SINGAPORE ISSUES & DEVELOPING COUNTRIES: A MISMATCH BETWEEN PERCEPTION AND REALITY?

By

Inaamul Haque

Significance of Singapore Issue:

"The World Trade Organization (WTO)", a commentator pointed out, "is still reeling under the impact of the Cancun debacle and has failed to make any tangible headway in the negotiations held since then on any issue" (Economic Business Review, January 19–25, 2004: Dawn). This is an apt observation as outcome of Cancun Conference is, indeed disappointing. One was in fact, looking with a great deal of optimism to the fifth WTO Ministerial. Failure in Cancun has revived the threat to the multilateralism in international trade and provided incentive for the bilaterism as well as for other non-multilateral options. One of the leading Pakistani scholars appropriately has summed up the situation:

> The failure of talks at Cancun might mean an end to the progress the world has made towards evolving a trading system that is based on strictly defined rules implemented by an organization (the WTO) that is not beholden to one large trading country (say, the United States or China) or one large trading bloc (say, the European Union). Such an outcome would not benefit any country, rich or poor.
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> (Shahid Javed Burki: Dawn 30th September, 2003)

The outcome, arguably, might have been different, had developing nations adopted a more pragmatic and smarter approach to Singapore issues (seeking

extension of WTO framework to investment, competition policy, transparency in government procurement and trade facilitation). The agriculture, as apprehended, proved to be the major obstacle to any accord. One cannot, however, in this context, wish away Singapore issues because they have significantly contributed their share to an apparently unbridgeable gap between developing and developed countries. Highlighting the significance of these issues, it has been rightly observed, “The World Trade Organization (WTO) seems to have been made hostage to these by the West since Doha Ministerial session held in 2001 and no meaningful progress in negotiations on any vital area has taken place” (Economic and Business Review: February 2-8, 2004, Dawn). The Commerce Minister of Pakistan also admitted that despite substantial progress in Cancun the controversy over Singapore issues and failure to bridge the gap contributed its share to the break down of negotiations. (Business Recorder dated 19th September, 2003)

These "new” issues, have also a significant tactical dimension. Though presently there is little overt demand for Singapore agenda in Europe, some EU officials see clear advantage in persisting with them. They hope to extract a price from developing countries, primarily in terms of softening their stand on agriculture in exchange for taking these issues in full or partially off the negotiating table. Developing countries, one hope, are also capable of playing a similar game and are really motivated to oppose incorporation of these new issues within the framework of WTO due to tactical reasons and not owing to any ideological “Third World” vs First World polarization. Even assuming that developing countries have not become as yet sophisticated in negotiations, the extreme stand at Cancun taken by them should be now profitably exploited as a good bargaining counter for obtaining worthwhile concessions from developed countries.

Reality and Perception:

Developing countries have to ask themselves: Whether allowing incorporation of the new issues in the framework of WTO places intolerable burdens or entails unreasonable costs? Whether the proposed multilateral discipline for new issues is totally devoid of benefit for developing countries? Whether contours of the proposed regulatory landscape in respect of investments, competition policy, transparency in public procurement and trade facilitation would be radically different from existing/contemplated policies and action in many developing countries? In short, is the price asked for in the form of negotiations on Singapore issues, excessive for obtaining reciprocal concessions from developed countries in areas of interest to developing countries (e.g. agriculture subsidies, and peaks/escalation in industrial tariffs etc)? To come up with sound answers to such questions it would be necessary for developing countries to view things from a proper perspective. This in turn requires a high degree of maturity and pragmatism on the part of developing countries. It is very important for these countries to dispassionately examine the nature and implications of Singapore issues. This would be possible only by going beyond the surface, steer clear of ideological pitfalls and determine if there is a mismatch between highly adverse perception of these issues and fairly benign reality on the ground. The perception in North-South interactions, it would be pertinent to note, is a complex phenomenon, moulded by multitude of factors which is often distorted by emotions generated by the past unhappy experiences. However the advice to developing countries is not for unilateral flexibility or capitulation.

One need not in this context over emphasise the obvious importance of even greater flexibility on the part of developed countries particularly the European Union if any meaningful progress is desired. To be fair, EU on the last day in Cancun

showed inclination to drop two and possibly three of these issues from the agenda (Though Japan and Korea were obstinate in rigidly adhering to their stand. But with EU changing its stance it would have been possible to soften them down). There was however, no matching response from developing countries. At that critical moment they appeared to have been caught unawares and were unprepared to make a constructive response. A good opportunity was thus lost and the Conference was brought to an abrupt end at a point of opportunity to save negotiations and multilateral process.

Dynamics of Multilateral Negotiations:

Multilateral negotiations have a dynamics of their own. Progress takes place after a lot of "give and take"- a concession 'here' is balanced by an advantage 'there'. The process is driven by a mutual exchange of concessions on a reciprocal basis. In Doha trade ministers met under the shadow of Seattle debacle. With a view to propelling further the stalled multilateral process a lot of efforts were made. Polemics were replaced during the final days of conference with a refreshing pragmatism and flexibility. This result was Doha Development Agenda (DDA), a significant agreement, at it sought to give more importance to issues of development and developing countries than was the case ever before. This outcome was partly a result of concessions by developing countries, about negotiations on Singapore issues which were considered important enough by industrial countries to make them agree to various pro-development provisions including a stronger mandate for post-Doha agricultural negotiations.

