The Singapore Issues in Cancun: a failed negotiation ploy or a litmus test for global governance?

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The 'Singapore issues' in the debate on the agenda of the Doha Development Agenda of the World Trade Organisation are investment, competition, transparency in government procurement and trade facilitation. More accurately the issue is what role the WTO should play in each of these policy areas. A number of developed countries, above all the European Union, have argued that these issues should be on the WTO agenda. Developing countries have been either reticent or downright opposed to including these issues. They are referred to as the Singapore issues because it was at the WTO Ministerial Meeting in Singapore in 1996, that agreement was reached to study the issues in WTO. After five years of discussions there was still no consensus on the inclusion of these issues when the Doha Development Agenda (DDA) was launched in November 2001. The decision on whether to include the issues in the DDA, was postponed until the Cancun WTO Ministerial in September 2003. It was also agreed that a decision on 'the modalities' of negotiations on these issues would be taken by an 'explicit consensus'. This meant that any of the 144 WTO members could veto their inclusion. Whilst the WTO normally takes decisions by consensus, this is normally taken to be the case when no WTO member explicitly opposes a decision.

It was ostensibly differences over the inclusion of the Singapore issues in the DDA that resulted in the collapse of the WTO Ministerial meeting in Cancun. As negotiations moved into their final stage on Sunday 7th September three crucial issues needed to be resolved if the 'round' was to progress and have a chance of meeting the scheduled completion date of January 2005. These three issues were; agriculture (e.g. the scale of reductions in domestic support, export subsidies and tariffs); market access for goods (e.g. tariffs) and whether the four Singapore issues should be included. These three topics were discussed in the so called 'green room' process of the WTO, where a group of leading countries representing all the key interests meet to

thrash out agreements. In these discussions the Singapore issues were placed first on the agenda. In the face of opposition to inclusion of the issues the EU negotiators dropped their insistence that all four issues should be treated together. In other words the European Commission agreed to drop or de-link investment and competition, in the hope that agreement could be reached on the less controversial issues of transparency in government procurement and trade facilitation. But Japan and South Korea, who had long supported the EU position, were not prepared to make the same concession and the developing country members present vetoed any inclusion of the Singapore Issues. The tough posture adopted by the developing countries (DCs) came as a bit of a surprise to the EU, but followed the bolstering of DC positions by the successful creation of the Group of 20 plus, a coalition of developing countries at the Cancun Ministerial. Faced with this deadlock the Mexican chairman brought the negotiations to a close before the final negotiations on agriculture and market access had even started.

What was the cause of this failure? Was it a failed negotiating tactic on the part of the EU? It has been argued that the EU sought to add the Singapore issues to the DDA in order to slow progress and thus delay the day when further reforms of the Common Agricultural Policy would be required. It could also be argued that the EU's tactics were poor and that it should have de-linked the issues sooner. On the other side it may be argued that in rejecting the EU's compromise proposal the developing countries showed a lack of sophistication and flexibility. Should these countries not have made concessions on the Singapore issues in order to get more of what they wanted on agriculture and market access for goods? After all many developing countries were seeking reductions in the agricultural support programmes of the EU and US, which may not now happen. Or was the failure due to the inherent difficulties negotiating on complex issues with 144 parties when decision-making is by consensus?

Aside from the problems of tactics and process, there are also inherent tensions concerning the scope of the WTO that may have made the collapse on talks inevitable? These tensions have been present in the trading system since the 1960s, but have become more acute since the end of the Uruguay Round (1986-94). These tensions concern whether the WTO should address new potential barriers to market access, even if this means intruding further into national policy autonomy? Or should

the WTO remain essentially a trade organisation that leaves scope for national policy options? The lines of confrontation on the scope of the WTO agenda are by no means purely North-South, with the North more ready to see the addition of new issues and the South opposing new rules. There are, for example, powerful interests in the North, in the shape of a range of non-governmental organisations, which see an increase in scope of WTO rules as an unacceptable extension of globalisation. Such tensions have been present in every discussion of the Singapore issues between the 1996 WTO Ministerial and the 2003 Cancun Ministerial. Tactical errors or difficulties in the negotiating process may have determined the nature and timing of the collapse of talks, but disagreements over the role of the WTO in regulating international markets in these areas were arguably the main cause.

