensus possible for the whole package of issues. He then made the decision to close the conference, without having an agreement on any issue, and ended the Green Room meeting.

The impasse over the Singapore issues was thus the immediate cause of the breakdown of the Cancun Ministerial. A more deep-rooted factor was the perception of most developing countries that their views (and not only on the Singapore issues) had not been taken into account in the revised draft Cancun Ministerial text. This led them to believe that the Cancun process was unfair, imbalanced and heavily tilted against them. The legitimacy of the Cancun Ministerial process itself was thus undermined by the bias of the text. Until that point, developing countries had been willing to give the benefit of the doubt to the process, in the hope that the revised draft would be balanced. Moreover, the developing countries felt seriously threatened, as the Derbez text would have very significantly eroded whatever "policy space" these countries still had to formulate national development policies. The fact that the text was issued so late (and thus there was really no opportunity to revise it before the end of the conference) added to the frustration. There was so much division and acrimony over the draft text that it was impossible for the divide to be bridged quickly enough by yet another draft, especially with the short time left. There was so much dissatisfaction and anger among so many developing countries that the usual attempt used at Ministerials by the major developed countries to bulldoze through a text at the last minute would probably not have worked this time. This last-day crisis was ultimately brought about by the very untransparent and non-participatory way in which the drafting of the successive drafts of the Ministerial text had been undertaken.

4 The Process After Cancun and the "July Package" Decision

THE developments at Cancun constituted a dramatic turn of events and positions with regard to the Singapore issues. Many officials present at the Green Room meeting had the distinct impression that EU Trade Commissioner Lamy's offer to "drop" two or three of the issues meant that negotiations would not start on the issues, and moreover the issues would no longer be discussed at the WTO. In effect, the working groups would even close.

Lamy later told a press conference in Cancun after the end of the conference that his offer would remain on the table, even though the conference ended without agreement.

This was a rather sensational development, for at one swoop, two or three of the issues seemed to have disappeared from the table. As became common talk, once the eggs have splashed on the floor, they cannot be put back again.

After Cancun, the Chairman of the WTO General Council initiated a number of informal consultations on how to deal with the Singapore issues in general, as well as on the specific issues of trade facilitation and transparency in government procurement (where attempts were made to discuss possible modalities for negotiations). The Chairman announced that a solution might be found to put aside two issues (investment, competition) at least for the time being, and explore the possibility of launching negotiations on the other two issues (government procurement, trade facilitation).
From October to December 2003, the informal discussions continued. A major bone of contention was the apparently unclear position of the EU,

which confused the other WTO members. Having "dropped" the issues in Cancun, and having apparently promised to maintain the offer, the EU appeared to adopt a tactic of trying to salvage the situation by retrieving the issues whilst keeping a façade that it would agree to "drop" the issues if that was the wish of the developing countries.

It seemed for a long while after Cancun that there are many ways to drop an issue, just as there are many ways to skin a cat, as the old saying goes. And there are apparently many meanings to the word "drop". The EU tried to keep the issues on the table, even as it said it was willing to drop them. The game seemed to be "how not to drop, even if we say we are willing to drop". (See Annex 1, "A Short Guide to Terminology on 'Dropping' the Singapore Issues".)

The EU said in its internal papers and at WTO meetings that it was prepared to drop any or all of the Singapore issues from the "single undertaking." Also, it wanted plurilateral agreements (where members can choose whether or not to sign on) if multilateral agreements (where every member has to sign on) were not possible.

The single undertaking is a framework established in Doha in 2001 whereby all issues on which negotiations are being held to establish new rules or changes in existing rules would be considered as a package which everyone has to accept as a whole, and the negotiations would end at the same time, at the end of 2004. It was unclear what the EU meant exactly by "dropping from the single undertaking", but it was certainly not the same thing as the Cancun offer of "dropping altogether from the WTO".

Several developing countries, in informal talks, responded that the EU offer to drop from the single undertaking was not a concession, as the Singapore issues were never part of the single undertaking in the first place. Moreover, dropping the issues from the single undertaking would really be a way of keeping the issues alive, thus skirting around the offer of removing them altogether from the WTO. If an issue is withdrawn from the single undertaking, it can still be retained within the WTO in at least the following ways:

(a) One is to start negotiations for multilateral rules now but not complete them at the same time as other issues, and continue talks into the next round when new agreements can then be established.

(b) Another way is to start negotiations for plurilateral rules now and complete them in this round at the same time as other issues, but since members can choose not to be party to the rules, this can be said to be outside the single undertaking. Alternatively, the plurilateral negotiations could be completed in the next round.

(c) A third way is to continue the discussions in the working group without a commitment to upgrade them into negotiations, and carry the discussions over into a next round during which they can then be upgraded.

These three options would keep the issue alive, with the hope that ultimately new rules will be created in the WTO, with some if not all members being party. The issue would thus be "salvaged" from the real dropping that Lamy had proposed in Cancun. The broken eggs could thus be re-assembled in some fashion or even completely.

In the informal meetings at the WTO after Cancun, the EU caused a great deal of confusion when it told others it was willing to drop one, two, three or even all four issues from the single undertaking and from the Doha agenda, and yet that it wanted all four issues to remain in the WTO. No one knew exactly what the EU had in mind, and neither could the EU explain precisely what it meant. In retrospect, it must be seen as a tactical move by the EU to "test the waters", to gauge what the developing countries were willing and not willing to accept, on each and all of the Singapore issues. Indeed, many developing countries were also not very clear what they were demanding when they themselves used the word "drop".

Then, at the WTO General Council meeting on 15-16 December 2003, 45 developing countries (including the members of the core group on Singapore issues, which included Malaysia, India and China, as well as the LDC Group) presented a formal paper calling for further work on three of the issues – investment, competition and transparency in government procurement – to be "dropped". They could go along with the fourth (trade facilitation) but

only to clarify the issues and not start negotiations for a legally binding agreement. The meaning of "drop" in this instance was clear. There would be no more discussion on these three issues in the WTO, let alone any negotiations. Discussions to clarify the fourth issue, trade facilitation, could go on.

The 45-country paper (which is reproduced in Annex 2) stated:

"It is … important to note that in the Green Room process at Cancún, one major proponent of the Singapore issues was willing to drop further work on two issues, namely, Trade and Investment and Trade and Competition Policy. During further discussions in the Green Room meeting, it became clear that there was no consensus on the need for any multilateral disciplines on Transparency in Government Procurement and hence, there was a suggestion that further work on this issue may also be dropped. The co-sponsors of this paper, therefore, are of the view that all further work on Trade and Investment, Trade and Competition Policy and Transparency in Government Procurement should be dropped.

"With regard to Trade Facilitation, work on clarification of various aspects of this issue may continue in the light of the interest expressed by several Delegations. However, this work should be carried out in parallel with the other segments of the Doha Work Programme and there should be no attempt to seek an early harvest on Trade Facilitation in advance of progress on core issues in Doha Work Programme. This work must also address the points raised by a group of developing and least developed countries, which are contained in Ministerial Conference document (WT/MIN(03)/W/4 dated 4 September 2003) such as cost of compliance, justification of any binding rules subject to the DSU, commitment for provision of technical and financial assistance to meet the cost of compliance and implementation of any possible multilateral framework. Furthermore, after completion of the clarification process, a decision would need to be taken on the modalities, by explicit consensus, before negotiations can commence.

"The co-sponsors would also like to make it clear that they are against the efforts for the adoption of a plurilateral approach in respect of any multilateral

issues because such an approach is systemically unsuitable for a consensus-based multilateral organisation like the WTO. A plurilateral approach could lead to a two-tier system of membership, which would be contrary to the basic character of the WTO."

