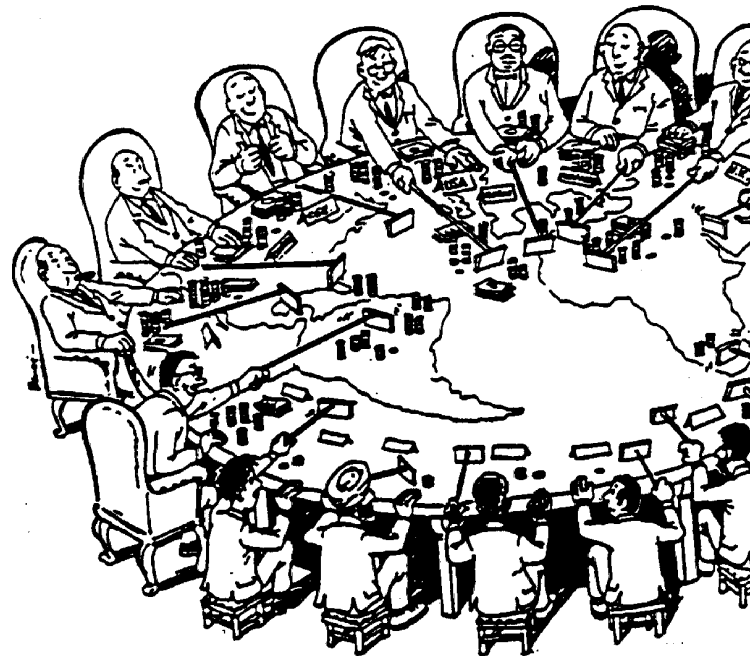


CUTS Centre for  
International Trade,  
Economics & Environment

# Putting our Fears on the Table

*Analyses of the proposals on  
investment and competition  
agreements at the WTO*



कट्स  CUTS  
Twenty Years of  
Social Change

1984 to 2003

#0312

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competition agreements at the WTO*

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## *About IWOGDA*

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International Working Group on Doha Agenda (IWOGDA) was a programme launched by CUTS in the aftermath of the Doha Ministerial Conference. The inclusion of the so-called new issues, namely, investment, competition policy, trade facilitation and transparency in government procurement, in the Doha Declaration threw up new challenges before the developing countries.

Many developing countries are reluctant to discuss these issues at the WTO. Awareness of these issues has been traditionally low in these countries, not only in the civil society, but also amongst policymakers and trade negotiators. Consequently, research and dialogue on these matters remained confined to a limited circle and there is an urgent need to promote understanding on a broader plane.

The IWOGDA programme was a response to this situation. The programme is intended to promote broad understanding of these issues, involving leading international experts, practitioners and other stakeholders in the areas taken up and/or proposed at Doha for future negotiations. In the first phase of the programme, a project on competition and investment policy was undertaken. The programme has plan to do research on other issues of the Doha agenda.

The main objectives of the programme are to:

- develop a knowledge base and understanding on the principles, provisions, modalities and implications of potential agreements on these issues;
- assist countries, especially the developing ones, to evolve appropriate negotiating positions on these issues;
- build the capacity of negotiators and other stakeholders on these issues;
- feed WTO Working Groups with the views of experts, practitioners and other stakeholders on these issues;
- sensitise developed countries in general and the protagonists of WTO agreements on these issues in particular to the concerns and feelings of developing countries; and
- assist countries in clearing their doubts about the utility of multilateral agreements on new issues in order to enable them to present well-argued concerns at the negotiating table, rather than just rely on rhetoric and hearsay.

## *Preface*

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Just after the Doha Ministerial meeting held in November 2001, I met UNCTAD Secretary General: Rubens Ricupero at Geneva. Being from India, the conversation turned to India's stand at Doha on the 'Singapore issues' and how that had created some problems. He asked me to impress upon the Government of India that it is pointless in just opposing the 'new' issues at the WTO without putting forward constructive arguments. "Let them put their fears on the table and that should guide the negotiations". I did as advised, but did not stop there. We drafted a proposal to do work on the Singapore issues, and discussed the matter with our contacts at DFID, and the Dutch and Swedish governments. All agreed to support the project. This volume is a result of the project.

The 'Singapore' issues, namely, investment, competition, transparency in government procurement and trade facilitation, figured quite prominently in the Doha Development Agenda. As per the Doha Ministerial Declaration, for these issues "negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations".

The issues of investment and competition, in particular, have become a matter of intense debate among the member countries of the WTO. Many developing countries, including India, have been opposed to negotiations on a potential multilateral framework for investment and competition. They have been unconvinced of the need for and the value of negotiating multilateral rules on investment and competition. Broadly, some of the concerns raised have been:

- Will adequate benefits be realised from a multilateral framework on investment and competition?
- Once negotiations start, will the proposed agenda be restricted only to the existing elements, or will it be expanded in the interest of developed countries?
- Will an expanded agenda reduce options for developing countries to regulate in the interest of development?

For negotiations to result in a balanced framework of rules, the design of the elements of potential agreements have to be premised on objectives that suitably incorporate the particular needs and concerns of developing countries. There are various dimensions to potential multilateral agreements on competition and investment, the understanding of both the costs and benefits of which requires in-depth research and active dialogue. There is a strong call for developing countries to prepare a negotiating stance on both these issues, based on a judicious cost-benefit analysis of the issues involved.

It is also feared by many that due to the imbalance in negotiating power and capacity at the WTO, despite opposition from the developing countries, negotiations on these issues may be launched at the Fifth WTO Ministerial at Cancun, Mexico. This increases the urgency for developing countries to understand the issues and evolve a negotiating stance on competition and investment, based on informed decisions.

In the light of the above, in June 2002, CUTS launched a programme called the International Working Group on Doha Agenda (IWOGDA) involving leading international experts, practitioners and other stakeholders in the areas taken up and/or proposed for negotiations at Doha. Research analysis by a core group of experts from Southern countries on the interpretation and development implications of each of the proposed elements in potential agreements on competition and investment has been carried out under the IWOGDA project. The core experts drafted issues papers which were discussed in a brainstorming meeting at Jaipur, India. Two policy briefs, one on competition and the other on investment, were prepared on the basis of the issues papers and the discussions in the brainstorming meeting. The policy briefs were debated in another meeting at Geneva before giving them final shape.

This volume is a product of this comprehensive research and dialogue. It puts together the accumulated output of the project, i.e., the policy briefs, the issues papers and the proceedings of two meetings held to discuss the issue papers and the policy briefs. It is designed to facilitate the formulation of negotiating positions of developing countries on investment and competition policy.

Many have found the work to be of high quality, and that it will really help developing countries to comprehend and deal with the issues in the WTO context. Further, demands were also made on us to look at the other two 'new issues' of trade facilitation and transparency in government procurement.

Thus the Phase II of IWOGDA research project on trade facilitation and government procurement has also been formulated. In the same vein as in IWOGDA I, it aims to build capacity of developing countries in understanding the implications of possible WTO frameworks on trade facilitation and transparency in government procurement.

Jaipur  
February, 2003

**Pradeep S Mehta**  
Secretary General

## *Introduction*

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Competition and investment are by no means new issues. Neither is their occurrence in a multilateral context recent. As a matter of fact, both have been on the world-trade agenda since the aborted Havana Charter. They figured quite prominently in the Doha Development Agenda and have since been centre stage in the WTO discourse. So much so that there is a keen possibility that negotiations on these issues may be launched after the Fifth WTO Ministerial at Cancun, Mexico. The current surge of interest in these two issues should, therefore, be quite obvious.

Although the issue of trade and competition policy is very much present in many of the existing WTO agreements, it has not, as yet, been systematically addressed in the WTO negotiations. Similarly, while several WTO agreements relate to investment, there is no multilateral accord. A number of WTO members, including the EU, South Korea and Japan are supportive of multilateral agreements on competition and investment. However, there are others like India, Malaysia and Egypt that have been opposed to such agreements, while the US has been sitting on the fence.

Many developing countries continue to be sceptical about the benefits of a multilateral agreement on investment or competition. There are fears that an agreement on investment would exacerbate the existing limitations imposed by TRIMs, which is perceived to have reduced the scope for governments to regulate transnational corporations and prevented them from channelling investment flows according to their specific developmental needs and strategies. Many of these concerns are shared by rich countries too.

Enthusiasm for a binding multilateral competition policy has also waned. Developing countries once supported the idea of converting the UNCTAD Set into a binding instrument. However, their unsatisfactory experience with the WTO system has caused in them widespread disillusionment. The reasons are not far to seek. While developing countries were obliged to make binding concessions

to developed countries, the special and differential treatment (S&DT) expected in return was not. Unsurprisingly, S&DT never materialised in any significant way. The EU and Japanese have adopted an approach of 'market access' push to competition policy and for obvious reasons. Freer access to developing-country markets would allow huge transnational corporations to swallow up local companies.

The experience with TRIPs, which involved costly and time-consuming legal and institutional reforms, has made developing countries reluctant to bear the burden of any further multilateral agreements. Furthermore, it is believed that such agreements will not have sufficient coverage. For example, export cartels have been deliberately kept out of past agreements to the detriment of developing countries which import more than they export.

Developing countries have resisted multilateral agreements on competition and investment in large measure on account of their experiences in the context of the implementation of previous WTO agreements. But the fact remains that many of these implementation problems could have been avoided if developing countries had actively engaged in negotiations. However, this was difficult for developing countries, as awareness of competition and investment issues has been traditionally low in these countries, not only in civil society, but also amongst policymakers and trade negotiators. Consequently, research and dialogue on these matters remained confined to developed countries. Now, there is an urgent need to promote understanding on a broader plane.

Sensing the urgent need to promote broad understanding of these issues, CUTS took up a programme called the International Working Group on Doha Agenda (IWOGDA) involving leading international experts, practitioners and other stakeholders in the areas taken up and/or proposed for negotiations at Doha. In the first phase of the programme, we have finished a project on



competition and investment policy. In the future, we propose to take up research on other issues of the Doha agenda.

During this initial project, a number of papers on various aspects and elements of potential competition and investment agreements and two policy briefs were produced for debate and discussion by a large group of individuals. The main objectives of the research programme were to:

- develop a knowledge base and understanding on the principles, provisions, modalities and implications of potential agreements on competition and investment;
- assist countries, especially the developing ones, to evolve appropriate negotiating positions on competition and investment at the WTO;
- build the capacity of negotiators and other stakeholders on competition and investment issues;
- feed WTO Working Groups with the views of experts, practitioners and other stakeholders on the issues of competition and investment;
- sensitise developed countries in general and the protagonists of competition and investment agreements in particular to the concerns and feelings of developing countries; and
- assist countries in clearing their doubts about the utility of multilateral agreements on investment and competition in order to enable them to present well-argued concerns at the negotiating table, rather than just rely on rhetoric and hearsay.

For this purpose, a research agenda was drawn up identifying the elements, principles, provisions and implications of potential international agreements. Subsequently, a group of experts was selected to implement this agenda. The core experts prepared

draft issues papers which were discussed at an interactive brainstorming meeting at Jaipur, India.

Two policy briefs, one on competition and investment each, were also prepared. They pooled the analysis/information contained in the issues papers incorporating the inputs from the brainstorming meeting. In addition, some further research was done to make them more comprehensive. The draft policy briefs were also discussed in a meeting at Geneva and enriched further on the basis of the comments received. The members of the network maintained regular contact with each other during the entire process. Comments of the larger group of experts were also incorporated into the documents produced under the project.

This volume puts together the accumulated output of the project. It is organised in three parts. The first part brings in two policy briefs, one on competition and the other on investment. The policy briefs analyse the elements identified in the Doha Declaration for potential multilateral agreements on competition and investment at the WTO. These issues/elements have been discussed in synoptic tables, which cover potential elements discussing the proposals for each element, their implications for development, the issues that need further discussion and the way forward. The second part brings in the issues papers prepared under the project. They will provide the readers with deeper analysis on the issues/elements under discussion. Finally, the third part brings in the proceedings of the brainstorming meeting and the final meeting held at Jaipur and Geneva respectively. The proceedings give a live picture of the kind of debate that the issues concerned are evoking among the stakeholders, especially in developing countries.

## *Policy Brief*

# *Multilateral Competition Agreement*

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### **Introduction**

Standard economic theory states that competition is good for all, and that competition policy promotes consumer welfare and economic efficiency. It is widely agreed that all countries, developed and developing, should have an effective competition policy framework in place, to support fair competition, consumer welfare, economic efficiency and growth.

The forces of globalisation: trade liberalisation, international capital mobility and the subsequent integration of markets has made regulation of markets imperative and reinforced the need for effective competition laws. Not only are national competition laws being instituted to facilitate unilateral efforts towards liberalisation, but also greater cooperation is sought between national competition authorities to support market transactions of an open world economy.

The Doha Declaration, signed at the WTO Ministerial Meeting at Doha in November 2001, recognises “the case for a multilateral framework to enhance the contribution of competition policy to international trade and development” and mandates the Members to “focus on the clarification” of certain identified elements before “negotiations...take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations.”

The prime aim of this Policy Brief is to analyse the elements identified in the Doha Declaration for a potential multilateral competition agreement (MCA). These issues/elements have been discussed in a synoptic table later in this paper, which covers the identified elements of a potential MCA, discussing the proposals for each element, their implications for development, the issues that need further discussion and the way forward.

### **The Agenda**

The pressing negotiating issues with respect to a potential MCA are:

- Relevance of an MCA in the WTO.
- The scope of a potential MCA and the cross border issues that should be considered in an MCA.
- Effectiveness of voluntary cooperation as opposed to a binding one.

### **The Case for and against an MFI**

When the industrialised countries (ICs) in general talk of a competition policy framework, it is for the purpose of establishing domestic competition laws in the developing countries (DCs) so that their national companies do not get privileged treatment. When DCs speak of the possibility of negotiating a competition policy framework in the WTO, it is for the purpose of curbing restrictive business practices at the national, regional and international levels. Thus, while the ICs are more interested in global standards for national competition rules, the DCs talk about global rules on competition. One cannot have the latter without having the former.

### **The Case for an MCA**

A key advantage of an effective MCA would be to check certain private practices of transnational corporations (TNCs) that reduce competition, impair free trade and thus undermine both the gains from trade and the development prospects of countries. Such practices include those that prevent trade liberalisation from having a positive effect (import cartels, vertical restraints between domestic manufacturers and retailers, domestic abuses of dominant position) and those that rob the trading nations of the benefits of trade, export cartels, abuses of dominant position, anticompetitive mergers and international price fixing cartels.

There is mounting evidence that all countries have been victim to the abuse of dominant positions created by TNCs in their markets. However, the impact on DCs is more severe. For example, a World Bank commissioned study<sup>1</sup> conservatively estimates that the DCs imported US\$81.1bn of goods from sixteen publicly known cartel-infested industries and the amount was likely to be an underestimate. These

imports represented 6.7 percent of total imports and 1.2 percent of combined GDP of DCs.

The playing field between the developed and developing countries being unequal, the probability that firms in DCs will be able to create and exploit monopolistic advantages in developed markets, is comparatively low. In addition, it is not wise to expect voluntary cooperation in cases where the commercial interests of the two parties involved differ substantially.

While some of the existing WTO Agreements (TRIPs, GATS and SCM) recognise the need to regulate, they do not deal in a systematic way with the panoply of issues that arise in the context of competition. Bilateral or regional cooperation agreements are useful complements to an MCA but are not substitutes due to their discretionary and optional nature. Moreover, there are very few bilateral agreements between developed and developing countries as there is no particular interest to reach one. These factors strengthen the case for an MCA.

### ***The Case against an MCA***

In the light of dynamic changes in the world economy, most DCs are convinced of the virtues of an MCA. In fact, during the Uruguay Round of negotiations the demand for multilateral rules on restrictive business practices came first from the DCs. It is also this group of countries that once promoted the idea of converting the UNCTAD Set of Multilaterally Equitable Agreed Principles and Rules for the Control of Restrictive Business Practices (the Set) to a binding instrument.

However, what remains as the issue of contention is whether the WTO is the right forum to address the same. The underlying *raison d'être* for opposing an MCA in the WTO is that such a framework is seen as a tool to gain market access for the goods and services of OECD countries-based TNCs in developing economies. DCs fear that their enterprises would be wiped out in the so-called level playing field created by an MCA. When competition is isolated within a local economy, then failure of weaker firms results in gains to the stronger, i.e. the more efficient firms within the economy.

When, however, the winners are TNCs, the gains are extracted out of the economy and consequently there may be welfare losses. The small size of developing countries' economy in global terms places policy makers in a dilemma – local companies must be virtual monopolies at the local level to have the economies of scale to survive global competition.

The above arguments were specific to an MCA, but generally, DCs are also averse on taking new obligations under the WTO. Further they feel that the inequities in the system are too much to allow a fair MCA, if one is crafted.

### **Specific Concerns of DCs**

Calls for an MCA have been based largely on the potential benefits of a MCA for DCs with little consideration of the costs associated with such an agreement.

In general, developing countries that are characterised by less mature markets have to face challenges, which are absent in the ICs, with regard to implementing competition policy/law effectively. These include the inadequacy of business infrastructure both physical and institutional; special problems with thin markets; insufficiently informed and organised civil society; and lack of general support for competition policy which is manifested in the fact that competition is generally overlooked when implementing economic policies such as deregulation, privatisation and investment promotion.

There are merits associated with international cooperation among competition authorities to combat anti-competitive behaviour. One of the major reasons for that is the asymmetric power relations between TNCs and most host governments in the DCs. As a result, it may be difficult to get the incriminating evidence from the TNCs, to be able to prove anti-competitive behaviour. However, it is not clear if the adoption of an MCA could actually promote the desired level of cooperation.

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<sup>1</sup> Levenstein, Margaret and Valerie Suslow, Private International Cartels and Their Effect on Developing Countries (Background Paper for the World Bank's World Development Report 2001, 9 January 2001)

## Scope and Definition

<b>Proposals</b>	<ol style="list-style-type: none"> <li>1. In terms of objectives of the competition policy e.g. effective market contestability, public interest, creating a level playing field, promotion of consumer welfare and economic efficiency.</li> <li>2. Practices to be covered e.g. inclusion of restrictive agreements, anti-competitive conduct, mergers and acquisitions (M&amp;As), abuse of dominance, state aid.</li> <li>3. Timeframe e.g. short-term (hard core cartels) and long term (other anti-competitive practices).</li> <li>4. Take note of the existing GATT, 1994 and WTO Agreements like Anti-dumping, Subsidies and Countervailing Measures, Safeguards, GATS, TRIMs, TRIPs etc.</li> </ol>
<b>What they mean</b>	<p>In terms of objectives, essentially the MCA will be primarily concerned with ensuring market access for foreign firms, as effective market contestability seems to be the preferred choice.</p> <p>A public interest approach is a broader concept than that of competition alone. This will have room for concerns regarding fairness, diffusion of economic power and safeguarding small and medium sized enterprises.</p>
<b>Development implications</b>	<p>Whatever the approach, the burden of adjusting to the new obligations lies with developing countries as the developed countries already have the basic legislation in place.</p> <p>Improving economic efficiency is not always the preferred choice of governments in the face of competing objectives of development such as promoting national champions. Restricting the scope to, for instance, hard core cartels, would mean the adoption of a minimalist framework.</p>
<b>Issues for further discussion</b>	<p>How will restricting international anti-competitive practices in the long run be beneficial to development?</p> <p>In the case of DCs, there is a need to clarify the relationship between competition law/policy and</p> <ul style="list-style-type: none"> <li>• Sectoral regulation;</li> <li>• IPRs; and</li> <li>• Economic development.</li> </ul> <p>Furthermore, the EU's position is extremely complicated. EU speaks about only <i>de jure</i> rules and not <i>de facto</i>. This is not clear on how it will be done. Secondly, no DC has put forward any concise position. This requires further discussion, so that the debate is balanced.</p>
<b>Recommendations</b>	<p>If considering scope in terms of exclusion of certain activities from the MCA's ambit, countries should confront issues such as government subsidies, indirect export subsidies, and the protection of state-owned enterprises, to a degree permitted by the WTO.</p> <p>The scope may be formulated so as to coincide with pre-designated time dimensions (i.e. the short and long term periods). Hence, the MCA should focus on a more narrowly defined scope in the short-term; and a more broadly defined scope in the long-term.</p> <p>Important components within the broad scope of competition policy may include:</p> <ul style="list-style-type: none"> <li>• Privatisation and deregulation;</li> <li>• Effects doctrine; and</li> <li>• Positive comity.</li> </ul>

<b>Core Principles</b>	
<b>Proposals</b>	Apply the basic principles of non-discrimination (MFN and NT), transparency, procedural fairness, etc.
<b>What they mean</b>	These are to reinforce the core WTO objective of protecting the competitive process and setting standards for competition rules across nations.
<b>Development implications</b>	<p>There are fears that it will curtail regulatory autonomy and would provide greater market access (effective opportunity for competition) for foreign firms. This affects the flexibility to have own appropriate models of competition law/policy.</p> <p>May also prohibit or restrict industrial policy measures that favour local firms.</p>
<b>Issues for further discussion</b>	The core principles should take into account cultural, institutional and other such differences between countries. For instance, the legal institution is an important component of competition policy. However, they are divergent across countries, making competition law less effective in some countries than in others. These differences should be compared with benefits of an open economic world market.
<b>Recommendations</b>	<p>There should be uniform application of core principles of competition on a level-playing basis only if national circumstances are comparable.</p> <p>The principles should not come in the way of other national objectives and industrial policy in order to enable local industries to become competitive nationally and internationally.</p> <p>The challenge is to ensure that there is a very clear understanding of what is the meaning of these principles in the context of the enforcement of national competition laws. The wording is crucial to future interpretations.</p>

**Non-discrimination**  
**[Most Favoured Nation (MFN) and National Treatment (NT)]**

<b>Proposals</b>	<p>Require Members not to grant a more favourable treatment to their nationals, goods or services (NT) or favour another Member than to other Members (MFN).</p> <p>Members should permit access to the mechanisms and procedures of its national competition law on a non-discriminatory basis to natural or legal persons resident in the territory of any party.</p>
<b>What they mean</b>	<p>Non-discrimination in a competition regime relates to how the law is enforced within the national jurisdiction.</p> <p>Thus non-discrimination in allowing access, for instance, to a competition authority means that a foreign firm can have equal access as a local firm to lodge complaints with the authority, and have the case examined with the same impartiality.</p>
<b>Development implications</b>	<p>For the countries, which do not have any competition laws, they may have to enact them in order to be able to implement this requirement.</p> <p>Non-discrimination may not guarantee market access to foreign firms in a particular market. Its application in a competition law only increases market access after market entry has been achieved. So developing countries should not expect any improvement in obtaining access to the developed countries' markets due to an MCA.</p> <p>It may come in the way of the State providing subsidies to its national firms providing public services in some important sectors.</p>
<b>Issues for further discussion</b>	<p>With regard to MFN, countries should perhaps look at the parallel issue of mutual recognition of standards agreements. In this kind of case, it will not be expected that, for example, confidential information be shared equally with everyone but those who meet certain criteria should be treated alike.</p> <p>Countries have bilateral agreements on cooperation, which result in providing more favourable access to information, legal assistance and other considerations, which would not be accessible to non-parties to the agreement. Much more work is needed to understand how this principle would apply in a competition regime.</p>
<b>Recommendations</b>	<p>The importance of treating the national and foreign firms even-handedly (NT) under domestic competition rules cannot be ignored. However, DCs should have enough flexibility in terms of exceptions and exemptions. They should also retain its ability to discriminate positively in favour of certain group of firms to pursue their development objectives.</p>

<b>Transparency</b>	
<b>Proposals</b>	Competition authorities should explain to the public what are their priorities, how they investigate and make decisions, and the reasoning behind their enforcement and policy decisions.
<b>What they mean</b>	<p>Means that there should be readily accessible written guidelines, regulations, other public guidance and that there should be ongoing updates of changes in the law or regulations.</p> <p>There is also the view that transparency should include the requirement that the competition authority should set a good example by following the guidelines and regulations that are issued.</p>
<b>Development implications</b>	This obligation, depending on the requirements, can be very burdensome for DCs and LDCs. However, there are indications from the proponents that the commitment would probably be <i>de jure</i> only.
<b>Issues for further discussion</b>	The reasons why a competition authority may decide to pursue an individual enforcement action may rely on confidential information that cannot be disclosed. Procedures in competition law and its administration differ across countries. Thus transparency in the competition context is not entirely clear and what constitutes a transparent competition regime may be a cause of controversy in the future.
<b>Recommendations</b>	<p>It is in the interest of DCs to develop a culture of transparency in the implementation of their competition regime. However, this requires resources and expertise to provide all the necessary elements itemized here that lends transparency to the regime.</p> <p>Any exceptions to non-discrimination must be transparent.</p>

<b>Procedural Fairness</b>	
<b>Proposals</b>	Applies to law enforcement procedures as they relate to individuals and firms.
<b>What they mean</b>	<p>It requires that enforcement be governed by ethical standards, such as providing those subject to the application of the law, a fair hearing of their case.</p> <p>This may give the DCs a voice to complain in a foreign forum where proceedings have implications for them.</p>
<b>Development implications</b>	Guidelines may be evolved as to what constitutes due process, i.e., minimum standards for procedural fairness.
<b>Issues for further discussion</b>	Due process should be firmly anchored in the national legal system, suitably developed on the basis of best practices elsewhere.
<b>Recommendations</b>	DCs need to make it absolutely clear that they retain the sovereign right to choose the type of sanction, the standard of review and the judicial and administrative process which, in their view, are best adapted to their circumstances.



<b>Exemptions and Exceptions</b>	
<b>Proposals</b>	A carve out may be long rather than short term. The idea of periodic renegotiations of MFN exemptions might be feasible.
<b>What they mean</b>	They can be of four categories, those: <ol style="list-style-type: none"> <li>1. aimed at balancing unequal economic or bargaining power,</li> <li>2. aimed at addressing information, transaction costs and “collective action” problems,</li> <li>3. that reduce risk and uncertainty, and</li> <li>4. addresses special sector or interest group demand.</li> </ol>
<b>Development Implications</b>	These would potentially benefit DCs. However, it is foreseeable that there will be opposition to any temporary safeguard exception/opt out. It may, however, be noted that the issue of sectoral exemptions and exceptions is generic and not a developing country issue alone.
<b>Issues for further discussion</b>	E.g. Canada Costa Rica Free Trade Agreement allows parties to establish exemptions in their national competition laws, but they are subject to transparency obligations and periodic review.
<b>Recommendations</b>	WTO commitments should generate predictability and transparency, so that exemptions are well signalled to economic actors.

## Cross-border Issues

<p><b>Proposals</b></p>	<p>The main proposal envisages that the framework be based on core principles rather than specific provisions but action can be taken only on activities of “hard-core” cartels.</p> <p>Proposals could include:</p> <ul style="list-style-type: none"> <li>● various restrictive business practices (including abuse of dominance and vertical restraints);</li> <li>● unchecked merger activity;</li> <li>● export and/or import cartels;</li> <li>● anti-competitive practices of globally dominant TNCs;</li> <li>● policy-induced anti-competitive practices of businesses; and</li> <li>● anti-dumping.</li> </ul>
<p><b>What they mean</b></p>	<p>OECD members failed to reach an agreement in 1998 on banning so-called “hard core cartels” and agreed on a set of non-binding recommendations only.</p> <p>Reaching an agreement on other anti-competitive practices would be even more difficult, but eminently desirable for DCs.</p>
<p><b>Development implications</b></p>	<p>Hardcore international cartels are causing serious damage to developing countries.</p> <p>Export cartels are explicitly exempted (perceived as valuable export promotion tools), yet they have an adverse impact on DCs. Export cartels in DCs might of course help their firms to reach developed country markets and compete with large MNCs.</p> <p>In substance, the capacity of DCs to be able to deal with cross border issues at par with ICs is doubtful.</p>
<p><b>Issues for further discussion</b></p>	<p>National competition laws to the extent that they exist and are implemented, often lack the necessary extra-territorial reach to counter TNCs’ anti-competitive practices at a global level.</p> <p>Anti-dumping laws are inefficient tools to check dumping and they are very often misused. Applying competition rules to dumping will ensure better outcomes.</p>
<p><b>Recommendations</b></p>	<p>It may be useful for domestic competition rules to be supplemented by international avenues of co-operation.</p> <p>It is imperative that DCs receive the co-operation of other jurisdictions, (especially ICs) to obtain information located outside their national territory in a case affecting their market.</p> <p>Although the issue of confidentiality often proves to be a stumbling block in cases of cooperation, certain studies have shown that the type of information needed for investigating hard-core cartels is not strictly business secret or proprietary and sensitive business information.</p> <p>Besides, if hard core cartels are criminal in nature, there is no justification that confidential information cannot be shared.</p>

<b>Cooperation between Agencies</b>	
<b>Proposals</b>	<ol style="list-style-type: none"> <li>1. Voluntary cooperation</li> <li>2. Positive comity</li> <li>3. Aspects of information sharing-requirements relating to nature of case; need for “downstream protection” of confidential information; other protections beyond equivalency; notice to providing party; requirement for a cooperation agreement; downstream disclosure of information etc.</li> </ol>
<b>What they mean</b>	<ol style="list-style-type: none"> <li>1. Enable a country to obtain evidence located in the home country(ies) of the alleged offenders.</li> <li>2. Request that country to enforce its law and is asked to do the same.</li> <li>3. Cooperation: case-specific exchange of information and consultation.</li> </ol>
<b>Development implications</b>	<p>Due to the imbalance of power and capacity, chances of a cooperation provision working in favour of the DCs is poor.</p> <p>The EU-US example is based on a formal cooperation agreement that is buttressed by existing solid relationship.</p> <p>Mutual understanding has been reached through regular informal contacts on any case, aided by the large number of cases that affect both jurisdictions.</p>
<b>Issues for further discussion</b>	<p>Importance of cooperation in enforcing competition authorities’ decisions in cross border cases.</p> <p>Are multiple reviews of the same merger becoming a trade barrier [multiple fees, multiple documentation requirements, different outcomes on the same merger in a number of cases]?</p> <p>Is there a case for a formal agreement to facilitate something that could be done anyway, i.e. exchange of non-confidential information? Do DCs have a right to cooperation, as against the same right for ICs?</p>
<b>Recommendations</b>	<p>Consider the different stages of institutional development of competition regimes when negotiating on the issue of cooperation.</p> <p>Which areas should be covered?</p> <ul style="list-style-type: none"> <li>● hard core cartels;</li> <li>● merger control;</li> <li>● abuse of dominance;</li> <li>● IPR abuses;</li> <li>● policy-induced RBPs; and</li> <li>● capacity and institution building.</li> </ul> <p>Cooperation at what level: regional or multilateral? A way forward is to look at a framework of ‘constructive cooperation’, wherein DCs will have a right without a matching obligation, due to limitation of resources (non-reciprocity).</p>

## Special and Differential Treatment (S&DT)

<p><b>Proposals</b></p>	<p>Broad framework with exceptions and exemptions for developing countries, transition periods and technical assistance.</p> <p>Should also be allowed to deviate from the core principles of the WTO.</p> <p>May be included as one of the core principles that countries have to apply.</p>
<p><b>What they mean</b></p>	<p>Needs of DCs and LDCs would be considered. Thus, they could be granted appropriate flexibility, window for exceptions and exemptions that suit their development level.</p>
<p><b>Development implications</b></p>	<p>The countries will, depending on how the S&amp;DT provisions are framed, be able to apply the MCA in accordance with their capability.</p>
<p><b>Issues for further discussion</b></p>	<p>DCs may be allowed to maintain export/import cartels, promote national champions, etc.</p> <p>There are suggestions that a full-fledged MCA can be concluded with an approach that draws from both the TRIPs and GATS accords. The principles can be laid down with a well-designed transition arrangement. The GATS-type positive list approach could be adopted so that countries may decide on different types of substantive provisions as well as the sectors that may be subjected to an MCA. Suggestion for adopting a negative list approach has also come in this regard.</p> <p>Further, both LDCs and DCs need to implement competition law sequentially and progressively.</p>
<p><b>Recommendations</b></p>	<p>DCs should ensure when they liberalise, national firms are protected in order to sustain and develop instead of being forced out of the market. Hence S&amp;DT for certain industries, particularly their small and medium-sized enterprises, would seem essential in this respect.</p> <p>Further, small countries/LDCs may be exempt from any multilateral commitments, if they have joined a regional competition policy framework rather than develop one of their own.</p> <p>Objectives of S&amp;DT must be very clear based upon a factual determination of need.</p>

<b>Public Interest</b>	
<b>Proposals</b>	<p>No specific proposal has been put forward but seems to be one of the important elements in any discussion on competition policy.</p> <p>Furthermore, the element of ‘regulation in public interest’ has been identified as one in the case of the investment agreement in the Doha Declaration.</p>
<b>What they mean</b>	<p>Highly contestable:</p> <ol style="list-style-type: none"> <li>1. Should meet the twin objective of welfare and equity.</li> <li>2. Is a window for exceptions and exemptions.</li> <li>3. Is it a commonality of interest or a balancing process?</li> </ol> <p>Considered to have two aspects: value judgments and procedure.</p>
<b>Development implications</b>	<p>Although ostensibly in public interest, the WTO reforms have been dominated by efficiency, productivity and contestability considerations. This has many facets, which means it will be difficult to establish public interest.</p> <p>Balance between TNCs acting uncompetitively and the interests of the weak, in this case consumers, and small and medium enterprises.</p>
<b>Issues for further discussion</b>	<p>Need to distinguish three things well:</p> <ol style="list-style-type: none"> <li>(i) What should be the public interest criteria in national competition laws?</li> <li>(ii) What should be the trade-off between equity and efficiency in global rules on competition in an ideal world?</li> <li>(iii) How much in practice should an MCA restrain/constrain governments to pursue ‘other’ aims in competition law?</li> </ol> <p>Very little priority has been given to non-economic considerations such as equity, representation, political accountability, and consultation and distributive outcomes.</p> <p>What is the criterion of evaluation of effectiveness of the public interest? For example, continuation of monopolies in some sectors.</p>
<b>Recommendations</b>	<p>Public interest is an inherent component in competition policy enforcement in all jurisdictions (both ICs and DCs) and hence has to feature very clearly in an MCA.</p> <p>The MCA needs to provide a balance between both the economic interests (market access and merger issues) and the social interests of DCs such as low levels of income, skewed distribution of wealth, low levels of education and asymmetry of information.</p>

## Dispute Settlement

<p><b>Proposals</b></p>	<p>Current proposal says that the MCA would not come under the ambit of WTO dispute settlement mechanism. However, there would be periodic peer reviews, which, to some extent, would bring discipline. It is of course not very clear if peer reviews will be limited to legal provisions only or will include their enforcement as well.</p> <p>However, in a recent submission the EU has indicated that binding core principles imply that “compliance with these principles is subject to dispute settlement”.</p>
<p><b>What they mean</b></p>	<p>There is a view that since the core principles would be treated as binding rather than guiding in the context of the proposed MCA, it would automatically come under the dispute settlement mechanism.</p> <p>Despite assurances from the EU, there is a feeling that once the MCA comes into being, it may be difficult to ignore enforcement issues in the peer reviews or any dispute settlement mechanism envisaged in the MCA.</p>
<p><b>Development implications</b></p>	<p>Doubts have been expressed whether the peer review system will be effective. The peer reviews for the smaller or developing countries will bring significant pressure on them but the same cannot be said about the mighty developed countries.</p>
<p><b>Issues for further discussion</b></p>	<p>Leaving this area vague in the MCA can create huge problems.</p> <p>If no dispute settlement mechanism is there for the MCA then the agreement may become irrelevant.</p>
<p><b>Recommendations</b></p>	<p>An alternative dispute settlement mechanism could be developed, which requires further work.</p> <p>One thing which will be necessary if this is in the WTO framework is to exempt the MCA from the ‘single undertaking’ commitment.</p>

### **Current Country Positions on a Potential MCA**

The proposal put forward by the European Union (EU), the leading proponents of an MCA at the WTO focuses on a framework that “could and should...establish a solid basis for dealing with basic competition policy issues”. However the EU adds that the MCA “would *not* require harmonisation of domestic competition laws [and] would be fully compatible with existing and future differences in national competition regimes”. But, at the same time, the domestic competition law of the Member states should be based on the core principles of non-discrimination, transparency and due process.