The thin end of the wedge?

Does the inclusion of the Singapore issues on the DDA represent a modest step towards global governance or the thin end of the wedge for continued domination of the WTO by 'Northern business interests'? Are the Singapore issues a major threat to the policy autonomy of developing countries? Will they cost a great deal to implement? The following discussion of the issues will show that the substantive commitments involved in all the Singapore issues are modest. They would not sweep away national policy autonomy or 'policy space' for developing countries. Whilst there would be modest gains for international business, thanks to more transparent and predictable conditions for trade and investment, consumers in all countries including in developing countries would also gain. In the area of competition, there would also be the prospect of gaining more effective control over international restrictive business practices. Preparatory work in the WTO had made all parties aware of the potential costs of compliance. As a result the focus of the debate has been on how to promote wider implementation of good regulatory practices, rather than imposing a 'one-size-fits–all' approach. Developing countries can, however, be forgiven for arguing that they have heard all this before and that previous experience suggests that once an issue is on the GATT/WTO agenda there is pressure for them to accept more binding obligations.

Investment [1]

At the end of the Uruguay Round in 1994 it was assumed by leading policy makers that 'investment (could) provide the next great boost to the world economy following the powerful impulse given by the removal of trade barriers during the Uruguay Round'.[2] The United States had pressed for stronger rules on investment since the early 1980s. Whilst progress was made in the OECD, there was less success in the GATT, where opposition from developing countries resulted in only modest results in the shape of bans on six main performance requirements on foreign direct investment. The US had more success in NAFTA where it had extended the CUSFTA provisions to established high standards of investment protection including 'regulatory taking' provisions when regulation denies investors the expected benefits. Other NAFTA provisions banned a range of performance requirements, established a top-down, negative list approach to liberalisation of investment, and set up investor-state dispute settlement.[3]

When it came to the post Uruguay Round debate the US interests favoured plurilateral negotiations on investment within the framework of the OECD in order to extend the high standards achieved in NAFTA to more countries. The EU on the other hand favoured multilateral negotiations in the WTO, arguing that most barriers to investment were in developing countries and that the developing country negotiators would not simply sign up to a multilateral investment agreement negotiated in the OECD. A two-track approach was therefore adopted. Negotiations on the Multilateral Investment Agreement (MAI) began in the OECD in May 1995 and investment was proposed as an agenda item for the WTO. Given the opposition to investment in the WTO, the WTO forum was always likely to produce an agreement of 'lower standards'. [4] Nevertheless, a Working Group on Trade and Investment was established in the WTO.

In 1997 the MAI negotiations stalled and finally collapsed in 1998, with a coalition of non-governmental organisations, including development, environment NGOs and trade unions claiming victory. The US government therefore saw little point in pressing the issue at the WTO Ministerial in Seattle in November 1999, since WTO rules would always be second best to what the US had achieved in NAFTA and could demand in bilateral investment agreements (BITs). The EU, however, continued to

argue for general principles on investment to be included in the WTO as part of its comprehensive package for the WTO. In this effort the EU was joined by Japan and South Korea, which supported a joint paper with the EU on the issue in the run up to Seattle.

At the Doha Ministerial of the WTO the EU, with some lukewarm support from the US again tried to get investment on the agenda along with competition, government procurement and trade facilitation. It was clear that if investment provisions were to be included they would have to take account of developing country interests. This was reflected in the Doha declaration on the topic:

> "Any framework should reflect in a balanced manner the interests of home and host countries, and take due account of the development policies and objectives of host governments as well as their right to regulate in the public interest. The special development, trade and financial needs of developing and least-developed countries should be taken into account as an integral part of any framework, which should enable Members to undertake obligations and commitments commensurate with their individual needs and circumstances. Due regard should be paid to other relevant WTO provisions. Account should be taken, as appropriate, of existing bilateral and regional arrangements on investment."[5]

The wording of the Doha text clearly limits the scope of WTO coverage of investment. For example, reference to the right to regulate in the public interest clearly indicates that provisions on 'regulatory takings' similar to those in NAFTA, would not be on the agenda. Commitments commensurate with the needs of developing countries clearly points to a 'GATS type' positive listing of coverage, rather than the more far-reaching negative listing. It was also very clear from the discussions within the Working Party on Investment, that there would be no scope for investor-state dispute settlement. In short at issue was not a MAI-type agreement but something much more limited.