At the end of the meeting, the General Council Chairman, Carlos Perez del Castillo of Uruguay, continued to insist on his "two plus two" proposal of trying to agree to modalities for negotiations on two issues (government procurement and trade facilitation) whilst suspending work in the meantime for two other issues (investment, competition). But many developing countries spoke against this. They wanted to close the work completely on three issues, whilst discussing (but not negotiating) only trade facilitation.

At the WTO's first General Council meeting of 2004 on 11 February, the members did not appoint chairpersons for the working groups on three of the Singapore issues, i.e., investment, competition and transparency in government procurement. The implication was that these working groups would not be meeting, at least for the time being. However, the Singapore issues would still be discussed at the level of the General Council, and would be the subject of informal consultations under the direction of the General Council Chairman.

Subsequently, informal discussions on trade facilitation were conducted under the chairmanship of the WTO Deputy Director-General Rufus Yerxa. Substantive discussions on the other three issues – investment, competition and transparency in government procurement – were in effect suspended. However, a number of informal heads-of-delegation meetings were held to discuss the Singapore issues overall, and the overall issue also figured in General Council meetings.
The process of how to handle the Singapore issues overall to a large extent shifted out of Geneva and took place at Ministerial meetings of various groupings of WTO members.

At the LDC Trade Ministers' meeting in Dakar on 4-5 May 2004, a Dakar Declaration was issued stating that: "The LDCs reiterate the need to take out of the Doha work programme the three Singapore issues namely, the

relationship between trade and investment, the interaction between trade and competition policy, and transparency in government procurement." As the Doha work programme includes issues for negotiations as well as issues and working groups in a discussion mode (such as the working groups on trade, debt and finance and on technology transfer), the implication of the term "taking out of the Doha work programme" was that further discussions on the three Singapore issues in their respective working groups should be discontinued, at least for the duration of the Doha work programme.

The Declaration also stated that on trade facilitation, work on clarification of various aspects should continue; after the completion of the clarification process a decision would need to be taken on the modalities by explicit consensus before negotiations could commence. Modalities should include a provision that LDCs were exempted from WTO dispute settlement action. Commitment for technical and financial assistance should also be ensured to LDCs to conduct studies and meet the cost of implementation of trade facilitation measures.

The Singapore issues were also discussed during 13-14 May by the Organisation for Economic Cooperation and Development (OECD) Ministerial meeting on trade in Paris, to which several non-OECD countries were also invited. Most of the discussions focused on the agriculture issue, and little time was spent on the Singapore issues, according to some diplomats who were present. Nevertheless, a Chairman's summary of the OECD Ministerial Council meeting, made by Mexican Foreign Minister Derbez, said: "On the Singapore issues, the Chair sensed emerging agreement among the WTO Members that trade facilitation warrants multilateral negotiations under the DDA [Doha Development Agenda] single undertaking. On the other Singapore issues…the consensus seems to be moving towards maintaining them in existing study groups."
This Chairman's summary was disputed by a senior developing-country diplomat who represented his country at the Paris meeting. "We did not even discuss the three Singapore issues going back to the working groups," he said. "The Chairman's summary is thus very misleading. Many developing countries do not want further work to be done on these three issues, and this means the working groups should not be revived."

In relation to trade facilitation, it was true that many WTO members were willing to restart discussions on this issue, said the diplomat. But this did not mean there was agreement that negotiations should start on the issue. "Any decision to launch negotiations must be based on an explicit consensus on the modalities of negotiations, and we are far from having that consensus."

Another Geneva-based diplomat who was at the Paris talks also said that there was no agreement on having three of the Singapore issues discussed again in working groups. Some developing-country diplomats were concerned that those who were not present at the OECD meeting could be misled by the Chairman's summary into thinking that the participants of the Paris meeting had reached some sort of accord to restart the working groups on three issues and launch negotiations on multilateral rules on trade facilitation. Actually, there was no such agreement.

At the WTO's General Council meeting on 17 May, the Singapore issues were commented on by the Council Chairman and by some delegations. But there was no mention of reviving the working groups on the three issues. In his opening statement at the meeting, the Council Chairman, Japanese Ambassador Shotaro Oshima, reported on the Singapore issues. He said at a heads-of-delegation meeting in April, he had opened the subject by saying that: "There is still a range of positions on the table and there is not yet a convergence on any of the possible scenarios. To be more specific, major questions of which of the issues, if any, should be within the single undertaking, and of what should be done with those issues to be put outside the single undertaking are yet to be resolved."

Since then, he said, there had been significant initiatives at the political level, including at Ministerial meetings such as the LDC meeting in Dakar and the OECD meeting in Paris, and Ministers at the meetings were demonstrating "every flexibility" on the treatment of the Singapore issues.

At the Council meeting, several developed countries, including the US and Canada, asked that a decision be taken in July to start negotiations on trade facilitation. Many developing-country delegations, such as Kenya, reminded members that a decision on starting negotiations must be based on there being an explicit consensus on modalities. No member asked for negotiations

to begin on any of the other three issues. Some developed countries indicated they could go along with the other three issues being left out of the single undertaking. According to diplomats present at the meeting, there was no mention or suggestion of restarting the working groups on the three issues.

At the close of the meeting, Chairman Oshima said that on the Singapore issues, there was an emerging sense that there could be negotiations on trade facilitation, and that the other three issues were not part of the single undertaking or the work programme, but what to do with them would have to be decided in July.

On 11 July, at a meeting of Trade Ministers of the ACP Group held in Mauritius, an ACP Ministerial Declaration was issued. On the Singapore issues, the Declaration stated that the Ministers continued to be concerned with the potential serious implications of and the burdensome requirements of negotiating and implementing any future agreements on any of the Singapore issues. "Having regard to the various developments concerning the Singapore Issues amongst WTO members in and outside Geneva, at and since the Fifth WTO Ministerial Conference, the ACP States call for the issues relating to Trade and Investment, Trade and Competition Policy, and Transparency in Government Procurement to be dropped from the Work Programme."

With regard to trade facilitation, the ACP Ministerial Declaration noted that there was an emerging convergence of views for future development of a work programme on trade facilitation. The Declaration stated, however, that before any agreement by explicit consensus on negotiating modalities, a number of issues should be clarified first. It continued that "in considering any future work programme, the ACP States emphasise the following:

(a) the need to clarify the issue of adopting a multilateral framework on Trade Facilitation, the provision of the necessary technical assistance and capacity building prior to the launch of any negotiations by explicit consensus;

(b) the need, inter alia, to address the resource and capacity constraints of developing countries, the costs of implementing the new rules and to determine how and by whom the costs will be met;

(c) the need for clarity on the applicability of the Dispute Settlement Mechanism and whether any new rules will be binding."

From the above, it can be seen that the ACP Group called for the three Singapore issues to be dropped "from the Work Programme", thus keeping the option open as to whether they should be dropped from the Doha programme or the WTO programme altogether.

The WTO General Council set a deadline for decisions to be taken on a package of issues (including agriculture, NAMA, cotton and the Singapore issues) – known as the "July Package" – at a special meeting of the Council at the end of July. Many consultations were held to discuss modalities for trade facilitation. No work was undertaken on the other three issues. As the end-July date approached, it became clear that a decision would be taken to launch negotiations on trade facilitation, and that the other Singapore issues would be sidelined, but in what way was not clear.

On 16 July, the first draft of an agreement on the July Package was issued. On the Singapore issues it had two main points: (a) the three issues of investment, competition and transparency in government procurement would not form part of the Doha work programme and no work towards negotiations on these issues would take place in the WTO during the Doha Round; and (b) negotiations on trade facilitation would commence on the basis of modalities set out in an annex (Annex D).