The approach to the core principles varies among countries with New Zealand calling for the principle of “comprehensiveness” to be added to the open-ended list of core principles. Recognising exceptions and exemptions to competition laws/policies, it stresses the need to implement these in a manner that would minimise economic distortions. Significantly it stresses ‘flexibility of approach’ that “would recognise the diversity of circumstances in WTO Member countries” and “does not put pressure on developing countries to drive towards particular competition policy outcomes, which may be inappropriate and/or premature.”

Thailand wants “special and differential treatment” to be the fourth proposed core principle for competition negotiations, calling firstly for exemption of developing countries from national and international export cartels (citing the small scale of developing country exporters and importers and the need to counter the bargaining power of larger buyers or sellers from industrialised countries). Secondly, it calls for a gradual introduction of greater transparency and due process in the administration and enforcement of competition law. Thirdly, Thailand has also asked for mandatory cooperation.

Meanwhile, India considers it appropriate to adopt the concept of non-discrimination subject to differential treatment of different countries with different capacities (hence a waiver of the doctrine of national treatment, NT). These countries also have the need and responsibility to provide assistance, positive measures and affirmative action to local firms and institutions in DCs to ensure their viability, development, efficiency and competitiveness.

Subject to transparency and the rule of law, Switzerland is in favour of a modified interpretation

of the NT principle, which, while not discriminating on grounds of nationality, allows in specific instances the use of industrial policy based on public benefits test as well as for other policy choices.

### **The Way Forward**

- Countries should first comprehend the relevance of competition to their development priorities and national policies. Little has been done to raise awareness and appreciation of competition policy among groups that influence policymaking: politicians, legislators, trade unionists, civil society and professional associations. There is a long way to go in this respect, as most developing countries have no competition culture. A top-down approach to inculcating the so-called benefits of competition is not the way forward for DCs, when a competition culture is imposed upon them through external obligations. Keeping this in mind, the discussions should go beyond the level of action on the basis of intuition and towards action on the basis of empirical research. There is a need to carry out an assessment as there is very little information on the impact of competition policy on overall welfare (growth, consumers, firms), especially in a developing economy context.
- A grasp of competition framework implications will in turn enable DCs to make an informed decision on whether or not to adopt one at a regional level or an international level. It must be noted that various studies<sup>1</sup> (e.g. CUTS’ 7-Up project) have highlighted the importance of having an active, bottom-up approach to the design and/or implementation of competition policy.
- The fact that many DCs in the world with regional competition initiatives do not have any formal competition policy and law at the national level or only a marginally operative system of the policy raises important questions as to the effectiveness of regional competition provisions. The same concerns in a slightly different manner may be extrapolated to the multilateral framework.
- DCs should accept the need for an MCA but insist on looking at it specifically from the perspective of economic development and anti-competitive practices which impair it. They should insist on flexibility and progressivity for its implementation, corresponding to their development status and needs.

- DCs are characterised by weak institutional capacities. Issues of interest and specific concerns of DCs should be firmly incorporated as negotiating elements. For example, monopsonistic practices of TNCs are of more interest to them since their comparative advantage is in commodities and these markets often display high levels of concentration.
- DCs' acceptance of some disciplines proposed under a potential MCA will help to ease out the current situation. In any case, many DCs now have a competition law and many others are in the process of formulating one. Large DCs such as Brazil, South Africa and India should be able to accept some disciplines on the basis of informed decision-making.
- As regards the objectives and public interest dimension of the framework, developing countries should demand enough flexibility. ICs want an MCA to promote certain kind of efficiency-aggregate global efficiency. This does not take account of the unpreparedness of many DCs to participate in an open world trading system, to 'grow' their own national companies and that a number of developing countries need to build and nurture a competition culture first. Aggregate global efficiency may not necessarily ensure efficiency for all nations and regions.
- Broad exemptions can also be inserted in the provisions of an MCA. Simultaneously, it has to be ensured that there is predictability and transparency in the law enforcement process.
- If a decision is taken at Cancun to launch negotiations, then the modality of the exercise has to be carefully considered since it will determine how well a country's concerns are addressed. The more extensive the substantive obligations of the agreement, the more difficult it is for governments to accept it (and the more demands there will be for special and differential treatment or clauses to ensure progressivity and flexibility). Even so, the framework of rules and disciplines in the area of competition policy and law should go beyond the exchange of non-confidential information.
- In many countries exchange of information will require adequate coordination between state and federal levels. DCs' right to seek cooperation ought to be mandated in a multilateral agreement, if there is one.
- At its minimum, an MCA should aim at prohibiting hard-core cartels and regulating anti-competitive practices of TNCs, and developing institutional capacity in DCs in order to enable them to detect the cartels affecting their economies and deal with them effectively.
- Another approach would be to limit the commitment of the member to the elimination of private anti-competitive practices that impair trade (such as international hard-core cartels) similar to the telecom annex of the GATS agreement. Another suggestion is to negotiate a market access commitment whereby nations would commit themselves to "have and enforce laws prohibiting commercial conducts (for example hard core cartels) that impair market access".
- An MCA, if instituted, can adopt a hybrid TRIPs and GATS type approach in that while minimum standards would be incorporated and different time frames can be allowed for implementation of certain provisions. This would call for Special and Differential Treatment and phase-in period under the MCA.
- An MCA, if instituted, should also have exemptions and exceptions that allow countries to regulate in public interest/address public interest issues.
- It is quite inconceivable to have a global competition authority within the WTO system. It is also difficult to arrive at global rules or even standards on vertical restraints as they are much more complex than the horizontal restraints. Hence, they will have to be addressed outside the realm of an MCA, at least in the near future.

<sup>1</sup> CUTS (2003) Pulling Up Our Socks—A Comparative Study of Competition Regimes of Seven Developing Countries under the 7-Up Project: CUTS, Jaipur.



*Policy Brief*  
***Multilateral Framework on Investment***

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### **Introduction**

In the past decades, the significance of foreign direct investment (FDI) as a tool for economic growth and development has received increasing attention. FDI has been recognised as a source of finance, a principal channel for transfer of technology and managerial know-how, a tool for increasing productivity and expanding productive capacity, to create export potential and improve competitiveness in the international market.

However, developing country experiences have also shown that FDI sometimes fails to generate the expected positive impact on the host economy. The net effect on gross domestic investment, employment creation, environment and sustainable growth and development of the host economy depends largely on FDI-related policies of the host government, regulatory oversight and attractiveness of the investment climate offered.

Proponents of a multilateral framework on investment (MFI) have argued for a multilateral accord to ensure and strengthen the protection of the rights of the foreign investors in the host countries and to curtail the role of the host government in putting conditions on their entry and operation. This according to them will facilitate greater flows of FDI to developing countries (DCs). However, DCs have argued that FDI will, in practise, contribute to development objectives only if multilateral rules allow for *national policy space* to effectively regulate and channel FDI into areas of interest to their economy.

Further, it is argued that proponents of an MFI have not attached adequate importance to the need for international investment rules to curb those actions by governments that very often lead to wasteful competition among the governments to attract FDI (e.g., government tax breaks and subsidies).

The Doha Declaration, signed at the WTO Ministerial Meeting at Doha in November 2001, mandates the Members to “focus on the clarification” of certain

identified elements in respect of a potential MFI before “negotiations...take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations.”

The prime aim of this Policy Brief is to analyse the elements identified in the Doha Declaration for a potential MFI. These issues/elements have been discussed in synoptic tables later in this paper, which cover all elements of a potential MFI discussing the proposals for each element, their implications for development, the issues that need further discussion and the way forward.

The main negotiating issues with regard to a potential MFI are:

- The need for MFI and its appropriateness in the WTO framework.
- Modalities/nature of negotiations; WTO’s General Agreement on Trade in Services (GATS)-style or opt-outs.
- The application of WTO principles such as non-discrimination to investment.

### **Pros of an MFI**

Firstly, it is widely believed that the existing scenario in terms of international investment agreements is not quite satisfactory from the viewpoint of DCs. Many DCs have conceded (and are still conceding) major concessions to industrialised countries (ICs) in bilateral and regional settings. Collective bargaining can give more strength to DCs with similar agenda, as compared to individual bargaining for Bilateral Investment Treaties (BITs). If there are multilateral negotiations on investment regulations, some DCs will gain from taking a common stand with other DCs. In addition, the transaction costs will be lower in an MFI, as compared to any non-multilateral setting.

Secondly, incentive bidding where DCs outdo each other by offering the most beneficial investment incentive packages, can only be addressed in a multilateral framework.

Thirdly, multilateral negotiations are believed by some to come under more scrutiny from, for example, civil society actors, as compared to bilateral negotiations, which are unlikely to attract much attention. Transparency of home regulation can thus be enhanced.

Fourthly, a multilateral agreement is more likely to come under regular review, especially if applying a uniform dispute settlement mechanism. A comprehensive set of consistent rules among all WTO Members is believed to provide for a stable, transparent and consistent environment for firms operating in the global market, whatever their ownership structure or place of incorporation.

### **Cons of an MFI**

Primarily, calls for an MFI raises the fear that the resulting liberalisation of foreign investment will reduce national sovereignty by limiting the regulatory and promotional capacity of governments to address development challenges.

Secondly, an MFI would have such a wide reach and involve so many countries that there is a fear that it would result in codification of international customary law, and thus bring in place a certain kind of international investment regulation, long resisted by the developing world.

Thirdly, multilateral fora like the WTO are biased toward free trade and not likely to consider development goals as a priority. A “one size fits all” multilateral framework might give less scope to accommodate differences between countries at different levels of development. This disadvantage can possibly be reduced by providing for country-specific exceptions and special and differential treatment for DCs.

Fourthly, sanctions in a multilateral setting, such as trade restrictions, can be much more deleterious in a multilateral setting than in a bilateral or regional setting.

It is worth noting that once a multilateral agreement is signed it will be hard for any one country to get out of it as opting out of it would mean opting out of the entire WTO regime.

### **Some Other Concerns**

The main objection against having an MFI in the WTO, as argued by its opponents, is the very inappropriateness of an investment agreement at the WTO. The adoption of GATS-style of negotiation in terms of progressive liberalisation and application of core principles of non-discrimination has convinced the opponents that irrespective of what proponents state, the MFI is more of a liberalisation instrument.

Moreover, in recent years, there has been a phenomenal increase in the cross-border flow of capital, without any multilateral framework. The year 2001 saw a downward trend in this regard but interestingly, it affected FDI flows mostly to ICs. Countries are liberalising unilaterally to create a more investor-friendly environment. The principles developed by some international bodies in this regard can indeed help such unilateral liberalisation and an MFI is redundant<sup>1</sup>.

Secondly, the non-transparent operating culture of the WTO is such that its rules are developed, interpreted and applied in a way that often excludes those countries and interests seeking to develop appropriate developmental and environmental policies. Moreover, DCs in the WTO are quite weak and easily manipulated by pressure and green room deals to develop and hold a common front.

Thirdly, the non-discrimination principles proposed for the MFI is expected to parallel GATS'. As it is, DCs have no capacity to understand precisely which sectors to open up and which types of limitation and exceptions to put under each sector so that a country is not economically, socially, or politically harmed. The bilateral services negotiations require an extensive understanding of the various economic sectors, something that DCs are still lacking in. An MFI would simply add on to the already burdensome process and detract the Members from more pressing issues. Moreover, the process will require an understanding of how certain commitments will impact constitutional and legislative mandates as well as domestic regulation in each country.

The impression emerging from the WTO Working Group discussions pertaining to the MFI proposal can be summarised as follows:

1. Most countries are adopting an attitude of wait and see – first gauging how the countries react to the proposals that have been discussed so far, before adopting a position.
2. Countries are still struggling to understand what are the contours of an MFI and the implications of the MFI on their national development and industrial policies.

The following synoptic tables provide brief discussions on the various elements/issues pertaining to the proposed MFI as identified in the Doha Declaration. It also considers some proposals not identified in the Declaration but brought up by some Members at the WTO Working Group on Trade and Investment.

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1 Principles for a fair agreement on investment have been developed by the UN Expert Working Group (UNCTAD Commission on Investment and Related Financial Issue, 1 Oct 1997, “*Criteria for the development friendliness of investment frameworks*”, Geneva: UNCTAD 28-30 May 1997.) These principles, it is claimed could form the basis for a set of core principles and an eventual agreement on international investment. Other rules include UNCTAD’s Rules for Control of Restrictive Business Practices and OECD’s Guidelines on MNEs. In the same vein, the UN Sub-Commission on the Promotion and Protection of Human Rights has been mandated to develop a code of conduct for companies based on human rights standards including draft principles (standards, liability and redress).

## Scope and Definition

<b>What is proposed</b>	Focus is on the definition of the terms “investment” and “investor” and the relationship between the two. Two main proposals: 1. Limit investment to FDI which in essence means the adoption of an enterprise-based definition i.e. controlling interest in the business enterprise. 2. Broad asset-based definitions with options to narrow it down.
<b>What they mean</b>	1. The narrow definition will affect establishment, operation and exit of FDI only. 2. The broad asset based approach would include every kind of asset including property and property rights, direct and portfolio investments, contractual rights (service agreements), IPRs, reinvested earnings, and business concessions, similar to NAFTA's.
<b>Development implications</b>	1. Narrowing the scope to FDI in the MFI might make regulation in public interest easier due to its long-term nature. This may take into account both host and home country interest in a balanced manner. 2. Due to the missing element of certainty in a broad-based approach: (i) Its open ended nature may commit countries to forms of investment protection they never contemplated (because of the evolving nature of capital markets). Though flexible in coverage, it may restrict their development policies and limit policy options. (ii) Too broad a definition may make it impossible to understand the implications of the substantive provisions proposed (as in the failed MAI). (iii) Inclusion of short-term investment has the potential to create capital volatility in the event of economic turbulence. (iv) Including footloose capital, which is not sector specific, may be difficult in light of the positive list approach of negotiations.
<b>Issues for further discussion</b>	1. When relying on tests of ownership and control, need to clarify the criteria of determining: <ul style="list-style-type: none"> <li>• long term relationship between investor and the investments;</li> <li>• the size of investments;</li> <li>• the sector;</li> <li>• use of definitional clause to delimit subject matter;</li> <li>• duration that can be considered long-term;</li> <li>• management control;</li> <li>• flow of funds; and</li> <li>• methodology of industrial classification.</li> </ul> 2. Consider limitations based on the country's industrial development position. There should be a study of factors underlying the absorptive capacity of countries at different levels of development for FDI to be extremely relevant. 3. Potential benefits of green-field investments v. the acquisition of existing enterprises (UNCTAD study has shown that adverse effect is likely in M&As). 4. Are standards for protection of investment included?  NAFTA is the best example of what could go wrong with the adoption of a broad based approach. It was one of the reasons for MAI's failure.
<b>Recommendations</b>	1. It may be well to consider having the definition in the operative provisions as the narrow based approach may also lockout room for compromises. 2. Instead of blindly including IPR provisions in the agreement, advantages that can be gained through transfer of technology (TOT) should be taken into consideration. 3. Australia's suggestions of a review of the development implications of the MFI and a dual approach to investment protection: broad asset-based approach for investment protection and narrower transaction or enterprise-based approach for cross border investment liberalisation agreements.

<b>Core Principles</b>	
<b>What is proposed</b>	<ol style="list-style-type: none"> <li>1. Extend the application of all the core principles (MFN, NT, and transparency) to both investors and investment.</li> <li>2. Does full NT/MFN apply or a certain degree of flexibility is essential to permit state regulation?</li> </ol>
<b>What they mean</b>	These are to reinforce the core WTO objective of protecting the competitive process and setting standards for the treatment of foreign investment/investors across nations.
<b>Development implications</b>	Full application of the principles to both investors and investment will guarantee free flow of international investments. This might affect government sovereignty in policy making in economic, social and political spheres.
<b>Issues for further discussion</b>	<p>Should minimum treatment standards (“fair and equitable treatment” etc) like those found in some IIA’s be included in a multilateral agreement?</p> <p>In most BITs, investment is granted national treatment, while investors are accorded only MFN treatment. It may be interesting to see how this arrangement has worked.</p>
<b>Recommendations</b>	<p>Should allow for limited exceptions, retain right to regulate by performance requirements and allow selective liberalisation and right to discriminate.</p> <p>Could also consider basic minimum standards and broad definitions for effective compliance rather than a broad framework.</p>

<b>Most Favoured Nation (MFN)</b>	
<b>What is proposed</b>	Apply as a general principle.
<b>What they mean</b>	Means that foreign investment/investors are required to be treated equally irrespective of their nationality.
<b>Development implications</b>	No major disagreement among countries in this regard. However, it has been pointed out that it may not be possible to adhere to the MFN principle in all circumstances.
<b>Issues for further discussion</b>	Will granting MFN really help in attracting investment?  Whether GATS-type MFN exemption can be considered ?
<b>Recommendations</b>	Should have some flexibility to give preference to investments from particular countries based on past experiences, cultural and historical ties etc.

<b>National Treatment (NT)</b>	
<b>What is proposed</b>	<p>Apply as a general principle.</p> <p>Alternative proposal is that it will depend on:</p> <ul style="list-style-type: none"> <li>• beneficiary;</li> <li>• scope; and</li> <li>• stage of admission.</li> </ul> <p>Or, apply as general obligation unconditionally in the post-establishment phase.</p>
<b>What they mean</b>	Members are obliged to grant foreign investors/investments treatment equal to the one granted to their domestic equivalent.
<b>Development implications</b>	<p>Full NT places a foreign investor on equal footing with national investors, removing the means by which a host country supports and protects its domestic investors.</p> <p>In IIAs NT in the post establishment stage is accepted as a general obligation. However, NT in the pre-establishment phase, in effect, is a market access commitment, and an uncommon feature in IIAs.</p>
<b>Issues for further discussion</b>	<p>Equal treatment to foreign investors might actually mean more than equal treatment as the domestic companies may have to adhere to some additional regulatory requirements which may not be relevant to foreign companies.</p> <p>Should it include performance requirements?</p>
<b>Recommendations</b>	Should have enough flexibility to impose performance requirements. Otherwise will have a situation like in Mexico where their export processing zones though successful export wise, are characterised by very low levels of value addition (less than 2 percent), weak national linkages, dependence on foreign capital and imported technologies, and over-reliance on cheap labour.

<b>Transparency</b>	
<b>What is proposed</b>	<p>Core obligation is to make all relevant information publicly available.</p> <p>Scope will depend on:</p> <p>(i) substantive provisions – what do the provisions apply to and who is responsible, and</p> <p>(ii) purpose – whether the information has relevance to investment.</p>
<b>What they mean</b>	<p>Members are obliged to provide sufficient information to determine whether or not obligations are in fact being met.</p> <p>Also may require that the administration of rules be reasonable and non-discriminatory.</p> <p>In the WTO, it is more important and detailed in areas with wider government discretion.</p>
<b>Development implications</b>	<p>There is a conceptual difference in treatment of transparency by the WTO and IIAs. The laws/regulations relating to investment are more extensive than for trade and cover wide areas of public policies.</p> <p>This inevitably means technical and capacity constraints in complying with the proposed transparency obligations. Particularly, the need to ensure they are administered in a uniform, impartial and reasonable manner, which introduces the notion of external assessment.</p>
<b>Issues for further discussion</b>	<p>Investment is related to almost all areas of government policy regime, it will be difficult to identify which of these will be required to be notified.</p> <p>Hence, attempt may be made to identify some important areas to avoid confusion and dispute at later stages. Since, BITs are largely silent about it, experiences with existing transparency requirements at the WTO can be good learning points.</p>
<b>Recommendations</b>	<p>Should be limited to easy availability of the relevant rules, procedures and decisions. It should not transgress into substantive areas of decision-making process.</p> <p>Strive to enhance transparency but without creating unnecessary burden, especially on DCs.</p>



<b>Fair and Equitable Treatment (FET)</b>	
<b>What is proposed</b>	<p>Not included in the Doha Agenda but has been a subject of discussion.</p> <p>May be proposed as a compliment to NT/MFN.</p>
<b>What they mean</b>	<p>The possible options may be a commitment:</p> <ul style="list-style-type: none"> <li>• where countries should offer investment FET (the hortatory approach);</li> <li>• that legally requires countries to accord investment ‘FET’, ‘just and equitable’ treatment, or ‘equitable’ treatment; and</li> <li>• in which FET is legally accorded to investment together with other standards of treatment, such as MFN and NT.</li> </ul>
<b>Development implications</b>	<p>The FET, which is a vaguely defined standard, is inherently subjective, and therefore lacking in precision. Moreover, difficulties of interpretation may arise because even in its plain meaning, the concept does not refer to an established body of law or to existing legal precedents. The uncertainty and the potential obligations would prove too burdensome for countries.</p> <p>A high standard of treatment may be expensive to provide for in many DCs at different stages of development and with different policy regimes.</p>
<b>Issues for further discussion</b>	<p>Whether a minimum treatment standard would facilitate development in poor countries. It may be good for both domestic as well as foreign investors.</p>
<b>Recommendations</b>	<p>Most problematic proposal. It would probably be better for countries to omit reference to FET in an MFI.</p>

<b>Nature of Commitments</b>	
<b>What is proposed</b>	<p>1. Should it apply to pre- and post entry phase or only post entry?</p> <p>2. GATS-type positive list approach in both pre- and post establishment phases.</p>
<b>What they mean</b>	<p>The GATS-type approach is meant to grant DCs flexibility to implement treaty provisions through selecting the areas in which they wish to make commitments.</p> <p>Such an approach provides means to determine:</p> <ul style="list-style-type: none"> <li>● stage at which MFN/NT are granted;</li> <li>● categories of investment for commitments, economy wide or sectoral approach; and</li> <li>● selection process: ad hoc, systematic or open door?</li> </ul>
<b>Development implications</b>	<p>Though in theory a country is free to select the sectors to commit, in practice its commitments including choice of sectors will be the result of a series of bilateral and plurilateral negotiations with other countries, in particular major industrialised countries. Thus, DCs will be under intense pressure to commit sectors, which they would rather not.</p> <p>The flexibility will allow countries to address their development objectives in terms of favouring domestic investors in specific sectors or in sectors of crucial importance for development, sectors with strategic significance such as national security.</p>
<b>Issues for further discussion</b>	<p>How to structure the treaty to mirror the economic differences among members?</p> <p>If a GATS-style approach does not give DCs maximum flexibility, what is the other option?</p> <p>What is the case for binding commitments on NT in a pre-establishment phase (market access) at a multilateral level as compared to unilateral market liberalisation?</p> <p>General exceptions are uncommon in most IIAs but common in trade agreements. Should such exceptions be included?</p>
<b>Recommendations</b>	<p>Bottom-up agenda that allows countries to liberalise selectively and gives more weight to differences in asymmetry in development levels between countries.</p> <p>Must be remembered that most IIAs do not include automatic right of admission, except in US-type BITs.</p>

<b>Development Provisions</b>	
<b>What is proposed</b>	Should have adequate flexibility so that DCs can channelise FDI to sectors and areas that will facilitate development in the country.
<b>What they mean</b>	<p>This may result in higher investment in areas of priority and may also ensure technology intensive FDI.</p> <p>However, it could simultaneously lead to strengthening the case for stronger IPRs.</p>
<b>Development implications</b>	<p>Will allow countries to continue with their affirmative action programmes like black empowerment in South Africa or such actions to address regional imbalances in economic development.</p> <p>Development provisions in the agreement might allow countries to adopt appropriate policy instruments to bring technology along with FDI.</p>
<b>Issues for further discussion</b>	Rising FDI flows are not necessarily accompanied by ToT. Moreover, DCs only get low-level type of technology. Of what use would the development provisions be in remedying the technology constraints faced by DCs?
<b>Recommendations</b>	<p>Ensure that MFI is not an instrument of liberalisation and protection of investment as opposed to one for promotion of investments (to DCs).</p> <p>Confer promotional measures such as technology and technical and financial assistance, and must specify the means to promote TA and advice.</p>

## Special & Differential Treatment (S&DT)

<p><b>What is proposed</b></p>	<p>Types of S&amp;DT:</p> <ul style="list-style-type: none"> <li>• phased-in periods of compliance with focused technical assistance;</li> <li>• Permanent “carve-outs” (exemptions) from any obligation regarding admission of FDI; and</li> <li>• Right to use performance requirements, investment incentives, etc.</li> </ul> <p>Provide for exceptions and temporal derogation to the treaty obligations under special circumstances.</p>
<p><b>What they mean</b></p>	<ul style="list-style-type: none"> <li>• Provisions to adopt appropriate measures to tackle adverse BoP situations.</li> </ul> <p>The exceptions can be:</p> <ul style="list-style-type: none"> <li>• systemic exceptions for certain measures (e.g. procurement, taxation);</li> <li>• general exceptions (public interest and for regional economic integration agreements); and</li> <li>• country-specific exceptions (which are exceptions to a general rule or commitments to a conditional rule).</li> </ul>
<p><b>Development implications</b></p>	<p>The present WTO system, has relied mainly on transition periods, broadly 5 to 10 years, for DCs after which all Members are considered “equal under the law”.</p> <p>However, even after such periods of time, it is quite obvious that a level playing field will not be achieved and equal rules will come to apply to unequal players.</p> <p>Too much emphasis on the so-called S&amp;DT provisions may detract DCs from wider interests and as a result they may not explore the opportunities in a proactive manner.</p> <p>There is also a fear that differential treatment in favour of the DCs do not provide real or stable safeguard.</p>
<p><b>Issues for further discussion</b></p>	<p>Many of the S&amp;DT provisions in the present WTO arrangement are rather symbolic and do not serve much of real purpose, in terms of granting greater market access.</p> <p>In order to have a targeted approach, some S&amp;DT provisions should be identified which can bring real benefits to the DCs. Another aspect that can be considered is that they should be easy to implement and at minimum cost.</p>
<p><b>Recommendations</b></p>	<p>Should consider S&amp;DT of a more structural nature that will automatically promote more of development-enhancing FDI (like greater market access in trade) to DCs.</p> <p>It should be recognised that S&amp;DT provisions for DCs should exist and operate as a matter of right rather than privilege.</p> <p>S&amp;DT should not be bound in time frames but be a flexible subject to a review process to determine the conclusion of time period which can be benchmarked on development indicators.</p>

<b>Technical Assistance (TA)</b>	
<b>What is proposed</b>	<ul style="list-style-type: none"> <li>• Policy analysis and development;</li> <li>• Human resources capacity-building; and</li> <li>• Institutional capacity-building.</li> </ul>
<b>What they mean</b>	Technical assistance might help countries to understand the issues before and during any negotiations on investment. It may also help them to create a policy environment compatible with their commitment in the MFI.
<b>Development implications</b>	If the technical assistance can be suitably utilised to create a development oriented investor-friendly environment then it will help the countries otherwise as well, even if they do not receive much of FDI. However, if the promised technical assistance does not come through, DCs will find it difficult to cope with the commitments made in the agreement.
<b>Issues for further discussion</b>	Whether provisions can be made to ensure that the actual fulfilment of the commitments made is contingent upon the actual receipt of technical and other types of assistance.
<b>Recommendations</b>	Technical and financial assistance in the areas of trade and investment cannot be delinked from other areas of socio-economic development. An overall development of an economy will make a country better able to fulfil its commitments made at the WTO. Hence, capacity building aid in the area of trade and investment should not be at the cost of development aid. Secondly, TA needs to be tailored to need-based requirements.