Decision at Doha:

In essence, DDA stated, that negotiations on these issues would take place after the Fifth Ministerial "on the basis of a decision to be taken by explicit consensus at that session on the modalities of negotiations". A consensus on modalities was thus a condition precedent for commencement of negotiations. It could be legitimately presumed that earnest efforts would be made by all the WTO members' countries to arrive at such a consensus. Developed countries were expected to show considerable flexibility and sensitivity to concerns of their third world trading partners while developing countries were expected to be sincere in developing a consensus on modalities. But both the groups failed to do what was expected of them. Unfortunately the Doha Declaration does not however give any guidance as to what is to be done if a consensus fails to evolve. Thus the conference reached an impasse.

Developing nations in Cancun could have proceeded more constructively in reaching some understanding on modalities of negotiations. Instead an aggressive approach, due to a variety of reasons, came to be adopted. There was a revival of confrontation between the north and south, a kind of throw lack to seventies of the last centaury. It particularly manifested in the context of Singapore issues. Developing countries took the position that as there was lack of progress in key areas of interest to them it was premature and inappropriate to consider commencement of negotiations on Singapore issue. They wanted resolution of the issues causing concern to them before they would be ready for negotiations on new issues. This was arguably, back tracking from Doha Accord. A more sensible and also proper approach would have been to continue with the Doha spirit, and abide by the agreement reached there through showing willingness to find common ground on these issues by positive movement on modalities. Of course while agreeing to do so, developing countries would have been able to safeguard their interests by clearly indicating that this

willingness to negotiate new issues was contingent on developed countries showing a matching flexibility on agriculture and other matters of interests to them. However no serious 'give and take' took place. The upshot was break down of negotiations and a clear setback to the multilateral process.

When the multilaterism is thwarted every trading nation loses but the loss of developing countries is much greater, than that of their rich partners. They have a greater stake in the success of a multilateral rule-based system. It would be fair to ask; What exactly is at stake for the developing countries? According to James Wolfensohn, President World Bank, promotion of multilateralism with its concomitant lowering of tariff peaks and averages in both rich and developing countries could produce up to $520 billion in income gains benefiting both the rich and the poor countries. This could also lift an additional 140 million people out of poverty by 2015.

Background – Singapore Ministerial:

These issues made their appearance somewhat unobtrusively (in the proverbial mode of the Camel and the Arab story) and almost innocusly in Singapore WTO Ministerial (1996). There was resistance from developing countries but notwithstanding that they finally agreed to move forward as per wishes of EU and other developed countries. The Ministerial Declaration (Paras:20-23) accordingly provided:

a) **Investment & competition policy**: It was agreed to:

- Establish a working group to examine the relationship between trade and investment.
- Establish a working group to study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any reason that may merit

further consideration in the WTO framework (Para 20 of the Singapore Declaration).

b) Transparency in government procurement: It was agreed to establish a working group to study practices and develop elements for inclusion in an appropriate agreement. In this process, the working group was explicitly directed to take into account national policies (Para: 21 of Singapore Declaration).

(c) Trade facilitation: The Council for the Trade in Goods was directed to undertake exploratory and analytical work on the simplification of trade procedures in order to assess the scope for WTO rules in this area (Para: 22 of Singapore Declaration).

Significant Step Towards Negotiations:

At this stage i.e. at Singapore, emphasis was solely on exploration and analysis without any agreement that these four issues warranted negotiations. A qualitative change occurred in Doha Ministerial Conference (2001) when the exploratory stage gave way to a conditional expression of support for negotiations of these issues. The relevant portions of the Doha Declaration are:

"Recognizing the case for multilateral framework to secure transparent, stable and predictable conditions for long-term cross-border investment, particularly foreign direct investment, that will contribute to the expansion of trade…, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of decision to be taken, by explicit consensus, at that Session on modalities of negotiations" (Para: 20 of Doha Declaration).

Similarly, members of WTO recognized the need for the multilateral frameworks for competition policy, transparency in government procurement and trade facilitation i.e. expediting movement, release and clearance of good (Para:27 of

Doha Declaration). Negotiations were stipulated to begin (as in the case of investment) on the basis of the decision in the Fifth Ministerial Conference by explicit consensus as to modalities (Para: 23, 26 and 27 ibid).

Adverse Perception by Developing Countries:

Developing countries were not, of course, jubilant about this agreement. They regarded the move to incorporate new areas in WTO framework as unnecessary, harmful, and primarily in the interest of developed economies. Some in developing nations felt that not only the agenda (re: new issues) of developed countries was unrelated to trade but it appeared to be somewhat sinister because one common goal underlying proposals about investment, competition and government procurement was to maximize rights of foreign businesses (essentially multinationals) and increase market access for industrial countries, goods and services in developing world. Besides that, negotiations and eventual agreement to bring these issues within binding discipline of WTO, it was feared, would adversely affect the capability of developing countries to take measures to support and encourage local enterprises. Such support, developing countries argued, proved critical for development in industrial countries themselves. Besides this, extension of WTO to new area would entail considerable financial outlay on the part of developing countries which they can not afford. Equally important is their lack of capacity to comply with enlarged commitment and disciplines. As a matter of fact, many countries have limited resources and capacity even to "negotiate these issues especially as they grapple with implementation of existing WTO rules and expanded work programme after the Doha Ministerial Conference". Above all developing countries suspected that the keenness of the developed countries to place these apparently non trade issues within the WTO

framework was motivated by the availability of its trade sanction mechanism to enforce essentially asymmetrical rules.