The WTO members had a first round of initial comments on the draft at an informal heads-of-delegation meeting on 19 July. Some countries made comments on the text on the Singapore issues. Ambassador Matthew Nwagwu of Nigeria, speaking on behalf of the Africa Group, said that on the Singapore issues, the Group welcomed the general thrust of the text to drop from the Doha Development Agenda three of the issues and focus only on trade facilitation. The Group said that clearly, some consensus had emerged among WTO members to drop from the WTO agenda these three issues, which the Group had all along considered as being non-trade-related issues. In this regard, the Group would like to enrich the text by deleting the last four words (i.e., "during the Doha Round") of the sentence. It was the view of the

Group that these issues should still be completely dropped from the work programme.

On trade facilitation, the Africa Group was concerned that despite repeated calls to take into account its positions, such as the need for clarification, the costs of technical assistance and infrastructure and the applicability of the DSU, the draft text called for the launching of negotiations on a fast-track basis based on a single undertaking. This approach was not acceptable to the Group, said Ambassador Nwagwu.

The Bangladeshi Ambassador, speaking on the Singapore issues, said they were being asked to accept negotiations on trade facilitation while the other three issues still remained in the WTO. This, he said, represented an unbalanced outcome. The level of ambition on trade facilitation was far in excess of what could be justified by the movement on all other areas of development significance. Further, the mandate of negotiations as contained in Annex D went far beyond what was stated in the Doha Declaration. Members were being asked to accept an outcome even before negotiations started, with words such as "establishment of an agreement" in the annex. Bangladesh also said the modalities should provide that implementation by LDCs should only be after they had received the necessary technical assistance and infrastructural capacity building to enable them to implement such an understanding.
In the next two weeks, more consultations were held on the wording of the annex on modalities for trade facilitation.

Eventually the 1 August 2004 decision of the General Council, widely referred to as the July Package, contained the following provisions on the Singapore issues:

"**Relationship between Trade and Investment, Interaction between Trade and Competition Policy and Transparency in Government Procurement:** the Council agrees that these issues, mentioned in the Doha Ministerial Declaration in paragraphs 20-22, 23-25 and 26 respectively, will not form part of the Work Programme set out in that Declaration and therefore no

work towards negotiations on any of these issues will take place within the WTO during the Doha Round."

"**Trade Facilitation:** taking note of the work done on trade facilitation by the Council for Trade in Goods under the mandate in paragraph 27 of the Doha Ministerial Declaration and the work carried out under the auspices of the General Council both prior to the Fifth Ministerial Conference and after its conclusion, the General Council decides by explicit consensus to commence negotiations on the basis of the modalities set out in Annex D to this document."

Annex D of the July Package is also attached as an annex to this paper (Annex 3).

In November 2004, the negotiating group on trade facilitation was set up, with the Malaysian Ambassador as the Chairperson. On the other three issues, it is clear that there will not be negotiations during the period of the Doha programme. According to some senior diplomats present at the Green Room meetings during the July Package period, it was also understood that there would not be a re-convening of the working groups on the three issues during the Doha programme period. There might, however, be seminars organised by the WTO on one or more of the three issues. Thus, the informal understanding is that there will be neither negotiations nor formal discussions on the three issues during the Doha programme period. Given the wording of the July Package text, the issues can be brought back at a future date when the Doha programme is completed. However, it may require the agreement of members to revive the issues.

5 Major Features and Development Implications of the Singapore Issues

General

WHEN the Singapore issues were first proposed by the major developed countries for introduction in the WTO, the developing-country delegations were not clear what the contents of the proposals and their implications were. As the discussions progressed through the years, these became clearer. This chapter provides an interpretation of the main features of the proposals and objectives of the proponents of the issues, and a summary of the implications for development and policy space of developing countries if the issues had become the subject of binding rules in the WTO along the lines desired by the proponents.

The common themes of the proposals for three of the issues (investment, competition, government procurement) were: the expansion and maximisation of the rights of foreign enterprises to have access to developing countries' markets through their products and investment; the reduction to a minimum of the rights of the host government to regulate foreign investors; and the prohibition against governments taking measures that support or encourage local enterprises. A major device used by the major developed countries was to argue for the application of the "WTO principle" of "national treatment" to the three issues. It could then be more easily argued by them that foreign goods, investors and traders should be given equal (or better) rights as locals, including access to markets and investments, and that governments should be prevented from giving preferences or advantages to local investors and firms.

These are major objectives, with serious implications for development. If the proposed agreements come into the WTO, developing countries would find it increasingly difficult to devise their own development policies, including for building the capacity and competitiveness of local enterprises. Developing countries would no longer be allowed to support their local industries. Many local companies and farms may not be able to survive the unbridled competition unleashed by such agreements.

An important question is whether these issues belong in the WTO in the first place. They are not directly trade issues. The developed countries had planned to place them in the WTO because of the relative ease with which it could be argued that the "WTO principles" should apply to these issues, and because the WTO's trade sanctions mechanism would ensure that the rules to be established could be enforced.

An increasing number of developing countries realised the inappropriateness of negotiating these issues in the WTO or lodging new agreements on these subjects in the WTO. They became aware that the outcome 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 and socio-economic goals such as nation-building and supporting disadvantaged communities.

In the WTO, the term "negotiation", especially when applied to "new issues", implies that a commitment has been made to establish new rules or agreements. The historical record shows that once a decision is taken to begin negotiations, it would be difficult to prevent new rules or treaties from being established. Moreover, during the negotiations, the developed countries have tremendous advantages in shaping the agenda, principles and provisions of the issue and the agreement, and the final outcome is likely to be against the interests of developing countries. It is thus important for the developing countries to prevent issues that are not appropriate from becoming subject to a decision to start negotiations or even to begin a "study process".
Below is a summary and analysis of the proposals of the developed countries on each of the Singapore issues.

Relationship between Trade and Investment

Background

At the Singapore Ministerial in 1996, Ministers agreed to form a working group to study the relationship between trade and investment. It was explicitly stated that there was no commitment to negotiate an agreement. For the next five years (1997-2001) the WTO Working Group on the Relationship between Trade and Investment held several discussions. Major developed countries pressed very hard to have the working group transformed into a negotiating group that would negotiate an investment agreement in the WTO. However, the majority of developing countries were extremely reluctant to agree to this. Some of these countries were strongly opposed. The reasons included: the inappropriateness of an investment regime in a trade organisation; the loss of policy autonomy over investment policy would damage development options; the lack of understanding of the issues and their implications for development; harmful effects of new obligations; and diversion of time and human resources from other vital work in the WTO. They wanted the study process to continue, and were adamant that negotiations for an agreement should not start.

As a result of the 2001 Doha mandate, the working group in 2002-2003 discussed the following issues which the Doha Declaration (in paragraph 22) identified as subjects for "clarification", i.e., 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, consultation and the settlement of disputes. Paragraph 22 also stated that any investment framework should reflect in a balanced way the interests of home and host countries, and take account of development policies and objectives of host governments and their right to regulate in the public interest. There was mention also that the special needs of developing countries should be taken into account; due regard should be paid to other relevant WTO provisions; and account should be taken of existing bilateral and regional investment arrangements.

A reading of the 2002 and 2003 reports of the working group clearly reveals that there was no consensus among the members on the various issues discussed. Even in relation to the WTO as a forum, some members had doubts regarding the propriety of the WTO being the right forum for the discussion of an issue whose relationship with trade is tenuous. On scope and definition, there was a major split between countries like the US that wanted a comprehensive coverage, including portfolio investment, and most other countries, which wanted to restrict the discussion to foreign direct investment. There were many points of disagreement regarding development provisions, with many developing countries wanting maximum flexibility for development policies whilst developed countries wanted a much more restrictive approach. On non-discrimination, the developed countries insisted this was a core principle, but several developing countries doubted its appropriateness in relation to investment. On investor and home-country obligations, some countries insisted this issue must be included for the sake of having some balance, whilst others did not think it even belonged in an investment framework.