<b>Balance of Payments (BoP)</b>	
<b>What is proposed</b>	<ul style="list-style-type: none"> <li>• Need exceptions from disciplines when host countries face BOP problems.</li> <li>• Be patterned after TRIMs BOP exceptions and take into consideration similar GATT provisions.</li> </ul>
<b>What they mean</b>	If a developing country has full discretion and flexibility about putting conditions on entry and operation of FDI, it will not need exceptions and BOP safeguards. But if such flexibility is lost within the MFI, a need will arise to include BOP safeguard measures.
<b>Development implications</b>	In the short run, FDI inflows improve the BOP position, but in the long run, as the repatriation of profits starts increasing, the situation may worsen.
<b>Issues for further discussion</b>	Current GATT BOP exceptions are inadequate for DCs. What could be the alternative?
<b>Recommendations</b>	<p>Are BOP restrictions a “self-defeating strategy” in the long term given that right to free transfer of capital is crucial, especially at the time of high current account deficit?</p> <p>Countries may be allowed to impose higher taxes on repatriated profits.</p>

<b>National Policy Space</b>	
<b>What is proposed</b>	<p>An MFI will have substantial implications for national policy space.</p> <p>The standard of protection to investors may also have implications for national policy space.</p>
<b>What they mean</b>	<p>With greater market access and higher commitment to foreign investors, it is widely felt that national governments will be left with much smaller space in terms of national policy making.</p> <p>NAFTA allows firms to sue governments over the latter's policies that are said to have reduced or eliminated "profits, current and future," including through the concept of "takings" (unlawful deprivation of private property).</p>
<b>Development implications</b>	<p>Shrinking national policy space means that national governments will have little manoeuvrability to manage their economy in line with their development priorities.</p> <p>Expropriations and compensation rules, such as right to regulate for environment protection, would be difficult to enforce (e.g.,Metalclad).</p> <p>Since DCs are yet to put in a basic regulatory framework in place, they are likely to bring in relatively more such measures in future and they will face more such problems if NAFTA type protection standards are adopted.</p>
<b>Issues for further discussion</b>	<p>DCs need to go beyond the GATS in respect of issues such as performance requirements, as these are important policy instruments to pursue development objectives and to promote domestic industry.</p> <p>The concept of regulatory 'takings' or the related concepts of 'indirect expropriation' and a 'measure tantamount to nationalisation or expropriation' are not clear enough even in advanced jurisdictions.</p>
<b>Recommendations</b>	<p>Need to find the right balance between rules and disciplines on market access and protection of investment in the WTO and safeguarding the national sovereignty and control over one's own economy.</p> <p>The policy choice of governments to privatise public entities should be reinforced.</p> <p>As the relevant concepts are not clear enough, inclusion of such provisions may create problems especially for DCs. Moreover, regulatory measures are often enforced at the sub-national and local levels where the capacity to comprehend such issues would be even lower.</p> <p>Regulatory measures should not be linked to the protection of investment, unless they are discriminatory in nature.</p>

<b>Dispute Settlement Mechanism (DSM)</b>	
<b>What is proposed</b>	<p>Should it be a binding provision, and if so, who is permitted to use it?</p> <p>Introduce a compensation/fine-based system.</p> <p>Consider provisions for investor-state disputes.</p>
<b>What they mean</b>	<p>The WTO's DSM includes only compliance; compensation is voluntary. Moreover, retaliation is only generated unilaterally by the winning party.</p> <p>A compulsory fine or compensation based system may be more effective and egalitarian.</p>
<b>Development implications</b>	<p>DCs' power to retaliate is doubtful. Hence such a retaliation based dispute settlement mechanism would be against the interests of DCs.</p> <p>Foreign investors may get more than equal treatment, as domestic investor will not have the right of action in an international forum against its own country.</p>
<b>Issues for further discussion</b>	<p>Retrospective remedies are available in international investment arbitration. It may be considered that to what extent similar provisions can be made in the MFI at the WTO.</p> <p>The possible implications of introducing investor to state issues at the WTO dispute settlement.</p> <p>Peer review as an alternative to the DSM.</p>
<b>Recommendations</b>	<p>May restrict dispute settlement to state to state.</p> <p>Investors should not have any role as it might complicate the situation and the implications are not yet clear either. They may approach the international forum through their governments, as is done usually in the WTO framework.</p>



<b>Relationship with other WTO Agreements, BITs, and RIAs</b>	
<b>What is proposed</b>	<p>The MFI should take note of the existing WTO Agreements:</p> <ul style="list-style-type: none"> <li>• TRIMs- prohibit negative incentives;</li> <li>• GATS- includes FDI through mode 3: “commercial presence”; and</li> <li>• TRIPs- has implications for FDI in general and transfer of technology through FDI in particular.</li> </ul> <p>BITs:</p> <ul style="list-style-type: none"> <li>• US model – disciplinary provisions are of higher level, core principles apply at pre-and post-entry, and provide for investor-state dispute settlement.</li> <li>• European model – more traditional, standards apply only at the post entry stage.</li> </ul>
<b>What they mean</b>	<p>Would TRIMs be incorporated in the proposed agreement on investment by reference? Or should its scope of prohibited practices be modified or further clarified?</p> <p>GATS involves quite a broad definition of investment and hence a narrower definition that most DCs would prefer in a potential agreement might be in conflict with GATS.</p> <p>The proposed MFI may also be in conflict with the existing BITs or RIAs depending on the kind of provisions it includes.</p>
<b>Development implications</b>	<p>The existing investment instruments at the WTO or BITs or RIAs, are often biased against DCs’ interests. DCs may take stock of all these to ensure that an MFI if agreed ensures a better situation for them.</p>
<b>Issues for further discussion</b>	<p>What kind of impediments would the agreement address with respect to GATS, given that an overwhelming majority of investment restrictions arise in service industries rather than in manufacturing?</p> <p>If “due regard for other WTO provisions and existing bilateral and regional agreements” as mentioned in the Doha Declaration is interpreted as all such provisions or agreements taking precedence over the proposed MFI, then there will be limited scope for its application.</p>
<b>Recommendations</b>	<p>An MFI at the WTO will have much greater implications for the global community, especially the DCs. Hence, it needs to be balanced compared to the existing instruments at the WTO or BITs or RIAs, which are often biased against DCs’ interests.</p>

## Investors' Responsibility and Obligations of Home States

<b>What is proposed</b>	This is not included in the Doha Agenda but has been proposed by some.
<b>What they mean</b>	This will require TNCs to behave with full corporate responsibility and accountability in countries where they operate. In case of violation of law of the land in host countries the home country government concerned will extend necessary cooperation in taking appropriate action.
<b>Development implications</b>	<p>Since many of the DCs find it difficult to take appropriate action against the mighty TNCs for irresponsible behaviour and violation of rules, such a provision in MFI will be beneficial for the DCs. This might also ensure that the TNCs do not take undue advantage of a weak regulatory framework in DCs.</p> <p>A case in point is the Union Carbide's irresponsible behaviour that led to the Bhopal gas disaster in India. The company could not be appropriately punished for its irresponsible behaviour. An MFI with such provisions could probably make the situation different.</p>
<b>Issues for further discussion</b>	Could OECD Guidelines for MNEs serve as the starting point for developing a framework for this provision?
<b>Recommendations</b>	<p>The MFI should oblige TNCs:</p> <ul style="list-style-type: none"> <li>• not to undertake restrictive business practices;</li> <li>• respect consumer and environmental protection standards abroad;</li> <li>• ensure total transparency in financial transactions and accounting;</li> <li>• not act in a manner prejudicial to the social norms and economic interest of host countries; and</li> <li>• provide for international blacklisting of investors found in default.</li> </ul>

<b>Incentives Race</b>	
<b>What is proposed</b>	This is also not included in the Doha Agenda but has been proposed by some.
<b>What they mean</b>	In their enthusiasm to attract more and more FDI, governments are offering higher incentives and lowering their regulatory standards, a phenomenon termed as 'race to bottom'. This has serious social, economic and environmental implications for the countries as well as the global community. An agreement to check such an incentive race would enhance global welfare as well as that of the individual countries.
<b>Development implications</b>	<p>TNCs extract undue advantage while countries engage in a zero sum game of getting a bigger slice of the fixed FDI pie and collectively lose in the game. For instance, Chile and Costa Rica were in the race to win Intel's investment. However, the winner, Costa Rica, was able to offer an attractive incentive package including an 18-year "tax holiday", exemption of taxes on exports, imports and repatriated profits and subsidised employment, the incentives not available to domestic investors.</p> <p>But Costa Rica is now left with an investment, of admittedly enormous importance, from which it cannot raise revenue through taxes, and where local supply is not favoured as input imports are duty-free and employees cannot bargain collectively.</p> <p>Hence the potential gain from the investment is minimised by the cost of government incentives. A check on such a race will be good for collective welfare, especially for DCs.</p>
<b>Issues for further discussion</b>	Balancing the TRIMs (which prohibits negative incentives) by regulating the use of "positive TRIMs" investment incentives.
<b>Recommendations</b>	At this stage it is indeed difficult to arrive at a set of global standards for regulatory framework for different areas or taxation regimes. Moreover, regulatory requirements are also likely to be different in different countries. However, it may be noted in this context that many countries offer treatment to foreign investors in this regard, which is far better than that given to domestic investors. This can be stopped.

### **Different Country Positions on an MFI**

Many DCs are not so enthusiastic about the idea of launching WTO negotiations on an MFI. They are rather adamant about certain issues, which are crucial to them, thus posing a challenge for the future of the discussions. For instance, to the main demandeurs of the agreement, EC and Japan, inclusion of the non-discrimination principle is very critical. But the DCs consider this as one of the main stumbling blocks of the MFI. Moreover, they would like to see issues of interest to them discussed in the working group and eventually form a part of the negotiations. However, the demandeurs are against the introduction of such issues, e.g. discussions on the obligation of the investors as well as the home countries obligations to enforce these obligations introduced by a group of DCs including China and India.

Unlike other countries, which seem ambivalent, India and Malaysia have been steadfast in their opposition to an MFI at the WTO. According to India, investment is not a trade issue, therefore it does not belong to the WTO. Moreover, India has consistently insisted that Members must discuss the movement of natural persons (labour) in any discussion on capital flows. Pakistan has also repeatedly stated that it remains unconvinced of the need for an agreement adding that it would weaken the bargaining position of host countries vis-à-vis investors. As far as it is concerned, this would merely add to the existing imbalance in the WTO against the DCs.

The EU and Japan have tried to placate India and Malaysia as well as other DCs by advocating an approach similar to that under the GATS. In their view, adopting this approach to investment would allow governments to open up areas where they want to attract foreign investors and exclude those considered too sensitive for political, economic, or developmental reasons. In general, DCs have not been supportive of this stance.

Most DCs are in favour of including a narrowly defined and long-term foreign investment i.e., FDI, in the possible MFI if there is to be one at all. This is considered more realistic and achievable as it is also more easily classified from a methodological and statistical point of view, which may be necessary while adopting a positive-list approach.

But the US is of the opinion that a broad-based and open-ended definition (which includes portfolio

investment) and pre-establishment rights are necessary to maximise the benefits of investment liberalisation and protection. This can also contribute to the development agenda. Canada in turn would like to see a broad-based but long term approach for the MFI scope with an exhaustive list. It considers this as the best means of facilitating “common understanding”. Australia is exploring the idea of having a narrower definition for entry (pre-establishment treatment), and a broader definition for post-establishment treatment, in part for consistency with BITs.

With regard to transparency, both DCs and ICs consider this to be an indispensable and integral part of the agreement but they differ in scope and reach.

Taiwan has been controversial by suggesting that Members should consider provisions for investor-state disputes through the dispute settlement system patterned after the Independent Entity Scheme for WTO Pre-shipment Inspection disputes. Most countries including Malaysia, Hungary, New Zealand, Hong Kong and China have objected to this proposal on the ground that it is beyond the Doha remit.

### **The Way forward**

DCs need to take the following into consideration before negotiating an MFI at the WTO:

- They must be convinced of the importance of foreign investment to their economy first before considering the necessity of an MFI within or outside the WTO framework. Subsequently, if it is found important enough to warrant the need to regulate investment multilaterally, the existing frameworks and agreements should be explored.
- Most trans-border investment takes place among ICs while most of the international investment agreements are between developed and DCs. The only attempt at a multilateral framework among the industrialised countries, the Multilateral Agreement on Investment (MAI) at the OECD did not succeed. It is thus essential for DCs to carefully study the effects of the existing IIAs as well as the failed MAI process. The OECD MAI was actually targeted at DCs and a study of it might give some indication of the kind of problems/issues countries might face in this context. In addition, DCs should consider negotiating regionally which will give them adequate experience to deal with the issue at a multilateral forum. For example, NAFTA has given substantial

experience to the north American countries and hence they are in a much better position to handle any multilateral negotiations.

- Within the WTO context, DCs should bear in mind that there is already a lot of unfinished agenda (most likely due to imbalances in negotiating strengths) which include services, autonomous liberalisation, implementation issues, agriculture, S&DT, market access for industrial goods, etc. Hence, considering an MFI within the WTO will overload the system.
- If the WTO proves to be a suitable forum for the MFI, then the DCs must analyse the economic, social and environmental impacts of such an instrument. The GATS, which in a sense, is the first such investment instrument, can provide a model for that. An in-depth analysis of the impact of GATS should be able to provide trade policy-makers with tools to develop a negotiating agenda and a set of policy options that can maximise the contribution of an MFI to sustainable development and minimise its potentially negative implications. E.g. Council for Trade in Services has service trade assessment as a standing agenda item. Such a sustainability assessment should include:
  - Quantitative economic effects; and
  - Social, environmental and human rights implications.
- Theoretically, labour and capital movements play the same role in promoting efficiency. Thus, investment liberalisation can be balanced with equal commitments in labour mobility. The question remains, however, whether all Members will agree to such a proposition. If yes, then what will be the framework of such an accord?
- The GATS Agreement provides a model of what could go wrong if Members take on further commitments without weighing their future implications. The GATS Agreement has no commitment to undertake sustainability assessments at the national level to identify and address the economic, developmental and environmental implications of trade agreements and policies. Rather, the agreement merely “encourage[s] the voluntary use of environmental impact assessments”. It would be sensible for countries to look at the bilateral avenues for negotiations in order to assess whether the GATS really provides a coherent approach to addressing the particular needs and circumstances of DCs.
- Any negotiation must include discussions for establishing obligations of investors and rights of host countries. A legally binding international framework on corporate accountability and liability should therefore be considered as a concomitant requirement for negotiations on an MFI.
- If the decision to go ahead with negotiation is taken, then the proposed MFI must include as per the paragraph 22 of the Doha Declaration:
  - A degree of flexibility with a development dimension that considers DCs -national policy objectives, keeping in view their level of development. Care has to be taken to ensure that the MFI does not result in the loss of a high degree of sovereignty for host governments in their policymaking. Article XX of GATT provides policy flexibility;
  - A balanced reflection of the interests of home and host countries;
  - The right of the host country to regulate in public interest; and
  - The special development, trade and financial needs of DCs.
- As regards the issue of checking the incentive race among the nations, i.e., balancing the TRIMs Agreement with provisions on positive TRIMs as well, a code of good practices can be annexed to it, as in the Technical Barriers to Trade (TBT) Agreement. This approach can also be followed with regard to the obligation of the investors and the home countries. This can be a good beginning.
- Giving DCs a fixed transition period for implementation of MFI provisions might not be effective, given that DCs might take more than 10 to 15 years to reach the desired levels of development. Provisions of exemptions until the time DCs reach a certain level of development might be more meaningful.
- Many feel that a multilateral setting may be better than a bilateral setting as the earlier provides a more predictable environment. However, are all existing IIAs going to be abandoned once an MFI is there? If not then what benefits will an MFI bring? Can we avoid an MFI and do with some

modifications in TRIMs, GATS and TRIPs? These are some important questions that need to be addressed.

- An investment agreement giving protection to foreign investors is one of the many factors that determine FDI flows into a country. However, this may not be true in all cases. For example, the US is a major investor in both India and Malaysia, but it does not have a BIT with either of them.
- As it is very often argued that foreign investors will benefit the most out of an MFI. But it is not clear the degree of importance that these investors attach to an MFI.
- It may be premature to arrive at a comprehensive MFI with binding obligations at this stage. Hence, countries may explore the idea of agreeing to code of good practices. It may be recalled that during the Tokyo Round, the countries agreed on codes for both anti-dumping and technical barriers to trade and full-fledged agreements on these were arrived at during the Uruguay Round. Such a soft law approach may be the best way forward in the present context and depending on the experience of this approach an MFI may finally be evolved.



# *Scope and Definition of Competition*

*Shankaran Nambiar\**

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## **Executive Summary**

A well-developed and effective national competition policy has been identified as an institution necessary to support international market transactions and to help countries reap full benefits from the process of globalisation. Developed countries have voiced the need for global standards on national competition laws to facilitate market access and further liberalisation. Developing countries have expressed urgent need for global rules on competition to check anti-competitive practices by transnational corporations and to control the activity of hard-core cartels.

This issue paper discusses the key factors involved in determining the scope and definition of competition policy, in the context of a potential multilateral competition framework at the WTO. Four categories of anti-competitive business practices have been identified as important: monopolies and dominant firms; horizontal restrictive business practices; vertical business practices; and mergers and acquisitions. A well-developed competition policy framework would involve clear and well-defined objectives of competition policy, policies and laws that sanction restrictive agreements, legislation against mergers and regulations to facilitate efficient allocation of state aid. Addressing problems associated with hard-core cartel activity has been identified to be of paramount importance.

## **Introduction**

There is widespread agreement that competition conditions in national and international markets have an impact on international trade, and that anti-competitive practices (by the government and the private sector) adversely affect the growth of international trade. It is argued that the benefits of trade liberalisation can be substantially negated by anti-competitive business practices, thereby greatly reducing the efforts that are being put into the process of liberalisation of every country.

Further, the benefits of globalisation and prevalence of a multilateral trading system cannot be reaped unless there is a more competitive economic environment in economies. It is in this context that proposals for the inclusion of competition policy as a multilateral framework to be established at the World Trade Organisation (WTO) have been put forward.

The primary difficulty in formulating an adequate competition policy is the task of ensuring that domestic competition policies and laws are suited to national needs and developmental goals. Not only is there no convergence in thinking on competition

issues, but also domestic competition laws are subject to national judicial processes and norms. This problem is compounded by the absence of competition authorities and laws in many developing countries.

The fundamental problem of discussing and formulating decisions on essentially domestic institutions (competition policy and law) at a multilateral level raises complications of its own. Nevertheless, this is perhaps a key constraint that should inform negotiations and influence subsequent policy formulations.

## **Key Factors for Determining the Scope and Definition**

The *first* key issue that needs to be considered relates the objectives of competition policy. Competition policy should ensure the unity of the internal market, and in doing so it must allow firms to compete on a level playing field. The question of a level playing field is contentious, yet it must be addressed. A possible suggestion as to how it can be adequately handled will be mentioned below.

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In any case, an effective competition policy should ensure that all Member states have equal access to markets, and that the interests of consumers are protected. This can be secured by putting in place policies and mechanisms so as to prevent companies and national authorities from disrupting the practice and spirit of competition in the conduct of transactions.

In order to achieve a level playing field, it is necessary that action be taken to avoid markets from being shared and monopolised through restrictive agreements. More specifically, restrictive agreements relate to agreements between firms that prevent competition, or restrict competition, or in some way distort competition within a market. Obviously, the agreement involves at least two firms, possibly more than two firms.

Another feature relating to these agreements is the nature of the firms involved, in terms of their relationship vis-vis the stage of production. The agreements include horizontal agreements, that is, agreements between firms that deal with the same stage of production or nature of output. They concern different firms producing the same output.

Vertical agreements are another aspect of restrictive agreements. Vertical agreements involve firms that are operating at different stages of production or process. These agreements result in one or more firms gaining an unfair advantage in the market by virtue of a collusion that spans different stages in the production of a particular output.

Anti-competitive business practices can be classified under four categories, viz, monopolies and dominant firms; horizontal restrictive business practices; vertical business practices; and mergers and acquisitions. By instituting policies and laws that sanction restrictive agreements, competition policy is adequately armed to limit a large class of activities that constitute anti-competitive practices.

It must be noted that very often firms do not execute restrictive agreements. Rather than engaging in an agreement, firms may coordinate their behaviour in such a way as to achieve outcomes that have the same impact on the market as outcomes resulting from restrictive agreements. When the conduct of two or more firms causes the market to be shared among them, without an agreement between them, such behaviour is more difficult for competition authorities to monitor and act against. Nevertheless, there must be sanctions against these practices.

Notwithstanding these concerns and suggestions, certain forms of cooperation must be permitted. Cooperative behaviour among firms that contributes to technological improvement in the economy or improves the distribution of goods and services are some agreements that should be exempt from the principle of disallowing collusion among firms. Exemptions should be permitted which are seen to be positive and which would promote economic development.

A second crucial element that a competition policy framework must include, so as to make possible a level playing field, is to provide for disincentives against abuse of a dominant position. A firm can be in a position to exert substantial influence over a market. But if a firm attempts to manipulate industry structure to its sole advantage, then the firm is said to abuse its dominant position. A framework for competition policy must include measures that do not permit abuse of dominant position, because otherwise firms can hinder the functioning of competition in a market by imposing unfair prices or limiting supply when not compelled by market conditions to do so.

A third factor is that competition policy must incorporate legislation on mergers. A merger arises when a firm acquires control over another firm so as to be in a position to acquire significant influence over the decision-making process in the acquired firm. The act of acquiring an interest in a second firm can be done independently by one firm or in cooperation with more than one firm. Regardless of the number of firms that act together to gain control over the decision-making process of a firm, what occurs is an increase in market concentration and the dilution of competition in the market.

There are definitional problems involved in legislating against mergers. These include the definition of the product market and deciding on the relevant geographical boundaries for the market.

Mergers are permissible when in spite of its existence a specific industry will not suffer from a diminished state of competition or, when without the merger the industry will suffer due to lack of efficiency, which will further jeopardise national economic growth and consumer interests. This principle of exemption cannot be granted when mergers offer to improve better technical production capabilities, but at the same time threaten to foreclose emerging markets and create boundaries against future entrants into the market.

A fourth element of consideration in any competition framework relates to state aid. State aid refers to any allocation of resources or advantage extended by a Member state. The issue becomes a matter of interest to competition authorities when state aid is provided selectively to certain firms and not to others. Similarly, it is problematic if state aid is provided for the production of certain goods or services and not for others.

Central to the controversy is whether state aid contributes to concentration and, hence, besides impeding competition in an economy also adversely affects trade between Member states. The form in which aid and advantage is dispersed has to be carefully noted: it could be in the form of a local or regional body or through a company either owned directly by the government or over which the government has much influence.

Certain exemptions would need to be exercised over the dispersion of state aid. A blanket ban against all forms of state aid would have deleterious effects on an economy, particularly in developing countries. Some forms of aid must be permitted, particularly if the withholding of such aid will result in a loss of human security (social and economic) or be the cause of deprivation of fundamental human rights.

State aid to the least-advantaged sections of society and to those sections subject to social exclusion must be encouraged, especially in the least developed countries. Aid should not be reconsidered in the case of areas affected by strife, war, or natural disaster.

In the interest of the development of the least developed nations, these countries should be permitted to provide aid for targeted regions, industries and activities. The purpose of this exemption is to assist such economies to develop sections of the economy that are crucial to generate employment and economic growth.

Clearly special provisions will have to be made in the case of developing countries, perhaps for specified time periods or targeted sectors, so as not to permanently disadvantage these countries. It is equally important to give these countries the opportunity to catch up with the developed countries.

Laying down the exemptions that have to be made for developing countries necessitates taking into account the importance of special and differential

treatment. Developed countries recognise that special provisions and exceptions have to be allowed for developing countries, taking into account their respective stages of development. Modes of competition standards that are acceptable to developed countries are definitely not applicable to developing countries, which are in greater need of state support.

The presence of anti-competitive practices in developing countries is due to the conduct of: a) private domestic firms, b) multinational corporations, and c) state-owned firms. There is evidence that private domestic firms in developing countries engage in rent-seeking behaviour, and that such behaviour, directly or indirectly, encourages anti-competitive practices.

Keeping in mind that state-aid policy is an important component of the industrial policy strategy of developing countries, competition policy, which aims to minimise distortions created by state support, has to be introduced in these countries gradually. Developing indigenous capabilities by supporting domestic industries is a crucial aspect of the development strategies of developing countries.

Competition policy is thus seen as a way for multinational corporations to pry open domestic markets. In the interest of developing competition across borders, the fears of competition policy being used as an instrument for gaining market access can be allayed by ensuring that the multilateral framework will be effective in sanctioning the anti-competitive practices of multinational corporations. The trust of developing countries has to be cultivated. Concurrently, time frameworks have to be set so as to allow domestic industries in developing countries to come of their own, to be given a chance to grow out of their infant industry status.

### **Conclusion**

The importance of a timetable for the introduction of competition policies and agreements within a multilateral framework cannot be overemphasised. For this purpose it must be recognised that two time dimensions have to be delineated: the short-term and the long-term. Accordingly, the scope of competition policy must be formulated so as to coincide with the pre-designated time dimensions (i.e. the short and long term periods). Competition agreements should focus on a more narrowly defined scope in the short-term; and a more broadly defined scope in the long-term.

The first step and the immediate goal of a competition framework will be to rectify problems associated with hard-core cartel activity, since hard-core cartels are the principle set of problems within competition policy in its narrow sense. It is quite clear that hard-core cartels constitute a serious breach of domestic competition law. Hard-core cartels are, typically, groups of powerful multinational corporations that engage in agreements involving price-fixing, bid rigging, artificial supply restrictions, and market sharing. Multinational corporations operate in a manner where information and evidence of their activities are tightly guarded and often unavailable. Exposing these illegal and, perhaps, criminal activities will be a move towards building the confidence and trust of developing countries.

With successful implementation of competition law, it should be shown that it is possible to check the illegal anti-competitive practices of powerful multinational corporations, and that with international cooperation and cooperation on the sharing of information, it is possible to regulate the behaviour of multinational corporations.

Subsequently, competition in its broad sense can be examined. This should be done by progressively attending to issues such as countervailing measures and dumping first, and then extending the scope of competition policy to focus on a diminished role for the government in industry. This implies confronting issues such as government subsidies, indirect export

subsidies, and the protection of state-owned enterprises. Privatisation and deregulation would be important components within the broad scope of competition policy.

At this juncture, as far as government participation in business is concerned, the government would have to compete with the private sector on equal grounds. The government would, then, not be able to enjoy any special advantages; and any access to resources or advantages, in policy terms, that state-owned enterprises have access to should be equally available to private firms.

An even broader scope of competition policy would attempt to include within its ambit a more democratic and liberal approach to the functioning of markets. This view would place government participation in business on the same footing as private participation. But, in addition, competition policy would seek to encourage the free movement of resources (goods, services, labour, capital), both internally and across borders. All firms would have unrestricted access to essential facilities.

It must also be added that competition, broadly defined, would be concerned with the promotion of a culture of competition and competition advocacy. There is no doubt that a long view of competition policy must be considered, and in doing so, one must not lose sight of the vulnerability of developing countries and their need for economic stability.

# *WTO Core Principles and Competition Agreement*

*Taimoon Stewart\**

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## **Executive Summary**

This paper focuses specifically on the interpretation of the application of the core principles of non-discrimination (national treatment and most favoured nation), transparency and due process to a proposed WTO Competition Framework. The paper is written as background information to assist developing countries' delegates to prepare for the September 2002 meeting of the WTO Working Group on Trade and Competition Policy (WTO WGTCP). The title specifically refers to the inclusion of the principles in each country's national competition law, since this is where they would reside. There is no attempt in the WTO to create a supranational competition law. Rather, the obligation being proposed is that each member develop a national competition law, in which the minimum scope of the law would be prohibition of hardcore cartels and inclusion of the principles of non-discrimination, transparency and due process.

## **Non-Discrimination**

In the debate in the WTO WGTCP as well as in some written papers, there is a view that the inclusion of the principle of non-discrimination in a national competition law would lead to unbridled market access for foreign goods and services in that country. It is felt that it would limit a country's ability to use industrial policy and other governmental support of domestic industries to protect them from foreign competition. There is even the view that national treatment means harmonisation of all competition laws. It is my view that this interpretation of the implications of including non-discrimination in the national law is flawed.

Competition law increases market access only after market entry has been achieved. All governmental barriers to entry of goods, services and investment remain intact when a competition law is introduced. Let us not forget that the law proscribes anti-competitive conduct by businesses. The details of what such conduct constitutes is up to the national government and community to decide.

The debate in the WTO has not gone beyond proscribing hardcore cartels. And even that can be tempered by having exclusions and exceptions to the

law. Industrial policy can and should quite legitimately live side by side with competition law. If the application of non-discrimination means unbridled market access, then developing countries should not have a problem accessing Europe's agricultural market. But they do, because the common agricultural policy is unaffected by the non-discrimination provision in the competition law, and in any case, is exempt from the application of the competition law.

All OECD countries have included in their competition laws the principle of non-discrimination. Yet, developing countries have serious problems of market access. We must ponder why? Clearly, the barriers to entry into these markets are successfully keeping out goods and services from developing countries despite the inclusion of the principle of non-discrimination in their law.

Non-discrimination in a competition regime means very specifically how the law is enforced within the national jurisdiction. For example, under some competition regimes, the law states that access to essential facilities must be granted at market value (i.e. infrastructure, access to which is essential for the provision of a good or service, for example,

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telephone lines and home phones, gas pipes, docks, all of which are too expensive and impractical to replicate).

Let us take the example of a case in which the competition authority determines that a firm with market power is guilty of abuse of its dominant position, denying access to its essential facility. In this instance, the authority cannot enforce the law in such a way that local firms are granted access to the facility, but foreign firms which are already operating in the domestic economy are not granted access.

Another example which looks at the converse is that a competition authority cannot pursue cartels consisting of local firms, but ignore foreign firms operating in the economy which are part of a cartel. Foreign firms must feel the strong arm of the law equally as domestic firms.

Non-discrimination in allowing access to the competition authority means that a foreign firm can have equal access as a local firm to lodge complaints with the authority, and have the case examined with the same impartiality, as if it were a local firm lodging the complaint. The idea is that the competition authority should not favour local firms above foreign ones when responding to complaints. For instance, the authority may proceed with vigorous investigation of a complaint lodged by a local firm against a foreign firm, but may ignore a complaint brought against a local firm by a foreign firm which is operating in the economy, or may even not give foreign firms a hearing.

Foreign firms must be granted equal access to the courts as local firms, so long as they are operating in the market. In most developing countries' jurisdictions, this is already part of the legal tradition. What developing countries have to be concerned about is their ability to handle complaints and court cases, given the dire lack of human resources and institutional capacity. That has to be addressed under technical assistance and capacity building.

The Draft Chapter on Competition Policy in the Free Trade Area of Americas (FTAA) speaks directly of the issue of non-discrimination and makes clear its meaning:

*[1.2 Each party undertakes to permit access, on a non-discriminatory basis, to natural or legal persons resident in the territory of any party to the mechanisms and procedures of its national competition law.]* (emphasis mine).

Interestingly, most favoured nation (MFN) is not directly addressed in the FTAA agreement and there are problems with interpretation of MFN when applied to a competition regime which needs to be explored further. Countries have bilateral agreements on cooperation which result in providing more favourable access to information, legal assistance and other considerations which would not be accessible to non-parties to the agreement. Much more work is needed to understand how this principle would apply in a competition regime.

### **Due Process**

Due process applies to law enforcement procedures as they relate to individuals and firms. It requires that enforcement be governed by ethical standards, such as providing those subject to the application of the law a fair hearing of their case. It is also instructive to look at the definition of due process in the FTAA Draft Chapter on Competition Policy. (Square brackets indicate provisions still to be negotiated, but the text reflects the results of long and in-depth discussions and debate in the negotiating group).

### **Definitions**

The principle of due process means to ensure fair, independent and equitable procedures, before the competent and pre-established authorities, observing the formalities and guarantees established in the national and sub-regional laws and legislation.

This principle includes the [natural or] legal persons subject to the application of the law conferring right:

- [To be duly notified];
- to be informed of the reasons, nature and characteristics of the trial and proceedings;
- to offer or present arguments and evidence; and
- [that decisions issued by the competition authority are duly founded and motivated].

It is clear that due process, in this definition, is firmly anchored in “the formalities and guarantees established in the national and sub-regional laws and legislation.” It is, therefore, respecting the traditions of the legal system of the country.

## **Transparency**

Transparency means that there should be readily accessible written guidelines, regulations or other public guidance and that there should be ongoing updates of changes in the law or regulations. There is also the view that transparency should include the requirement that the competition authority should set a good example by following the guidelines and regulations that it issues. It should explain to the public what are its priorities, how it investigates and makes decisions, and the reasoning behind its enforcement and policy decisions. This would generate confidence in the private sector because it introduces predictability into the system. It is instructive to look at the text of the FTAA Draft Chapter in this regard:

The principle of transparency means [inter alia] that each party shall publish [and] [or] otherwise make available laws, regulations, procedures and administrative rulings of general application respecting any matter covered by this chapter.

### **Considerations for Developing Countries**

The challenge which developing countries face in dealing with the inclusion of the core principles into a possible WTO Framework Agreement is to ensure that there is inclusion of a very clear definition of what is the meaning of these principles in the context of the enforcement of national competition laws. The wording is crucial to future interpretations. One may find that, indeed, most, if not all, jurisdictions in developing countries practise non-discrimination in access to the legal machinery of the land.

It is not useful to divert energies into arguing a case of excessive market entry linked to national treatment, without recognising that governmental barriers to entry remain intact, and that market entry is increased only after the firm is already operating in the national economy, and only if barriers erected

by firms are removed, such as taking action against a cartel that engages in predatory behaviour to exclude competitors from a product or service market. In fact, all that has to be done is study the application of national treatment in competition regimes in OECD countries and observe the extent to which there are barriers to entry of developing countries goods and services, to recognise that our problems of access to those markets would be solved if non-discrimination in a competition regime meant unbridled market access, since all OECD countries have provisions in their competition law for non-discrimination.