Competition

Like investment, competition is not a new issue in GATT/WTO. Indeed, the International Trade Organisation (ITO) negotiated in Havana in 1948, included provisions on restrictive business practices. At that time memories of the damaging effects of international cartels during the 1930 was still fresh. Following the failure of

the ITO competition did not figure in the GATT, in part because most governments were keen to promote concentration of national champions in order to enhance competitiveness. With the growth of global production there has been an increased debate on the need for international agreements on competition. Globalisation means that markets are global but competition authorities are still largely limited by national (or regional in the case of the EU) jurisdictions.

As with the coverage of investment in the TRIMs and GATS agreements, elements of competition policy have also found their way into existing WTO rules. In particular the 1997 sector agreements on basic telecommunications and financial services under the GATS contain important elements of competition. There have also been significant developments at the regional and bilateral levels. The EU represents by far the most developed form of regional competition regime. This was built on the view that European-wide competition rules were needed if private restraints on trade were not to replace public restraints on trade with the creation of the common/single market. The EU's promotion of competition policy within the WTO clearly represents an attempt to apply this logic to global markets. Other regional agreements include putative competition regimes, such as COMESA and Caricom, which are modelled on the EU approach but at a very early stage of development. The EU and US have concluded bilateral agreements on competition/anti-trust, both with each other and with third countries. Competition rules have also been developed within the OECD. The UNCTAD Set of Mutually Agreed Equitable Principles and Rules for Control of Restrictive Business Practices (The Set) also represents an on-going effort to promote coherent competition policies in developing countries.[6] Somewhat analogous to the case of investment, the US has favoured bilateral co-operation in the field of competition policy, with the US Department of Justice arguing that multilateral agreements would be so general as to not offer much value and that bilateral co-operation can effectively address any major anti-trust issues.

As with investment early grand ideas, such as proposals for a global competition authority, have not survive the dialogue within the WTO's Working Group on Trade and Competition Policy (WGTCP) established in Singapore in 1996. Indeed, discussion within this group made considerable progress towards a far greater understanding of the issues involved in establishing international co-operation in

competition policy and the proponents of competition within the WTO (i.e. the EU) have trimmed their ambitions. The work of the WGTCP focused on what core principles should be included in any agreement, how to deal with so called hard-core cartels, 'modalities for co-operation' (between national competition authorities) and 'support for the progressive reinforcement of competition institutions in developing countries.' These central issues were also reflected in the text of the Doha declaration that covered competition.[7]

Although the likely provisions in any WTO agreement are modest they would still require resources from developing countries. Governments in developing countries might argue that establishing national competition authorities and policies are low on their list of priorities. Having said this there is a growing number of developing countries that have recently introduced competition policies.

In terms of core principles the debate in the WTO has focused on standard WTO type of principles such as transparency and non-discrimination. Transparency provisions on competition involve national governments publishing national laws on competition (*de jure* transparency). Although this would clearly involve some costs, many WTO members that currently have competition laws already provide such information. There are also a number of inventories of competition law and procedures already in existence. Transparency with regards to how competition laws are implemented (*de facto* transparency), such as the decisions of competition authorities and or courts of law, is much more resource intensive. Although decisions implementing rules set precedents and therefore form an integral part of national competition laws, their inclusion would mean significant compliance costs. Even if the number of cases in developing countries would not be very large, the consensus in the WGTCP was that transparency provisions would have to be limited to *de jure* rules.

The same distinction applies to the core principle of non-discrimination. If applied *de jure*, meaning that national competition legislation and implementing provisions could not discriminate between the country of origin of a company, the compliance costs are not great. There would, however, be limitations on the policy choices since national legislation would not be able to grant any preference for national companies. The real issue in terms of non-discrimination, however, arises in the application of competition

rules (*de facto* non-discrimination). For example, WTO provisions requiring non-discrimination in the application of competition law would mean there would have to be some way of showing that decisions of national competition authorities did not favour national producers. As most competition cases are unique, an effective regime to ensure compliance with *de facto* non-discrimination would require extensive and costly procedural safeguards. This would increase the cost of compliance and as a result was more or less discounted in the discussions in the WPTCP.