The lack of consensus on the investment issue became very obvious before the Cancun meeting. The then chairman of the investment consultations, the Brazilian Ambassador Luiz Felipe Seixas Correa, himself concluded at a heads-of-delegation meeting on investment in August 2003, on the eve of Cancun, that there was no consensus on the modalities for negotiations.

After Doha, the EU and Japan became the main developed economies seeking to upgrade the study process into negotiations for an agreement. Since many developing countries were opposed to introducing an investment agreement in the WTO, the EU and Japan attempted to portray their aim as being to produce a development-friendly investment agreement. However, a large number of developing countries remained opposed or reluctant to move into negotiations.

Main Design and Strategic Aim of Proponents

The main features of an international investment agreement as advocated by the major developed countries are rather well known and have remained

constant over the years, although there may be differences in some of the details. Among these main features are the following:

- The right to entry and establishment: Foreign investors would be provided the right to entry and establishment in member countries of the agreement without (or with minimal) conditions and regulations and the right to operate in the host countries without most conditions now existing.

- "Non-discrimination" principle: National treatment and MFN status would be given to foreign investors and investments. This would apply at the pre- and post-establishment phases.

- Scope and definition: The original definition of investment has been very broad. For example, the coverage of the proposed OECD Multilateral Agreement on Investment (MAI) spanned foreign direct investment, portfolio investment, credit, intellectual property rights and even non-commercial organisations, and all sectors except security and defence. According to the Doha Declaration, cross-border FDI is mentioned as an issue for clarification. However, in the discussions, some countries, notably the US, proposed a broad definition of investment and investor, one that would include portfolio investment.

- Performance requirements imposed by host-country governments (e.g., regulations on limits and conditions on equity, obligations for technology transfer, measures for using local materials and for increasing exports or limiting imports) would be prohibited or disciplined.

- Investors' rights and funds transfer: Host governments would be obliged to allow free mobility of funds into and out of the country; regulations/ controls on funds transfer would thus be restricted or prohibited.

- Investors' rights and expropriation: There would also be strict standards of protection for investors' rights in relation to "expropriation" of property. A broad definition was given to expropriation in the proposed MAI model; it included "creeping expropriation". The North American

Free Trade Agreement (NAFTA) experience is very pertinent. The US has advocated that both direct and indirect expropriation be covered; the latter includes the loss of goodwill and future revenue/profits of a company or an investor as a result of a government measure or policy.

- It is advocated that the investment agreement be legally binding, with a dispute settlement system. In NAFTA and the proposed OECD-MAI, the dispute settlement system would also enable investors to bring cases against a state (i.e., investor-to-state dispute).

Most of the elements above were in the original EU paper (1995) proposing an international investment agreement in the WTO, or in the OECD draft of the MAI, or in NAFTA.

Although several of the above elements were not directly mentioned in the Doha Declaration as issues for clarification, some of them entered the discussion in the working group under one item or another. The developed countries had tried to ensure that all these elements, and some more, would be part of the negotiations and the outcome.

Due to the unpopularity of this extreme model, including among developed-country citizens that had successfully opposed the OECD-MAI, some of the major proponents put forward watered-down versions. These versions would not be so extreme, and would not enable the proponents to reach their ultimate goals immediately. Instead, step-by-step or stage-by-stage approaches were proposed, whereby members of the WTO would agree to negotiate an investment agreement, and in the agreement they could have the choice of which sectors and how fast to liberalise. (This is presumably what the "GATS-type" approach referred to; see below.) The approach adopted was to first persuade developing countries to agree to the *concept* that investment rules belong in the mandate of the WTO; to then draw them into negotiations for an agreement which appears not to be so harmful and where there is some space to make choices (especially when compared to the original models); and only later on exert pressure on them to undertake increasing commitments for liberalisation in more sectors and obligations in a wider range of policy measures.

To make an investment agreement appear more acceptable, a GATS-type approach was mooted. Though in theory GATS (the WTO's General Agreement on Trade in Services) allows each country to choose the timing, sectors and degree of liberalisation, in reality there is pressure to accelerate the pace and depth of liberalisation in many (services) sectors. Also, countries that have made a commitment would be unable to "roll back" or backtrack without providing compensation. Moreover, the services agreement also has general rules that apply across all services sectors (whether or not they are on the schedule for liberalisation) and these rules are being expanded. Presumably the proposed investment framework would also have had general rules that apply, irrespective of what the countries have committed on a sectoral basis.

For its part, the US was advocating a "higher-standard" investment agreement, and this could be closer to the MAI or NAFTA models. So it was probable that if negotiations had commenced in the WTO, the US (and possibly other countries) would have advocated for the elements, scope and high standards of the extreme models.

Potential Effects of an Investment Agreement

Foreign investment is a complex phenomenon with many aspects. Its relationship with development is such that there can be positive as well as negative aspects. There is an important need for government and government policy to regulate investments so that the positive benefits are derived while the adverse effects are minimised or controlled. The experience of countries shows that governments have traditionally made use of a wide range of policy instruments in the formulation of investment policy and in the management of investment. It is crucial that developing countries continue to have the policy space and flexibility to exercise their right to such policies and policy instruments.

Due to its particular features, foreign investment can have the tendency to bring about adverse effects on the host country or trends that require careful management. These include:

(a) possible contribution to financial fragility due to the movements of funds into and out of the country, and due to some types of financially destabilising activities;

(b) possible effects on the country's balance of payments (especially through increased imports and outflow of investment income, which have to be balanced by export earnings and new capital inflows; if the balance is not attained naturally, it may have to be attained or attempted through regulation);

(c) possible effects on the competitiveness and viability of local enterprises;

(d) possible effects on the balance between local and foreign ownership and participation in the economy;

(e) possible effect on the balance of ownership and participation among local communities in the society.

On the other hand, foreign investment can make positive contributions, such as:

(a) use of modern technology and technological spillovers to local firms;

(b) global marketing network;

(c) contribution to capital funds and export earnings;

(d) increased employment.

In order that these potential benefits be realised, and that a good balance is attained between the negative and positive effects so that there is an overall net positive effect, there is a crucial role for governments to play in managing a sophisticated set of investment and development policies.

An investment agreement of the type envisaged by the developed countries would make it much more difficult to achieve a positive balance as it would

severely constrain the space and flexibility for investment and development policies.

Such an agreement 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 the ability to plan in relation to local participation and ownership, balancing of equity shares between foreigners and locals and between local communities, the ability to build capacity of local firms and entrepreneurs, etc. It would also weaken the position of government vis-à-vis foreign investors (including portfolio investors) in such areas as choice of investments and investors, transfer of funds, performance requirements aimed at development objectives such as technology transfer, protecting the balance of payments, and the formulation of social and environmental regulations.

It is argued by proponents that an investment agreement will attract more FDI to developing countries. There is no evidence of this. FDI flows to countries that are already quite developed, or where there are resources and infrastructure, or where there is a sizable market.

A move towards a binding investment agreement is therefore dangerous as it would threaten options for development, social policies and nation-building strategies. It is thus proposed that the strategy to be adopted should be to prevent the investment issue from entering the mode of "negotiations".

Conclusions

Investment is not a trade issue, and thus bringing it within the ambit of the WTO would be an aberration and could cause distortion to the trade system. The principles of the WTO (including national treatment and MFN) that apply to trade in goods are inappropriate when applied to investment. Instead, their application would be damaging to the development interests of developing countries. Traditionally developing countries have had the freedom and right to regulate the entry and conditions of establishment and

operation of foreign investments; restricting their rights would cause adverse repercussions. An agreement in the WTO is likely to be of the type proposed by developed countries. It would be profoundly anti-development.