With regard to due process, developing countries need to make it absolutely clear that they retain their sovereign right to choose the type of sanction, the standard of review and the judicial and administrative process which, in their view, are best adapted to their circumstances (hence the wording in the FTAA text respecting the national systems and procedures in enforcing the law).

The practice of transparency makes the competition regime more acceptable to stakeholders, generates more cooperation, and wins respect for the competition authority. It is, therefore, in the interest of developing countries to develop a culture of transparency in the execution of their competition regime.

However, this requires resources and expertise to provide all the necessary elements itemised above that lends transparency to the regime. This is a point that should also be tackled in the discussions on technical assistance and capacity building, because most developing countries which have competition authorities are stretched beyond limits, have very limited skilled human resources and even less financial resources to set up systems to ensure transparency. Those that are yet to set up regimes have even less capacity.

# *Application of WTO Core Principles on Competition*

*Faye Sampson\**

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## **Executive Summary**

This paper takes a peek into the issue of WTO and competition policy. Specifically, it emphasises the inherent diverseness of competition policy that differs with the particular institutional setting of a country. Thereafter, it draws out the implications of linking competition policies of developing countries with core WTO principles transparency, non-discrimination, procedural fairness, cooperation and commitment, supported by enforcement procedures, cooperation and dispute resolution. Finally, it identifies some core requirements of a multilateral competition policy.

## **Introduction**

It is well recognised that varying economic, social and cultural needs and interests influence and separate national systems of competition law (Ulrich, 1998)<sup>1</sup>. That competition policy cannot be identical in different countries and each market needs to be assessed in its own context (Britain and van Miert, 1996).<sup>2</sup> Differences in competition policies are therefore significant and often reflect themselves in the goals of competition laws. There is perceived to be a broad consensus amongst WTO members that the basic goal of competition policy is to enhance inter-firm rivalry in private markets, to deal with anticompetitive government measures so as to promote economic efficiency, consumer welfare and economic development.

Governments differ, however, on whether and to what extent non-efficiency goals, such as fairness, opportunities of small business, market integration, pluralism and technological development, should be taken into account in the conduct of competition policy.

The WTO principles of non-discrimination (national treatment and most favoured nation), transparency and procedural fairness reinforce the competition-law objective of protecting the competitive process irrespective of the nationality of the competitors. However, it is argued that there is a need to clarify and adapt the non-discrimination principles vis-à-vis competition laws and policies for developing and least developed countries.

Multilateral negotiation on competition policy by developing countries has been a slow and deliberate process. These countries appear to be uncertain if not insecure about the costs and benefits of new disciplines in this area, although many support the general concept of the application of binding international rules to curb restrictive trade practices. The differences in the approach, goals and implementation of competition policies in developed countries, however, suggest that national needs and objectives rather than international considerations are decisive issues.

## **WTO and Competition Policy**

Given the different conceptions and objectives with which developed and developing countries have approached exploratory negotiations on competition policy, the outcome of the exercise has been unpredictable. In the present context, developing countries have a lot of freedom to design and implement their competition policies, unrestricted by international rules and to some extent so far free from demands or coercion by developed countries. There is no obvious urgency on their part to move forward the agenda for a multilateral competition regime.

The EU appears as the leading force behind the proposal to develop disciplines on competition in the framework of the WTO; although there is considerable disagreement amongst some developed countries on the desirability and possible outcome of such a proposal.

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The EU initiative appears to be driven by the belief that an effective application of competition policy can keep markets open and accessible for foreign competitors.

The reaction of developing countries has been one of cautious observation, adopting a collective position to proceed with care in the context of the limited domestic reach of competition laws vis-à-vis the growth of anti-competitive practices by TNCs globally. They are cognisant of the fact that domestic competition policy cannot ensure that competition will prevail because competition in any territory will be affected by external actions and decisions (e.g. market strategies of firms located outside the territory, especially in the service industries) over which the national territorial laws have no jurisdiction.

It is argued that a multilateral framework of competition rules and cooperation for international trade should be consistent with the general WTO principles of transparency, non-discrimination, procedural fairness, cooperation and commitment, supported by enforcement procedures, cooperation and dispute resolution. These principles are endorsed in the WTO agreements, namely GATT, GATS and TRIPs<sup>3</sup>, whilst further recognising and specifically addressing the issue of national circumstances. The proposal for the application of these principles to competition law and policy has been met with mixed reaction from some of the developed and many developing Member states of the WTO.

### **Implications for Developing Countries**

The uniform application of these principles in the context of the general thrust and objective of WTO agreements (to provide for market access) would not only create serious inequities between the developed and developing WTO Members but also have the effect of opening up domestic markets of all Members to other Member states on a non-discriminatory basis and expose their businesses (importantly, services of the LDC and developing countries) to competition from developed countries.

The ability of home companies to sell products and provide services in their own home markets is only possible in the long run if their products and services are competitive with goods from the US, EU and Japan. (Admittedly, this is highly unlikely).

Application of these principles in relation to competition in an international context without

specific adjustments would give the firms of developed countries an unfair advantage of unlimited and uncontrolled access to the LDCs' national market which would harm their firms' development prospects, especially the service sector which currently makes up 60 percent of most economies. This underscores the concerns of developing countries and explains their reaction to the proposals for a multilateral framework for competition law and policy negotiation.

Competition authorities in developing countries complain that their interests are not adequately taken into consideration in the competition policies of developed industrialised countries. This can be substantiated by numerous examples.

The Director General of the WTO, Michael Moore, (a New Zealander) recently wrote, "It is ironic that it is those sectors that benefit most from the international trading system that continue to work so hard to stay outside the system and its rules. The aviation and agriculture sectors in particular stand to benefit and yet they remain largely outside the scope of the WTO rules. The most global of all industries remain protected contrary to the WTO principles of non-discrimination and transparency and thus advance the case for a multilateral framework"<sup>4</sup>.

Private international anti-competitive practices or monopolisation by global firms of domestic markets can, therefore, prevent economic development or limit its scope. Failure by developing countries to have adequate means to fight such practices exposes them to significant costs and retardation in their processes of economic development. Developed countries have generally ignored or encouraged export cartels whose activities deleteriously affect other countries (LDCs and developing countries in the main). Experience has shown that cooperation of developed countries in the investigation and discovery of such practices has been lacking.

Many developing countries do not have the necessary endowments, national competition laws or competition policy in place to meet the transparency and non-discriminatory market-access principles and obligations of the WTO agreements; they lack the ability to engage in market-orientated reforms or to adopt a competition law without the instruments to build a competition culture or develop appropriate institutions. Real concerns are also expressed that a multilateral framework on competition policy would



impair or limit their development policy options and their ability to implement pro-development industrial policies at their fledgling stages.

It is essential, therefore, that the effect of WTO principles on the autonomy of national competition authorities and the interpretation and enforcement of their laws should not weaken existing competition safeguards. As stated by Ernst-Ulrich Petersmann,<sup>5</sup> ‘There is a need for pragmatic synthesis between narrow “...competition law approaches” and overambitious “integration law approaches” so as to enable WTO Members to move towards progressive competition-orientated reforms of the world trading system in order to better protect consumer welfare and the equal rights of citizens’.

There are real issues to be addressed as global economies are not homogenous and pose serious difficulties for the integration of competition rules<sup>6</sup>. Any serious deliberation must include and address the issues of non-discrimination requirements that could limit parochial exemptions that unreasonably favour domestic economic activities and impose significant costs on other countries. A literal and untempered application of MFN and non-discriminatory treatments would be inequitable and difficult given the vast differences in development amongst WTO Member countries.

The WTO principles could fulfil the competition-law objective of protecting the competitive process irrespective of the nationality of the competitor in an integrated approach, as proffered by Ernst-Ulrich Petersmann<sup>7</sup>, whilst providing for a pragmatic synthesis between narrow competition-law approaches and the overambitious integrated-law approach as stated by Frederic Jenny<sup>8</sup>.

In the final analysis and in the context of a statement issued in the 1997 WTO Annual Report, “The issue is not whether competition policy issues will be dealt with in the WTO context, but how and, in particular, how coherent will the framework be within which this is to be done”<sup>9</sup>.

### **Core Requirements of New Agreement**

Adoption of a multilateral competition framework reflecting the core principles of WTO would need to deal with the following issues in order to address the concerns of developing countries:

- General consensus and acceptance of core principles of competition at the international level integrated into cooperation agreements with different commitments and conditions for their implementation, corresponding to the development and cultural regimes of each country; allowing for the different levels of resources and institutional endowments, as members are characterised by extensive diversity of economic development, socio-economic circumstances, laws, cultural norms and history.
- Commitment to the process with suitable modulation of treatment through negotiated transitional periods and requirements for each subgroup, depending upon the Member’s state of development and legal and institutional endowment. These should not be abused for protectionist reasons.
- Establishing sub-groupings into Developed - with functional law and institutions, Developing - with operative competition regime, policy, legislation and agencies and Least Developed Countries with limited or no competition institutional endowment.
- Clarifying and adapting the non-discrimination principles of WTO law with regard to competition law and policies as a safeguard for LDC and developing countries and, in so doing, providing for special and differential treatment through flexibility, appropriate exemptions, exceptions, and waivers so as to reflect the specificity of national competition policy and law; to provide temporary relief from competition to domestic manufacturers and service providers to address the concerns of LDCs and developing country Members; to enable them to achieve their development objectives with binding realistic timeframes.
- Permitting realistic exclusions and exemptions and waivers with timely provisions for elimination or phasing out and measures to ensure transparency of such exclusions, exemptions or waiver.
- Promoting bilateral and multilateral cooperation on competition matters, exchange of information, assistance in the formulation and introduction of competition policy, laws and institutions and capacity building for LDCs and developing countries.

- The MFN treatment can be problematic but Governments can choose to negotiate commitments in various ways as provided in the GATS and TRIPs Agreements.

### Conclusion

There should be temporary respite suitable for addressing the cases of countries without national regimes or those that need to make necessary national adjustments to be in a position to access and apply the negotiated competition commitments in an agreed time framework, in order to facilitate market access by a gradual process. Allowance should be made for differences in national legislation provided they are not contradictory or conflict with the underlying consensus expressed in the WTO principles whilst accepting the reality that the community of trading nations is very diverse with different cultural norms.

It should be accepted that there are differences in the levels of economic development amongst the Members and that not all Members are immediately and equally able to provide or access the benefits of a multilateral international competition regime applied in the context of the WTO principles.

There should be uniform application of core principles of competition on a level-playing basis only if national circumstances are comparable.

Limits should be placed upon unfair protectionists' exceptions and sectoral exclusions in national

competition laws and policies and bilateral cooperation among competition authorities should be strengthened and extended.

### Suggested Wording of Provision

Temporary relief and negotiated competition commitments in an agreed time framework.

“Each Member State subscribing to the WTO set of protocols on the Multilateral Agreement in respect of Competition Law and Policy shall have the right to apply for temporary relief from international competition to domestic manufacturers and service provider firms, to address the specific constraints of that Member State in an attempt to minimise the burden on Members carrying out any obligations or commitments given.

Temporary relief shall be by way of grant of waiver, exemption or exclusion to comply with the Agreement or the application of any commitment required or given or any provision of the Agreement.

Members shall be granted the opportunity to obtain such relief with appropriate flexibility upon mutually agreed terms in respect of the applicant Member and with respect to the time limit within which such obligations and commitments given are to be complied with. All such commitments and/or temporary relief granted shall be binding upon the parties thereto and shall be otherwise subject to the general provisions of the Agreement.”

1 Hanns Ullrich, *International Harmonisation of Competition Law—Making Diversity a Workable Concept*, in Hanns Ullrich, (ed.), *Comparative Competition Law—Approaching an International System of Antitrust Law*, Baden-Baden, 1998.

2 Communication to the Council, Submitted by Sir Leon Brittan and Karel van Miert, *Towards an International Framework of Competition Rules*, Com (96) 296 final, 18 June 1996; F. Jenny, “The Interface between Competition Policy and Trade, Investment and Economic Development”, paper prepared for a conference of the Global Forum on Trade and Competition Policy, New Delhi, 17-18 March 1997.

3 See GATT Article X, GATS Article III and TRIPs Article 63.

4 The Times, August 2 2002.

5 Ernst-Ulrich Petersmann, *Competition-oriented Reforms of the WTO World Trade System: Proposals and Policy Options*, in Roger Zäch (ed.), *Towards WTO Competition Rules*, (1999).

6 Report of the Working Group on the Interaction between Trade and Competition Policy to the General Council, 2002

7 Ernst-Ulrich Petersmann, *Competition-oriented Reforms of the WTO World Trade System: Proposals and Policy Options*, in Roger Zäch (ed.), *Towards WTO Competition Rules*, (1999).

8 Frederic Jenny, *Globalisation, Competition and Trade Policy: Issues and Challenges* in Roger Zäch (ed.) *Towards WTO Competition Rules*, 1999

9 Report of the Working Group on the Interaction between Trade and Competition Policy to the General Council, 2002.

# *Cross-Border Competition Issues in the Context of the Doha Agenda*

*Vani Chetty\**

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## **Executive Summary**

This issue paper will focus on certain cross-border competition concerns of developing countries and how this concern can be addressed at a multilateral level in the WTO having regard to paragraph 25 of the Doha Declaration. Since this is an issue paper only, it is not exhaustive of all issues to be addressed in this context and highlights selected issues only. It also discusses the means by which developing countries can constructively and proactively engage in negotiations at a multilateral level with the object of addressing their key competition concerns.

Among the key recommendations, developing countries should ensure that certain pre-negotiating conditions like a thorough process of technical assistance be fulfilled; they should unite to obtain substantial concessions from developed countries for their developmental requirements; and they should ensure that any multilateral agreement be not biased at their expense in favour of developed countries.

## **Introduction**

The Doha Declaration pursuant to the WTO Ministerial Conference specifically recognised the case for a multilateral framework to enhance the contribution of competition policy to international trade and development. Paragraph 25 of the Doha Declaration mandated the Working Group on the Interaction between Trade and Competition policy (the “WTO Working Group”) to focus on the clarification of core principles, including transparency, non-discrimination and procedural fairness, provisions on hard-core cartels, modalities for voluntary co-operation and support for progressive reinforcement of competition institutions in developing countries through capacity building.

Whilst it is acknowledged that all forms of restrictive business practices (RBPs) that distort international trade should be addressed at a multilateral level, in reality it may be over-ambitious for developing countries to deal with all forms of RBPs at once. An urgent cross-border competition concern for developing countries is hard-core cartels. It is argued that a prohibition on hard-core cartels requires greater priority than other RBPs.

Research has shown that cross-border activities involving mergers, cartels, abuses of dominance and other RBPs have the potential to, among other consequences, distort trade to the advantage of the perpetrators, eliminate weaker domestic trading partners, stifle entrepreneurship and ultimately retard economic development.

It is widely acknowledged that anti-competitive practices with a cross-border effect can adversely affect trade flows, thereby undermining those benefits which would otherwise be delivered by trade liberalisation and open markets<sup>1</sup>.

In this regard, developing countries are most vulnerable to the effects of such anti-competitive behaviour. This situation is compounded by the fact that developing countries, unlike their counterparts in the developed world, do not have the necessary competition policies and framework in place to deal with anti-competitive behaviour of transnational corporations (TNCs).

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National competition laws to the extent that they exist and are implemented in a very limited number of developing countries<sup>2</sup> often lack the necessary extra-territorial reach to counter such anti-competitive practices at a global level.

### Analysis of the Issues

Major cross-border competition concerns include the activities of hardcore cartels, various restrictive business practices (including abuse of dominance and vertical restraints) and unchecked merger activity.

Activities of hardcore cartels are generally acknowledged to be the most destructive form of anti-competitive behaviour. Hard-core cartels are generally understood to include agreements among competitors involving price fixing, bid rigging, output restrictions or customer allocation and market restrictions. Developing countries are especially vulnerable to cartel activities, since the risk of detection is often minimal due to developing countries' weak legal structures and enforcement capacity<sup>3</sup>. Furthermore, developing countries often do not get cooperation from the competition authorities of the countries in which the cartel participants may be incorporated/situated.

While hard-core cartels are clearly a priority, cross-border mergers, on the other hand, if unchecked may result in a reduction in competitiveness or contestability of a market, if too much market power is concentrated in a single merged firm. Whilst many cross-border mergers may have little or no effect in developed countries because their markets are so competitive, the merger of two TNCs could create severe problems for developing countries where the merged firm could result in a monopoly.

As contemplated in Paragraph 25 of the Doha Declaration, it is proposed that the possible elements of a multilateral framework agreement should be based on core principles, provisions on hard-core cartels, cooperation modalities and the necessary support, technical assistance and capacity building for developing countries.

A framework for rules should be based on core principles rather than specific provisions. The latter should contain minimum standards and, at the same time, should comprise the basic concepts upon which there could be broad agreement for example:

- a commitment to adopt a competition law containing at the minimum provisions on the

prohibition of hard-core cartels and to the extent necessary other certain general types of practices on which there is underlying consensus;

- the creation of effective enforcement institutions; and
- agreement on acceptable forms of co-operation.

An approach based on core principles should not mean a harmonisation of domestic competition laws but should have the necessary flexibility to accommodate differences in national legal systems and institutional capacities. Any multilateral agreement should have the necessary flexibility with regard to exemptions from the application of competition law and should provide for transitional periods where this is required for the introduction of domestic legislation or the strengthening of domestic institutions.

Having regard to the damage caused to developing-country consumers and producers by international hard-core cartels, as has been acknowledged in the World Development Report 2001 background paper, the fight against the latter can be best addressed in the form of an international commitment to ban such practices.

The multilateral ban on hard-core cartels should be implemented by means of corresponding domestic legislation and policies. Having regard to the fact that national laws are often ineffective where the proof lies outside a country's borders, it is becoming urgent for domestic competition rules to be supplemented by international avenues of cooperation.

A commitment on hard-core cartels in a multilateral agreement would need to lay down the essential elements that domestic law provisions on this issue should contain, e.g. a total prohibition of hard-core cartels, a definition of what constitutes hard-core cartels and deterrence measures whether in the form of administrative fines and/or criminal sanctions.

The treatment of hard-core cartels (or indeed any other anti-competitive practice) at the multilateral level must be dealt with extreme care by developing countries. It is proposed that fundamental to any undertaking by developing countries at a multilateral level should be the principle of special and differential treatment and a constructive policy on the technical means and practicality of implementation of such special and differential treatment.

In this regard the necessary cooperation modalities and capacity-building elements are crucial. It is suggested that certain WTO principles of non-discrimination (national treatment and most favoured nation) transparency and due process be clarified and adapted to competition laws and policies for developing countries. Without this flexibility most developing countries will be reluctant to provide such commitment.

An unqualified adoption of existing WTO principles will not only impact on a developing country's national sovereignty but may also be in direct conflict with the industrial policies of a particular country.<sup>4</sup> It is therefore important for any multilateral commitment to have the necessary derogations and exceptions for public and developmental objectives which accommodate the different national regimes in terms of its laws and policies.

Special and differential treatment must be guaranteed to developing countries since the latter are not on a "level-playing field" in the international environment and adoption of a "one-size-fits-all-approach" will not take account of the existing asymmetries between developing countries.

Furthermore, it is the perception of developing countries that existing multilateral agreements reflect the concerns of sophisticated economies and presuppose an existing institutional, human and financial base that is often deficient or even non-existent in developing countries.

Unlike the developed world, developing countries have other pressing national issues, which may be perceived as requiring higher priority, for example, HIV-AIDS, housing, poverty, education and the like. Developing countries should therefore be in a position to introduce competition policy to the extent that it may be required, without utilising its scarce resources to make competition policy a higher priority than it needs or deserves to be.

Another reality of developing countries opening up their domestic markets to foreign direct investment on a non-discriminatory basis (without the necessary individual adjustments to firms of developing countries) is that developed countries would have unlimited and uncontrolled access to such national markets. This could ruin the local markets of developing countries unless such liberalisation is cognisant of the development dimension. It is

therefore suggested that any commitment by developing countries be tempered with appropriate exemptions (for certain sectors and/or for small and medium enterprises), adjustments, negotiated transitional periods and individual requirements of each country.

Many developing countries are not only unaware of cartel activity and RBPs adversely affecting their economy, but also powerless to investigate and successfully prosecute such perpetrators. It is therefore imperative that developing countries receive the cooperation of other jurisdictions, (especially developed countries) to obtain information located outside their national territory in a case affecting their market.

Various forms of cooperation may be adopted, ranging from voluntary cooperation and exchange of publicly available information, consultations and peer-review mechanisms. Modalities for cooperation could take place in a number of ways and could include:

- exchange of information and evidence;
- exchange of information and views among competition authorities of relevant information and cases affecting the important interests of another country; and
- application of appropriate comity principles.

Although the issue of confidentiality often raises its ugly head and proves to be a stumbling block in cases of cooperation, certain studies have shown that the type of information needed for investigating hard-core cartels is not strictly business secret or proprietary and sensitive business information. The information sought normally constitutes evidence of collusion in the form of meetings between cartel members and the like. The issue of what exactly constitutes "confidential information" in the context of hard-core cartels must be analysed more closely.

Enforcement authorities often cooperate on issues involving tax, customs and other criminal activities. A similar level of cooperation should be provided to competition authorities when investigating hard-core cartel activity.

A multilateral agreement should in no way preclude the possibility of countries establishing closer cooperation links on the basis of bilateral or regional agreements. South Africa's Free Trade Agreement concluded with the EU in 1999 has provisions

concerning cooperation in the context of competition. The provisions on cooperation are modest but have the possibility of requesting each other to take enforcement action, and each signatory must take into account each other's important interests in the course of their enforcement activities. By way of example, this is demonstrated in at least two cross-border cases in the South-African context.

The South African competition authorities obtained cooperation from the EU in the international merger of SmithKline Beecham PLC and Glaxo Wellcome PLC and a case involving an export cartel (comprising an association of five US soda ash producers) namely, American Natural Soda Ash Corporation ("the ANSAC case")<sup>5</sup>.

The ANSAC case is an appropriate example of an export cartel whose anticompetitive behaviour would not be tolerated in the domestic US market<sup>6</sup> but which may operate with impunity in the markets of other countries which include South Africa and India.

A multilateral ban on hard-core cartels will nip such anti-competitive practices in the bud. The ANSAC case in South Africa has been investigated and prosecuted since 1999 at great expense to the South African competition authorities.

The benefits of cooperation may emerge at a regional level for countries in the SADC region through the current initiative of the South African competition authorities in the formation of the Southern and Eastern African Competition Forum ("SEACF"). Countries involved in the initiative include, Kenya, Malawi, Mauritius, Mozambique, Seychelles, Swaziland, Tanzania, Zambia, Zimbabwe and the Secretariats of SADC and COMESA.

The objective of an SEACF in the SADC region is to create a coherent group of countries in the region to assist countries in the development of competition policies and establishment of competition agencies.

Experiences gained from cooperation at bilateral and/or regional level will be very important and useful for developing countries entering into appropriate cooperation arrangements with their developed counterparts. Such collective experiences gained on a bilateral or regional basis pave the way for a broader agreement as envisaged at the multilateral level. The SEACF has a vital role to play in that members can

promote and defend common African positions on issues of competition in their member states.

### **Recommendations and Conclusions**

For any negotiation at a multilateral level, certain pre-negotiating conditions must be fulfilled. These include a thorough process of technical assistance where developing countries should educate themselves on the relevant issues.

In order to truly "level the playing field", both developed and developing countries should initiate a process of in-depth technical assistance prior to negotiations and subsequent commitment at a multilateral level. This process should take explicit consideration of the developmental dimension and the competition challenges that are unique to developing countries. It is therefore imperative that developing countries be properly prepared and understand the full implications of any proposed multilateral or plurilateral commitments.

DCs should not underestimate the power of having a united front and combining forces to obtain substantial concessions from a developmental perspective from developed countries. This is often very hard to achieve in the context of a bilateral agreement. Developing countries should therefore engage in thorough pre-negotiation activity as part of the preparatory process prior to entering into any multilateral agreement.

DCs are aware that being insufficiently prepared for previous trade rounds has led to protracted negotiations with little concessions made for developmental considerations. Furthermore, multilateral trade agreements have by themselves not ended protectionism.

DCs may therefore be forgiven for not expecting that a multilateral competition agreement will end anticompetitive practices with international effects. Having said this, fears of an agreement being biased towards or abused by developed countries at the expense of developing countries are not a sound basis for refusing support for and participation in negotiations on multilateral competition rules either.

The issues raised in this paper constitute a very basic framework of any multilateral commitment on competition policy by developing countries. It is premature at this stage to draft a legal position that

encapsulates a position to be adopted by developing countries. A developing country position will however emerge once there is consensus among developing countries themselves at a national and regional perspective, prior to a multilateral commitment. This

can only occur once the necessary programmes for capacity building and technical assistance takes place to enable such countries to engage more meaningfully in addressing their cross-border competition concerns at a multilateral level.

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- 1 The world economy is increasingly being shaped by globalisation and liberalisation of trade. Developing countries have not been spared the effects of the aforesaid changes in the world economy which are unlikely to be reversed in the foreseeable future. Developing countries therefore risk being marginalised unless they can adapt and adjust to a new competitive international environment in a constructive manner which benefits their interests.
  - 2 By way of example, of the 14 countries in the Southern African Development Community (“SADC”) only 3 countries have operational competition laws and policies, namely, South Africa, Zambia and Zimbabwe. The SADC region does however recognise the prevalence of anti-competitive behaviour in its member states. Article 25 of the Protocol on Trade in the SADC region stipulates that “member states shall implement measures within the community that prohibit unfair business practice and promote competition”.
  - 3 Professor Simon Evenett conservatively estimates the annual loss for developing countries from a few known international cartels to be about 1.7 percent of these countries GDP. Furthermore, according to a presentation by Simon J Evenett of the World Trade Institute at WTO symposium on 22 April 2002, the effect of merely 16 cartels on developing country imports was an estimated US\$81,1 bn, which was likely to be an underestimate. Furthermore, in terms of comparison with international aid flows to developing countries, the harm done by cartels to developing economies was 3 to 6 times the recent increase in US aid and that overcharges by cartels were equal to at least one-third of aid received by developing countries.
  - 4 South Africa for example, has in its competition legislation various public interest criteria. In the context of mergers, regardless of the outcome of the evaluation of the competition impact of the merger a public interest test must be administered. The public interest criteria include black empowerment, international competitiveness and employment. This model fundamentally differs from the efficiency models used in more developed jurisdictions.
  - 5 This matter is currently still being considered by the South African authorities. One of ANSAC’s grounds of defence is that it is a legitimate export trade corporation according to the law of its country of incorporation. ANSAC was successfully prosecuted in the EU and was banned from operating as a cartel in the EU. ANSAC was also prosecuted by the Indian competition authorities.
  - 6 ANSAC’s activity is exempted in the US in terms of the provisions of the Webb Pomerene Act.

# International Cooperation and Competition Policy

Gesner Oliveira\*

## Executive Summary

The objective of this paper is to argue that the dissemination of competition laws is positive for the world economy. However, the benefits derived depend crucially on adequate enforcement and institutional building in the various jurisdictions for which international cooperation within WTO and in other forums is crucial.

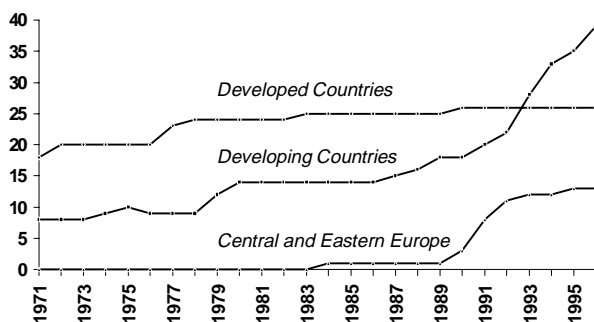
The paper addresses two issues. Section 1 underlines a few aspects of the increasing importance of competition policy in the developing world. The second section provides a few suggestions for the international cooperation agenda.

## The Increasing Importance of Competition Policy for the Developing World<sup>1</sup>

### *The Dissemination of National Competition Laws*

The last decade has been characterised by the dissemination of competition laws throughout various jurisdictions, especially in developing countries, as Table 1 shows. According to the 1997 UNCTAD World Investment Report, more than seventy nations have now competition laws, in contrast with less than forty in the eighties. In the second quarter of 1999, 83 countries had competition laws in force and 23 were developing new laws in the area<sup>2</sup>.

**Table 1: Number of Countries with Competition Laws**



Source: UNCTAD, World Investment Report 1997, p. 189

Table 2 illustrates that a new wave of competition laws has taken place in the nineties, involving a larger

number of countries than in the previous decades since the turn of the last century and in the immediate post-war period.

### *1.2 Different Stages of Institutional Development of the National Competition Policies*

The implementation of competition policy requires time, cultural change and investment in adequate institutions. Therefore, it is not surprising that competition laws and enforcement vary widely across countries.

Despite this historical nature of competition policy, it is useful, for analytical purposes, to identify a sequence of evolutionary stages which could serve as a reference for comparisons among different countries.

The above considerations show the importance of defining priorities and setting a plan for institutional building. Table 3 contains a useful timetable to serve as a reference for governments.

The sequencing proposed is based on a simple idea inspired by Khemani and Dutz (1995). Given its limited resources, the agency should start with the actions which most likely benefit the market. Gradually, it could introduce measures which require more sophisticated cost/benefit analysis. Merger review

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**Table 2: National Competition Laws**

PERIOD	COUNTRIES
1890-World War II	United States, Canada and Australia.
After World War II	Germany, European Union, United Kingdom, Japan, Sweden, France, Brazil, Argentina, Spain, Chile, Colombia, Thailand, India, South Africa and Pakistan.
1980...	Kenya, Sri Lanka and Korea.
1990...	Russian Federation, Peru, Venezuela, Mexico, Jamaica, Czech Republic, Slovakia, Côte d'Ivoire, Bulgaria, Kazakhstan, Poland and initiatives in many other countries.

Source: Information from Khemani and Dutz (1994), Boner and Krueger (1992), Boner (1995) and Rowat (1995).

comes after conduct control due to the fact that the welfare effect of a merger might be less clear than that of a price cartel, the latter being unequivocally welfare reducing.

The stages suggested are organised according to the degrees of difficulty authorities face in undertaking cost/benefit analysis of the impact of competition measures on social welfare. However, it might well be the case that legally sound repression of price cartels turns out to be more difficult than the implementation of a merger review system.

In fact, it is generally easy to assess the microeconomic impact of a cartel but it is hard to fulfil the requirements for an acceptable standard of proof for the courts. Therefore, the actual plan should take into account not only the difficulty in assessing the welfare impact of a particular illicit antitrust activity, but also the expected return on each dollar spent on the particular line of action, given the relative probabilities of success of alternative public policies.

**The International Cooperation Agenda**

Although only preliminary, the above evidence suggests the need to focus on the quality of competition law enforcement rather than on the mere enactment of the legislation. This implies that effective international cooperation in the area of competition policy has to be beyond standard forms in order to cope with the challenge of institutional building.

**The Major Lines of Action for International Cooperation**

There are three major areas for which international cooperation is needed and they are all of great interest for developed and developing countries:

- combat hardcore cartels;
- reduce the transaction costs of merger control; and
- promote institutional building and disseminate competition culture.

**The Need for Coordination among Competition Agencies**

As pointed out in BRAZIL (1998), two factors explain the importance of international cooperation for the first two areas:

- Different from the jurisprudence of the sixties and seventies, there are more and more cases which not only present the same characteristics in several markets but also constitute in reality cross-border mergers or generalised conducts. Therefore, the potential for inconsistent decisions among different national agencies is high.
- The frequency of cross-border transactions poses the problem of transaction costs firms incur when they have to comply with so many applications and bureaucratic timetables. Efforts to harmonise particular requirements (e.g., for merger review) could be useful even without a more profound convergence in the legislation.

Brazil provides a good illustration. 17 percent of the merger cases analysed in 1998 represent transactions which were generated by global strategies on the

**Table 3: Timetable for Implementation of Competition Policy**

Stages	I	II	III	Institutional Maturity IV
National	1. Competition Advocacy + 2. Repression of Horizontal Agreements + 3. Technical Assistance	I + 4. Merger Control + 5. Vertical Agreements	II + 6. Regulation + 7. International Cooperation Agreements	III + 8. Second Generation International Agreements + 9. Pro-Active Competition Advocacy
Mercosur	Harmonisation Agenda	Competition perspective into anti-dumping analysis		
WTO	General Guidelines			

part of foreign groups. In many instances, the operations were reviewed by several other national agencies besides CADE.