Moving Forward in Larger Interest:

These apprehensions have substance and should not be casually dismissed by developed countries. Sensitivities and concern of developing nations need to be addressed in a constructive manner if the multilateral system in international trade is to survive. Having said this, developing country should also recognize that they had reached an understanding, good or bad on these issues at Doha. They are now expected to move forward rather than obstruct the process by dragging their feet on evolving a consensus on modalities. They have to convincingly demonstrate that they are responsible members of the community of world trading nations. Failure to proceed further, as agreed, would result in loss of their credibility with serious consequences in the future.

The following advice given to them in the present context is very much in order:

> In the post-Cancun scenario, it is in the larger interest of developing countries to renew negotiations and work towards amicable solutions to the contentious issues. Developing countries must also realise that they cannot continuously adopt a confrontationist approach without taking concurrent and concrete steps to liberalise their own economies.

Examination of Relevant Issues in Detail:

Investment:

At Doha the assignment of the Working Group on "The Relationship between Trade and Investment" was elaborated and given a concrete focus. The group was directed to clarify the flowing issues related to investments:

- Scope and definition;
- Transparency;
- Non-discrimination ;
- Modalities for pre-establishment commitments based on a GATS-type, positive list approach;
- Development provisions;
- Exceptions and balance-of-payments safeguards; and
- Consultation and the settlement of disputes between members.

This list is exhaustive but it did not still fully satisfy some developed countries who wanted it to be even more all embracing and include, for instance, issue of performance requirements.

The Working Group while carrying out its assignment examined various aspects of the subject to help the process move forward. It also reiterated the importance of technical assistance and capacity building to enable the developing countries members to make informed decisions.

Linkage between Trade and Investments:

The close linkage of investment with trade is now widely acknowledged and is duly reflected in DDA. As a matter of fact there was an agreement by the world trading community as far back as 1940's to place trade and investment within the same multilateral framework under the International Trade Organization (ITO). This organisation could not however become operational and was abandoned. The intimate linkage between trade and investment is also borne out by

the fact that a substantial volume (about 1/3rd) of world trade is trade within companies e.g. "between subsidiaries in different countries or between a subsidiaries and it's headquarter". Investment made by multilateral enterprises in various countries is thus generating quite a significant segment of international trade.

Case of Developing Countries against a WTO Investment Regime:

The case of developing countries against the proposed regime for investment within the WTO has been very well summarised by a well known third world trade expert:

> An investment agreement within the framework of WTO would be damaging to development options and interests. 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. It is certainly not clear that the principles of the WTO (including national treatment and MFN) that apply to trade in goods should not apply to investments nor that if they were applicable that they would benefit developing countries. Traditionally developing countries have had the freedom right to regulate the entry and conditions of establishment and operation of foreign investments.
>
> (Martin Kohr)

Current Foreign Investment Landscape:

Before we deal in some detail with the proposal for an investment regime in the framework of WTO it would be helpful to cast a glance on the current foreign investment landscape.

Foreign investments were not always popular with developing countries. There was mistrust and doubts about foreigners investing particularly in important sectors of economy. Laws in many countries were made more stringent in regard to foreign investments in 1970s. All this, has undergone a dramatic change in recent years. Now almost every developing country, has been keenly seeking private

foreign investment. There is now almost a consensus on the value and need of such inflows. As the Monterrey Consensus document, reflective of change that has occurred in this context, aptly puts it:

> "*Private international capital flows, particularly foreign direct investment along with international financial stability are vital complements to national and international development efforts*"

Private capital flows, have assumed greater importance for developing countries during the last twenty years. These countries, needless to emphasize, often experience chronic shortage of resources. Both the national saving rate and export revenues are low. Foreign inflows under these conditions are indeed critical. A large number of developing countries in the past had been relying upon the Official Development Assistance for making up these financing gaps. The flow of concessional resources, however, has been shrinking for many years. On the other hand private capital flows to developing countries have markedly increased. To secure and sustain such flows has been seen by developing countries themselves as imperative if they "expect to emerge from the poverty trap and to catch up with the richer countries, for there is never likely to be enough concessional finance to support investment needed for accelerated growth". The existing investment regime, relying solely upon Bilateral Investment Treaties (BIT's), invariably seeks to secure agreements on a set of legal rules for the protection of foreign investment but without giving much attention to legitimate interests and priorities of host countries. It also virtually does nothing to address market failures. Further, many BITs do not even have transparency provisions.

Concerns of Developing Countries:

Despite the obvious need for private capital inflows developing countries, find it disquieting that proponents of a WTO investment agreement have not rested content with the establishment of a foreign investment friendly regime but have gone beyond that by asking for strong binding rules that would entitle foreign investors to enter countries with complete ease and without subject to any discipline or regulations by host governments. The preference of developed countries to bring investment within the ambit of WTO's is essentially to obtain the benefits of principles regarding 'national treatment' and MFN. If one were to recall that before the establishment of WTO in 1995 these core principles governed only trade in goods. They were extended to trade in services and intellectual property only after the Marakesh Declaration. To apply these principles to something different like investments is regarded by many in developing countries as detrimental to their interests.