Whilst the Doha Declaration recognised the case for a multilateral framework on investment, it can be argued that it can also be recognised that there is a case against a multilateral framework, depending on what the framework is like. If the framework is located in the WTO, with the elements and obligations proposed by the advocates, it would be an imbalanced one and thus should not be accepted. A more appropriate framework must be a balanced one, with the main aim of regulating corporations (instead of regulating governments); it could be one that is not legally binding; and it could be one that is located in the United Nations and not the WTO.

The WTO agenda is already over-crowded, with delegations unable to cope. Introducing investment and other Singapore issues on the negotiating agenda would divert the time and resources of the members from the urgent uncompleted tasks, including the implementation and other development issues that members had pledged to give priority to but on which the developed countries have so far not shown a commitment to make progress.

The establishment of an investment agreement which gives unprecedented rights to foreign investors would cause the already imbalanced WTO system to become much more imbalanced. Since most international investments are owned by firms from the developed countries, they will obtain the overwhelming share of the benefits, whilst developing countries as a whole would bear the costs, including the loss of flexibility in framing development policy. The proposed investment framework would thus not be reciprocal in the distribution of benefits.

For these reasons, an investment agreement should not be negotiated or even further discussed in the WTO. The issue has been a divisive one and has for too long diverted the attention of the WTO membership from the real issues of trade and development. The issue should be dropped altogether, and not only for the duration of the Doha work programme.

Interaction between Trade and Competition Policy

At the Singapore Ministerial, Ministers decided to set up a working group on the interaction between trade and competition policy. There was a specific mention that this did not commit members to negotiating an agreement in the WTO on competition. As in the case of the investment issue, most developing countries voiced reluctance or opposition to the establishment of a WTO agreement on competition policy.

However, with the developing countries' views not adequately represented in the drafts of the Doha Declaration, a work programme for clarifying certain topics (with a view to reaching consensus on modalities) was ultimately established at Doha. The Doha Declaration (paragraph 25) mandated that in the period until the Fifth Ministerial, the Working Group on the Interaction between Trade and Competition Policy would focus on the clarification of: (a) core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; (b) modalities for voluntary cooperation; and (c) support for progressive reinforcement of competition institutions in developing countries through capacity building. Full account shall be taken of the needs of developing and least developed countries and appropriate flexibility provided to address them.

At the time of the Doha meeting, there was hardly any common understanding, let alone agreement, among countries on what the competition concept and issue meant 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. The proposal of the proponents of a WTO agreement was to have multilateral rules that discipline members to establish national competition law and policy. According to them, these laws/policies should incorporate the "core principles of the WTO", defined as transparency and non-discrimination (MFN and national treatment). Thus, the location of the competition issue and agreement within the WTO would bias the manner in which the subject and the agreement were to be treated. In this case, the "core WTO principles" would be applied to competition.

This interpretation and aim seemed to have been endorsed by the Doha Declaration, as the first item for clarification included "core principles, including transparency, non-discrimination and procedural fairness". This is most controversial. It can be questioned whether the principle of non-discrimination is appropriate if applied to competition law and policy in developing countries.

Competition law and policy, in appropriate forms, is beneficial, including to developing countries. It can be a valuable instrument to prevent or reduce monopolistic abuses. However, each country should have full flexibility to choose a competition law and policy model which is suitable for itself and which can also change over 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 should be allowed 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.

Developed Countries' Framework

After the end of the Singapore Ministerial Conference in 1996, the heads of the delegations of the US (Charlene Barshefsky) and the EU (Leon Brittan) made it clear at separate press conferences that for them the objective of having a competition agreement in the WTO was to gain greater access for their corporations to the markets of developing countries.

A subsequent paper by the EU on the application of core WTO principles to competition (issued in 1999) explains this "market access framework" more clearly: a competition policy framework in the WTO should provide "effective equality of opportunity for competition" in the local market for foreign firms. This framework of applying the WTO "core principles" (particularly non-discrimination and national treatment) to competition law/policy would affect the flexibility the country needs to be able to choose its own appropriate model or models of competition law/policy.

The EU paper's approach would look unfavourably on domestic laws or practices in developing countries that favour local firms, on the ground that these are against free competition. The EU argues that what it considers to be the core principles of the WTO (national treatment and non-discrimination) should be applied through WTO rules on competition policy. Through an agreement on competition in the WTO, it could eventually be compulsory for developing countries to establish domestic competition policies and laws of a certain type. Government policies or practices that favour local firms and investors could be called into question, as could private sector practices that favour local firms. For example, if there are policies that give importing or distribution rights (or more favourable rights) to local firms (including government agencies or enterprises), or if there are practices among local firms that give them superior marketing channels, these are likely to be called into question and disciplines may be imposed on them.

The developed countries argue that policies or practices that give an advantage to local firms create a barrier to foreign products or firms, which should be allowed to compete on equal terms as locals, in the name of free competition. Such pro-local practices and policies would be targeted for phaseout or elimination in negotiations for a competition agreement.

Towards a Development Framework on Competition for Developing Countries

The developed countries' conceptual framework can be challenged through a different framework that looks at competition through the lens of development. Developing countries can argue that only if local firms and agencies are given certain advantages can they remain viable. If these smaller enterprises are treated on par with the huge foreign conglomerates, most of them would not be able to survive. Perhaps some would remain because over the years (or generations) they have built up distribution systems based on their intimate knowledge of the local scene that give them an edge over the better-endowed foreign firms. But the operation of such local distribution channels could also come under attack from a competition policy in the WTO, as the developed countries are likely to pressure the local firms to also open their marketing channels to their foreign competitors.

At present, many developing countries would argue that giving favourable treatment to locals is in fact pro-competitive, in that the smaller local firms are given some advantages to withstand the might of foreign giants, which otherwise would monopolise the local market. Providing the giant international firms equal rights would overwhelm the local enterprises which are small and medium-sized in global terms.

However, such arguments may not be accepted by the developed countries, which are likely to insist that their giant firms be provided a "level playing field" to compete "equally" with the smaller local firms. They would like their own interpretation of "competition" (which, ironically, would likely lead to foreign monopolisation of developing-country markets) to be enshrined in WTO law.

Competition can be viewed from many perspectives. From the developing countries' perspective, it is important to curb the corporate 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 as it adversely and often unfairly affects the products of developing countries. The restrictive business practices of large firms also hinder competition. Intellectual property rights laws that are biased towards rights holders vis-à-vis the public interest by unduly providing for exclusive and monopolistic positions can also be anti-competitive. However, these issues (and this type of interpretation of competition policy) are unlikely to find favour with the major developed countries, which for example would like to continue to be able to use anti-dumping actions as protectionist devices.

If negotiations begin in the WTO, the EU interpretation of competition, i.e., that foreign firms should enjoy national treatment and have a "free competition environment" in the host country, could well prevail, especially given the unequal negotiating strength among WTO members 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 having recourse to practices which are to their advantage.

What is required, instead, 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 meet 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 over a short period. The state should also play a vital role in nurturing, subsidising and encouraging the local firms. The build-up of local competitive capacity also requires protection from the "free" and full force of the world market for the time it takes for the local capacity to develop. This means that development strategy has to be at the centre, and an appropriate approach should be taken for competition and competition policy that is consistent with the central development needs and strategy.

Therefore some of the conventional models of competition may not be appropriate for a developing country. Other models may be more appropriate, but their adoption may be hindered or prohibited by a future WTO agreement on competition that is based on the "core principles of the WTO." For example, the Cambridge University economist Ajit Singh has pointed out that the US and European models of competition law and policy are inappropriate and can cause harm to the development efforts of developing countries. More suitable is the Japanese model of the 1950s and 1960s, when Japan was at its developmental stage. The Japanese government enacted competition law as a tool to prevent the intrusion of large foreign firms and their products, whilst at the same time using industrial policy to nurture and strengthen Japanese firms so that they could develop and eventually successfully compete with the giant foreign companies. The kind of model represented by the Japanese example, in which competition policy is complemented by and indeed subsumed under industrial policy, would not

be allowed in the kind of competition agreement propounded by the EU. Indeed, the EU-advocated framework would precisely seek to outlaw the Japanese-style model that developing countries may find consistent with their development needs.