One area where the WPTCP brought forward proposals for concrete commitments was that of hard-core cartels. International cartels exist. A large number of international cartels have come to light as a result of work by established national competition authorities,[8] and others are probably still to come to light. Nor are they due to a coincidental convergence of interest on the part of the producers organised over business breakfasts (Fruestuckskartelle), but are intentional and professionally run. Cost estimates of such RBPs are not without their difficulties. The OECD work suggests that the median mark-up in terms of prices is about 10%, with mark-ups ranging from 5% to 65%. The costs may also fall disproportionately on developing countries, with one estimate showing that between 6 and 7% of all developing country imports could be affected by international cartels, with price mark-ups in a range between a few percent and 50%. [9]

If developing countries have an interest in controlling such restrictive business practices they also have an interest in gaining access to information from the competition authorities of the OECD countries. The developing countries with competition regimes therefore favour provisions on co-operation. But should there be WTO provisions requiring co-operation?

Another issue in competition has been how to deal with countries at different levels of development. Here the WGTCP made significant progress towards identifying the process by which developing countries that wish to introduce competition policies could be supported in this exercise. The idea of a 'one size fits all' approach to competition was never on the agenda. Indeed, the approach emerging from the discussions in the WGTCP was not very different from that pursued by the UNCTAD 'Set' for the past twenty years.

Transparency in Government Procurement

Unlike investment and competition, the GATT 1947 had a specific exclusion for government procurement from GATT disciplines. This was partially corrected in the Tokyo Round of the GATT when a number, but not all OECD countries signed a plurilateral agreement. The Uruguay Round efforts to get all WTO members to sign up to the strengthened agreement negotiated essentially between the United States and the EU failed. So the 1994 GPA remained a plurilateral or qualified MFN agreement, despite the general requirement for all WTO members to sign a single undertaking.

As with other Singapore issues, procurement has figured in many of the recent regional trade agreements, especially those involving one of the main signatories to the 1994 GPA, i.e. the US and the EU. As a result the number of signatories to the GPA seems likely to grow steadily.

Government purchasing is an important part of all economies, reaching 10% of GDP in the developed economies and possibly higher in some developing economies. Although it is seen as an important instrument of national policy, lack of transparency and competition in the award of contracts can result in inefficient allocation of resources. Transparency measures therefore help to reduce corruption and improve efficiency.

'Liberalisation' of government procurement is not as clear-cut as a tariff reduction or even the inclusion of a service activity in the GATS schedules. Although some countries retain *de jure* discrimination in favour of national suppliers, such as a specified price preference for national suppliers, government procurement markets generally remain closed for a range of much less obvious reasons. Thus while the 1994 GPA requires *de jure* non-discrimination it also includes elaborate measures to ensure that contracts are notified, processed and awarded in a transparent fashion designed to enable foreign competitors to bid. These procedures include provisions for both domestic reviews of contract award decisions by independent authorities and the ability of foreign suppliers to challenge the award of a contract they believe has been awarded unfairly. The GPA 1994 is also based on reciprocity in the sense that

signatories have sought to ensure that commitments made will result in reciprocal opening of national government procurement markets.

The WTO Working Group on Transparency in Government Procurement (WGTGP) soon identified reluctance on the part of many WTO members to make commitments on non-discrimination and on enhanced market access. The Doha declaration made clear that discussions on government procurement in the run up to Cancun would be limited to transparency. There would be no commitment to non-discrimination or market opening. In other words WTO members would still be able to favour local suppliers. They would just have to be transparent about it. This compromise resulted in a rather unique position of trying to negotiate transparency provisions in the absence of any market opening obligations, and led to much confusion during the discussions between 2001 and Cancun.