One important conceptual reason for their opposition is the perceived violation of the well established norm of international law i.e. that every country has a sovereign right to regulate the entry and operations of foreign investments. On operational level objections of developing countries are especially strong to application of the principle of "national treatment" to investments at the pre-establishment phase. This deprives developing countries the right to control the entry of foreign investment. When applied at the post-establishment phase it impairs the ability of governments of developing countries, to give preferential treatment to local firms for encouraging industrialization or channeling foreign investment in directions deemed necessary in the national interest.

Other Relevant Issues:

Many other issues are also relevant including that of the scope of the term 'investment'. There has been a divergence of views as to whether a narrow definition (enterprise or transaction-based) or a broader one (based on assets, with options to include or exclude various categories of investment) is adopted. Both the United States and Canada favour adoption of a broader definition (WT/WGTI/W/142 and WT/WGTI/W/113) respectively. On the other hand developing countries in order to restrict scope and intrusiveness of the proposed WTO investment regime have been supporting adoption of a narrow definition. They contend that the Doha mandate in this regard is for long-term investments only that are relevant for the expansion of trade. They therefore oppose inclusion of portfolio investments in any international regime because these are relatively less stable and are a "flightier" form of investments as compared to FDI. Hence they strongly favour some regulation by host governments of this kind of volatile and unpredictable inflows.

Issue of Transparency:

There is a general agreement about enhancing the element of transparency in an investment regime. This is considered crucial for establishing stable, secure and predictable environment for foreign investment. The main points relevant in this regard pertain to the nature and depth of transparency provisions and their scope. Developing countries are concerned mainly with the cost of compliance particularly in view of financial burdens presently borne by them in complying with existing WTO regime.

Settlement of Disputes:

An important element in an international investment regime would be the type of dispute settlement mechanism. There is a divergence of views on this point. Many developed countries (e.g. Canada) are for the adoption of the existing WTO's Dispute Settlement Understanding (DSU) (WT/WGTI/W/147) as they find it logical, appropriate and well tried. Developing countries by and large, feel that this would be clearly inappropriate and impose intolerable burden on them. This issue has to be resolved in a pragmatic fashion. Insistence of developed countries on adopting WTO's dispute settlement mechanism in entirety is a significant obstacle to an agreement on investment. They need to show flexibility and give up excessive adherence to the form of the mechanism. The objective should be to install a dispute resolution system which is credible as well as acceptable to both developed and developing countries. A rigid stance to tread on the beaten track of WTO's DSU would be divisive. Developing countries on their part should try to become proactive and develop some alternative models which may be such that both groups of countries may be to able live with.

Several countries have highlighted the need to identify ways of strengthening the consultation phase of the dispute settlement process so that it would more usefully serve needs of the host and the investing country (EU,T/GTI/G/141). Further, the nature and kind of remedies to be provided to a successful party needs to be agreed upon. At present in bilateral investment agreements, there is usually a provision for the establishment of a tribunal, empowered to award monetary damages and/or restitution of property to the investor if a host state is found to be in breach of the agreement. (The arbitral tribunal is not, however, empowered to order a host State to revoke or modify an inconsistent measure or policy). Adoption of such a system in the prospective agreement, making possible the award of damages, would differ a

great deal from the WTO's DSU, where neither panels nor the Appellate Body can recommend the payment of monetary damages. It is yet to be seen if a change of this kind would be acceptable resulting in introduction of concept of the monetary damages.

Development Provisions:

Developing countries would like incorporation of meaningful development provisions in the proposed investment regime. The provisions are regarded as a horizontal issues, having a positive impact on all the themes identified for clarification by the Working Group. The development provisions, above all, should enable developing countries to adopt 'policy flexibility' particularly in matter of choice of investments that would contribute to the expansion of trade in the light of national interests (WT/WGTI/W/148).

Some countries have proposed a dedicated 'Development Clause' in the substantive part of all the investment agreements, which in their view, would be more efficacious than the declaratory preambular language in the multilateral agreement itself. Many developing countries have been also favoring negative list approach of, scheduling specific exceptions to general obligations rather than a GATS type positive list. The latter constricts the power of choice more stringently.

Case for a Multilateral Regime:

There is undoubtedly a seller's market for foreign investments at present. Consequently there is a strong likelihood of increasingly unequal and asymmetrical arrangements unless a multilateral regime is adopted. Efforts for establishing a multilateral regime have been, however, driven so far by developed countries. From 1995 to 1998, a Multilateral Agreement on Investment ("MAI") was

under negotiation within the Organization for Economic Cooperation and Development ("OECD"), a group of thirty of the world's largest and most developed countries. Many developing countries raised vocal objections to the MAI. Human rights and other non-governmental organization ("NGO") also mounted a massive coordinated attack on it. Over the course of 1998, the negotiations were suspended, and finally terminated.

Given the growing importance of private capital flows, and flaws of a BIT based system it is plainly in the interest of developing countries to have a stable and balanced multilateral regime for foreign investments. They should therefore try to work for adoption of a multilateral agreement on investments (within the framework of WTO or as a stand alone, independent arrangement), universalizing a legal framework for a liberal investment regime in the same way that the GATT/WTO has universalized a liberal trade regime. The evident need for a multilateral framework is at times lost right of by developing countries due to inner contradiction in their policies leading to different postures on the same issue before different bodies. It would be helpful if they were to remind themselves of the importance of a multilateral framework when formulating their response to proposal of extending WTO regime to investments.