There is not a convincing case for a multilateral set of binding rules to govern the competition policies and laws of countries. Moreover, there are justified grounds for serious concern if such an agreement were to be located within the WTO, as it is likely to be skewed against the development interests of developing countries as a result of the attempt by proponents to apply the "core principles" of the WTO to the issue and to the agreement.

If a multilateral approach is needed, there are other venues that are more suitable, for example, the UN Conference on Trade and Development (UNCTAD) which already has a Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, and a committee that deals with competition law and policy. 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.

Transparency in Government Procurement

The Singapore Ministerial 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 did not specify that an agreement must result; it only committed members to set up a working group to study the subject of transparency in government procurement 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 their need for policy-making flexibility.

Before and at Doha, many developing countries put forward the view that they were not ready to negotiate an agreement on transparency in government

procurement. However, these views were not adequately reflected in the Doha Declaration. As with the other Singapore issues, the Declaration (paragraph 26) stated that negotiations would take place after the Fifth Ministerial on the basis of a decision to be taken by explicit consensus on modalities of negotiations. The Declaration also stated (in paragraph 26) that negotiations would build on progress made in the Working Group on Transparency in Government Procurement and take into account participants' development priorities. Negotiations shall be limited to the transparency aspects and therefore would not restrict the scope for countries to give preferences to domestic supplies and suppliers.

The study in the working group, and the agreement, was only mandated to cover transparency in government procurement (and not the practices themselves), and this limited scope was reaffirmed by the Doha Declaration. However, the major developed countries advocating this issue had made clear their ultimate goal to fully integrate the large worldwide government procurement market into the WTO rules and system. (At present, WTO members are allowed to exempt government procurement from WTO market-access rules. The exceptions are those members which have joined the WTO's plurilateral agreement on government procurement. However, hardly any developing country is a member of this plurilateral agreement.)

Since developing countries have found it unacceptable to integrate government procurement and its market-access aspect into the WTO, the major developed countries devised the tactic of a two-stage process: firstly, to draw all members into an agreement on transparency; and secondly, to then extend the scope from transparency to other areas (for example, due process) and ultimately to the areas of market access, MFN and national treatment for foreign firms. This was clear from various papers submitted by the US and EU to the WTO.

If the integration of government procurement into the WTO eventually takes place (as is clearly the aim of the major developed countries), governments in future will not be allowed to give preferences to local companies in deciding on the supply of goods and services and the granting of 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 in developing countries:

- The level of expenditure on government procurement, and the attempt to direct the expenditure to locally produced materials, is a major macroeconomic instrument, especially during recessionary periods, to counter economic downturn.

- There can be national policies to give preference to local firms, suppliers and contractors in order to boost the domestic economy and the participation of locals in economic development.

- There can be specification that certain groups or communities, especially those that are under-represented in economic standing, be given preference.

- 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 the government procurement market be opened up through application of 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:

- If the foreign share increases, there would be a "leakage" in government attempts to boost the economy through increased spending during a downturn.

- The ability to assist local companies and particular socio-economic groups or ethnic communities would be seriously curtailed.

- The ability to give preferences to certain foreign countries would similarly be curtailed.

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

Given the ambitions of the major developed countries, it is realistic to anticipate that if there is an agreement on transparency, strong pressures would then build up to extend its scope to cover market access or the rights of foreign companies to compete on a "national treatment" basis for the procurement business. Thus, discussions on "transparency" and on a "transparency agreement" should be seen in the light of the strategic objective of the developed countries to draw 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.

Trade Facilitation

The Doha Declaration (paragraph 27) stated that until the Fifth Ministerial the WTO Council for Trade in Goods shall review and, as appropriate, clarify and improve relevant aspects of Articles V, VIII and X of the General Agreement on Tariffs and Trade (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.)

After Doha, developing countries continued to voice concerns that new multilateral obligations on trade facilitation may be unsuitable as well as costly to implement, especially if the developing country has other budgetary priorities.

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 trade expert Bhagirath Lal Das: "[T]here are grave dangers involved in 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 developing countries adopt rules and procedures in this area which are similar to theirs. It ignores the wide difference in the level of 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 environments." (Bhagirath Lal Das (2003), *WTO: The Doha Agenda – The New Negotiations on World Trade*, London and New York: Zed Books and Penang: Third World Network) For example, it may be proposed that physical examination of goods by customs authorities should only be conducted in a small number of cases selected on a random basis, in order to improve the flow of goods through the customs barrier. But this increases the risk of avoidance of payment of adequate customs duties. This practice may be appropriate for the major developed countries where the chances of such leakage are negligible, but it may not be appropriate for the developing countries where leakage is higher.

Das adds that clarification and improvement of the rules in this area will add to the commitments of the developing countries in the WTO, bringing about new burdens and possible adverse implications too. Negotiators at the WTO should obtain the input of the trade and customs administrative machinery so as to know the possible problems and adverse effects of proposals being tabled. Developing countries should put forward the view that improvements in trade facilitation should be made through national efforts aided by technical assistance, rather than through imposing additional obligations in the WTO. If the consideration of the problems in these areas results in some solutions, these should, at best, be adopted only as guiding principles or as flexible best-endeavour provisions not enforceable through the WTO dispute settlement process.

The developing countries maintained their opposition to launching negotiations on trade facilitation at Cancun. After Cancun, however, they were more open to considering negotiations, provided the other three Singapore issues were dropped from the negotiating agenda and provided

their concerns were addressed, particularly that they should not be obliged to implement new trade facilitation rules if they do not have adequate financial resources to do so.

After several rounds of intense discussions, the developing countries were able to sign on, in the July Package, to a text that commences negotiations on trade facilitation on the basis of modalities that they believed addressed their concerns.

In the modalities agreed to in the July Package, the main operational part is paragraph 1 (of Annex D of the July Package) which states that "negotiations shall aim to clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994 with a view to further expediting the movement, release and clearance of goods, including goods in transit." The negotiations shall also aim at enhancing technical assistance and support for capacity building in this area. The negotiations shall further aim at provisions for effective cooperation between customs or any other appropriate authorities on trade facilitation and customs compliance issues.

Many of the subsequent paragraphs of the modalities specify the "safeguards" for developing countries in meeting new obligations that may arise from the negotiations. Paragraph 2 states that the results of the negotiations shall take fully into account the principle of special and differential treatment (SDT) for developing and least developed countries, and that this should extend beyond the transition periods for implementing commitments. "In particular, the extent and the timing of entering into commitments shall be related to the implementation capacities of developing and least-developed Members. It is further agreed that those Members would not be obliged to undertake investments in infrastructure projects beyond their means." This paragraph establishes a strong SDT provision, including that commitments will be related to implementation capacity, and moreover there is no obligation to implement infrastructure projects for countries that do not have the financial resources to do so.

A further safeguard for LDCs is provided in paragraph 3. The extent of their commitments is limited to what is consistent with their individual

development, financial and trade needs or their administrative and institutional capabilities.

The cost implications for developing countries of proposed measures are also to be addressed by members as a part of the negotiations (paragraph 4). Provision of technical assistance and support for capacity building is recognised as vital for developing and least developed countries, and developed countries in particular commit themselves to adequately ensure such support and assistance during the negotiations (paragraph 5).