### ***Institutional Underinvestment and Lack of Competition Culture***

Although it is hard to overstate the importance of the first two areas indicated above, it is the third area that merits particular attention when one is concerned about international cooperation.

Indeed, there is a central problem of political market failure. In each national jurisdiction, there will be a tendency for institutional underinvestment. There are not necessarily enough national constituencies who will support independent competition law enforcement. Although the problem is not peculiar to developing countries, it becomes more acute in jurisdictions which are at very early stages of institutional development and where competition culture is not widespread.

Developing countries start implementing competition laws under very unfavourable circumstances. Kovacic (1997) contains a list of factors which make the task all the more difficult for developing countries' authorities, to which one could add a few more elements in order to get the following set of obstacles:

- resources are extremely scarce;
- lack of professional expertise;
- lack of jurisprudence;
- frail academic infrastructure;
- weak professional associations and consumer groups;
- inadequate judicial systems;
- bad reputation of the public sector: excessive bureaucracy, lack of transparency and corruption; and
- political and bureaucratic resistance

Competition officials in mature jurisdictions have to apply competition principles given a stable and adequate pre-existing environment, whereas competition officials in developing countries have to help create such an environment for the effective application of competition law.

Moreover, note that there are economies of scale and economies of learning for the implementation of competition laws; at earlier stages one would need

**Table 4: Stages of Institutional Development and the Cooperation Agenda**

Stages	Cooperation Agenda	Content
I and II	Technical assistance	Training and drafting of legislation and procedures in line with due process
III	Simple cooperation agreements	Cooperation in selected cases with exchange of public information
IV	Advanced agreements	Cooperation Systematic cooperation with exchange of confidential information

more resources and not less. The problem is attenuated by the fact that learning from pioneers in the field has been made a lot easier and less costly due to the Internet and other media. The communication revolution has made available technical papers and decisions which are very useful for the competition official, as well as the possibility for a faster exchange of ideas and opinions.

Therefore, there should be a permanent concern to incorporate world's best practices in competition policy, for which benchmarking exercises are particularly important.

The increasing globalisation of firms is also changing the private sector's view on the matter. At times, international firms have put pressure on local governments to set stable and transparent rules. National firms are also changing their views on the usefulness of a modern regulatory framework.

### ***The Cooperation Agenda and the Stages of Institutional Development***

The focus of international cooperation will depend upon the stage of institutional development of each national jurisdiction, as summarised in Table 4.

At Stages I and II in Table 3, technical assistance seems to be more appropriate. It will occur most likely between a developed country and a developing one. Technical assistance from countries at intermediary positions should be stimulated since the institutional environments might be similar and useful in terms of adopting new strategies for the implementation of competition law.

At Stage III, when the agency has already built in some internal experience, simple cooperation agreements including exchange of public information can be helpful. However, one should be realistic regarding two aspects: i) the limited resource endowment would not permit joint action in all cases; ii) sharing of confidential information would face serious legal constraints.

More advanced agreements, including exchange of confidential information, would require institutional maturity and greater homogeneity and integration among the participants.

### ***The Cooperation Agenda at the Regional and Multilateral Levels***

#### *The Regional Level*

The agenda of the regional blocks usually deals with two issues. First, the harmonisation of the national competition laws, which includes the creation of a new legal framework in certain countries as in the case of some of the Eastern European nations.

Second, the member states have to negotiate the convergence of anti-dumping rules into competition rules. This is not trivial theoretically or politically, but it is a question which has to be addressed in order to stimulate trade within the block.

#### *The Multilateral Level*

A worldwide transformation of the anti-dumping rules into competition rules does not seem to be realistic in the near future. Any kind of international code or legislation in competition seems to be premature given the great diversity of experiences and stages of development of the members of WTO.

The definition of general principles in regard to the prerequisites that a national law has to have to provide legal certainty to private economic actors seems to be the relevant agenda at the multilateral level. Although not comprehensive, the WTO principles of most-favoured nation, national treatment and transparency are of particular relevance for the building of solid competition institutions in the developing world<sup>1</sup>.

In addition to such definition, a number of actions could be undertaken:

- elaboration of standards for bilateral and plurilateral agreements;
- incentive for benchmarking exercises such as voluntary country reviews;
- greater coordination and funding for technical assistance;
- regular reports on world competition policy.

### **Conclusion**

Technical assistance and technical cooperation are crucial for institutional building in competition policy. Of course, one has to be very careful in order to select from the foreign experience the appropriate lessons for one's own legal and cultural environment. But the important point is that cooperation has to be understood in the context of the educational role of multilateral organisations more than in a result-oriented approach.

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<sup>1</sup> The importance of the last two has been emphasized in BRAZIL (1998).

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# *Public Interest in Competition Policy*

Reena George\*

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## **Executive Summary**

This paper addresses the role of “public interest” issues in competition policy, especially with regard to multilateral agreements. In the first two parts, the definition of public interest and its general role in competition policy are discussed. The final part of the paper discusses the procedure for establishing public interest.

## **Short Statement on the Issue**

Competition issues have been on the global trade agenda from the days of the Havana charter. However, in recent years there has been a growing interest in competition issues. The underlying presumption of competition is that competitive markets bring benefits, particularly for consumers and businesses. Restoring and enhancing incentives to compete lead to greater efficiency in resource use, lower prices and costs, higher incomes and fairer outcomes.

The European Union (EU), driven by market access considerations, was the push behind the inclusion of competition policy in the Doha Declaration. The main thrust behind this initiative was based on the belief that, despite trade liberalisation, policies such as competition policy (or the lack of it) could act as a non-tariff barrier to trade. High profile cases like the Kodak-Fuji film case and the Boeing-McDonnell Douglas merger case reinforced this belief. An analysis of these two cases will illustrate that thrust on putting competition issues on the WTO agenda is driven by producer interests.<sup>1</sup>

On the one hand, developing countries, having little to gain from market access considerations, fear, *inter alia*, that large MNCs headquartered in developed markets would expand into their markets and threaten young domestic companies. They also fear that any multilateral agreement on competition policy would be intrusive and impinging on their sovereignty to make decisions according to their unique market conditions.

Developing countries that, like developed countries, are affected by anti-competitive practices of globalised trade, such as domestic import cartels, international cartels that allocate national markets among participating firms, abuses of dominant positions, etc., are eager to design competition laws to safeguard their interests while maintaining their ability to regulate in public interest.

## **Analysis of the Issue**

The question of public interest has always come up whenever reforms take place. Public interest is a term that remains contested and ill defined, especially as traditional values are being replaced by market values. The term will require significant developments if it is to have any significant utility in the reform process. Nonetheless, public interest can be viewed as an analytical framework, which enables a rebalancing of ideas that influence policymakers.

Although ostensibly in public interest, the WTO reforms have been dominated by efficiency, productivity and contestability considerations. Very little priority has been given to non-economic considerations such as coordination, equity representation, political accountability, and consultation and distributive outcomes.

The ultimate objectives of most competition policies are the promotion of economic efficiency and/or consumer welfare. Economic efficiency entails considerations such as optimal allocation of an economy’s scarce resources, the most effective combination of productive resources and the optimal rate of technological innovation, development and diffusion.

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Economic efficiency is sometimes equated to social welfare and is therefore presumed to be in public interest. Some competition authorities like that in the US, for instance, effectively pursue consumer welfare. Under this approach, the fundamental question is not whether a business practice generates distortions in the market, which could lead to reductions in social welfare, but whether it would have a detrimental impact on consumer prices or on the choice or quality of goods and services available to consumers. In such instances, consumer interest is equated to public interest.

The concept of public interest has adapted itself to the values assigned to it. How then can public interest be defined and how should a competition policy, whether multilateral or domestic, be pursued such that it is in public interest?

Many definitions of public interest emphasise some kind of commonality of interests, a single interest that all citizens are presumed to share. Edward Banfield describes the difference between special interests and public interest as follows: “A decision is said to serve special interests if it furthers the ends of some part of the public at the expense of the ends of the larger public. It is said to be in public interest if it serves the ends of the whole public rather than those of some sector of the public.”

There are others who believe that there is no single interest which all members of a given society share. Public interest, for these people, is based on a consensus among the “preponderance” of the people. As Anthony Downs puts it :

“The concept of public interest is closely related to the universal consensus necessary for the operation of a democratic society. This consists of an implicit agreement among the preponderance of the people concerning two main areas: the basic rules of conduct and decision-making that should be followed in the society; and general principles regarding the fundamental social policies that the government ought to carry out.”

F. Raymond Marks and others describe not a consensus but a balancing of interests when they say that public interest is a “policy resulting from the sum total of all interests in the community – possibly all of them actually private interests – which are balanced for the common good.”

The next question that would inevitably arise is how is the balancing to be done. Some observers believe that “the public” is not capable of determining “public interest.” Supporters of the “idealist” school believe that only government officials have the knowledge and the wisdom to determine what public interest is. Anthony Downs describes modern idealists:

“The idealist school believes that public interest consists of the course of action that is best for society as a whole according to some absolute standard of values, regardless of whether any citizens actually desire this course of action. Therefore, the task of government officials is to be fully acquainted with that standard of values and to apply it to concrete situations by means of their own judgement. Public opinion need not understand the wisdom of the policies arrived at.”

A number of other theorists, however, emphasise procedure when discussing public interest. Often, the procedure involves interest groups and depends on a pluralist conception of society. A quotation from Gerhard Colm illustrates this:

“The mixture of personal and general interests differs in various groups and individuals, but from these varying emphases, a consensus emerges as to what constitutes public interest within the frame of reference of the particular society and culture. One of the main functions of the political processes in a democracy is to hammer out this common understanding of what is accepted as constituting public interest.”

### **Recommendations**

The next question that inevitably arises is what would be the procedure for establishing public interest? These two aspects of public interest, first the value judgements as to what constitutes public interest – in legal terms the substantive due process- and second, the method or procedure as to how the value judgements are arrived at- the procedural due process- have received equal emphasis in the literature.

Economists Jesse Burkhead and Jerry Miner use a legal analogy to define their position:

“In administrative law it is usually impossible to define substantive due process, but it is not as difficult to define procedural due process. If this analogy is

appropriate, it should be possible to define a procedural public interest, even though its content cannot be specified.

A procedural public interest would consist of an assurance, in the decision process, that the widest possible range of interests will be consulted. This consultation will assure that the intensities of preferences are revealed, even if these cannot be measured with precision.

The aesthetic cost of destroying a scenic wilderness cannot be compared with the value of power and water to be produced from a reservoir, but the intensity of reaction of affected groups can at least be assessed. A procedural public interest would both establish the values that underlie public interest and reveal the consequences of alternative policies. The rules of the game are important, not just the specific, isolated outcomes.”

There are many facets to public interest, which is why it has been so difficult to arrive at a consensus definition. It seems, however, that many of these facets can be grouped under two principal headings: efficiency and equity. Efficiency, in this context, concerns the size of society’s output “pie” while equity involves judgements about the relative amounts of the “pie” that go to various people, and the process by which (or the “procedural justice” with which) the amounts are decided.

Adopting the foregoing analysis on public interest how can a competition policy be designed to meet public interest?

For a multilateral agreement on competition policy to be in public interest, it has to balance both the economic interests (market access and merger issues) and the social interests of developing nations such as low levels of income, skewed distribution of wealth, low levels of education and asymmetric information and preservation of culture. Public interest requires that concerns of all parties should be addressed. This could well mean a paradigm shift in the focus of developed countries from market access considerations to welfare and equity considerations as the basis for a multilateral competition policy.

Besides, at this stage, developing countries with underdeveloped market structures lack the technical and practical expertise to assess the costs and benefits of a multilateral competition policy that would be in their interests and would require more understanding of international market structures and the impacts of international competition on their country.

This can be done through an increased level of cooperation, understanding and information sharing between countries. Such a broad-based cooperation to raise awareness would encourage a convergence of views on desirable regimes and enforcement practices. It would also serve the useful purpose of identifying precise areas of disagreement and a better understanding of those areas where convergence is not feasible or desirable.

Other strategies can also be explored, such as commitments by developed countries to developing countries for greater technology transfer and technical assistance, pressures for modifications in the anti-dumping laws of countries, as specific tradeoffs against agreeing to a competition agenda.

However, realism suggests that the primary focus of developing countries should be to design and implement suitable domestic competition policies<sup>2</sup>. This would involve an extensive national exercise in identifying the interests of all stakeholders. Domestic competition policy should address the ability of market forces to determine the allocation of productive resources while ensuring that social equity objectives are realised efficiently.

Care should be taken to see that producer interests do not capture the competition policy. It is important that competition policy and the enabling legislation (competition law) are consistent so that the competition criteria can help ensure that government intervention does not become excessively costly to the economy.

To sum up, using public interest criteria for competition issues requires the identification of the various competing interests, addressing them in a fair and transparent manner to meet the twin objectives of welfare and equity.

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1 The Kodak Fuji dispute resolved around the exclusive or selective vertical arrangement between upstream and downstream sellers. In such an arrangement a producer gives exclusive rights to one wholesaler on the condition that one wholesaler must not act for any other firm. The US claimed that Kodak was excluded from access to film wholesale markets, obliging it to sell to retailers, a much less efficient method of market penetration. Japan responded that the control of wholesalers by Fuji was irrelevant since most of the retailers they served also bought imported film and that Kodak's own distribution system amounted to the creation of a wholesale system of its own to the exclusion of Fuji. The WTO panel did not see anything wrong with Fuji's system. It is interesting to note that the dispute revolved around whether vertical agreements were anti-competitive or not and not whether companies had market shares they were unhappy with, thereby putting no weight on efficiency and welfare considerations.

The Boeing McDonnell Douglas merger case involved two US based firms whose combined sales in Europe were big enough for the EU Commission to claim right of scrutiny. The main concern of the EU was that some of the Boeings long arm sole sourcing contractual arrangements with airlines risked permanently excluding Airbus Industries if they were not challenged. The concern was not that the merger would result in higher prices for aircraft buyers, the concern was to protect Airbus, EU's competitor of Boeing McDonnell Douglas.

2 Arguably, the delays in the adoption and implementation of an effective competition policy has negative consequences in the development process and may require costly industrial adjustments at a later stage. In a formal communication to the WTO, the Korean government noted that: "In hindsight, if a competition policy had been introduced earlier, Korea's economic development would have been achieved in a more balanced and sound manner. At the early stage of development, the negative structural effects of market concentration and the distortions of the market structure were largely overlooked. As a consequence, Korea is now confronting the very difficult task of industrial restructuring. If competition policy had been introduced before the market structure was distorted, such tasks could have avoided."(WTO,1997c.p.3)

# *Technical Assistance and Capacity Building Commitments in Doha Agenda*

*Deunden Nikomborirak\**

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## **Executive Summary**

In the context of a multilateral agreement on competition at the WTO, there is a strong call for developed countries to build long term commitments towards assisting developing countries in developing technical capacity. This issue paper highlights the need for carefully designed assistance programmes and activities tailored to the specific needs of the recipient country. Amongst other recommendations, the paper calls for clearly defining the mode of delivery of technical assistance, for flexibility in programme design, for focus on building institutional knowledge and development of transparent and fair procedures, with assistance reaching out to the sector level.

## **Introduction**

Developing countries are typically characterised by financial, technical and institutional constraints that make it difficult for them to meet global standards as laid out in several multilateral agreements. The development of an effective competition regime and culture at the national level is an institution that requires high technical capacity. This has led to the inclusion of “technical assistance and capacity-building” as an element that needs to be incorporated in a potential multilateral competition agreement under the WTO framework.

At the first meeting of the Working Group on Trade and Competition Policy, there seemed to be a general consensus that technical assistance and capacity-building programmes cannot be applied on a “one-size fits all” basis and that there should be long-term commitments to provide such assistance. However, details with regard to how the assistance will be tailored to the specific needs of the recipient, the mode of delivery, and the role of the WTO in relation to other regional and international organisations providing such assistance, remain unclear.

## **Ensuring Effective Technical Assistance and Capacity Building**

From the experience of Thailand that has had a full-fledged competition law and authority since 1999, technical assistance provided through bi-lateral and regional arrangements, as well as through

international organisations such as the World Bank, have been most useful in providing basic concepts and some specialised knowledge about competition law and policy. However, to ensure greater effectiveness, future technical assistance and capacity building programmes should:

- Involve long-term commitments – i.e., two to five years in order for foreign experts to be sufficiently involved in the “implementation” process, where major hurdles are likely to emerge. One-shot programmes that last several days are normally ineffective since they present key concepts or ideas that are abstract or are not easily practiced in a different legal, economic and cultural environment, characterised by different constraints;
- Be specifically tailored to local needs and the local environment; be delivered in local language. It is best that foreign donors seek partnership with qualified local institutions in designing and organising the programmes. Local experts that can not only translate the key points made, but also make references to the local environment should assist all lectures. All documents used in the training should be translated into local language for future references;
- Be sufficiently flexible to allow targeted recipients to design their own programmes. A “competition fund”<sup>1</sup> may be established to finance locally initiated projects that help advocate competition (research on competition issues, design and set

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up of a local competition policy and law web site, publication and dissemination of competition-related literature, etc.);

- Focus more on building institutional knowledge, which involves the transfer of know-how in training – i.e. “training the trainers” – and in building an efficient documentation system so that developing countries may develop their own capacity-building capability and thus, need not rely on foreign funds indefinitely; and
- Include transfers of practical know-how, such as investigative techniques, data and information collection and analysis techniques.

As for capacity-building, in the author’s opinion, the area that is in most urgent need of assistance in countries with a competition authority is the design of transparent and fair procedures, which constitute key elements of the core principles that will be the topic of discussion in the third meeting of the Working Group on Trade and Competition Policy in September 2002.

Transparent procedures will ensure that the law is properly, consistently and impartially enforced, which should benefit all parties involved and will lay the necessary foundation for closer co-operation in the future.

Rules and guidelines governing competition authority’s rule-making and adjudicating process such as notification, public opinion soliciting, information gathering and disclosure as well as ethical issues need to be established in order to ensure that competition law is effectively and indiscriminately enforced.

To ensure consistency in the competition regimes across different sectors of the economy, we believe that technical assistance and capacity building programmes should also extend to sector-specific regulatory bodies. These include, for example, the Central Bank, the Stock Exchange Commission, and the sector-specific regulatory bodies. At the policy level, the national economic planning agency should also be made aware of the significance of competition law and policy.

While assistance in technical and practical skills related to the enforcement of competition law and policy is undeniably essential, we also believe that assistance in building “public awareness” on this relatively complex subject is equivalently important. This implies that the future programmes should target at a wider and diversified constituency.

As large development gaps are likely to exist between the capital city and the rural areas in most developing countries, capacity building and public awareness programmes need to be decentralised in terms of geography.

Assistance activities are normally targeted at the competition authority and other concerned public and private representatives in the capital city, where most people are already relatively informed and where competition flourishes due to the sheer size of the market. Little efforts have been placed in raising public awareness among provincial business and consumers communities that are more prone to anti-competitive abuses.

Finally and most importantly, in an environment where there is lack of political will and commitment to promote competition policy, pressures must come from outside the government. This means that assistance programmes and activities should aim at building a competition constituency at the grass root level. It is necessary to have training and capacity building programmes that target at civil society organisations, in particular consumer organisations, and the media as well.

It is imperative that these organisations recognise that competition policy is about consumer protection and that it is in the country’s interest to enforce the law. Financial assistance should be made directly to these organisations when possible or through a reputable and qualified local non-government, not-for-profit or academic institution.

One should not forget that ultimately, it is the people — not a few public officials — that will dictate the fate of competition policy in the WTO. Indeed, building such a wide constituency may require significantly greater resources, time and effort, but it can assure a smoother passage towards establishing multilateral cooperation in competition policy.

### **Conclusions**

The UNDP has been most active in delivering assistance in competition policy and is willing to co-ordinate bi-lateral and regional efforts in this area. Thus, we propose that UNDP be the organisation responsible for monitoring progress on technical assistance and capacity-building commitments made in the WTO. That is, it would be responsible for “keeping inventory” of various developing countries’ assistance and capacity building needs and, at the

same time, assist in mobilising required resources from donor countries to match the specific demands. It is therefore necessary that each developing country draft its own assistance and capacity-building needs that best suit the local environment.

The author believes that commitments in the provision of technical assistance and capacity building should be voluntary. However, assessment should be made periodically with regard to the progress by the UNDP

as mentioned above. Developing countries should maintain the freedom in deciding whether or not to enter into negotiation in competition policy in the next round. As with many issues subject to negotiation in the WTO, competition policy is a relatively complex issue. Without sufficient comprehension of the law and policy and their implications for the domestic economy and international trade, developing countries would be confined to playing at the most a defensive role in negotiations.

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<sup>1</sup> The local government may also help contribute to the fund to show its genuine commitment to promote competition policy.

# *Scope and Definition of Investment*

*John Gara\**

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## **Executive Summary**

There is considerable ambiguity regarding the definition of the term “investment” in world trade negotiations. Especially in the context of multilateral rules of trade, it would be critical to determine not only what constitutes investment but also what particular types of investment ought to be covered by such rules. An international agreement could deal with the matter in one or both of two ways: (1) determine the scope of the different types of investment to be covered in the light of the operative, though negotiable, provisions of the agreement itself, and/or (2) delimit the scope of the subject matter by way of an overriding definition of “investment”, which could be either broad and open ended or narrow and limited.

On account of policy differences and various concerns among developing countries, negotiations on a definitional clause for investment could conceivably lead to a narrowing of the scope of the subject matter. It may prove very difficult to take account of all the concerns of developing countries. The solution might be to adopt a twin-track approach where some investments may be admitted under a rather broad definition formula but with only limited rights under the substantive provisions of the agreement.

## **The Issue**

As the possibility of launching negotiations on broadening the scope of the subject matter<sup>1</sup> of multilateral trade rules to cover investment issues becomes stronger, a critical question to be looked at is which of the many types of investment activities should be covered. While Doha may have put the issue of investment on the table, there remains much room for debate on exactly what the “investment” issue covers, let alone how it should be treated.

## **Analysis**

First of all, the constantly evolving nature of international economic relations has created so many new ways of investing in foreign-owned assets that the concept of what constitutes foreign investment is in itself an evolving one and may therefore be a debatable issue. Over the last four decades in particular, the term foreign investment has come to represent increasingly diverse economic activities as, in addition to the traditional investment in the manufacturing and natural resources sectors, there have been increasingly new forms of investment in technology-related areas such as patents, copyrights

and intellectual property as well as investment in services and contractual rights. It is quite likely that still newer forms of “investment” in foreign countries will be developed. As this suggests, there might not always be a consensus on what kinds of assets constitute foreign investment at a given time.

Secondly, the classification of certain types of investments is sometimes based on arbitrary definitions. For instance, there is the issue of whether “direct” and “portfolio” investment should be treated in the same manner. Sometimes, the distinction between these two types of investment is based on whether it is short term or long term: investment is defined as direct if it is to be of a lasting nature. But more often, the distinction is based on company control.

An investment is considered direct when the investor’s share of ownership is sufficient to allow control of the company, while investment that provides the investor with a return, but not control over the company, generally is considered portfolio investment.

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However, this distinction is not a sharp one as in many companies no one investor is a majority shareholder, and effective control rests in the hands of an investor who simply owns a significant minority of the stock. A quantity of stock that would constitute portfolio investment in one corporation could therefore constitute direct investment in another.

Thus, economists often adopt arbitrary standards for making a clearer distinction such as classifying ownership of 10 percent or more of the outstanding stock as automatically direct investment. The point of emphasis here is that there are certain categories of investment that are in a sense well known but for which agreeing on binding rules of definition could actually prove problematic.

Thirdly, and perhaps most importantly in the context of possible negotiations, all these different types of international investment flows have different economic implications for countries at different stages of development.

Thus, even if there were a consensus about what constitutes foreign investment, different countries could, in an effort to implement their separate economic and development policies, wish to accept different rules concerning the treatment of the different types of foreign investment. In other words, countries may be willing to assume certain multilateral obligations only with respect to certain types of foreign investment and not others.

### **Discussion**

Thus, the issue of the scope of the subject matter will be critical in any discussion of multilateral rules both for purposes of determining what is meant by investment, in general as well as which types of investment should be covered, in particular. In an international agreement or some other sort of multilaterally accepted rules, this issue could be dealt with in one or both of two fashions.

On the one hand, the scope of the types of investment to be covered may be determined by the operative provisions of the agreement that may be negotiated. That is, in their prescription of the operational nature of the agreement, such provisions may also list or describe individually the assets/activities they apply to.

On the other hand, those drafting the agreement or rules may also wish to delimit the scope of the subject

matter simply through the formulation of an overriding definition of “investment”. Because that definition would specify the economic activities to which the operative provisions of the agreement would apply, the terms of that definition would determine the normative content of the agreement just as much as the terms of the operative provisions. Thus, the formulation of a definition of investment could effectively enlarge or limit the scope of a potential agreement.

The task of formulating some sort of definition of “investment” in international treaties is, of course, not a completely new one. The novelty here is the multilateral context. But developing countries can certainly take lessons from the many existing bilateral and other international agreements covering investment issues. And they would note that it is a wide spectrum. Some of these investment agreements define “investment” in a way that is very broad and open ended. Others define the term in a narrow and limited style.

The very broad definitions embrace every kind of asset including movable and immovable property, interest in companies (including both portfolio and direct investment), contractual rights (such as service agreements), intellectual property and business concessions. Most investment agreements, however, narrow the definition of investment with various limitations. In particular, they often exclude from the definition those types of investment that do not meet certain industrial policies of the host countries concerned and which they consider should not be accorded the guarantees and benefits international agreements provide.

### **Recommendations**

Can developing countries identify from these agreements a “development friendly” formula to emulate in a multilateral context? While one may draw lessons from examples of the existing bilateral and other international investment agreements, they, however, provide no consistency as each of the different kinds of limitations one finds therein appears either singularly or in quite varied combinations with others in different agreements.

It is, thus, difficult to pinpoint a particular strategy or pattern that most developing countries have adopted on drafting a definition clause on investment. Nevertheless, in the context of post-Doha discussions, these various formulations would indicate that there

are likely to be two major issues for developing countries to address with regard to the scope of a potential investment agreement. Certain general recommendations can be made in this regard.

First, the general definition of investment will be a critical issue for developing countries in any possible negotiations on multilateral rules and the fundamental question will be whether it should be an open-ended type or a limited type. An argument may be made that a very broad definition of investment actually has positive implications for the development of investment policies by developing countries. Given that the concept of investment has evolved continuously over time, the point could be made that there are advantages in international treaties utilising language that can extend an agreement to new forms of investment as they emerge, without renegotiation of the agreement.

On the other hand, others would argue that a broad, open-ended definition may commit host developing countries to permitting, promoting or protecting forms of investment that they did not contemplate at the time they entered into the agreement and would not have agreed to include within the scope of the agreement, had the issue arisen then explicitly.

It would also involve a commitment to provide treaty coverage to some investments that these countries may otherwise wish to restrict or control at the current time due to their development strategies even if they plan to liberalise further in the future. More likely than not, therefore, caution coupled with current differences in development policy approaches will almost inevitably result in a compromise leaning towards some narrowing of the definition of investment from the kind of open-ended type mentioned above.

Some developing countries may in particular wish to limit the types of foreign investment to be subject to such rules. Such limitations may be based on the size of investments or the sector or parts of the economy to which the agreement applies. Also of relevance here is the issue of portfolio investment regarded by some developing countries as not so desirable, given that it is generally easily withdrawn, thus creating the potential for capital volatility, especially in an event of economic turbulence. Some developing countries may also wish to exclude investments according to the date of establishment.

The second major issue for developing countries is whether to rely primarily on a definitional clause to delimit the subject matter. Here, the point to note is that while many of the concerns of developing countries could be reflected in limitations incorporated in a definition clause, it may prove impossible to agree on which one to adopt, even among the developing countries themselves.

Moreover, a very restrictive definition may leave no room for compromise that the developing countries may themselves be wishing for. For instance, there might be a desire to prescribe different limitations for different groups of countries or perhaps have some limitations applicable to only prescribed periods of time. These variations may be difficult to incorporate in a definition. The solution might be to adopt a twin-track approach.

As pointed out above, the subject matter scope may also be delimited through the substantive provisions. By addressing some of the developing-country concerns in the operative provisions, this may avoid the problem of an “all-or-nothing” solution that a purely definitional approach may provide. Rather, some investments may be admitted under a rather broad definition formula but with only limited rights under the substantive provisions of the agreement.

For example, while most developing countries would agree that portfolio investment is characterised by volatility, some view portfolio investment as an increasingly important source of capital and foreign exchange and, therefore, capable of providing a very positive contribution to their development. Thus, if the concern about portfolio investment is that it may be withdrawn quickly, an investment agreement might define “investment” to include portfolio investment, but the typical currency-transfers guarantee provision in such agreements would apply to portfolio investment only if the investment has been established for some minimum period of time. Such a limitation would be directed at the volatility of the investment, which may be the one particular concern regarding portfolio investment. But it would not exclude portfolio investment from the other provisions generally applicable to all investments.

Similarly, if developing countries' concerns are about some types of FDI, no category of investment would, through some definitional limitation, be excluded from treaty coverage *a priori*. Through the operative provisions, host countries would reserve the right to

screen or place conditions on individual investments. This approach would ensure that host countries are subject to multilateral rules only with respect to those investments that have passed some general or specific approval test.

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1 Generally speaking, the scope of an international treaty is delimited by its geographical coverage, temporal application, and subject matter. The geographical scope is determined by the number and identity of the States that are party to the treaty and the territorial limits of the States concerned. The temporal scope is determined by the treaty's date of entry into force with respect to each party and its duration. The subject matter scope is determined by the way in which the provisions of the agreement (such as definitions of the thematic issues) prescribe the specific topic(s) it covers. The focus of this paper is the potential subject matter scope of multilateral rules governing investment issues.

# *Core Principles in Investment Agreement*

*Deborah Akoth Osiro\**

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## **Executive Summary**

There are two core principles on investment identified in the Doha Declaration; transparency and non-discrimination. The latter contains two basic standards, ‘most-favoured-nation treatment’ (MFN) and ‘national treatment’ (NT). However, for international investment agreements (IIAs), another standard, ‘fair and equitable treatment’, can also be considered. These principles are important for a multilateral framework for investment (MFI) to ensure a transparent, stable and predictable investment environment. Transparency obligations are uncommon in IIAs and the effects of a transparency obligation in an MFI are, therefore, unclear. The core principles would put obligations on the states with regard to their treatment of investors, but not with regard to the regulation of the same.

## **Introduction**

The two core principles of any MFI would be non-discrimination and transparency. Non-discrimination is a common feature in all international trade and investment agreements, whereas transparency is not. In addition, “fair and equitable treatment” is another principle common in IIA’s but not mentioned in the Doha agenda. A major issue that needs to be addressed is whether the core principles of an MFI would apply to both pre-and post-entry phases of investments, and whether the core principles would include ‘fair and equitable treatment’. If ‘fair and equitable treatment’ is to be included, then a related issue will be what effect this might have on states’ abilities to regulate in the public interest.

## **Non-discrimination**

The principle of non-discrimination is fundamental to virtually all international trade and investment agreements. The standards of MFN and NT establish that a country should not differentiate between its trading partners or between its own and foreign products, services or nationals, thereby providing equal competitive opportunities.

The Doha Declaration has recommended the use of a GATS-type approach for an MFI. The GATS’ bottom-up approach stipulates that certain principles and requirements be applied only to those sectors committed to by individual Member states.

However, GATS differs from an MFI in respect to the non-discrimination principle in that this applies mainly to the post-entry phase while for an MFI, both pre- and post -establishment phases have to be considered. Some countries (Canada WT/WGTI/W/130) are of the opinion that drawing such a distinction would undermine the non-discrimination concept.

According to Canada, there is little conceptual justification for discriminatory treatment of foreign investors pre- or post-entry, noting that the latter can sometimes effectively amount to expropriation. Nonetheless, there is no investor right to ‘invest’ or for ‘admission’ in the international legal framework. The non-discrimination principle merely requires the elimination of a measure that discriminates between foreign investors and domestic ones.

## **MFN Treatment**

MFN treatment gives a guarantee for equality of competitive opportunities among investors/ investments from different foreign countries. The wording of the provision in an MFI will determine its basic scope and mode of implementation.

It may be expressed in a unilateral or reciprocal, conditional or unconditional, limited or unlimited manner. One element already pointed out is whether the MFN treatment should apply at the pre- or post-establishment stage. MFN treatment has traditionally

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been applied to the latter, i.e. only after an investment has been made, though recent IIAs have extended the principle to the pre-entry phase, e.g. the US and Canadian model of bilateral investment treaties (BITs) as well as NAFTA. In fact, the US is suggesting a pre-entry commitment to MFN for an MFI.