By smart negotiations it may even become possible to get core principles (at least to some extent) about conduct of transnational corporations and transfer of technology included in this regime. A multilateral regime, needless to say, will have to be balanced and take full care of interests of investors/source countries and ensure sustainability of a liberal investment environment. The value of such a framework will be greatly enhanced if it is accompanied by a set of codes addressing

a range of problems, such as environmental protection, restrictive business practices and tax policies.

Once both developed and developing countries reach an agreement on modalities (for this first of all it would be necessary to have an agreement on the exact meaning and scope of term “modalities”) it should be possible to make substantial progress. This would be greatly facilitated if developing countries are not asked to make unreasonable commitments. It would be pertinent to recall here that Working Groups were explicitly directed that “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”. These words, prima facie should give some comfort to developing countries. The important task - would be to hold major trading nations to this development friendly declaration and to make them live up to their word.

Competition Policy:

With respect to the competition policy para 25 of the Doha Declaration mandated the Working Group on the Interaction between Trade and Competition Policy to focus on the clarification of:

- Core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels;
- Modalities for voluntary co-operation;
- Support for progressive reinforcement of competition institutions in developing countries through capacity building.

Relevant Issues:

For proper functioning of the market economy, no doubt, competition is of great significance. Nearly eighty WTO members countries including about fifty developing countries and transitional economies have already competition laws (also known as anti-monopoly and anti-trust law). These laws seek to address, inter alia the problems of the price fixing, other cartel arrangement, existence of monopolies and anti-competition arrangements (vertical agreements) between suppliers and distributors.

In the context of international trade concerns have been articulated that gains from liberalization may be thwarted by private anti competition practices. It is also felt that effective competition policies can play an important role in wide dispersal of benefits of liberalization and market based reforms. There is a broad agreement among WTO members about the need for anti- competition laws in their countries. There is also general support for enhanced co-operation among members of WTO in tackling anti-competitive practice. Though in DDA developing countries have agreed as to the need for a multilateral framework for competition policy but still their doubts remain. Hence the question whether extension of the multilateral discipline of WTO to competition policy would be appropriate and will it really help in expansion of international trade. Being uncertain about the desirability of such an arrangement some of them favour instead bilateral and regional approaches in the matter.

The subject of competition is complex and can be viewed from many perspectives. For the developed countries a robust competition policy in developing countries would ensure a level playing field which they feel is essential for expansion

of trade and by the same token, would lead to a greater market access (i.e. essentially to the products and services of developed countries). Seen from the perspective of developing countries, proponents of a WTO competition agreement want to have a system of multilateral rules that would first of all oblige members to establish national competition law and policy and thereafter incorporate 'core principles of WTO' i.e. transparency, non-discrimination (MFN) and national treatment in a multilateral regime.

Their objections have been summarized by an expert as under:

> There is hardly any justification for application of a multilateral set of binding rules to regulate the competition policies and laws of various countries. Bringing a regime for competition falling within the ambit of WTO discipline would create a lot of problems in developing countries. There is apprehension that incorporation of competition in WTO framework will be skewed in favor of industrial countries and would be detrimental to development interests of developing countries.
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> (Martin Kohr)

Aspects Attractive to Developing Countries:

One aspect of competition policy should, however enjoy support of developing countries but which touches the raw nerve of industrial countries. This relate to the abuse of trade remedies such as anti-dumping actions against products of poor countries. Obviously such actions are anti-competition and logically should be strictly regulated. A good multilateral regime should be also able to control emergence of hard core cartels. Likewise restrictive business practices of large firms (mostly located in developed countries) also hinder competition and should be brought within the ambit of the proposed multilateral framework. Similarly, action should be taken in respect of the trend toward mega-mergers and acquisitions. Emergence of huge corporate entities poses a threat to the competitive position of

local firms in developing countries. In all these cases the ardour of developed countries for anti-competition crusade vanishes in the thin air.

Wide Spectrum of Views:

There is undoubtedly a lot of differences in views and perspectives of major *demandours* of a multilateral framework on trade and competition policy, (such as the EU and Japan) and those of developing countries. Differences are not however confined to the industrial and developing countries. There is lack of unanimity of views even among supporters of a multilateral framework as to the scope and nature of exceptions that could be built in the proposed system. Korea for example pleads for liberal MFN exemptions, especially in the context of regional trade agreements (WT/WGTCP/W/212). The EU on the contrary, is not happy with watering down of the 'core principle' of nondiscrimination (WT/WGTCP/W/222). On the issue of hard core cartels the EU is the only significant members among developed countries to clearly favour banning such practices under the prospective multilateral regime. The US, Canada, Japan, Korea and even Thailand are on the contrary, for promoting voluntary co-operation. Some other countries before making an informed decision have asked for a clearer definition of hard core cartel as well as the extent to which some of them could be defended on efficiency ground.

Other worth mentioning points of view are: New Zealand proposed adding 'comprehensiveness' to the coverage of competition policy (WT/WGTCP/W/210), Thailand strongly advocated the inclusion of 'special and differential' treatment for developing countries in the core principles of competition policy (WT/WGTCP/W/215). Many countries highlighted the importance of providing 'flexibility' and acceptance of the principle of 'differentiation' e.g. India (WT/WGTCP/W/216) and Thailand (WT/WGTCP/W/21). They advocated for

acceptance of the concept of differentiation in treatment of domestic firms as opposed to big multinational companies. Several other members advocated affirmative action to ensure the viability, development and efficiency of local firms and institutions in developing countries. Showing some sensitivity to such concerns the EU has been hinting that a framework agreement would not necessarily require a harmonization of domestic competition laws.