Provision of aid for implementation of commitments resulting from the negotiations is covered in some detail in paragraph 6. According to this paragraph, support and assistance should be provided to help developing countries implement the commitments. Implementation of some commitments by developing countries will require support for infrastructure development on the part of some members. In these limited cases, developed-country members will make every effort to ensure support and assistance directly related to the nature and scope of the commitments in order to allow implementation. It is understood, however, that in cases where required support and assistance for such infrastructure is not forthcoming, and where a developing or least developed member continues to lack the necessary capacity, implementation will not be required.

A review of the effectiveness of the support and assistance provided and its ability to support the implementation is also provided for in paragraph 7.

With these "safeguards", the developing countries hope that they are equipped to limit their commitments only to measures that they are able to pay for or obtain aid for implementing. It remains to be seen how this "special and differential treatment" will work out during and after the negotiations.

6 Prospects for the Reappearance of the Singapore Issues

ALTHOUGH the Singapore issues of investment, competition and government procurement are no longer on the negotiation agenda for the duration of the rest of the Doha work programme, the developed countries which have been strongly advocating these issues are certain to try to have them incorporated in other venues in the meanwhile, and to try to revive them in the WTO at an appropriate time in future.

The major developed countries had tried to introduce rules on investment policy during the Uruguay Round. When they failed to do this within the ambit of the TRIMs Agreement, they started another attempt at introducing an investment agreement in 1995, almost immediately after the Uruguay Round concluded. It can be easily predicted that another attempt will take place to re-introduce the three discarded Singapore issues in the WTO immediately after the Doha programme is completed, or even before that.

In the meanwhile, the major developed countries are already placing the three Singapore issues onto the agenda of other trade agreements outside the WTO. The issues of investment, competition and government procurement (in its market-access form and not just the transparency aspect) have been part of negotiations to establish trade agreements between the US and Latin American countries. They are part of NAFTA, as well as the Central America Free Trade Agreement (CAFTA). The investment chapter is also central in the US bilateral agreements concluded with Singapore, Chile and other countries, and in planned bilateral agreements between the US and many other countries.

The three Singapore issues are also on the agenda of the EU's economic partnership agreements with the ACP countries.

Thus, it is important for developing countries to be alert to the content of the issues, even if they have for the time being been put on the backburner in the WTO.

7 Conclusion

THE manner in which the Singapore issues were initiated and pushed along over the years by major developed countries raises the systemic question of how a "new issue" enters the jurisdiction of the multilateral trading system.

Of course an argument can always be made that this or that issue is linked in some way to "trade". But this does not mean that it is necessarily justified to link the issue to the WTO system. For an issue to be linked to the WTO system in an integral way, it must be made to pass a strict test with clear criteria, and moreover there should be a framework that helps specify in which way the particular issue should be integrated in the WTO. Issues chosen should be for the benefit of members, especially the developing countries that form the majority, and should be treated in a manner that leads to equitable results.

At present there is no such framework determining whether and how "new issues" should enter the WTO system, nor is there a way to determine the likely benefits and costs of an issue's inclusion and their distribution among the WTO membership.

Yet there are very strong pressures emanating from the developed countries to add more and more items onto the WTO agenda. There is now a clear danger that this could lead to very negative consequences such as: (a) an overload of the WTO system, making it impossible for developing countries to cope with negotiations and implementation of commitments; (b) a distortion of the WTO system, where fairness in the process of trade

operations is replaced by protectionism; and (c) a failure of credibility as citizens in developing countries perceive the WTO as an instrument through which the developed countries impose unfair and inappropriate rules and policies that are disadvantageous to the developing countries.

In the light of the already onerous obligations undertaken by developing countries in the existing WTO agreements, the immense problems of implementation, and the possible serious economic and social dislocation that will result in many countries, it is most inappropriate that pressure is continuing and intensifying to place more new issues into the WTO system.

At present the WTO does not have a systematic way of enabling the assessment, introduction (or rejection) and appropriate incorporation of new issues. As a result, several new issues were absorbed during the transition from GATT to the WTO through the Uruguay Round. And many more new issues are in various stages of "brewing", not only the Singapore issues, but also others such as labour standards and environmental standards.

A system or procedure for assessing potential or proposed new issues should be established. The criteria should not only be whether an issue is "trade-related", because a case can always be made out that almost any issue is related in some way to trade. The criteria should also be whether the entry of a particular issue would add advantage and benefit to the members of the WTO (especially the majority, i.e., the developing countries, and to the majority of people in these countries) and to the WTO system, with the ultimate goal being equitable and sustainable development (rather than liberalisation, which is only a means). And given the fact that the WTO is mainly a negotiating body with the mandate and task of formulating and monitoring the implementation of agreements, new issues should not be allowed to easily enter the system, even for a "study process" in a working group.

Discussions on potential new issues should take place in appropriate fora outside the WTO, in a setting more conducive to perspectives which go

beyond the narrow framework of trade relations. In such discussions, the role of trade relations can be placed in the broader context of equitable and sustainable development, and the specific role of the WTO (if any) can be demarcated. Until the discussion is sufficiently "brewed" or "matured" in the appropriate forum, the issue should not be brought into the WTO system – not for discussion in working groups and certainly not for negotiations for new agreements.

Unless the trend for putting more and more issues into the WTO basket is reversed, the trade system will become overloaded and bloated. It will not be able to carry out the tasks which it was originally intended to do, because it would have taken on other tasks it is ill-suited to perform and would be grappling with a host of new and complicated issues which will tie up its members, diplomats and policy-makers in knots too difficult to disentangle.

Members can decide to limit the WTO to the tasks it is supposed to perform, and to review its rules and system to put it back on the right track, or they can decide to throw more issues and complications into the system, with unknown – probably dire – consequences.

Annex 1

A Short Guide to Terminology on "Dropping" the Singapore Issues

After the famous offer by the EU at Cancun to "drop" some of the Singapore issues from the WTO agenda, there were a number of terms floating around in relation to "dropping" the issues. They don't all have the same meaning, and the differences can have major implications. Below is a brief guide to some of the terms.

1. Drop from the WTO, from the WTO agenda or from the WTO work programme.

This implies the work will not continue, even in the form of discussions, now (during the Doha work period) or later (after the Doha period).

2. Drop from the Doha work programme.

This implies it will not be on the Doha negotiating agenda; neither will it be on the discussion agenda as the work of the working groups on the Singapore issues (like the working groups on trade, debt and finance, and trade and technology transfer) is part of the Doha work programme. This implies that the working groups would be suspended at least during the period of the Doha programme. The latter interpretation is on the assumption that the Doha work programme includes the work of the working groups. If this phrase is meant by the user to mean that the working groups should not continue, this should be made clear, for example: "Three of the Singapore issues (investment, competition and transparency in government procurement) should be dropped from the Doha work programme, and discussion should discontinue in the respective working groups for the duration of the Doha work programme." The implication of this phrase is that the work can restart after the Doha programme ends.

3. Drop from the Doha development agenda.

It is not clear what this phrase means, as the "Doha development agenda" is not defined or even mentioned in the text of the Doha Declaration. It is a

phrase that has been used frequently by the WTO Secretariat and some WTO members; however, other members are careful not to use it and prefer the use of the term "Doha work programme", which is technically correct. In the context of the Singapore issues, it could be the case that the user of this phrase may take it to mean the negotiating agenda of the Doha programme and thus argue that the Singapore issues are to continue as subjects of discussion in the working groups.

4. Drop from the single undertaking.

This does not mean that there will be no negotiations. An EU paper refers to plurilateral agreements when it mentions its willingness to drop an issue from the single undertaking. Dropping from the single undertaking could thus enable negotiations to take place even during the Doha period as: (a) plurilateral negotiations and agreements are possible even during the Doha period, as it is not mandatory for members to be party to them; and (b) even multilateral negotiations may be launched but not completed during the Doha period, and be carried over to the next round.