Qualifying phrases, such as “in like circumstances” (used in agreements such as NAFTA) or “in like situations” (used in US BITs), allow the granting of differential treatment to investors in different objective situations, as it would be difficult to grant an ‘identical’ treatment.

The wording will also affect the object of the treatment, thus applying to either the investments or the investors or both.

According to the WTO Secretariat Note (W/119, Para 11), “applying MFN treatment does not interfere with a country’s ability to impose measures that give any competitive advantage to national producers over their foreign competitors.” What tends to matter to most countries is the flexibility to differentiate between nationals and foreign investors as opposed to distinguishing among the latter.

This means that MFN can reasonably be applied as a general principle irrespective of the entry phase with the necessary exceptions and exemptions. Suggestions have been made to use the GATS’ MFN exemption list as a model in that respect. Such exceptions are particularly important in providing developing countries with flexibility to pursue their economic development objectives while deriving benefits from the application of the principle.

### ***National Treatment***

National Treatment (NT) obliges Members to grant foreign investors/investments treatment equal to the one granted to domestic investors/investments. The substantive content of the NT standard involves two issues, the factual situation to which the principle will apply and the definition of NT itself.

With respect to the first issue, NT clauses usually contain a variety of qualifying terms that describe the limits of the factual comparisons of the principle. Some of these terms state that investors need to be in “identical situations” or “same/like circumstances” in order for NT to apply. These may be more restrictive than provisions that require that the

investors be in “like circumstances” or “like cases” or “like situations”. In GATS, an illustrative list of economic activities and/or industries is listed for which NT principle applies. Nonetheless, the primary focus of most NT application is the competitive relationship between different investors that exists in the market.

On the definition of NT, the possibilities can cover, *inter alia*, a strict formulation of the quality of treatment as well as techniques of comparison, the applications of which are limited to factual situations. These may include concepts such as “identical treatment”, “treatment as favourable as” or “treatment no less favourable than”. The last is found in most IIAs and GATS and could be interpreted to mean that a foreign investor might be able get more favourable treatment than the locals.

Moreover, the NT may apply either ‘*de jure*’ or ‘*de facto*’. This means, respectively, that the treatment given to foreign investors should be in accordance to the domestic laws and regulations, and measures that, though not discriminatory *per se*, in practice may disadvantage foreign investors as a result of their being ‘foreign’. Some countries consider that the focus should be on discriminatory measures based on nationality considerations only, as most existing bilateral and regional investment instruments do.

Thus, developing countries should seek a formula that, on the one hand, provides foreign investors with legal security and certainty and, on the other hand, provides host countries with adequate flexibility to both regulate the activities of foreign investors carried out in their territories and pursue their development and other domestic-policy objectives. The GATS’ approach can satisfy both demands, since it reflects a model that takes into account the different realities.

Under GATS, NT is a specific commitment allowing Members to select the sectors in which the principle will apply in order to be able to continue offering preferential treatment to domestic service suppliers. The same position is being suggested for an MFI. This is despite what some countries view as the increasing necessity of and merits of having it as an unconditional post-establishment phase general obligation. Most IIAs accept this but with exceptions and qualifications to the rules. Taiwan (W/127) noted that NT principle, allowing conditions to be attached under the GATS, has effectively rendered the applicability of such a principle post-establishment.



The provisions of NT, like the MFN's, have certain aspects that not only make each provision unique but that have implications for the process of development as well. These include:

**Beneficiaries** - this matter raises the question of the objective basis of applying NT to the investor or the investment or both.

**Scope** - the application of NT in the field of investment goes beyond that in trade. The activities that foreign investors can carry out in the host country are diverse covering the operation, maintenance, use, sale or liquidation of an investment. Thus, the potential range of policies and measures that is subject to the principle of non-discrimination is correspondingly broader than under trade agreements.

**Stages of admission of an investment** - this deals with whether NT only applies to foreign investment after it has been admitted or whether it also applies to the entry of the foreign investment. Provision of full NT places a foreign investor on an equal footing with national investors and removes to a very large extent the means that a host country has of supporting and protecting its own investors as well as its ability to screen investments.

### ***Fair and Equitable Treatment***

Fair and equitable treatment (FET) acts as a signal from host countries indicating a country's willingness to accommodate foreign capital on terms that take into account their interests. FET is an absolute standard, in contrast to MFN or NT standards.

The problem with the FET standard is that it is inherently subjective and therefore lacking in precision. Moreover, difficulties of interpretation may arise because even in its plain meaning, the concept does not refer to an established body of laws or to existing legal precedents.

In as much as FET may encompass both NT and MFN, it differs from them in that, for instance, NT protects foreign investors from discriminatory treatment, though this treatment might not necessarily satisfy the standard of FET. The concept of FET overlaps with transparency, the other core principle, in that transparency may be required as a matter of course by the concept of FET. Moreover, where a foreign investor wishes to establish whether or not a particular country's action is fair and equitable, as a

practical matter, the investor will need to ascertain the pertinent rules concerning the country's action, which is only possible if these are transparent.

Although the concept now features prominently in IIAs, different formulations are used in connection with the standard. At least four approaches are in practice, namely:

- One that omits reference to FET.
- One in which it is recommended that countries should offer investment FET, (the hortatory approach).
- A legal requirement for countries to accord investment 'fair and equitable' treatment, 'just and equitable' treatment, or 'equitable' treatment.
- A legal requirement for countries to accord investment FET together with other standards of treatment, such as MFN and NT.

There is some danger that an absolute standard such as FET will inhibit states' ability to regulate in the public interest. If certain regulation, which adversely affects a foreign investor, can be considered as an expropriation of the investors' property of expectations of profits (a "regulatory taking") then there is a danger of a 'regulatory chill', i.e. that states refrain from enacting certain regulations.

### **Transparency**

Transparency refers to both general and specific requirements in international trade and investment agreements to make their relevant rules and procedures clear and predictable (Secretariat Note, W/109). The 'transparency requirement' obliges Members to provide sufficient information so that other Members can determine whether or not obligations are in fact being met. It is also a requirement that the administration of rules be reasonable and non-discriminatory. The transparency obligation especially procedural transparency, is more important in areas where the role of WTO rules of general application is limited and where the scope for discretionary government action is greatest.

Standard provisions on transparency involve three core obligations:

- (1) to make information on laws, regulations, and other policies related to trade publicly available;
- (2) to provide notice of (notify) the laws and regulations and changes to them; and
- (3) to ensure that laws and regulations are administered in a uniform, impartial and reasonable manner.

BITs are largely silent on the question of transparency. One notable exception is the US prototype BIT concerning the encouragement and reciprocal protection of investment. The NAFTA also has transparency provisions comparable to the WTO.

Discussions in the Working Group focus on three themes: the purpose of transparency; the possible relevance of WTO transparency provisions to the area of investment; and the technical and resource requirements for meeting different levels of transparency. They reveal that the policy questions that arise in the context of an MFI are about the scope and application of “transparency”. The scope of ‘transparency’ in an IIA depends not just on obligations on publication, notification and administrative procedures, but on the ambition and breadth of the IIA’s substantive commitments.

With respect to the development dimension, a balance has to be struck between pursuing more transparency and avoiding the imposition of burdensome obligations. Moreover, technical assistance would be required to assist developing countries to comply with the transparency requirements.

The general and specific transparency provisions often contain exceptions making it clear that Members are not required to disclose confidential information, which would otherwise be prejudicial to public or commercial interests.

### **Conclusion**

The hybrid approach adopted by GATS might be a good approach, especially the sector-by-sector positive commitments which would allow governments to retain control of investments flowing

into their countries without discriminating between investors on the basis of their nationality. The above principles could be considered as basic standards of application to which all Members could abide by in a potential MFI. However, the degree, the range of existing operations, and the phase will differ according to the countries’ needs and the nature of commitments adopted.

Though the MFN principle might not prove problematic in an MFI, both the principle of national treatment and of fair and equitable treatment could cause some concern. The main problem with the fair and equitable treatment standard is that it is an absolute standard unlike the relative non-discrimination standards. It may, thus, discriminate against domestic firms. The principle of transparency would be new to an investment agreement, as most BITs are silent on it.

According to some, any possible agreement on investment should also deal with the responsibilities of the investors and their home countries. The existing agreements on investment, both at bilateral and regional levels, deal only with the rights of the investors, but to effectively tackle corporate wrongdoing by TNCs, cooperation from home countries is required. Any MFI should also include provisions to check the ongoing incentive race between countries to attract more FDI.

The issue of “regulatory takings” needs to be resolved, as, otherwise, countries might be unable to commit to important issues like environmental regulation. The issue of regulation in public interest is central to any discussion of an MFI.

### **Recommendations**

- Of the Core Principles on Investment proposed by the Doha agenda, transparency is relatively new to investment agreements. Any commitment on transparency, therefore, needs to be carefully examined.
- NT commitments in the pre-establishment phase would remove to a very large extent the means that a host country has of supporting and protecting its own investors as well as the ability to screen investment. Hence, a very cautious approach, possibly a GATS-type positive-list approach, needs to be adopted with regard to pre-establishment commitments.
- The ‘fair and equitable’ treatment standard prevalent in many IIAs is an absolute but unclear standard. Inclusion of such a standard in any investment agreement would be problematic.
- Any core principles on the treatment of investors need to address the issue of regulatory takings, so that regulation in the public interest is not restricted by an MFI.
- An MFI needs to address the danger of incentives bidding, whereby countries race to offer incentives to investors to attract foreign direct investment, as this can only be addressed at a multilateral level. The issue could be dealt with under the core principle of not discriminating between investors.

# *Investment Negotiations at the WTO*

## *The Nature of Commitments*

*Hilda Fridh\**

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### **Executive Summary**

A GATS-type positive list approach to investment negotiations would provide the most flexible framework. However, applying the GATS approach to a multilateral investment framework (MIF) raises some issues. Firstly, depending on the definition of ‘investment’, defining the ‘sectors’ in which commitments can be made, might not be easy. Secondly, countries may need to examine what exactly would be won by making a multilateral commitment to market access, as opposed to unilateral liberalisation and post-establishment national treatment commitment. Thirdly, exceptions from MFN-treatment need to be allowed for and to be made carefully, if countries wish to avoid multilaterilising their BITs obligations, especially when these obligations are unlikely to be exempted by any regional economic integration exemption.

### **Short Statement on the Issue**

The impact of an international investment agreement is determined by the positive commitments in the agreement, taken together with exceptions and exemptions included in any agreement. Positive commitments under most international investment agreements (IIAs) to date include non-discrimination (MFN and NT) and the provision of a minimum standard treatment (“fair and equitable treatment”). A GATS-type approach provides for making sector specific commitments on market access and national treatment, and making one-off MFN exemptions. Other exceptions common in trade agreements (e.g. exceptions for procurement, taxation, national security, public health, order and morals, exceptions from MFN for regional integration), though uncommon in IIAs, could be negotiated in a MIF.

### **Analysis of the Issue**

During discussions in the Working Group on the Relationship between Trade and Investment (the Working Group hereafter), the need for flexibility, especially in meeting countries’ development needs, has been widely addressed. There is a realisation that unless developing countries are given enough flexibility within any investment agreement, both in terms of screening and regulating investment, as well as opening up (liberalising) sectors of their economies to foreign ownership, they are very unlikely to agree to launch negotiations on investment at Cancun.

### **Types of Exceptions**

The WTO secretariat note on non-discrimination speaks of four types of exceptions to the general non-discrimination obligations (Most Favoured Nation (MFN) and National Treatment (NT)) found in trade agreements:

1. Systemic exceptions for certain measures (e.g. procurement, taxation);
2. General exceptions include the exceptions for governments to regulate in the public interest (national security, public health, order and morals) and exceptions for regional economic integration agreements;
3. Country-specific exceptions are exceptions to a general rule (e.g. MFN in GATS) or commitments to a conditional rule (e.g. scheduled NT and market access commitment under GATS); and
4. *Ad hoc* exceptions address special needs that arise on a case-by-case basis, for which a WTO waiver is typically needed.

In international investment agreements (IIAs) to date (that is regional and bilateral agreements), general exceptions are uncommon.

Exceptions for regional integration, preventing the MFN rule from extending special benefits reserved for regional integration partners to all others, are common in most IIAs. However, exceptions for regional integration have not been widely discussed in the Working Group.

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### **What is a GATS-type, Positive-list Approach?**

As GATS covers measures affecting foreign direct investment established for the purpose of supplying services, GATS has features of an investment agreement. The GATS model of making commitments has been specified in the Doha Declaration as a model to follow in future negotiations on investment.

Under GATS, MFN treatment is universal unless exempted, that is, it applies to both pre- and post-establishment situations and to all modes of service supply. Granting of national treatment and market access (that is liberalisation commitments or national treatment in a pre-establishment phase) is based on a positive-list approach.

### **The GATS Approach Applied to an Investment Agreement**

GATS deals with trade in services by its nature, not investment *per se*. “Commercial presence” in a host country focuses on the supply of services.

IAs cover two main issues. One is the liberalisation of investment regimes (market access in GATS terms), the other is the protection of existing investments. One major difference between the GATS and IAs is that the investment aspect can be divided into the pre- and post-establishment stages.

In IAs, NT in the post-establishment stage is accepted as a general obligation. However, NT in the pre-establishment phase, in effect a market access commitment, is an uncommon feature in IAs. The exceptions are of the North American styled BITs and NAFTA, which do entail pre-establishment commitments.

Using GATS-type commitments to an investment agreement of the more traditional type (e.g. BITs, NAFTA) raises some issues. For example, unless an agreement covers FDI only, it might not be feasible to schedule commitments in different sectors. This problem was highlighted when the US put forward its controversial proposal that any agreement on investment should cover not only FDI but also portfolio investment. Making scheduled commitments for sectors when liberalising portfolio investment would be practically tricky, as “portfolios” are not sector specific like services under GATS.

Despite extensive liberalisation during the 1990s, no country has given foreign investors an unconditional right to establishment. The right to screen investment upon entry is still part and parcel of countries’ sovereignty. Hence, unconditional NT in a pre-establishment phase in any future agreement is hard

to envisage. Instead a positive-list approach to NT in both pre-and post-establishment situations is being suggested. Negotiations would mean that countries through specific NT commitments bind their existing level of liberalisation vis-à-vis other member countries, and a progressive liberalisation clause could then take liberalisation successively further.

Most countries have by now liberalised their investment regimes beyond what is required by any IIA. However, there is still reluctance to commit to the same level of liberalisation multilaterally. It could be argued that a multilateral commitment would make little difference to a country’s ability to attract foreign investment. If an investor is guaranteed (in a multilateral set-up) NT treatment post establishment, then the fact that the investor entered the market on the basis of unilateral liberalisation and not a multilateral commitment will make little difference.

When it comes to MFN treatment in an investment agreement, a GATS model would suggest that MFN treatment is applied in both the pre- and post-establishment phases, unless an explicit exemption has been made.

In the area of investments, as opposed to that of services, there are numerous bilateral agreements (BITs) setting various standards for the treatment of investors. This means that if a country wants to avoid extending the rights given to investors in a BIT to all investors from WTO member countries, the country would need to exempt every BIT from its MFN obligations.

BITs, as opposed to regional economic integration agreements, deal only with investments. Hence, they could not be exempted from MFN obligations under any general exception for regional integration. This makes the need for flexible MFN exemptions even greater.

Considering the need for MFN exemptions one would expect many BITs treatment standards to be listed as MFN exemptions under GATS. This is, however, not the case. One interesting exception is that of Canada’s granting of investor-to-state arbitration from its MFN obligation. Canada accepts investor-to-state arbitration in many of its BITs, but does not, via the GATS-MFN clause, extend this right to investors from any WTO member. Considering how controversial the issue of investor-to-state dispute settlement is under the NAFTA, and the fact that investor-to-state dispute settlement provisions have now become standard in most BITs, it is surprising that not more countries have made similar exemptions.<sup>1</sup>

## Commitments to Treatment Standards Outside the Non-Discrimination Set

Apart from the MFN and national treatment (non-discrimination) standards set out in most investment instruments, most instruments also set out minimum standards for the treatment of foreign investors. Common treatment standards are “fair and equitable treatment”, where the host country commits to offering the foreign investor “full protection and security”. Host states also undertake to offer “prompt and equitable compensation” in case of expropriation. These treatment standards have a long history in investment agreements. Though standard clauses such as “Each party shall accord investors and investments fair and equitable treatment and full protection and security” might seem simple enough, most litigation under IIA refers to this treatment standard as well as to the definition of a measure with effects “tantamount to expropriation”.

Minimum non-comparative standards are normally not found in trade agreements, but only in investment agreements. Adding these absolute treatment standards to a WTO agreement would thus be a novelty. Some IIAs in addition make reference to “customary international law”, adding yet another yardstick against which to measure any treatment or action taken by a host country.

For a GATS-type positive-list approach to be of use, it needs to apply also to any of the minimum treatment standards, if indeed such standards are to be included in an agreement. “Fair and equitable treatment” should, like market access under GATS, come into play, only following a specific commitment. MFN exemptions are needed if countries want to avoid these minimum treatment standards to be extended from their bilateral obligations to investors from all WTO members.

### Discussion

In the Working Group, discussions have, in accordance with the Doha mandate, focused on the need for a flexible agreement. Indeed a GATS-type approach, where countries can choose which sectors to include for NT and market access and which measures to exclude from MFN, does provide the most flexible approach to commitments on

investment. However, one needs to ask what difference a very flexible agreement would make to the present situation. At present many countries have unilaterally liberalised their investment regimes and provide investment protection through BITs. If too many exceptions are negotiated within an international framework, any outcome might just end up making very little difference.

The OECD experience with the MAI might serve as an example of where the international community went wrong with an investment agreement. The opinion was that the problem was not in the drafting but in the interpretation. In general, European countries like France interpreted it as an attack on national sovereignty. Business interests, on the other hand, felt that the draft agreement offered them nothing of interest. A balance with commitments (which might attack national sovereignty) and exceptions (which might erode business’ interest in any MIF) needs to be found. A GATS-type positive-list approach will serve the purpose of each country being able to strike its own balance.

### Recommendations

1. Countries should be aware that a binding commitment on NT in a pre-establishment phase (market access) at a multilateral level as compared to unilateral market liberalisation might not really help in attracting more investment.
2. General exceptions (public health, morals, etc.) are uncommon in most IIAs, but common in trade agreements. If the effect of a multilateral investment framework (MIF) should be limited, such exceptions should be included.
3. Minimum treatment standards (“fair and equitable treatment”, etc), are vague and should either be avoided altogether in an MIF or be well defined.
4. If countries want to avoid multilateralising their BITs or regional investment commitments, they must bargain for allowing MFN exemptions and remember to exempt their already signed investment agreements from MFN obligations.
5. It might be more difficult to define investment ‘sectors’ than it was to define service sectors in GATS. To limit the scope of an agreement, ‘sectors’ for which to make investment commitments need to be well defined.

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<sup>1</sup> Perhaps they believe an exemption for this is unnecessary claiming that allowing for investor to state dispute settlement is not a “measure affecting trade in services” and hence is not covered by GATS.

# *National Policy Space*

## *In the context of Investment and Competition at the WTO*

Magda Shahin\*

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### **Executive Summary**

There is widespread agreement that the structural characteristics, institutional and policy constraints and development objectives and targets of developing countries are different from those of a typical developed economy. This fact has further generated an understanding that the process of trade and investment liberalisation, and the dynamic changes associated with it, have a different impact on developing economies. In this context, the need for maintaining *national policy space* has been recognised as crucial when laying down binding rules for a multilateral framework on investment and competition.

In order to incorporate national-policy-space considerations, the existing proposals for a potential multilateral framework on investment have to be reconsidered and revised to allow for national policy space in investment related policies of host developing countries. Host governments have to be given enough policy flexibility to ensure that foreign investors are socially responsible and that they contribute to the growth and development process of the host country.

In the context of a multilateral framework on competition, this paper emphasises that such a framework should not be confined to the interests and rights of foreign investors only. Rules should be formulated in such a way as to provide adequate policy space and flexibility for national governments for checking anti-competitive practices of transnational corporations operating in their countries.

### **Introduction**

Although many would like to see the negotiations on Singapore issues launched at the Fifth WTO Ministerial (at Cancun, Mexico in September 2003), such a presumption needs caution. The caveats in the Doha mandate are not to be overlooked. As an agreement to launch negotiations on Singapore issues is subject to a clear and overt consensus on the modalities of negotiations regarding the four Singapore issues, the Fifth Ministerial Conference could yet be another ‘stop’ to take stock and assess the situation. The Chairman of the Conference emphasised in his concluding remarks that it gave “each Member the right to take a position on modalities that would prevent negotiations from proceeding after the fifth session of the Ministerial Conference until that Member is prepared to join an explicit consensus.”<sup>1</sup>

At the outset, it is important to recognise that such a statement is in favour of developing countries for the following reasons:

(a) As the language of the statement re-emphasises the procedural inter-linkages in addressing the four new issues from the perspective of launching negotiations, in case an explicit consensus on the modalities of negotiations is not attained, there will be no multilateral negotiations.

(b) It gives ample time for developing countries to study the modalities of negotiations in a more profound manner and thus be more determined in pushing for the modalities of negotiations of interest to them.

Regardless of the Doha mandate empowering those developing countries that are objecting to multilateral frameworks on investment and competition policies

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to continue to do so, the fact of the matter remains that we need to go beyond the “categorical no” argument. We need to provide ourselves with enough ammunition in case negotiations become imminent. This paper goes beyond the mere argumentation against multilateral frameworks on investment and competition policy and considers options for possible negotiations. As an outline paper, I will address the topics since this is in a brief and focused manner.

### **The Right to Regulate in the Public Interest**

- In addressing the issue of national policy space, developing countries will have to find the right balance between the need to negotiate multilateral rules and disciplines on market access and protection of investment under the WTO and the need to control one’s own economy and safeguard national sovereignty.
- Governments must have the right and power to regulate the entry, terms, conditions and operations of FDI in their countries. This must form a part of the minimum requirements for a negotiated agreement on investment rules.
- Governments must maintain flexibility with respect to key sectors or policy areas of interest to them.

### **Development Policies and Objectives of Host Governments:**

One should rethink the issue of the definition of foreign investment and seriously reconsider the possibility of including short-term capital flows as complementary to FDI in the framework. This is especially so in the light of the volatility of the short-term capital markets and the need for host developing countries’ governments to discipline such flows to protect their economies.

Developing countries are not wrong in taking the GATS framework as a ‘starting’ point for negotiations on investment. This Agreement has given developing countries utmost flexibility for a number of reasons, which I need not reiterate at this stage. It is important to say, however, that GATS has provided a range of means for achieving flexible treatment for developing countries, in particular through its approach to scheduling commitments.

The essential lesson to learn from GATS is that developing countries should aim at gaining similar concessions to investment as they succeeded in securing for services, if there are any future negotiations on an investment agreement. Developing countries will have to try and replicate the asymmetry

of GATS that has helped set the right perspective for developing and developed countries by acknowledging the differences and gaps in the level of capital, technology etc. They will have to stick to the “positive list approach” by only listing those sectors which they would like to open for foreign direct investment. (The relevant articles in the GATS Agreement can be discussed and emulated for the investment framework, notably Articles IV, IX, VIII, Export, XV).

Developing countries also need to retain their right to use measures such as performance requirements for foreign investors, as these are important policy instruments to pursue development objectives and promote domestic industry. They should not go beyond the TRIMs Agreement, which so far does not prohibit:

- (a) Export performance requirements, as a condition for investment;
- (b) Local investors holding a certain percentage of equity in FDI ventures; and
- (c) Foreign investors bringing in the most up-to-date technology and conducting a specific level or type of R&D locally.

Furthermore, in any investment framework market access should be negotiated on the basis of development-oriented performance requirements including those stated above as allowable.

Moreover, the length of the transitional period for the TRIMs agreement regarding the local content requirement, which is an important factor for developing countries to develop their own industries and to ensure linkages of FDI with domestic economic activities to avoid developing a dual economy needs to be reconsidered. India and Brazil have called for a substantial modification of TRIMs agreement, which would exempt them from its disciplines or at least allow for the maintenance of local content requirements for an indefinite period.

### **Balancing the Interests of Host Countries with those of Home Countries:**

The inclusion of the right to relevant S&D treatment for developing countries and introduction of a balanced framework from the beginning are essential in order to set on a par the two broad objectives of protecting the rights of investors and promoting the development process of developing countries. Such a balance should be inherent in the structure of the Agreement.

Developing countries will have to think of how to introduce and reflect the principle of “relative reciprocity” in the Investment Agreement based on the asymmetry in the levels of capital, technology, regulatory framework and supply capacity, etc, between developed and host developing economies.

S&DT could be regrouped into the following categories:

- (a) Technical co-operation, capacity building and exchange of experience.
- (b) Transition periods allowing for temporary flexibility and gradualism.
- (c) Exceptions and exemptions: These could be performance requirements and/or sectoral exemptions under certain specified conditions and for developmental reasons. Such exemptions would not be subject to a time limit and their applicability could be reviewed periodically.
- (d) Specific undertakings for developed countries to eliminate their own exceptions and exemptions on a non-reciprocal basis and in areas of interest to developing countries under what is known as relative reciprocity.

The present WTO system, especially since the Uruguay Round, has relied mainly on transition periods, broadly 5 to 10 years for developing countries after which all partners are considered “equal under the law”. Even after this period of time, there is no guarantee that a level playing field will result from applying equal rules to unequal players. What should be contemplated in an investment framework is S&DT of a more structural nature.

### **National Policy Space and Competition policy**

The issue of competition policy had long been perceived as an issue of interest to developing countries in particular. It is worth noting that, in contrast to investment, the request to negotiate competition policy and Restrictive Business Practices (RBPs) in the Uruguay Round came initially from the developing countries at the Punta del Este meeting. Though specific negotiations on the issue did not take place at the Uruguay Round, a large number of competition rules are reflected, either directly or indirectly, in various WTO agreements, including those on anti-dumping, subsidies and countervailing measures, GATS, TRIPs, and state trading enterprises.

The positions of both developed and developing countries on this issue are far from harmonious. When developed countries in general and the US in particular speak of a competition policy framework, it is for the purpose of establishing domestic competition law in the developing countries to facilitate market access for their products. When developing countries, however, speak of the possibility of negotiating a competition policy framework in the WTO, it is for the purpose of curbing the RBPs at the national, regional and international levels, as their domestic competition policies at best are incapable of handling anti-competitive practices of the major TNCs.

While the United States has the capacity of extending its competition policies extra-territorially, other countries, particularly developing countries, lack such power. In addition, developing countries are largely unaware of the cartels affecting their economies and are largely powerless to investigate and prosecute these cartels. Even in cases where OECD countries know of international cartel activities that harm developing countries, and there is evidence available, this cannot be shared with the affected countries, as there are severe restrictions on competition authorities as to the extent to which they could share information.

We also find that export cartels are legalised in the major developed countries. An interesting export cartel case is the Soda Ash case, in which six US companies formed an export cartel named Ansac. This cartel does not sell soda ash in the US, but exports to Europe and elsewhere. When India banned Ansac from exporting to India, the US threatened to withdraw Generalised System of Preference (GSP) benefits to India’s exports to the US unless Ansac was allowed to be exported to India. (Issues in the WTO WGTCF: “Hard-core Cartels and Developing Countries’ Interests” An Outline Paper presented by Dr. Taimoon Stewart, the University of the West Indies – Republic of Trinidad and Tobago).

For the above-mentioned reasons and others a multilateral framework for competition policy should improve the situation for developing countries. The framework of rules and disciplines in the area of competition policy should go beyond the exchange

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1 WTO Summary Record of the Ninth Meeting, doc. WTO(01)/SR/9.



of non-confidential information. At the least, it should aim at prohibiting hardcore cartels and develop institutional capacity in developing countries to enable them to detect the cartels affecting their economies and deal with them effectively. (The Nordic countries had to change their laws to allow for successful investigation and prosecution of hard-core cartels. This cannot be done with non-confidential information).

There is, however, one important caveat that by adopting national competition laws and opening their markets to more competition by foreign firms while at the same time abolishing their national monopolies, developing countries are definitely taking an immense risk. When they liberalise, they need to ensure that national companies find a niche in order to have an opportunity to develop instead of being forced out of the market. Special and differential treatment for certain industries in developing countries, particularly the small and medium-sized enterprises, would seem essential in this respect.

It is important for developing countries to have a competition framework in the WTO to benefit from its Dispute Settlement Mechanism. The WTO, which is today a forceful and binding trading system, should not fail to cover trade distortions such as anti-competitive practices created by private enterprises, in accordance with the original objectives of the Havana Charter.

In pursuing actively an international agreement on competition rules and disciplines, developing countries should be cautious, however, to agree on a step-by-step approach that would begin at the national level, and may link it with the WTO Dispute-Settlement Mechanism in the end, as this could lead to sanctions and cross-sanctions if enforcement is considered inappropriate by a dispute-settlement panel.

The framework should also comprise rules and regulations aimed at making firms avoid restrictive business practices that have harmful effects at the international level (e.g. a ban on export cartels, control of monopoly-creating mergers, etc.). An agreement on this type of an international framework of competition could be harder to attain. In particular, it is difficult to see how such rules and regulations would be enforced directly against forceful TNCs. Such an agreement can only be adequately implemented if sincere and sound international co-operation exists with home country authorities.

#### **Interface between Investment and Competition**

Though developing countries recognise the need for adopting adequate competition laws at the national level to allow for fair competition and thus attract more investment, they also are well aware of the fact that such laws are deficient in addressing anti-competitive practices at the international level. Thus, there is a growing need to look at the linkages between trade, competition and investment from a global perspective, with the aim to come to grips with multilateral frameworks on investment and competition policy which are closely inter-related.

# *Trade and Investment*

## *The Issue of Dispute Settlement*

Loretta Ferris\*

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### **Executive Summary**

As wider negotiations on the issues of trade and investment continue and possibilities of broadening the scope of the relationship under multilateral trade rules increase, it is important to highlight the issue of inconsistency in dispute settlement remedies between what can be broadly referred to as the “international investment framework” and the WTO multilateral trade system.

This issue paper addresses this concern and attempts to provide the outline of a possible way to uniformity by focusing on the issue of investor-to-state dispute resolution mechanisms and the nature of remedies available. It suggests that incorporating an investor-to-state mechanism into the WTO dispute settlement process may deviate from the goals of the dispute resolution system and that addressing and restructuring compensation as a remedy may provide a better option towards consistency.

### **Issues**

At present there are different dispute settlement mechanisms operating in the international investment sphere. While dispute settlement within the multilateral trading system is regulated by the Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes, international investment disputes are regulated multilaterally through regional treaties on investment and bilaterally through bilateral investment treaties (BITs). As a result of the difference in the nature of these two systems, dispute settlement for investment issues is not harmonised.

First, dispute resolution within the WTO is sovereign in nature and focuses solely on resolution of disputes between Members, while dispute resolution within BITs and some regional agreements provides for both sovereign negotiation and scope for private parties to directly challenge injurious sovereign conduct.

Second, the aim of dispute resolution is to ensure compliance, while dispute resolution in investment agreements seeks to redress injury. Given these opposing goals, different remedies are provided by the various “systems”.

### **Analysis**

#### *The Investment Framework within the WTO*

The current framework for investment and dispute settlement in the WTO can be found in the following agreements: The Agreement on Trade Related Investment Measures (TRIMs) prohibits investment measures related to trade in goods that are inconsistent with the basic requirements of the multilateral trading system as set out in the General Agreement on Trade and Tariffs (GATT). In this regard, TRIMs contains provisions dealing with non-discrimination, notification, transparency and balance-of-payments provisions.

The General Agreement on Trade in Services (GATS) addresses foreign investment in that it includes “commercial presence” as one of the four modes of supply of services, as such introducing Foreign Direct Investment (FDI) into the WTO. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) provides for the protection of intellectual property rights in the context of trade. Moreover, it relates to investment in that it regulates transfer of technology through FDI, a subject that is of particular interest to developing countries trying to be at the receiving end of technology transfer.

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Finally, the Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) governs the dispute settlement of investment issues as each of the above agreements is subject to the DSU.

### ***Issues Relating to Dispute Settlement***

In terms of Article 3.7 of the DSU, the primary objective of the dispute settlement mechanism is to secure the withdrawal of measures found to be inconsistent with the WTO agreements. Thus, dispute settlement in the WTO system is designed to recognise the political goal of the multilateral trading system, which is to bring a country member in compliance with its obligations vis-à-vis other members under the WTO agreements.