One comes across a wide spectrum of view on the shape of competition policy that is sought to be brought within the ambit of the multilateral framework. No doubt some of the demands of developed countries would not be acceptable to developing countries. However these demands represent opening/initial positions. How can they be made to give them up or modify them unless negotiations start? Likewise, some of the views of developing countries may not be agreeable to developed countries. However, out of the great variety of proposals put forward by various member countries, it should be possible after a genuine dialogue with an open mind to evolve a consensus on strengthening pro-competition policies and adoption of a multilateral framework that would not entail unbearable costs to developing countries.

Government Procurement:

The Doha Declaration as stated above recognized a case for a multilateral agreement on transparency in government procurement and the need in this regard for enhanced technical assistance and capacity building. The Declaration also explicitly provided that the negotiations shall be limited to the transparency aspects and, therefore, will not restrict ability of countries to give preference to domestic suppliers and supplies (Para 26 of DDA).

The multilateral Working Group on Transparency in Government Procurement was mandated 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'. Procurement by government agencies constitutes a sizeable chunk of public expenditure. Not only it plays a significant role in domestic economies but it is also greatly relevant for international trade. Discriminatory procurement practices and policies lead to trade restrictive situations and distortions in international trade though here we are concerned with only one aspect of the process i.e. transparency in government procurement of "goods". The procurement in services is covered by General Agreement on Trade in Services (GATS). It would be also relevant to point out there is already a "plurilateral" agreement on government procurement. It binds only the countries that are signatories to this agreement.

Concerns of Developing Countries:

A large number of developing countries are uneasy with the 'intrusiveness' of proposed regime. They, therefore, seek to limit the scope of the negotiations in this area. Many of them are reluctant to begin negotiations even on transparency aspects of the subject because they suspect that an agreement on an apparently commendable point (i.e. transparency) would be a precursor of market-access agreement. They are also apprehensive about being subjected to a WTO dispute settlement system. Some developing countries e.g. India feel strongly about the importance of using government procurement as one of the few legitimate policy tools for achieving socioeconomic objectives. The United States has been trying to

assuage concerns of developing by maintaining that that greater transparency would not affect their capacity to do so.

Developed Countries' Views:

The developed countries particularly US, the EU and Switzerland on the other hand are attempting to broaden the scope of such an agreement. They would like it to be legally binding and effective (i.e. Japan: WT/WGTP/W/37). Canada while endorsing the need for flexibility for choosing criteria, for awarding contracts, qualification or registration, insists on transparency of the process (WT/WGTGP/W/36). The US has proposed four elements around which to organise an agreement:

i) General parameters of a potential agreement;

ii) Transparency of procurement systems;

iii) Transparency of specific procurements; and

iv) Operational provisions to fulfill the objectives of a potential agreement (WT/WGTGP/W/35).

An approach advocated by Australia is found more acceptable by many developing countries, which suggests a non-prescriptive framework that leaves up to the discretion of each government to decide what methods to use to ensure transparency (WT/WGTGP/W/31).

Case for Multilateral Regime:

One does not really understand the resistance of developing countries to adoption of a multilateral regime for transparency in government procurement. Lack of transparency breeds corruption, adds to cost, of projects and of doing business and frustrates development efforts. A multilateral regime would strengthen

hands of those who would like to fight corruption and bring about critical reforms. There will not be any problem in extending preferential treatment to local firms. The only requirement would be do so in an open and transparent manner. To oppose adoption of such a regime on theoretical/ideological objection of intrusiveness is not in the interest of developing countries. Let us not be also paranoid about the possibility of market access demand. Both GATT and GATs have specially exempted government procurement regulating from government market access commitments. Developing countries would be able in this regard to resist any future demand on market access. It is highly unlikely if developed countries would do so in the short or medium time horizon as that would mean re-opening of an accord constituting foundation of the present international trading system. Ultimately market access issue will have to be tackled as a part of a global comprehensive accord. But that day is not around the corner.

Trade Facilitation:

Para 27 of the Doha Declaration provides that until the fifth WTO Ministerial Conference, the Council for Trade in Goods "shall review and as appropriate clarify and improve relevant aspects of Articles V (Freedom of Transit), VIII (Fees and Formalities Connected with Importation and Exportation) and Article X (Publication and Administration of Trade Regulations) of the GATT 1994 and identify the trade facilitation needs and priorities of members, in particular developing and least-developed countries."

Relevant Issues:

Trade facilitation can be defined either narrowly or broadly. A narrow definition would cover efforts to facilitate the logistics of moving through ports or

accelerating movement of documents. Defined broadly, “it includes the environment in which trade transactions take place to include transparency, efficient custom handling by staff and regulatory regime, as well as harmonization of standards and conformance to international or regional regulations”. The issue of security in the post 9/11 world has also become relevant to the conduct of international trade adding a new dimension to challenges of trade facilitation.