Annex 2

Singapore Issues: The Way Forward

Joint communication by Bangladesh (on behalf of the LDC Group), Botswana, China, Cuba, Egypt, India, Indonesia, Kenya, Malaysia, Nigeria, Philippines, Tanzania, Uganda, Venezuela, Zambia and Zimbabwe, dated 12 December 2003 and presented to the WTO General Council

1. In the Doha Ministerial Declaration (paragraphs 20, 23, 26 and 27), relating to the Singapore issues, Ministers stated that 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 the modalities of negotiations. It is thus clear that a decision on modalities, by explicit consensus, is required before negotiations can commence. Certain elements were identified for clarification, besides which Members were free to raise other issues of relevance. A work programme on each of these issues was adopted, which was to be completed in the period until the Fifth Session.

2. However, during this period, various elements relating to each of the four issues remained unclear. More importantly, there was significant divergence of views among Members on each of the Singapore issues. A group of countries, in response to the Chairman's Draft Ministerial Text (Job(03)/150/Rev.1), indicated, in their Ministerial Conference document (WT/MIN(03)/W/4 dated 4 September 2003), the various elements that need to be clarified in respect of each of these issues.

3. At the Cancún Ministerial Conference, discussions on the Singapore issues were held under a Facilitator. A large number of developing country Members expressed concern, *inter alia*, about the impact that multilateral rules on the four Singapore issues would have on their domestic polices and the fact that they have neither the negotiating resources nor the capacity to implement obligations, which such multilateral rules will entail. A revised text was produced by the Chairman of the Cancún Ministerial Conference (Job (03)/150/Rev.2 dated 13 September 2003). The revised text on Singapore issues, however, did not address the concerns of the majority of Members, who expressed their strong opposition to it. As a consequence, no decision was taken at the Cancún Ministerial Conference by explicit consensus on

the modalities of negotiations on any of the four Singapore issues. The Ministers, in their Statement (WT/MIN(03)/20) adopted on 14 September 2003, instructed officials to continue work on outstanding issues and asked the Chairman of the General Council, working in close co-operation with the Director General, to co-ordinate this work. The Ministers also stated, *"We will bring with us into this new phase all the valuable work that has been done at this Conference. In those areas where we have reached a high level of convergence of texts, we undertake to maintain this convergence while working for an acceptable overall outcome."*

4. Subsequent to the Cancún Ministerial Conference, the Chairman of the General Council has held informal discussions with Delegations on these issues. However, the fact remains that on all these issues, there continues to be significant divergence of views among Members, and in the absence of explicit consensus, there is no basis for the commencement of negotiations.

5. Article III:2 of the Marrakesh Agreement Establishing the WTO makes it clear that "the WTO shall provide the forum for negotiation among its Members concerning their multilateral trade relations.....". The core competence of the WTO lies in trade in goods and services. The co-sponsors of this paper believe that binding disciplines on Singapore issues would certainly not only curtail the policy space for developing countries but would also entail high costs, which many developing countries cannot afford at their present level of development. Moreover, due to continued division over such a long period among Members on the status and substance of the Singapore issues and in the interest of early completion of this round of negotiations, we should concentrate our efforts first and foremost on issues of core competence of the WTO namely, agriculture, non-agricultural market access, services and development issues.

6. It is also important to note that in the Green Room process at Cancún, one major proponent of the Singapore issues was willing to drop further work on two issues, namely, Trade and Investment and Trade and Competition Policy. During further discussions in the Green Room meeting, it became clear that there was no consensus on the need for any multilateral disciplines on Transparency in Government Procurement and hence, there was a suggestion that further work on this issue may also be dropped. The co-sponsors of this paper, therefore, are of the view that all further work on

Trade and Investment, Trade and Competition Policy and Transparency in Government Procurement should be dropped.

7. With regard to Trade Facilitation, work on clarification of various aspects of this issue may continue in the light of the interest expressed by several Delegations. However, this work should be carried out in parallel with the other segments of the Doha Work Programme and there should be no attempt to seek an early harvest on Trade Facilitation in advance of progress on core issues in Doha Work Programme. This work must also address the points raised by a group of developing and least developed countries, which are contained in Ministerial Conference document (WT/MIN(03)/W/4 dated 4 September 2003) such as cost of compliance, justification of any binding rules subject to the DSU, commitment for provision of technical and financial assistance to meet the cost of compliance and implementation of any possible multilateral framework. Furthermore, after completion of the clarification process, a decision would need to be taken on the modalities, by explicit consensus, before negotiations can commence.

8. The co-sponsors would also like to make it clear that they are against the efforts for the adoption of a plurilateral approach in respect of any multilateral issues because such an approach is systemically unsuitable for a consensus-based multilateral organisation like the WTO. A plurilateral approach could lead to a two-tier system of membership, which would be contrary to the basic character of the WTO.

Annex 3

Modalities for Negotiations on Trade Facilitation

Annex D of the "July Package" decision adopted by the WTO General Council on 1 August 2004

1. Negotiations shall aim to clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994 with a view to further expediting the movement, release and clearance of goods, including goods in transit.[1] Negotiations shall also aim at enhancing technical assistance and support for capacity building in this area. The negotiations shall further aim at provisions for effective cooperation between customs or any other appropriate authorities on trade facilitation and customs compliance issues.

2. The results of the negotiations shall take fully into account the principle of special and differential treatment for developing and least-developed countries. Members recognize that this principle should extend beyond the granting of traditional transition periods for implementing commitments. In particular, the extent and the timing of entering into commitments shall be related to the implementation capacities of developing and least-developed Members. It is further agreed that those Members would not be obliged to undertake investments in infrastructure projects beyond their means.

3. Least-developed country Members will only be required to undertake commitments to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.

4. As an integral part of the negotiations, Members shall seek to identify their trade facilitation needs and priorities, particularly those of developing and least-developed countries, and shall also address the concerns of developing and least-developed countries related to cost implications of proposed measures.

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[1] It is understood that this is without prejudice to the possible format of the final result of the negotiations and would allow consideration of various forms of outcomes.

5. It is recognized that the provision of technical assistance and support for capacity building is vital for developing and least-developed countries to enable them to fully participate in and benefit from the negotiations. Members, in particular developed countries, therefore commit themselves to adequately ensure such support and assistance during the negotiations.[2]

6. Support and assistance should also be provided to help developing and least-developed countries implement the commitments resulting from the negotiations, in accordance with their nature and scope. In this context, it is recognized that negotiations could lead to certain commitments whose implementation would require support for infrastructure development on the part of some Members. In these limited cases, developed-country Members will make every effort to ensure support and assistance directly related to the nature and scope of the commitments in order to allow implementation. It is understood, however, that in cases where required support and assistance for such infrastructure is not forthcoming, and where a developing or least-developed Member continues to lack the necessary capacity, implementation will not be required. While every effort will be made to ensure the necessary support and assistance, it is understood that the commitments by developed countries to provide such support are not open-ended.

7. Members agree to review the effectiveness of the support and assistance provided and its ability to support the implementation of the results of the negotiations.

8. In order to make technical assistance and capacity building more effective and operational and to ensure better coherence, Members shall invite relevant international organizations, including the IMF, OECD, UNCTAD, WCO and the World Bank to undertake a collaborative effort in this regard.

9. Due account shall be taken of the relevant work of the WCO and other relevant international organizations in this area.

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[2] In connection with this paragraph, Members note that paragraph 38 of the Doha Ministerial Declaration addresses relevant technical assistance and capacity building concerns of Members.

10. Paragraphs 45-51 of the Doha Ministerial Declaration shall apply to these negotiations. At its first meeting after the July session of the General Council, the Trade Negotiations Committee shall establish a Negotiating Group on Trade Facilitation and appoint its Chair. The first meeting of the Negotiating Group shall agree on a work plan and schedule of meetings.

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