In other words, the focus of dispute resolution is on keeping intact the carefully negotiated system of rights and obligations, as opposed to punishing the wrongdoer. As such, the system is heavily influenced by diplomatic negotiations at the front end of the process.

It also tries to discourage retrospective enforcement measures such as compensation and does not provide for collective remedies such as fines or punitive damages. To the extent that compensation is provided for, it is designed to ensure compliance and operates on a voluntary and temporary basis only. Article 3.7 explicitly provides preference for compensation over the suspension of concessions. However, the system is set up in such a way that compensation is not always a viable option, while suspension of concessions often is.

According to Article 22.2, members have to enter into negotiations with the other party in order to “develop mutually acceptable compensation”. Not only is the possibility of reaching a mutually agreed decision on compensation considerably low, the DSU provides for only 20 days after the expiration of the reasonable period of time to end negotiations. The result is that retaliation becomes the optimal remedy in dispute settlement.

The WTO dispute settlement process is solely sovereign in nature, i.e. only Member States may access the dispute settlement system and private actors are not granted direct access to the dispute resolution process. Thus, from the perspective of private investors, finding a remedy may depend on whether their government is willing to take up their

claim against another Member State. In the event that an action is instituted, the nature of available remedies within the WTO dispute resolution system may not necessarily translate into any tangible remedy for the wronged private actor. For example, if compensation is granted, it may be in the form of a concession to increase market access in another product, one unrelated to the investor. If retaliatory measures are taken against the wrongdoer, it may similarly be in an unrelated area or under a different agreement.

### ***The International Investment Framework and Dispute Resolution***

International investment is currently regulated internationally by way of a complex web of agreements, which includes bilateral investment treaties (BITs) and regional multilateral agreements such as the North-American Free Trade Agreement (NAFTA), the Energy Charter Treaty, The Cartagena Free Trade Agreement and the Colonia Investment Protocol of Mercosur. These agreements provide for extensive investment arrangements, including dispute settlement arrangements. Investment agreements typically provide for the resolution of investment disputes by way of arbitration in international forums such as the International Centre for the Settlement of Investment Disputes (ICSID) in the World Bank Group or arbitration centres such as the International Court of Arbitration of the International Chamber of Commerce.

Whilst government-to-government disputes may arise, private actors are at the root of investment disputes and the point of dispute settlement under an investment agreement is usually to provide relief for the investor. As a result, the majority of investment treaties are structured in ways that will accommodate both state-to-state and investor-to-state procedures, thus enabling private actors to bring an action against a state in an international forum. The foundations for these types of provisions stem from the principles of public international law that provides for state responsibility for injury to aliens, or injury to the property of aliens.

In contrast to the nature of relief granted under the WTO dispute resolution system, investment agreements most often provide for remedies that would directly benefit the wronged private actor, such as monetary damages, restitution of property and compensation in cases of expropriation.

## Discussion

Nation states are no longer the only international actors. Over the last few decades, private parties such as multinational corporations have become dynamic international actors. As a result, international agreements, such as BITs have been designed exclusively to protect foreign investment, an important feature of this design being the direct participation of private actors in the international dispute resolution process.

This stands in contrast to the WTO dispute settlement process as it relates to investment. While investor-to-state procedures exist in most investment agreements, private actors do not have standing to bring a claim against a Member state under the WTO DSU. The inconsistency, therefore, arises that although foreign investors and international goods traders frequently are the same parties, the type of dispute resolution system available to them depends on the role they fulfil in a particular transaction. Hence the attempt to include provisions for investor-to-state dispute settlement in the failed Multilateral Agreement on Investment (MAI). In addition, remedies under the DSU have also not been shaped in a way that would directly benefit an aggrieved private party. As a result, there is probably not a real incentive for a private party to petition its government to act on its behalf in the WTO system.

Given the anomalies, this issue will need to be addressed. As with the MAI negotiations, some developed countries may negotiate for the inclusion of an investor-state procedure in the WTO dispute resolution framework. As pointed out above, this would not be in line with the goal of the WTO dispute process, which is essentially aimed at ensuring compliance. It also raises concerns about sovereignty.

## Recommendations

An alternative approach would be to modify the compensation provision in the DSU with respect to investment disputes in terms of both process and aim. Whereas compensation is currently negotiated on the basis of mutually acceptable terms and levels of compensation, it is suggested that an adjudicating body make the award instead.

One way of doing this would be for the complaining Member, once a panel report is issued, to request arbitration to determine the level of compensation which may include damages. If there is a failure to bring the inconsistent measure into compliance within the reasonable time period determined, the compensation award comes into effect. The complaining member should then have the option of invoking the compensation award or request authorisation from the DSB to suspend concessions.

The recommendation diverges from the current dispute settlement process in three major respects. First, compensation would no longer be a temporary measure designed to ensure compliance. An aggrieved private investor can petition its government to bring an action on its behalf with some assurance of relief in the form of damages, should compliance be lacking.

Second, compensation will be determined by an adjudicating third party and not negotiated by Member States. This strengthens the provision and brings the WTO framework closer to conformity with the international investment framework.

Third, it will loosen its nature as a voluntary option for the member in violation of the agreement and provide the complaining member, for whom retaliation is an unrealistic option, with an alternative tool to ensure compliance and restore the imbalance created by the inconsistent measure, whilst also providing relief for the private investor.

# *Investment Agreement at the WTO*

## *Will it conflict with the existing instruments?*

*Nitya Nanda\**

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### **Executive Summary**

In the context of a multilateral agreement on investment, the Doha Declaration mentions that “due regard for other WTO provisions and existing bilateral and regional agreements” will be given. Among the existing WTO agreements, TRIMs prohibits negative incentives, GATS includes FDI through mode 3, “commercial presence”, and TRIPs has implications for FDI, in general and transfer of technology through FDI, in particular. The existing investment instruments at the WTO or bilateral investment agreements (BITs) or regional investment agreements (RIAs) are very often biased against developing countries’ interests. If developing countries can take stock of all these and negotiate hard, there is a possibility that they can ensure, through multilateral negotiations, a better situation for themselves. However, it is quite possible that the proposed Multilateral Framework for Investment (MFI) may be in conflict with the existing agreements at the WTO. The proposed MFI may also be in conflict with the existing BITs or RIAs depending on the kind of provisions it includes. On the other hand, if “due regard for other WTO provisions and existing bilateral and regional agreements”, as mentioned in the Doha Declaration, is interpreted as all such provisions or agreements taking precedence over the proposed MFI, then there will be limited scope for its application.

### **Introduction**

Dealing with the issue of foreign investment in a comprehensive way and through international cooperation has been a major preoccupation in different forums for quite long. The inclusion of the issue in the aborted Havana Charter constitutes the first indication of such interest. Within the GATT, the issue was dealt with occasionally until the Uruguay Round. Even the theoretical discussions on the possibility of developing a ‘GATT on investments’ had taken place as early as the 1970s.

During the Uruguay Round (UR) of trade negotiations, developed countries advanced the idea of framing multilateral rules to further liberalise the foreign investment regime. But developing countries were opposed to any such idea, primarily because they were unwilling to embark on multilateral negotiations on investment matters under the GATT which is essentially devoted to trade matters.

However, eventually, developing countries settled for negotiations and agreements on four clusters of investment-related matters. The four agreements

under the auspices of GATT/WTO that deal with investment related matters are Trade-Related Investment Measures (TRIMs), General Agreement on Trade in Services (GATS), Trade-Related Intellectual Property Rights (TRIPs) and the Agreement on Subsidies and Countervailing Measures (ASCM)<sup>1</sup>.

Moreover, various countries continued to address the issue at bilateral and regional levels by signing treaties containing provisions on investment explicitly or implicitly. It is worthwhile to look at all such agreements both inside and outside the WTO, not only because they can provide useful lessons for multilateral negotiations on investment but also because many of them may be in conflict with the proposed agreement on investment at the WTO. Indeed, the Doha Declaration has recognised this by including “due regard for other WTO provisions and existing bilateral and regional agreements” in it.

### **Existing WTO Agreements**

Among the four agreements under the auspices of GATT/WTO that deal with investment-related

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matters, TRIMs deals with investment issues explicitly and exclusively. Negotiations on TRIMs represented an early attempt to catch up on multilateral rules governing investment liberalisation. Investment measures can be divided into two groups. The laws on expropriation, nationalisation, compensation, and measures to restrict or prohibit access to specific sectors of the economy are one group. These measures are potentially applicable to all private investments within a country. The second type of measures are intended to influence corporate decisions, mainly of foreign investors, though they could be applied to domestic investors as well. They can be further subdivided into positive and negative incentives according to the impact they have on the investors. The TRIMs Agreement relates to the negative incentives.

Based on the WTO rules of national treatment and elimination of quantitative restrictions, the TRIMs Agreement prohibits a number of measures mentioned in an illustrative list<sup>2</sup>. It is not clear how TRIMs would coexist with a generic agreement on investment. Would it be incorporated in the proposed agreement on investment by reference? Should its scope extend to include investment measures affecting trade in services? Or should its scope of prohibited practices be modified or further clarified?

Another related question is the issue of tackling the trade and investment distortions resulting from the proliferating level of investment incentive activities, which are nothing but the positive measures listed above. They are used both in developed and developing countries and can be considered to be closely associated to the imposition of performance requirements or the negative measures. The issue is partly addressed by the ASCM, as certain investment incentives fit within the definition of a subsidy and as such are prohibited<sup>3</sup>.

However, the provisions pertaining to investment in the ASCM have not received adequate attention and deserve greater analytical scrutiny. The proposed agenda on investment negotiations as outlined in Doha Declaration has not touched upon the issue. But silence on this front may be broken, as it is expected that attempts will be made to strengthen or broaden disciplines on performance requirements.

The GATS provisions aim to liberalise international exchange of services based on a broad definition of trade in services and represent a partial multilateral

regime on investment. It involves FDI matters since many of the services can only be provided by the establishment of a local subsidiary by a foreign service-provider and several provisions in the agreement regulate cross-border financial flows. In fact it is one of the four modes of exporting services as defined by GATS. The cross-border marketing of goods also relies increasingly on commercial presence in foreign markets.

Investments of manufacturing companies in wholesale and marketing or finance-related affiliates abroad are covered by the agreement if the establishment of such facilities aims at supplying a 'service' related to marketing of goods. An affiliate concerned only with the distribution of products that have been produced abroad is not covered by the agreement. In practice, however, it is difficult to make a clear-cut distinction between those foreign affiliates that really supply a service and those that do not.

The significance of GATS for the developing countries is that its central features suggest that a development-oriented approach to FDI is possible in any future discussion on multilateral investment rules and standards. However, here again, it is not clear how the provisions on the treatment of commercial presence in the GATS can exist alongside a comprehensive generic agreement on investment. The GATS involves quite a broad definition of investment and hence a narrower definition that most developing countries would prefer in a potential agreement might be in conflict with GATS. Similarly, an agreement without a pre-establishment commitment may lead to a conflict of principles with GATS, as it establishes both pre- and post-establishment rights<sup>4</sup>.

If the proposed agreement on investment focuses solely on measures affecting trade in goods, leaving the GATS intact, then the question arises as to what kind of impediments the agreement would address, given that an overwhelming majority of investment restrictions arise in services industries rather than in manufacturing? The list of reservations lodged under the NAFTA and the aborted OECD MAI indicates that some 80-85 percent of them arise in services.

Indeed, the bulk of the discriminatory measures affecting foreign investment today are maintained in the services sector and foreign investors in manufacturing are often given better than national treatment. Adopting different standards of investment

liberalisation for goods and services may also create complicated situations, as, very often, the distinction between investment in goods and that in services may be blurred and such possibilities are increasing with the growth of technologies.

The TRIPs Agreement has a bearing on FDI matters in that the definition of intellectual property rights (IPRs) and the adherence to the international standards and procedures constitute part of the framework within which foreign investment takes place. The impact of the agreement on the flow of foreign investment is of course not very clear. While FDI inflows may increase as a result of a more reliable legal environment and a better investment climate, lack of IPRs may also encourage FDI. A firm that wants access to a market where IPRs are not adequately enforced may have to rely on FDI to ensure control over the proprietary information. Lack of IPRs may also increase FDI in marketing activities that partially substitute for the enforceability of knowledge by establishing closer ties with consumers. However, developing countries were made to believe that it was necessary for them to attract greater flows of FDI along with advanced technology<sup>5</sup>.

### **Bilateral Investment Treaties**

The last decade has literally seen an explosion in the signing of Bilateral Investment Treaties (BITs). By the end of the year 2001, there were 2,099 BITs in force.<sup>6</sup> The initiative for the conclusion of these treaties was taken by major capital-exporting countries. Later, a considerable number of such treaties were concluded by capital importing countries, economies in transition and developing countries.

BITs usually include provisions regarding the area of application, admission and promotion of investment, general treatment and regulations on specific issues, including expropriation, losses as a result of armed conflict and other forms of non-commercial risks, transfer, operating conditions of investment, subrogation and settlement of disputes. Less traditional provisions cover restrictions on performance requirements and transparency.

Although BITs are essentially similar in nature, there are significant differences between their specific provisions. Mainly, there are two BIT models, the US model and the European model. In general, given the sort of provisions usually found in each type of BIT model, it can be said that the disciplinary

provisions in the US model are of a higher level than the provisions in the European model. In the European model, which is more traditional, the host country permits FDI to enter its territory subject to its laws. This implies that the stated standards apply only at the post-investment stage<sup>7</sup>.

The US model establishes the right of the investors to set up a business in all sectors except in those mentioned as “reserved”, which implies the application of national treatment (NT) and most favoured nation (MFN) treatment at entry and afterwards as well. In addition, this model contains treatment provisions for a series of specific and practical issues, such as performance requirements, temporary entry of investors and certain categories of personnel, and nationality of the members of the boards of directors. Moreover, the US model takes a broader definition of investment.

The main reason for the success of BITs in most countries is that they usually follow the European model. They do not place any restrictions on host countries’ policies regarding admission of FDI. BITs’ provisions address the protection and equitable treatment issues of FDI after the investment has taken place in conformity with the host country’s laws and regulations<sup>8</sup>.

Although the US has been insisting that the proposed agreement on investment at the WTO will take a broader definition of investment, it will be very difficult for the developing countries to accept that. As per the Doha Declaration, the proposed investment agreement will take a GATS-type positive-list approach as against the negative-list approach adopted by the US model of BIT. Hence, in terms of provisions or stringency, the proposed agreement at the WTO is likely to lie somewhere between the European and the US models of BIT.

Thus, the proposed WTO agreement on investment will be in conflict with both types of BITs that are in force. As per the current discussions, there is no indication that the BITs will be withdrawn, in case a multilateral agreement is signed. But if they exist side by side, there will be serious complications as to which agreement may be applicable in a particular case.

### **Regional Agreements**

At the regional level, liberalisation of the investment regime has tended to materialise in certain number

of initiatives taken mostly in the 1990s, notably the amendments to the Andean Group's instruments on foreign investment and transfer of technology in 1991; the North American Free Trade Agreement (NAFTA) of 1992 among Canada, Mexico and the United States; the Energy Charter Treaty adopted by 50 countries, which contains important provisions on investment liberalisation and protection; the 1994 APEC Non-Binding Investment Principles; and the Pacific Basin Charter on International Investments.

Similar trends can be identified in inter-regional agreements, such as the Fourth Lome Convention between the European Community and a large group of African, Caribbean and Pacific States, as well as in the association agreements concluded after 1989 by the European Community with countries of central and eastern Europe and north Africa. This trend mainly reflects the recognition by governments that large markets attract FDI. In fact, today's regional agreements are really no longer only free trade agreements but, more and more, free investment agreements as well<sup>9</sup>.

The extent to which and the manner in which these issues are incorporated in specific regional instruments vary considerably, as does the rigour with which they are addressed. However, there is no doubt that most of these agreements will be in conflict with the proposed WTO agreement on investment.

Of course, it may be argued that the investment agreements that were signed as part of the regional integration process will not pose so much of a problem as the regional agreement will take precedence over the multilateral agreement and there are institutional mechanisms at regional levels to deal with such issues. However, the same cannot be true for the BITs or the inter-regional agreements, as there are no institutional mechanisms to enforce these agreements. Moreover, even the regional agreements may pose problems as there might be cases where a third party that is not a part of the regional bloc is involved.

## Conclusion

The proponents of a multilateral agreement emphasise that a comprehensive framework for investment within the WTO may be necessary if the issues of globalisation of the world economy and liberalisation of the trade and FDI regimes are to be effectively tackled. Indeed capital-exporting countries attempted to adopt a comprehensive

multilateral framework for quite long. However, it could not be established due to resistance from developing countries who believed that such rules would probably serve the interests of the rich capital-exporting countries.

In this context, signing of BITs became part of the capital-exporting countries' strategy to create a more investor-friendly legal environment in host countries. They also got some other instruments both at regional and multilateral forums aimed at liberalising foreign investment. Thus, significant liberalisation has occurred even in the absence of a multilateral framework – a fact that is being used both by the proponents and opponents of a multilateral investment agreement to put forward their views.

The opponents argue that since significant liberalisation has occurred even in the absence of a multilateral framework, such framework is not necessary and would serve very little purpose. The proponents, however, argue that such an agreement would reduce conflicts between countries' norms and poor allocation of resources caused by a great number of different regulations, contribute to the continuity of investment-related policies and promote common and more stable rules and disciplines.

There might be some justification for adopting a comprehensive multilateral framework for investment, especially when the existing scenario is not so favourable to the developing countries, considering their levels of commitment in different bilateral and regional agreements. But adopting such an agreement, keeping the existing investment instruments both within and outside the WTO intact, is unlikely to meet its desired objectives and may even complicate the situation further.

If “due regard for other WTO provisions and existing bilateral and regional agreements” in the Doha Declaration is interpreted as all such provisions or agreements taking precedence over any future multilateral agreement on investment, then there will be limited scope for its application.

Thus, the negotiators need to take note of all such existing instruments, review or even scrap many of them in the event they agreed to sign a multilateral agreement to make it really effective. It may also be noted that a multilateral framework on investment will have bigger implications for the world community and, hence, it needs to be ensured that it is more balanced than the existing instruments that are in force today.



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- 1 See South Centre, "Foreign Direct Investment, Development and the New Global Economic Order: A Policy Brief for the South", South Centre, Geneva, 1997, p9.
  - 2 For details, see Annex to Agreement on Trade-related Investment Measures (available on [www.wto.org](http://www.wto.org))
  - 3 UNCTAD, "Tax Incentives and Foreign Direct Investment: A global Survey", United Nations, New York & Geneva, 2000, p24.
  - 4 Pierre Sauve, "Scaling Back Ambitions on Investment Rule-Making at the WTO", *Journal of World Investment*, Vol. 2, No.3, September 2001, pp529-36.
  - 5 Taimoon Stewart, "The Functioning of Patent Monopoly Rights in Developing Economies: In Whose Interest?" CUTS, Jaipur, 2000, p16.
  - 6 UNCTAD, "World Investment Report 2002", United Nations, New York & Geneva, 2002, p8.
  - 7 Mehta et al, "All About International Investment Agreements", CUTS, Jaipur, 2001, p6.
  - 8 Ibid p7.
  - 9 UNCTAD, "Investment Regimes in the Arab World: Issues and Policies", United Nations, New York & Geneva, 2000, p51.

*International Working Group on Doha Agenda*  
***Proceedings of the Brainstorming Meeting on  
Competition and Investment Issues at the WTO***

*November 8-9, 2002, Jaipur, India*

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### **Highlights**

The brainstorming meeting was attended by about 25 participants from research institutes, government agencies, civil society organisations and donors, from various countries including Brazil, India, Kenya, Malaysia, Sri Lanka, South Africa, Switzerland, Tanzania, the UK and the USA.

The discussions revolved around the potential elements, as mentioned in the Doha ministerial declaration of the WTO, of possible multilateral agreements on competition policy and investment. Some new elements, which could be helpful in promoting development, were also discussed. The deliberations were intense, rich and very productive. Following are the main points that emerged from the discussions:

- There are costs and benefits to any international agreement, but developing countries must ensure that what they get at the end does not hamper their development efforts. Promoting understanding and building capacity of all stakeholders including the civil society on the relevant issues was essential to make markets work within the framework of the proposed multilateral agreements.
- Despite a general agreement on the potential benefits of a multilateral competition agreement in tackling anti-competitive practices of the TNCs, concern was expressed on the development impact of such a framework, particularly in countries without any national legislation and on small economies.
- Despite calls for a minimalist approach to a potential multilateral competition framework, it was felt that whatever the developing countries committed to would have a binding effect, and will not be merely a burdensome voluntary instrument.
- The harmonisation of national competition laws should be avoided due to variability in the economic and political environment in developing countries. It was stressed that not only one-size-does-not-fit-all, but one-type-does-not-fit-all.
- The case for a multilateral agreement on investment was not felt to be very convincing, as there is no evidence to suggest that it will bring more investment to developing countries. However, the existing situation is not satisfactory as most developing countries are signing bilateral investment treaties (BITs) that favour developed countries.
- The existing agreements on investment, both at bilateral and regional levels, deal only with the rights of the investors, therefore, any possible agreement on investment should also deal with responsibilities of the investors, and their home countries.

It was difficult to articulate the Issue Papers in a legal language at this point of time due to the given time frame in which the Issues were discussed. Secondly, given the nascent stage of the Issues, an attempt to give a legal angle would not have been justified. However, it was suggested, by the end of the project CUTS may formulate a synthesis of the negotiating inputs for policy makers and negotiators in the developing countries. This will form part of the discussions agenda at the Final Meeting in Geneva early 2003.

### **Introduction**

The International Working Group on Doha Agenda (IWOOGDA) project has been taken up to produce research outputs embracing views from leading international experts, practitioners and other

stakeholders in the areas of competition and investment policy at the WTO. The project aims to create a knowledge base and promote better understanding on these issues by reaching the relevant people through brief yet comprehensive

documents. A brainstorming meeting was organised at Jaipur on November 8-9, 2003 as a part of this initiative.

A number of issue papers on various aspects of potential competition and investment agreements have been prepared by a group of leading experts from developing countries that were distributed among the participants to provide them with a background on the issues. To optimise the outcome of the meeting, presentation of the issue papers was avoided. Instead a group of commentators (already giving their comments on the papers) was chosen to make presentations based on the papers that also included a critical review of them.

Spread over two days, the presentations were made in six sessions, three each on competition and investment. Since it was a brainstorming meeting, the presentations were designed to throw up the issues and initiate discussions rather than being pedagogic. Each presentation was followed by discussions encouraging participation from the floor. At the end, a brief session was held to discuss the proposed/desired directions of the issues both within the framework of the project and beyond. Session-wise brief account of the deliberations is given below.

## **Competition**

### ***Scope and Definition of Competition and Core Principles***

The session was initiated by Kevin Gray of the British Institute of International and Comparative Law, London. He touched upon the issues of definition and scope of competition, and the core principles of transparency, non-discrimination and procedural fairness that have been proposed at the WTO. He also gave the varying interpretations and possible implications of these, as put forward by different paper writers and experts in the field. Following are the salient points that emerged from the session:

- One of the major concerns that have been expressed in this regard is that adoption of a competition law, without the necessary safeguards, may not augur well for many national firms in developing countries who might shut down or be taken over by foreign firms. However, it was pointed out that the smaller firms in developing countries are already exposed to high degree of competition due to trade liberalisation. And hence, a competition policy and law would rather protect them from manipulative restrictive business practices of powerful TNCs. It was also pointed

out that competition policy should be regarded as a sovereign choice and a bottom-up agenda should be adopted as the most appropriate one in any discussion or negotiation for a potential multilateral competition agreement (MCA).

- Any reference to globalisation invariably affected competition policy; hence, this should form a basis in framing the scope of an MCA. It was also voiced that many developed and developing countries have achieved economic development without having a competition policy and law.
- At another level, developing countries were cautioned that, contrary to what they thought, competition policy would not solve the problem of market access issue at the WTO, though it would address some of them.
- State aid was considered to be out of the scope of the MCA as it was already substantially covered by other WTO agreements such as Subsidies and Countervailing Measures. It was noted that these agreements do not address the issue of whether developing countries were getting the promised access into the developed country markets or whether the existing access was of a pro-development nature.
- In as much as it was important to have the core principles of non-discrimination [national treatment (NT) and most favoured nation (MFN) treatment]; transparency; and procedural fairness in a competition framework, it was equally important to conceptualise this within the framework of special and differential treatment (S&DT).

Uniform application of the core principles had the potential to create serious inequities between the developed and developing countries, resulting in the latter's markets being opened unconditionally to unfair competition.

A comprehensive approach in introducing these principles was advocated for, with a focus, not on minimising uniformity, but to separate principles from binding commitments. MFN treatment in particular should be applicable in the matter of cooperation between countries. It was also viewed that MFN is not likely to be a problem area but accepting the NT principle in the competition policy would not be easy for developing countries.

- There were two objections raised on national treatment, one based on an incomplete contract reasoning, that there might be contingencies based on development experience, which would require countries to develop special targeted policies and

an NT provision may tie their hand as these contingencies are difficult to anticipate and hence would need some sort of open-ended exemption. The other concerned targeted policy like Bhoomiputra in Malaysia, which may conflict with NT.

- It was also felt by a section that there was a need for certain flexibilities to cater to the requirements of developing countries. The introduction of the core principles as applied in the other WTO agreements was considered inappropriate since the trade restrictive analysis applied to them would not adequately address the public policy issue in competition.
- It was acknowledged that the circumstances under which a derogation from the basic principles could be allowed needed to be identified. Public and industrial policy considerations were suggested in this regard. Although, it is difficult to state the kind of exemptions required, as it may not be possible for many countries, with little or no experience, to anticipate the problems that might come up in future. It is even harder to say which would be applicable to all countries.
- There was a presumption that countries have to claim public policy and social conditions exemptions and not take them as given. This in essence placed the burden on the country seeking exemption. Alternatively, the negotiations could take the minimalist path by taking up select competition issues such as hard-core cartels, merger reviews or export cartels, and bringing in other types of anti-competitive practices gradually. It was also suggested that a GATS-type approach may be adopted and only a few sectors may be put under the purview of MCA and bring in others gradually.
- Other issues included: how affirmative action policy features in the national competition laws could fit into the MCA; or how promotion of national champions (in essence discriminating against foreign firms) or reservation of markets for certain disadvantaged groups would be viewed in an MCA. It was generally felt that except for discrimination on the basis of nationality, other policy measures should not face any problems provided they follow due process and are done in a transparent manner.
- Developing countries were advised to look at the existing instruments and models, not as a precedent but as a guide. It was also pointed out that an MCA with binding rules to curtail TNCs' anti-competitive practices can indeed help developing

countries, if it is done in an appropriate manner with active cooperation from the home countries.

### ***International Cooperation and Cross Border Issues***

Prof. Gesner Oliveira, former President of CADE (Brazilian Competition Authority) introduced the subject of cross-border issues like international cartels, export cartels, M&As with international spill-over etc. He also gave an excellent illustration on how a competition law could be drafted and implemented in a progressive manner, and how international cooperation can play important role in this regard. The main points that emerged at the end are:

- It was recognised that anti-competitive practices of TNCs hamper development in developing countries, negating the benefits of trade liberalisation. An MCA has the potential to provide standards and assist in strengthening the national laws through peer reviews and building national competition coalitions. International cooperation is very much desired in tackling, for example, the difficulty of getting information on hard-core cartels like the vitamins case.
- However, it was also felt that a case for an MCA had not been fully made. Merely signing an MCA did not translate into an effective national implementation of competition law. It was also noted that small economies may not even go for national laws but could use a regional framework e.g. Paraguay in Mercosur or similar efforts being made by the CARICOM and COMESA countries.
- Competition law implementation in developing countries was different for various reasons including: presence of dual markets due to the large size of the informal economy; small market size; recent past of inefficiencies, distortion; infrastructure bottlenecks and a lack of competition culture in a protected economy; and more importantly, political market failure, meaning failure of the polity to understand the issues in proper perspective leading to under investment in institutions that correct market failures.
- International cartels are particularly harmful but export cartels and import cartels also need to be tackled effectively. South-South cooperation needs to be encouraged in this regard since the developing countries often bear the brunt of the cartels' activities more than their developed country counterparts. It has been observed that these cartels are mostly made up of companies based in developed countries and overcharging is disproportionately higher in developing countries.

- Modalities and types of cooperation among countries varied according to the stages of institutional development of national competition framework. The sequence of evolutionary stages may be characterised by: (1) competition advocacy and repression of horizontal agreements; (2) merger control and vertical agreements; (3) cooperation with regulators and foreign competition authorities; and finally (4) second generation agreements and proactive competition authorities.

This four-stage approach appreciated the sophistication applied to specific competition issues. Hence, in the context of a multilateral agreement, countries could be required to join stage one. Sequencing could vary and no timeframes should be fixed. In the first stage, technical assistance was greatly required. Stage three could signal readiness to fully integrate into an MCA. The type of international cooperation could be simple e.g. US-Brazil (which creates an ambience for cooperation) or advanced e.g. the US-Canada Mutual Legal Assistance Treaty (MLAT).

- The issue of which government department could access the information affected the level of cooperation. For instance, information provided to competition authority may be passed on to the trade authority that could utilise it for anti-dumping actions. Such fears *inter alia* hamper substantial cooperation. It was noted that demand for information reduces substantially if transparency increases, thus making information available without a struggle.
- On the suggestion that information sharing be made mandatory, it was observed that this might be problematic. Part of information procured may come through leniency programmes, which the authority may not like to share. It would also act as a disincentive and leniency programme may not work. Possible solutions put forward included countries offering joint amnesty programmes. However, others were of the opinion that the offending parties did not deserve such special and soft treatment.
- The case for the principle of unjust enrichment was argued to overcome the inability of certain jurisdictions to deal with cartels or other anti-competitive activity. This may not directly affect the home market, but does lead to rent-seeking behaviour by their firms in foreign markets, and thus earning unreasonable profits.
- Mutual recognition arrangements were considered as a possible model for information sharing among members. Though a multilateral process, it is

bilateral in nature providing for minimum amount of information sharing, which would be helpful in merger review and cartel enforcement.

- Cooperation should not be limited to countries, but should be extended to consumers and civil society as well. Consultation in the marketplace could be a source of information, e.g. consumers providing opinions on products. Consumer organisations should also be included in deliberations on a multilateral regime on competition as their participation is crucial.

### ***Public Interest and Technical Assistance***

Faye Sampson, a Legal Consultant from Jamaica/UK set the ball rolling in the session by introducing the concept of public interest and how it has acted as window for exceptions and exemptions in different legal provisions. The second part of the discussions was on technical assistance and capacity building for developing country competition institutions. The discussions also made reference to that in the previous session which dealt with the issue of progressive reinforcement of competition institutions, an issue that has been explicitly included in Doha Declaration. Following are the prominent points that came out in the session:

- The main concerns with regard to ‘public interest’ were: a) how to include it in a multilateral agreement; and b) how does one define it. It was also pointed out that in a multilateral setting, conflicts may arise between countries as an action by one country on public interest ground may cause injury to public interest in another country. However, it was suggested that public interest is inherent in competition policy and there is no need to put it under the rubric of S&DT.
- Generally, it is very difficult to have one standard definition as elements of public interest varied from country to country. However, broad guidelines on how to treat public interest consideration could be worked out in consultation with the various member states, which would include a whole host of parameters. It was of course suggested that the issue should be looked at from development perspective.
- It was felt that certain public interest clauses already existed in the WTO agreements and other international treaties and these could be used as basic guidelines while incorporating this provision in an MCA. Though still evolving, GATT Article XX was one such exception provision, which could be considered as a model of the level of deference granted to countries to regulate in public

interest. There should be an effective instrumentality for evaluating the cost and benefits of public interest, otherwise it can be a slippery slope.

- An element, which many consider as a public interest issue, is the issue of ‘national champions’ on the ground of which anti-competitive mergers are, very often allowed. It was felt that if this were done by use of economic efficiency analysis and by injecting some objectivity into the exercise, then the argument for national champion may pass the criteria.
- It was recommended that even though there is difficulty in dealing with the issue, inability to define public interest should not be an argument for not having an agreement that makes provisions for public interest related exceptions and exemptions. Moreover, the argument as public interest could not be defined as governments cannot anticipate what exemptions will be needed a decade from now should not be given much weight. This may undermine any discussions on a rules-based multilateral system.
- Another opinion was that the processes of determining public interest was just as important as the substantive definition and this should be left to the national governments. This is because despite the fact that the substantive issues for consideration are always subjective, the standards of determining them are usually objective. And competition being more of a governance agenda than any other WTO agreement, it was advisable to restrict the discussion in that direction.
- Recognising that developing countries do not have a history of implementing competition laws, they faced higher obstacles, which served as a rationale for technical cooperation. Nonetheless, they should try to reduce their dependence on external resources since they might be unpredictable. More foreign technical assistance may come with a donor-driven agenda that may not be the most appropriate for the country’s needs. Hence collection of filing fees and the imposition of penalties and fines on defaulters as a means of generating revenues were suggested.
- Alliance with civil society groups and their capacity building and resourcing are also very important. Since a large proportion of developing countries’ population were not able to play their rightful role because of low or no purchasing power, spreading awareness among the masses and involvement of civil society groups must be made an intrinsic part of any developmental effort.