EC (G/C/W/394) and Japan (G/C/W/401) and many other developed countries would like streamlining of processing of imports under Article VIII (Fees and Formalities Connected with Importation and Exportation). As a matter of fact EC accords special importance to this Article and advocates in this connection adoption of ‘operational’ rather than ‘aspirational’ rules. Other proposals of EC are:

- Article X of the GATT (on publication and administration of trade regulations) should be converted into an agreement on trade facilitation;
- Members should 'take administrative actions, decisions or rulings affecting importers or exporters only where a legal basis to do so is established' – that is, that members' ability to take action at the border should be limited to what is allowed by a WTO trade facilitation agreement;
- A 'regular consultative mechanism' with private sector bodies should be established, with provision for consultation between interested parties – both governments and the private sector – on proposed new legislation and regulations before they are implemented.

Developing Countries’ Problems:

Developing countries however feel that the above proposal would, inter alia, affect their ability to control exploitative practice of transfer pricing. They are also reluctant to carry out burdensome reforms – “all in order to help suppliers from the developed countries”. Malaysia expressed the view rule making cannot build customs infrastructure in developing countries. A huge outlay would be required

to do so. It has been also argued that the environment in developing countries is very different from that of developed countries. Therefore imposing the concepts, rules and formulae that had worked in industrialized countries may not be useful for developing countries.

Developing countries do recognize the importance of trade facilitation but feel that adoption of new practices would cost a lot of money. Thus they feel that improvement should be encouraged through generous financial and technical foreign assistance. This would be the correct way to help them to upgrade their facilities in an appropriate manner. It would not be in the interest of developing countries to subject trade facilitation to binding rules and obligations in the WTO. This would give rise to imposition of obligations on them to undertake expensive programmes. Besides this, some of the obligations may not be even in their interest at all. Thus the general stand of developing countries is that trade facilitation measures have to be taken autonomously.

EU has been trying to reassure developing countries by its willingness to accept WTO elements of special and differential treatment in implementing future WTO commitments in respect of trade facilitation to help reduce some of these burdens. It is also recognized that there can be difference in levels of commitments particularly for the least-developed countries, allowing the grant of longer transition periods to enable progressive implementation and extending technical assistance for building their capacity (G/C/W/222).

Most of the developing countries have not submitted any substantive proposal about trade facilitation. Some of them (Uruguay, Pakistan, Malaysia, India, Indonesia and Cuba) while highlighting their limited implementation capacity have

taken the stand that in the spirit of Para. 27 of the Doha Declaration, e.g. the exercise should consist of a review and not for any negotiations.

Developing countries have also suggested greater attention to some other aspects of trade facilitation which are of greater relevance. Brazil has, for one, proposed that refraining from the abusive and protectionist use of trade instruments, as well as completing the WTO harmonisation work programme on rules of origin (i.e. harmonising the diverging methodologies in use for calculating the origin of a good), should be included as important elements of a trade facilitation effort. Developing countries by and large have been emphasizing that the best way to facilitate trade for them, would be to eliminate trade barriers to their products.

From the perspective of developed countries an agreement on trade facilitation would, of course, ensure a 'locking-in' of reforms that would make WTO rules on customs procedures 'irreversible'. Developing countries finds this very outcome to be undesirable and fraught with myriad of risks for them. They question the need for new binding obligations on Article VIII, expressing particular concern over the potential benefits of 'excessive disciplines' in comparison with the costs.

While deliberating upon the subject of trade facilitation, it has become necessary to factor in the implications of international security code adopted by USA (and some other countries as well). Under this system, it is mandatory to inform authorities in the destination country twenty four hours before loading of the cargo at the port of origin, "of all the details of the ship entering the US port, of the entire manifest of cargo in containers". In fact many other security checks, in addition to the above requirements form part of a comprehensive system covering economic, business and transport activities in a country that trades with the US and countries that have adopted this code. These measures and regulations aim at cargo and conveyance

visibility and securing access to information on goods, equipment conveyances and crew throughout the supply chain. This system calls for substantial upgrading of infrastructure in developing countries that can only take place with assistance from major trading nations. Such assistance is unlikely to be extended till developing countries agree to bring trade facilitation under the ambit of a multilateral framework proposed by industrial countries.

Major Issues:

Two issues really divide developing and developed countries. First is the issue of cost. Many developing countries do not have sufficient resources. Second the issue of locking in reforms through the mechanism of a multilateral regime.

As for costs, developing countries instead of opposing adopting of a multilateral regime should try to get commitments from industrial countries for adequate and regular aid.

As regards locking in of reforms these are again in the interest of developing countries, given the inconsistency in their policies and failure to persist with reform with the requisite level of commitment. A multilateral regime for trade facilitation is apparently a good solution to this important problem.

To Negotiate or Not to Negotiate that's the Question?

Agreement on Modalities:

An explicit consensus on modalities (as provided in the DDA) is a condition precedent for commencement of negotiations on Singapore issues. Developing countries, it appears, in order to avoid that have been so far palpably disinclined to evolve a consensus on modalities. They have expressed concerns in discussion held at the Cancun "inter alia, about the impact that multilateral rules on

the four Singapore Issues would have on their domestic policies and the fact that they have neither the negotiating resources nor the capacity to implement obligation, which such multilateral rules would entail". It would be relevant here to point out that a clear decision (to which developing countries have been parties) in regard to Singapore issues was taken at Doha. They are bound now by norms of international relations to make sincere efforts to develop a consensus on modalities as a first step. There is, of course, genuine difference of views on the meaning of modalities. However, given the good will and good faith of parties, these differences can be resolved. Developing countries should not try to achieve through their extreme and rigid stance what they failed to achieve at Doha. They chose there to accept commencement of negotiations (of course following a sequence requiring first an agreement on modalities) as well as agreed in principle about the need for a multilateral framework for the new areas.