A number of issues caused difficulties. First of all there was the question of the scope of any possible agreement on transparency in government procurement. Should such an agreement cover only central government, or should state/provincial and local government (which accounts for nearly 60% of government purchasing) also be included? Then there was the question of whether goods and services should be included. The proponents of a WTO agreement (i.e. the EU, US and other countries) argued that transparency should apply to all purchasing since its aim was to promote best practice an thus the most economic use of public funds. Developing countries led by India and Brazil argued that only purchasing of goods by central government should be covered. Developing countries also argued that thresholds should be set fairly high so that many contracts would fall outside the scope of the agreement and thus reduce the costs of compliance.

Another issue that created tensions was whether all WTO members should be obliged to provide review procedures under national law for aggrieved parties that believe a contract award procedure has not been transparent. The proponents of WTO rules on transparency in government procurement argued that there should be such review procedures, because only such provisions could ensure that the required national procedures were respected. Some leading developing countries argued that review provisions constituted a form of compliance mechanism, which in turn implied that

the provisions on transparency would be used to open up markets. As the agreement at Doha had made clear that the negotiations were not about market opening, these developing countries argued there was no need for review provisions.
Another important difference of view in the WGTGP was over the application of WTO dispute settlement provisions. The proponents of WTO rules on transparency argued that all WTO rules should be subject to the common WTO dispute settlement provisions. These proponents also felt that it would set a bad precedent to exclude some parts of the WTO system from dispute settlement. It could also be argued that without the provision for ultimate recourse to dispute settlement, WTO members could simply ignore the rules. As with the issue of review provisions, some leading developing countries argued that dispute settlement was not needed because the negotiations were not about trade/market access.

Trade facilitation

Trade facilitation can be broadly defined as any measure that helps speed up the passage of goods through ports. As customs duties and other barriers to trade have come down, the relative importance of delays and other costs associated with customs clearance has increased. In some cases such costs may be more important for exporters than tariff barriers. Hence the interest in trade facilitation as tariffs are reduced.

Unlike investment, competition and transparency in government procurement, no special working group was established for trade facilitation. Work on this topic has been done in the WTO Committee on Trade in Goods (CTG). Broadly speaking the aim of the proponents, which are again predominantly the developed countries, has been to develop a framework of WTO commitments to simplify and harmonize trade procedures. They claim that there are excessive documentation requirements, a general lack of automation, a lack of transparency and thus predictability in customs clearing procedures, and a lack of audit-based controls and risk assessment techniques. The aim of the latter two methods is to reduce the need to stop and check every consignment without undermining the ability of authorities to regulate and collect customs duties.

In pursuit of these goals it has been suggested that what is needed is the (i) a harmonization and simplification of trade and transport documents and data, drawing on international standards, and relying on commercial information; (ii) progressive introduction of modern customs techniques designed to strengthen compliance and control while speeding release of legitimate goods; (iii) progressive automation and electronic data interchange (EDI) at the level of customs and other agencies to replace paper procedures for export and import; (iv) development of measures to facilitate convergence of official controls on border crossing goods; (v) capacity building to strengthen human and physical infrastructure and improve import/export management; (vi) consideration of scope for provision to ensure smooth conduct of banking and payment transactions. Although trade facilitation sounds fairly arcane and innocuous the implementation of these sorts of measures would entail considerable costs for many WTO members.

Rather than develop new agreements the work in the CTG focused on how existing GATT provisions might be improved to promote these aims. The main GATT articles identified were Art V (freedom of transit), Art VIII (on fees and formalities) and Art X (publication and administration of trade regulations). As with the other Singapore issues therefore, the work on trade facilitation represents building on existing GATT measures, as well as the work of the World Customs Organisation and other bodies that are doing relevant work in the field. It does not represent a new issue, although efforts to promote best practice in trade procedures could well mean new commitments for WTO members.

Opposition to work on trade facilitation has been muted, in part because of the highly technical nature of the issue. Developing countries are however concerned about the potential costs of complying with any new obligations. Developing country governments are also concerned that new measures should not make it any harder for them to collect customs revenue, which for some developing countries can constitute a major share of tax revenue.

Conclusions

This brief discussion of the Singapore issues shows that they are not 'new issues'. In each case there is an existing patchwork of rules in multilateral, plurilateral and regional/bilateral agreements. The existing WTO rules also touch upon all the issues. What is at issue therefore is not whether these topics should be covered by international rules, but whether there should be a general framework agreement for each within the WTO.