Negotiating Resources:

As to the issues of negotiating resources and the capacity to implement obligations, later on, they have been making justifiable and sustainable points. However, receptivity to their point of view in this regard has diminished as it forms a part of efforts to stall emergence of consensus on modalities. Suspect motives have thus tainted valid points. It would be, therefore, in their larger interest to establish first their good faith about modalities, then highlight these constraints and make their removal a part of negotiations.

Mismatch between Perception and Realities:

Let us now see if there is indeed a mismatch between the perception of Singapore issues by developing countries and the reality on the ground. An answer to

this question would involve a determination as to costs and benefits of commencing negotiations on these issues and ultimately reaching an agreement on them with developed countries member of WTO.

Costs and Benefits:

As to costs, developing countries have been pointing to three kinds of costs: (a) Financial outlay and strain on managerial resources, (b) Costs in case of non-compliance of new regime including risk of cross-retaliation if complaints upheld by WTO, and (c) Intrusiveness of the prospective framework, leading to violation of principles of international law based on the concept of national sovereignty e.g. several developing countries stated that the "adoption of these new issues is a direct attack on sovereignty and freedom".

As for benefits, the stalled negotiations on issues of interest to developing countries would restart if we show willingness to commence negotiations. This by itself will be important as the multilateral process will be revived. In case, developing countries negotiate smartly by making concession on new issues they may be able to obtain reciprocal concession on issues of interest to them. The price asked for by developed countries in terms of concession on Singapore issues may not really turn out to be excessive or unreasonable provided we negotiate hard on the content of new regime (including dispute settlement and the issue of differentiated and special treatment).

Viewed dispassionately and in proper perspective many elements of the proposed framework are in the interest of developing countries as discussed elsewhere. It is also relevant to bear in mind that many countries including Pakistan have already adopted autonomously or thinking of adopting frameworks in respect of investments, competition policy, transparency in public procurement and trade

facilitation, which are substantially in consonance with the proposed multilateral regime under WTO.

It would be observed many reservations on Singapore issues stem from the concept of sovereignty and norms of international law. Developing countries in this connection should not be overly influenced by their existing notions about national sovereignty and perceived violation of international law principles. These concepts should be dynamically viewed and the impact of globalization on them should be recognized. It would be wrong to resist changes on basis of a theoretical construct, whose factual foundation have undergone a profound change. The views about national sovereignty as held in the 18th and 19th Centuries and international law concepts based on this foundation should give way to a concept more in tune with realities in the present era of globalization. As it has been pointed out:

> It is now generally recognized that sovereignty is neither absolute nor indivisible. In fact, sovereignty has a much restricted meaning today than in the eighteenth and nineteenth century when with emergence of powerful highly nationalized states few limits on stale's authority were acknowledged.

In the similar vein, the famous jurist Louis Henkin remarks:

> It is time to bring sovereignty to earth; to examine, analyse, reconceived the concept, cut it down to size, break out its normative content, repackage it perhaps even rename it.

In view of the above, the writer recommends that developing countries should initiate steps firstly to narrow differences on the meaning and concept of modalities, start preparation for negotiations, ask for technical assistance to build capacity for this purpose and finally commence negotiations with an open mind.

Pakistan's Position:

Pakistan has already on its own established new institutions and processes in fields of investment, competition policy and transparency in public procurement which measures up to international standards.

Investments:

Pakistan's investment regime is one of the most liberal in the world. Foreign investors are permitted to hold 100% of the equity in most of the ventures. No permission of the government is required for setting up any industry (with some exceptions essentially on account of security reasons). In general, there is no restriction on repatriation of capital and profit (some exceptions are in regard to service sector where certain limits are prescribed). For Pakistan, whose investment regime is both liberal and non-discriminatory there would be no difficulty in conforming to international standards and disciplines of WTO. It would definitely benefit from the establishment of a multilateral framework.

Competition Policy:

As regards issue of competition, Pakistan has a statutory quasi-judicial authority namely Monopoly Control Authority, which is a regulatory body tasked to prevent undue concentration of economic power, unreasonable monopoly power and restricted trade practices. Here again we should not have any problem to bring competition policy within the ambit of WTO.

Transparency in Procurement:

As regards, transparency in government procurement, it is already the normal practice. In order to enhance it, a Public Procurement Regulatory Authority (PPRA) has been set up in 2002. The Authority has been assigned the responsibility

of taking measures necessary for improving governance, management, transparency, accountability and quality of public procurement of good services and work in the public sector.

Trade Facilitation:

As for trade facilitation, Pakistan is fully conscious of the need to reduce invisible costs which adversely affect our competitiveness. From its perspective, it is indeed time after more than four years of exploring and analyzing the scope for WTO rules for trade facilitation, to move to the stage of negotiations. Proposals made by developed countries should be objectively considered and we should also formulate our proposals for facilitating trade. We should also try to secure sufficient funds so as to able to bring about improvements in conducting international trade.

In the opinion of the writer, it would be in the fitness of things if Pakistan does not only support holding of negotiation but also persuade other developing countries about the desirability of quickly evolving a consensus on modalities for negotiations on Singapore issues. Pakistan can indeed become a bridge between proponents of new framework and those who have strong reservations about it.