Second, the form in which each of the issues has emerged from the working groups set up in Singapore is such that they are not likely to impose significant obligations on developing country members of the WTO, at least in the short to medium term. The resource implications of implementing provisions in these issues will also be limited although not insignificant. The work carried out in the WTO as well as in UNCTAD, the OECD and elsewhere over the past seven years, has led to a clearer understanding of the issues involved for developing economies. This has been the case for investment and competition especially, which have been the two most controversial issues, and has led to both an awareness of the need for more technical assistance for developing countries and flexibility in the proposed rules. The proposals on investment, competition and government procurement all appear modest. Indeed, one has to ask whether WTO rules based on rules envisaged would have much impact? The issues are somewhat less clear with trade facilitation, as work in the CTG is less advanced.

A third conclusion would be that despite this greater flexibility on the part of the proponents of the Singapore issues many developing countries have remained very suspicious of efforts to negotiate on these issues in the DDA. There remains a fear that even modest provisions represent the thin end of the wedge that would lead to more intrusive, costly and inappropriate rules at a later stage. Such suspicion is not unjustified given the experience of developing countries in previous negotiations. On the other hand it should not be forgotten that there were potential benefits for developing countries in the introduction of multilateral disciplines. In the case of competition, developing countries could benefit from more effective controls of hard-core cartels, which may be having a disproportionately detrimental impact on developing economies. Consumers and tax- payers in developing countries also stand

to benefit from improved regulatory practices and thus reduced corruption, which the Singapore issues promise to help bring about.

Another fairly safe conclusion is that the Singapore Issues will not go away if the EU drops its insistence that they be included. The absence of an agreed multilateral framework for rules in the WTO will mean that plurilateral, regional or bilateral measures will continue to fill the vacuum. While the developing countries can, under WTO rules, block the adoption of plurilateral agreements within the WTO, they may not find it in their interests to frustrate efforts by countries wishing to conclude such agreements. Developing countries will also find it harder to resist pressure to conclude regional or bilateral agreement including the Singapore issues. The current generation of regional/bilateral agreements being negotiated by the US and EU all include these issues.

Finally, WTO Ministerial negotiations have stalled or failed in previous rounds, such as in Montreal in November 1988 and Brussels in 1990 in the Uruguay Round. What is different about Cancun is the higher public profile of the WTO today. Past experience suggests that the failure in Cancun may not be fatal for the DDA round, even if it is likely to put it (well?) behind schedule. But a perception that multilateralism is not working could well lead to a redoubling of regional and bilateral negotiations, as indeed already seems to be the policy the US is pursing. In such bilateral negotiations developing countries will be in a weaker position than in the WTO.

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[1] For a recent discussion of the four Singapore issues see The Federal Trust Expanding *World Trade Rules? Should there be rules on competition, investment, trade facilitation and government procurement*? 2003 www.fedtrust.com

[2] Sir Leon Brittan since the beginning of 1995, see '*Smoothing the Path for Investment Worldwide'* speech in Washington January 1995.

[3] See Stephen Woolcock 'Investment in the World Trade Organisation' in Klaus Deutsch (ed) *The European Union in the Millenium Round*, Cambridge University Press, 2001

[4] Due to opposition from India and Brazil the investment provisions in the Uruguay Round were modest and took the form of Trade Related Investment Measures or TRIMs. Investment was however, included in the GATS agreement.

[5] Doha Ministerial Declaration World Trade Organisation WT/MIN(01)/DEC/1

[6] See Experience gained so far on international co-operation on competition policies issues and the mechanisms used Report for the UNCTAD Secretariat UNCTAD TD/B/COM.2?CLP/21/Rev1 12

[7] See for example WTO Report of the Working Group on the Interaction Between Trade and Competition Policy to the General Council WT/WGTCP/6 2002

[8] See OECD *Draft Report on the nature and impact of hard-core cartels and the sanctions under national competition laws*, Paper for the Global Competition Forum, 2001 CCNM/GF/COMP(2001)3 2 October 2001.

[9] M Levenstein *Private cartels and their effects on developing countries*, Background Report for the World Development Report 2001