## Investment

### *Scope and Definition, Core Principles and Nature of Commitments*

Prof. Manoj Pant of Jawaharlal Nehru University, New Delhi kickstarted the session with his presentation based on three of the issues papers. He covered the issues of scope and definition of investment, core principles of transparency, non-discrimination and procedural fairness and their implications in the context of a multilateral investment agreement. The issue of nature of commitments, including exceptions and exemptions, and the use of a GATS-style positive list approach were also discussed. The main points of the discussions are highlighted below:

- It was pointed out that the issue of defining investment is a contentious one. Developing countries prefer to have a narrow definition including only FDI, whereas some developed countries, especially the US prefer a broad definition. NAFTA’s example was cited as it has a very broad definition of investment, which includes portfolio investment and other forms of contractual capital (e.g. investment in real estate).
- On the issue of application of core principles, it was felt that as regards the principle of MFN there should not be any disagreement. But with regard to the principle of national treatment, there could be some problems. Extension of fair and equitable treatment could be further problematic. The main problem with the fair and equitable treatment is that it is an absolute standard unlike the more relative NT. It may thus discriminate against domestic firms.

About another principle of transparency it was felt that there is no model as BITs are largely silent on it. About MFN, one view was that even this principle could face problems, as there were BITs under which certain treatment is being offered to some countries, which they may not want to extend to others.

- It was suggested that the OECD experience needs to be elucidated more as it was an example of where the international community went wrong with an investment agreement. The opinion was that the problem was caused not by the drafting but the interpretation. In general, European countries like France interpreted it as an attack on national sovereignty. Business interests, on other hand, felt that the draft agreement offered them nothing of interest.
- It was also suggested that any possible agreement on investment should also deal with responsibilities of the investors and their home countries. The existing agreements on investment, both at bilateral and regional levels, deal only with the rights of the

investors, but corporate wrongdoing by TNCs is not so uncommon in developing countries who would require cooperation from home countries to effectively tackle such problems. Moreover, it may also include provisions to check the incentive race among the countries to attract more FDI.

- There was a feeling that the issue of “regulatory takings” had to be resolved, as, otherwise countries would not commit to important issues like environmental undertakings. It was noted that, the issue of regulation in public interest, as discussed under the competition section, would apply to investment too.

### ***Development Provisions and National Policy Space***

This session discussed the issues concerning special and differential treatment to take into account needs of developing and least developed countries, need for appropriate flexibility, exceptions and exemptions etc., in the context of an investment agreement. Discussions also dealt with the issues of special development needs of LDCs and small economies; technical assistance and capacity building; balance of payments safeguards; trade and financial needs of developing countries; and ways of taking into account the development policies and objectives of host governments etc., to protect the national policy space.

The ways of balancing the interests of host countries with home countries was another important issue that was highlighted. The session was moderated by Shishir Priyadarshi from the WTO Secretariat. Following are the significant points:

- It was emphasised that the S&DT provisions need to have a targeted approach. They should be formulated in a manner that the cost of their implementation is minimal. It was pointed out that when we look at S&DT as a negotiating tool, we are bound to consider costs as opposed to when we look at S&DT as a concession. This area needs more research.
- It was felt that the objectives of S&DT must be very clear, which must be based upon a factual determination of need. These objectives need to be both offensive and defensive, i.e. it should help developing countries to fulfil obligations and provide them enough time to do it. The time period should also be flexible rather than a pre-determined period for all countries.
- The adage ‘one size fits all’ once again may not be applicable in the S&DT context. A clearer

definition of developing countries based on certain economic criterion was important, rather than a graduated scale.

### ***Dispute Settlement and Relationship with other WTO Provisions***

Simon Evenett of the World Trade Institute, Berne initiated the last substantive session of the meeting. The subject matters of discussions were consultation and dispute settlement between Members and/or between Members and non-state actors, and the possible relation or overlap of a multilateral agreement with other WTO provisions, and existing bilateral and regional arrangements on investment. Following are the highlights:

- Emphasis was put on the need to have a dispute settlement mechanism to look into both state-to-state and investor-to-state disputes. Basic minimum standards and broad definitions must be set for its effective functioning.
- Since in the WTO, the DSU is restricted between the member states, it was felt that extending DSU to investment disputes is a complex issue. The US is floating a new idea of fine-based system rather than retaliation through tariff measures. WTO dispute settlement does not have provision for compensation, whereas it is much needed in a multilateral regime for investment. However, some felt that fines would be very difficult to implement.
- It was suggested that there should be an internal dispute settlement mechanism for each state. States could then improve transparency, introduce due process and be allowed to choose their mechanism as long as a sound and standard criteria is adhered to. The WTO in conjunction with the member states could then impose punitive measures upon the wrongdoers.

### ***The Way Forward***

The final session of the meeting was essentially to discuss the future course of action under the project as well as the activities that can be undertaken even beyond. Suggestions were sought from the participants in this regard. They were also requested to raise any new aspects or areas that they felt important but have not been discussed in the meeting. Participants also expressed their general feeling, which was that the meeting had succeeded in its objective and the outcome will help in clarifying the issues to the developing countries. The meeting ended with a vote of thanks proposed by Pradeep S Mehta of CUTS. The important points are highlighted below:

### *Process Issues*

- It was felt that further research would be required if the negotiations on these issues actually start after the Cancun Ministerial. Given the nascent stage of the issues, it was felt that discussing the issues with all ramifications was not possible. It was also pointed out that the list of elements for possible negotiations or modalities may be just illustrative and one does not know what direction the negotiations may take once they start.
- However, it was suggested, by the end of the project CUTS may formulate synthesis papers on these issues before the proposed follow-up meeting early next year. These might work as preliminary negotiating inputs for policy makers and negotiators in the developing countries. It was also suggested that by early next year a clearer picture may emerge and hence future strategies and action to be taken may be discussed in the follow up meeting.
- It was also pointed out that some substantive research on these two issues is being done under another project at CUTS, namely EINTAD (EU-India Network on Trade and Development). Some of the researchers of EINTAD were also present in the meeting. It was noted that such coordination is desirable to share learning and avoid duplication of efforts.
- It was felt that the issues papers that formed the basis of discussions at the workshop should be

revised to incorporate the issues and concerns that came up during the meeting. They should also be uniformly formatted as far as possible. The format of the revised papers was proposed to be as follows:

- a) Executive summary
- b) Short statement on the issue
- c) Analysis of the issue
- d) Discussions
- e) Recommendations

### *Substantive Issues*

- National arrangements should be taken into consideration before going in for a multilateral regime. Each country should be given a right to choose the kind of arrangement it wants.
- There was also a need to look at improving trade ties in the bilateral and multilateral context, so as to further facilitate the role of negotiators from developing countries. This would also enable the negotiators within the developing countries to adopt appropriate stances to get concessions from developed countries in development areas.
- Low budgetary resources and bureaucratic mindset were a problem, hence technical cooperation and technical assistance are crucial for institutional building for both national competition and investment frameworks.



# *International Working Group on Doha Agenda Proceedings of Final Meeting on Competition and Investment Issues at the WTO*

*February 17-18, 2003, Geneva, Switzerland*

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## **Highlights**

The final meeting of the project on Network-based Research on Competition and Investment Issues of the International Working Group on Doha Agenda (IWOGDA) was held on February 17 and 18, 2003 at Geneva. IWOGDA was established to promote understanding on competition and investment issues emanating from the WTO Doha agenda compiling the views of experts from different countries of the world. Apart from the members of the group, the meeting was attended by civil society representatives of different countries, negotiators and policymakers. Following are the highlights of discussions at the meeting:

- The Geneva meeting of the Group was designed to have a final discussion on the policy briefs. The two policy briefs, which contain analyses of the various elements of the two potential agreements in a matrix, have been designed for easy reading for busy policymakers. The design was highly appreciated by the discussants.
- With regard to competition and investment at the WTO, developing countries are in a Catch-22 situation; they feel that a multilateral agreement on these issues may tie their hands in terms of freedom in national policymaking. But, at the same time, the *status quo* is not in their favour, especially in the context of investment, as many of them have signed bilateral investment treaties that have created high levels of obligation. This was the feeling that dominated the discussions at the meeting.
- Regarding competition, the group agreed, there is a *prima facie* case for a multilateral approach or initiative. However, the group was not sure as to whether the core principles of the WTO will be suitable for a competition agreement and even whether the WTO is the right place for hosting such an agreement. Thus, extreme caution was recommended before making any decisive move.
- On investment, however, there was no consensus regarding whether a liberalised foreign investment regime will usher in expanded FDI flows to developing countries. It was pointed out that there is no conclusive evidence in this regard. Moreover, it was noted that, in some cases, the impact of FDI in host countries has even been negative. Indeed a multilateral agreement was seen as one that would further liberalise FDI movement and prevent governments from regulating them. It was of course observed that developing countries might have a more advantageous position in a multilateral set-up than in a bilateral situation owing to collective bargaining power.
- It was also felt that any investment agreement, if at all there should be one, should have provisions to check the incentive race that most developing countries are engaging in to get more FDI.
- Echoing the views expressed in recent submissions by India, China, etc., it was also suggested that there should be adequate provisions to make investors responsible and to put obligations on home countries as well.
- Another suggestion was that any such agreement should be accompanied by a complementary agreement on movement of labour. Movement of labour and movement of capital were seen as two sides of the same coin. Thus, no economic justification was seen in making one of them mobile while keeping another restricted.
- The general message that the group wanted to convey to negotiators and policymakers is that the latter (i.e. negotiators as well as policymakers) need to tread with extreme caution. They also need to put development at the centre of discussions on these two extremely important and controversial issues.

It was decided in the meeting that the policy briefs prepared by IWOGDA would be further revised on the basis of discussions at the meeting. The entire output of the project would then be printed in a single volume in order to be circulated among negotiators, policymakers and other stakeholders throughout the world.

## Introduction

The International Working Group on Doha Agenda (IWOGDA) was established to promote understanding on competition and investment issues emanating from the WTO Doha agenda by embracing the views of experts from different countries of the world. The group has been instituted by Consumer Unity & Trust Society – Centre for International Trade, Economics & Environment (CUTS-CITEE), Jaipur, India. The IWOGDA project is being supported by the Ministries of Foreign Affairs of The Netherlands and Sweden and the Department for International Development, UK.

The group, through written contributions, discussions via a virtual network and a brainstorming meeting on 8<sup>th</sup> and 9<sup>th</sup> November at Jaipur (India), has produced two policy briefs, one on competition and the other on investment. The written contributions were mainly from developing country experts, experts from industrialised countries (ICs) were also involved in the consultative process. The final meeting of the group was held on 17<sup>th</sup> and 18<sup>th</sup> February 2003 at Geneva. The meeting was designed to facilitate a final discussion on the policy briefs. Apart from members of the group, civil society representatives of different countries, negotiators and policy makers attended the meeting.

The two policy briefs, which contain analysis of the various elements of the two potential agreements synoptic tables, have been designed for easy read by busy policy makers. The design was highly appreciated by participants and negotiators.

As regards competition, the group agreed that there is a *prima facie* case for a multilateral approach or initiative. However, the group was not sure as to whether the core principles of the WTO will be suitable for a competition agreement or whether the WTO is the right place for hosting such an agreement. Thus, caution should be exercised before making any decisive move, including but not limited to, an independent international forum outside the WTO, or one that is bereft of the single undertaking nature of the WTO.

On investment, however, there was no consensus that a multilateral framework on investment (MFI) will usher in expanded FDI flows to developing countries (DCs). It was agreed upon that there is no conclusive evidence in this regard. Neither FDI can be considered to be a panacea for promoting

development in DCs. In some cases, the impact of FDI in host countries has even been negative. Indeed a multilateral agreement is seen as one that will further liberalise FDI regimes and bind governments from regulating foreign investors. It was of course pointed out that DCs might have a more advantageous position in a multilateral set-up due to gaining collective bargaining power, which is absent in a bilateral situation.

It was also felt that any investment agreement, if at all, should have provisions to check the incentive race that most DCs are engaging in to attract more FDI.

Echoing a recent paper submitted to the WTO Working Group by India, China and other WTO members, it was also suggested that there should be adequate provisions to make investors responsible and to put obligations on home countries as well.

Another suggestion was that any such agreement should be accompanied by a complementary agreement on movement of labour. Movement of labour and movement of capital are two sides of the same coin. Thus, there is no economic justification for facilitating the mobility of one factor while keeping the other restricted.

The general message that the group wanted to convey to the negotiators and the policy makers is that they need to tread with extreme caution. They also need to put development at the centre of discussions on these two extremely important and controversial issues. The following sections give more details of the proceedings of the final meeting at Geneva.

## Competition

On the first day of the meeting issues concerning the proposed multilateral competition agreement at the WTO were discussed. The meeting started with a welcome address by Pradeep S Mehta, Secretary General of CUTS, who also briefly introduced the project. As mentioned before, to start with, the policy brief on MCA was presented to the audience. Cezley Sampson of Oxford Policy Management made the presentation.

## Presentation

The elements identified in the Doha Declaration for a potential multilateral competition agreement (MCA) include:

- Scope and definition of competition;
- Application of core principles: transparency, non-discrimination, procedural fairness;

- Cross-border issues: export/import/hard-core cartels, mergers & acquisitions (M&As);
- Cooperation between agencies; voluntary, positive comity;
- Special and Differential Treatment: (S&DT), need for appropriate flexibility, exceptions and exemptions;
- Public Interest – window for exceptions and exemptions; and
- Technical assistance and capacity-building commitments, support for progressive reinforcement of competition institutions in DCs.

The pressing negotiating issues are:

- Relevance of the MCA in the WTO.
- The scope of the MCA and the cross border issues that should be considered is still controversial.
- Effectiveness of voluntary cooperation as opposed to binding one.

Conventional wisdom states that competition is good for all, and that competition policy promotes consumer welfare and economic efficiency. Having no competition framework adversely affects competition and contestability in DCs and the world economy. Hence, all countries should have a competition policy framework in place.

Many DCs have no doubt been able to maintain considerable competition without an exclusive legislative framework. However, competition policy is very often neglected because the benefits of such a policy and law are diffused and it is very difficult to assess them. But it is also observed that due to the effects of increasing liberalisation and globalisation, DCs do need national competition laws.

The discussion of a potential MCA at the WTO or any other multilateral forum has its own dynamics. This is because the discussions are essentially on domestic institutions, competition policy and law, which touch upon the sovereignty of countries very closely. For some this very nature makes it easier and strengthens the case for an MCA but for others, the lack of homogeneity among countries is reason enough not to discuss it.

One advantage of having competition law and cooperation agreements between competition authorities, it is argued, is to be able to control abuse of dominant position by transnational companies (TNCs). There are certain private practices of TNCs that impair trade and competition. These include those

which prevent trade liberalisation from having a positive effect (import cartels, vertical restraints between domestic manufacturers and retailers, domestic abuses of dominant position) and those which rob the trading nations of the benefits of trade; export cartels (Webb Pomerene Act in the US), abuses of dominant position (Microsoft, Intel in Taiwan), anti-competitive mergers (Coca Cola and Cadbury Schweppes) and international price fixing cartels (vitamins cartel).

Moreover, there are very few bilateral agreements between ICs and DCs as there is no particular interest to reach one. The probability that firms in DCs will be able to engage in practices, which will reduce competition in ICs, is comparatively low.

Hence, an MCA will allow Members to overcome the aforementioned obstacles. Indeed DCs do recognise the potential benefits. It is also this group of countries, which once promoted the idea of converting the UNCTAD Set of Multilaterally Equitable Agreed Principles and Rules for the Control of Restrictive Business Practices (the Set) to a binding instrument.

However, in the changed geo-political scenario, DCs are convinced of the virtues of a multilateral competition framework, but whether the WTO is the right forum or not, remains an enigma. The basic opposition to an MCA in the WTO is that it is seen as a further market access tool to open up the markets of DCs to the goods and services of OECD countries-based TNCs.

The small size of DCs' economy in global terms places policy makers in a dilemma – local companies must be virtual monopolies at the local level to have the desired economies of scale to survive global competition.

Moreover, despite repeated assurances, concerns still persist that the MCA demandeurs have failed to adequately answer the question of whether the competition problems faced by Members could be addressed, to a large extent, through existing WTO Agreements or activities or whether the MCA would solve their problems.

The calls for an MCA are predicated on the need for a comprehensive domestic competition law, failing to take account of the position of countries that do not want to adopt such a law or found it to be not so

necessary at least for now. The focus so far has been largely on the potential benefits of the MCA for DCs with little mention of the costs that such an agreement might bring about.

There are merits associated with international cooperation among competition authorities to combat anticompetitive behaviour. One of the major reasons for that is the asymmetric power relations between TNCs and host governments in most of the DCs are such that it may be difficult to get the incriminating evidence from the TNCs, to be able to prove anti-competitive behaviour. However, it is not clear if the adoption of an MCA could actually promote the desired level of cooperation.

When ICs in general talk of a competition policy framework, it is for the purpose of establishing domestic competition law in the DCs so that their national firms do not get privileged treatment. When DCs, however, speak of the possibility of negotiating a competition policy framework in the WTO, it is for the purpose of curbing restrictive business practices at the national, regional and international levels.

Thus while the developed world is more interested in global standards for national competition rules, the DCs talk about global rules on competition. The UNCTAD Set takes a hybrid approach, as it speaks about some global rules as well as some standards for national rules. The Set also suggested that the countries that may find it burdensome to have a national competition law, could also go in for a regional approach.

The proposal put forward by the European Union (EU), the leading proponents of an MCA at the WTO focuses on a framework that “could and should...establish a solid basis for dealing with basic competition policy issues” which impair market access. The EU proposal seems to have a wider domestic implication than a market access commitment would have.

Thailand has put forward the idea of including “special and differential treatment” as the fourth core principle for competition negotiations, calling firstly for exemption of DCs from national and international export cartels. Secondly it calls for a gradual introduction of greater transparency and due process in the administration and enforcement of competition law. Thirdly, it has also asked for mandatory cooperation.

Meanwhile, India considers it appropriate to adopt the concept of non-discrimination subject to differential treatment of different countries with different capacities (hence a violation of the doctrine of national treatment, NT).

Given this context, countries should first comprehend the relevance of competition to their development priorities and national policies. Little has been done to raise awareness and appreciation of competition policy among groups that influence policymaking. To this end, the discussions should go beyond the level of action on the basis of intuition and towards action on the basis of empirical research.

A grasp of competition framework implications will in turn enable DCs to make an informed choice on whether or not to adopt one at a regional level or at multilateral level.

If a decision is taken at Cancun to launch negotiations, then the modality of the exercise has to be carefully considered since it will determine how well a country’s concerns are addressed. The more extensive the substantive obligations of the agreement, the more difficult it is for governments to accept it (and the more demands there will be for special and differential treatment or clauses to ensure progressivity and flexibility). Even so, the framework of rules and disciplines in the area of competition policy should go beyond the exchange of non-confidential information.

With regard to the specific issues, DCs should, inter alia, consider the following:

- (i) Accept the need for MCA but insist on looking at it purely from the perspective of economic development.
- (ii) In respect to the objectives and public interest dimension of the framework, DCs should demand enough flexibility. ICs want an MCA to promote certain kind of efficiency-aggregate global economic efficiency. Aggregate global efficiency may not necessarily ensure efficiency for all nations and regions.
- (iii) Issues of interest to DCs should be firmly introduced as negotiating elements. E.g. monopsonistic practices of TNCs are of more interest to them since their comparative advantage is in commodities and the buyers often display high levels of concentration.

## Discussion

The presentation was followed by discussions that started with comments on the presentation made by two discussants of the session, Peter Holmes of the University of Sussex and S. Chakravarthy of India (formerly with Monopolies and Restrictive Trade Practices Commission). This was followed by general discussions in which almost everybody from the floor participated actively. Following are the main points that emerged from the discussions:

- The issue is not whether competition policy is going to be dealt with at the WTO or not. While people are debating whether competition cases would be brought under the WTO dispute settlement mechanism, the fact is that some competition cases have already come before the WTO.
- There is a need to consider whether to negotiate for a competition framework or allow competition laws to evolve on their own. We need to proceed with extreme caution. It has to be recognised that countries will be using the same road but not from the same starting point. All countries do not have equal endowment. Thus, they will find it difficult to accept non-discrimination as a core principle for competition. However, it was pointed out, in terms of clear pristine law, one cannot have discrimination. It is also difficult to arrive at a basis for making discrimination.
- Many countries are not aware of cross-border anti-competitive practices that are robbing their economies and people. In addition, since industrialised countries do not find too many market access barriers created by private firms, especially in DCs, an MCA will not give them more market access than they already have. A multilateral agreement could be useful in that it could provide a framework for cooperation between competition authorities and create a framework for countries to check anti-competitive practices by TNCs. But the question arises, whether an MCA will be able to tackle TNCs' abuse of dominant positions. For DCs, the issue is quite different from that of industrialised countries. The ICs are talking about global standards for national competition rules that in effect may be inadequate to challenge the TNCs, especially by DCs.
- The EU's position is quite complicated and its approach towards establishment of a regional competition authority has been based on the need for greater market access. Obviously other countries tend to believe that its push for a competition agreement at the WTO is driven by a similar approach. EU claims that no harmonisation is required and is pressing for adherence to core principles. EU is talking about only *de jure* competition rules and not *de facto*. However, it is not clear how that will be done or whether that will make any sense. In addition, no other country has presented a concise position, especially not even DCs.
- What is the way forward then? DCs must be well informed. There is a need for wider involvement. DCs are starting with weak endowment and weak institutional capability. Key concerns of DCs, which involve controlling monopolistic behaviour of TNCs, should be given priority.
- DCs' acceptance of some disciplines will help ease out the situation. In any case many DCs now have a competition law and many others are in the process of instituting one. A reasonably well-informed country like India, for example, should not have any problem in identifying proposed elements of a MCA that could be useful. There can also be broad exemptions in the provisions of the MCA, to suit the needs and the existent institutional capacities of DCs. In addition, predictability and transparency in the law enforcement process has to be ensured.
- The UNCTAD Set is quite cautious on exchange of confidential information. In some cases, even the EU could not obtain confidential information from the British competition authority. Moreover, an agreement may not be necessary to obtain the necessary cooperation and information. Brazil got more information from Canada than the US could get, even though the US has a cooperation agreement with Canada and Brazil does not. In many countries exchange of information will require adequate coordination between the state and federal levels. DCs should have the right to cooperation. Voluntary cooperation may not work well for DCs either. The idea of constructive cooperation can be reflected upon. However, in the opinion of some discussants, cooperation is always voluntary. Mandatory cooperation is conceptually inconsistent.
- Under an MCA, by and large, there would not be much difference among countries in terms of coverage of issues. But the procedural part may be different across countries. Even then, by and large competition laws in different countries have similar objectives. The question remains then as to why it is so difficult to reach a common ground.
- Balancing consumer interest and public interest is a difficult issue. DCs may have varying needs

in this regard. Therefore, acceptance of core principles might create problems for them. South Africa has developed jurisprudence in public interest. But this is not seen in other countries. The Doha Development Agenda does not even mention public interest. But the list of elements/issues in the Doha Development Agenda is not an exhaustive list. Public interest is an important issue even in the developed world. The UK competition authority seeks comments from the public on mergers focusing on public interest i.e., to see if the merger may be expected to operate against the public interest. Recently, two German firms were allowed to merge on public interest grounds even though it raised competition concerns. A similar approach was taken in New Zealand and Brazil. In Germany, public interest was supposed to have influenced the decision of the Minister. But nobody in Germany except the Minister and the industry thought so.

- However, public interest may be a slippery slope. If the German Minister decides something to be in the public interest then what can one do? In Indonesia even a judgement is kept secret. How can one be sure about the due process and procedure of law in such a situation? Provision of public interest exposes the system to regulatory capture. Very often it is actually used against the middle class and the poor. But one cannot always rely only on efficiency. If one takes the example of the public distribution system in India, it is inefficient. But food still reaches the poor. An alternative efficient system may not ensure that. Thus, public interest is a safeguard. It has already been included in many other agreements and it hence it can be included in an MCA as well.
- National policy space is another important issue. Sovereignty should be protected. However, it was pointed out that the issue is not specific to an MCA only. In any multilateral agreement some amount of compromise is made on policy flexibility.
- It is also important to see where DCs stand now. If they remain spectators, ultimately they may sign an agreement in which they did not have any say. It was suggested that the conclusion of an MCA might not happen soon. What may be done at the WTO first is to arrive at some understanding on harmonisation of principles. Some light should be thrown on bilateral trade negotiations. Many such agreements are actually including cooperation on competition issues. This might be detrimental to the interests of DCs.
- Are we losing out on an opportunity? Many countries have undertaken reforms that have

diminished government barriers, but private barriers are replacing them. MRTPC (Indian competition authority) did not take any action in India. In Pakistan, the competition authority tried but the government did not favour the idea. It may be good to bridge the existent difference between developed and DCs, with the former taking action against anti-competitive practices of TNCs and the latter not doing so. Even if negotiations start now it will take at least five years to reach an agreement.

- However, there are some issues that are holding DCs back. There has been no progress in the so-called Doha Development Agenda, especially on agriculture, TRIPs and Public Health, Implementation Issues and S&DT. The deadlines were postponed. As a result, confidence of DCs in the system is quite low. There is a feeling that except the US and EU nobody is really heard at the WTO. They may ask: Why does the EU not bring agriculture under competition law?
- Benefits of competition policy are not apparent. That is why many DCs find it difficult to adopt one. An interesting study was done in Peru. It was found that 6-7 percent of GDP gets lost due to anti-competitive practices. Chaebols in Korea did not do as much good for the economy as it was perceived. Lack of political culture graduates from national to regional, and to multilateral levels.
- In DCs with smaller markets, a structural approach may be disastrous. It is also interesting to note what would be the boundaries for the relevant market in a globalised environment. If one considers the global market, a very few mergers would be considered to be anti-competitive. On the other hand, in a national market almost all mergers would be anti-competitive, especially in smaller DCs.
- As regards industrial policy and competition policy, needs of DCs are different for those of ICs. There should be S&DT and phase-in period for MCA. For example, Peru does not have merger review provisions but only in extreme situations is a merger review done. Small countries can also go for regional arrangement, instead of a national law. An MCA, if instituted, can take a TRIPs style approach in that different time frames can be allowed for implementation of certain provisions. This would call for Special and Differential Treatment and phase-in period under the MCA. A GATS style approach could be adopted, by progressively bringing in other practices besides hard-core cartels within its ambit.

- The EU did not create standards for national governments. EU competition policy was part of the internal trade policy – to prevent private barriers from coming up. Now EC has become a regional CA. But nobody can think of WTO secretariat getting firms to the WTO dispute settlement panel. Harmonisation of vertical restraints and global rules will never happen.
- Why are DCs signing bilateral agreements if they are not fair? Conclusion of an MCA will not stop the US from signing such bilateral agreements. Singapore is negotiating a bilateral agreement with the US because of geo-political reasons and not economic reasons, as they are not comfortable with the growing clout of China in the region. This partly explains the situation. Larger countries use all sorts of instruments and tactics to influence evolution of national laws in other countries.
- US-EU cooperation has never taken the interest of other countries into consideration. In the McDonnell Douglas Boeing merger case, the EU was concerned about its own aircraft manufacturer, Airbus Industries and the EU-US agreed that sourcing of components from Europe would be done. But what could other countries do? They do not even have the capacity to supply components.

### **Investment**

On the second day of the meeting the issues concerning the proposed multilateral framework on investment were discussed. Prior to the discussion, Manoj Pant of Jawaharlal Nehru University, New Delhi, presented the draft policy brief on MFI.

### **Presentation**

The elements identified in the Doha Declaration for an MFI are:

- Scope and definition;
- Core principles - non-discrimination and transparency;
- The nature of commitments – GATS-style positive list approach;
- Development provisions;
- National policy space- ways of taking into account the development policies and objectives of host governments including the right to regulate in the public interest;
- Consultation and dispute settlement; and
- Relation with other WTO provisions, existing bilateral and regional arrangements on investment.

The main negotiating issues are:

- The need for MFI and its appropriateness in the WTO framework.
- Modalities/nature of negotiations; WTO's General Agreement on Trade in Services (GATS)-style or opt-outs. Under GATS, which governs trade in services, countries pick and choose the areas in which they wish to make commitments.
- The application of trade instruments such as non-discrimination principles to investment.

International investment agreements (IIA) tend to cover two main issues. One is the liberalisation of investment regimes i.e. providing market access; the other is the protection of existing investments.

Proponents of a multilateral framework on investment (MFI) have argued for a framework to ensure and strengthen the protection of the rights of the foreign investors in the host countries and to curtail the role of the host government in putting conditions on their entry and operation. This according to them will facilitate greater flows of FDI to DCs. However, DCs have argued that FDI will, in practise, contribute to development objectives only if multilateral rules allow for national policy space to effectively regulate and channel FDI into areas of interest to their economy.

It is widely believed that the existing scenario in terms of IIAs is not quite satisfactory from the viewpoint of DCs. Many DCs have conceded (and are still conceding) major concessions to ICs in bilateral and regional settings. Collective bargaining can give more strength to DCs with similar agenda, as compared to individual bargaining for BITs.

Incentive bidding where DCs outdo each other by offering the most beneficial investment incentive packages can only be addressed in a multilateral framework.

Multilateral negotiations are believed by some to come under more scrutiny from, for example, civil society actors, as compared to bilateral negotiations, which are unlikely to attract much attention. Transparency of home regulation can be enhanced, as experienced by South Korea during the MAI negotiations. Moreover, a multilateral agreement is more likely to come under regular review, especially when applying a uniform dispute settlement mechanism.

However, once a multilateral agreement is signed it will be harder for one country to get out of it unilaterally. Sanctions in a multilateral setting, such as trade restrictions, can be much more damaging in a multilateral setting than in a bilateral or regional setting.

Multilateral fora like the WTO are biased towards free trade and not very likely to consider development goals as a priority. A “one size fits all” multilateral framework might give less scope to accommodate differences between countries at different levels of development. This disadvantage can possibly be reduced by providing for country-specific exceptions and special and differential treatment for DCs.

The main objection against having an MFI in the WTO, as argued by its opponents, is the very inappropriateness of an investment agreement at the WTO. Moreover, in recent years, there has been a phenomenal increase in the cross-border flow of capital, without any multilateral framework. Countries are liberalising unilaterally to create a more investor-friendly environment. The principles developed by some international bodies in this regard can indeed help such unilateral liberalisation and an MFI may not be necessary.

Most trans-border investment takes place among ICs while most of the international investment agreements are between developed and DCs. The only attempt at a multilateral framework among the industrialised countries, the Multilateral Agreement on Investment (MAI) at the OECD, did not succeed.

The present calls for an MFI raise the fear that the resulting liberalisation of foreign investment will reduce national sovereignty by limiting the regulatory capacity of governments to address development challenges.

The non-discrimination principles proposed for the MFI is expected to parallel that of GATS. As it is, DCs have no capacity to understand exactly which sectors to open up and what types of limitation and exceptions to put under each sector so that a country is not economically, socially, or politically harmed.

The impression emerging from the WTO Working Group discussions pertaining to the MFI proposal can be summarised as:

- Most countries are adopting an attitude of wait and see-first, gauging how the countries react to the proposals that have been discussed so far, before adopting a position.

- Countries are still struggling to understand what are the issues for an MFI.
- They are also trying to comprehend the implications of an MFI on their national policies.
- DCs in general are not enthusiastic about the idea of launching WTO negotiations on an MFI. To the main demanders of the agreement, EC and Japan, inclusion of the non-discrimination principle is very critical. But the DCs consider this as one of the main stumbling blocks of the MFI.

However, the demanders are against the introduction of such issues, e.g., discussions on the obligation of the investors as well as the home countries obligations to enforce these obligations introduced by a group of DCs including China and India.

Unlike the other countries, which seem ambivalent, India and Malaysia have been steadfast in their opposition to an MFI in the WTO. According to India, investment does not belong to the WTO, as it is not a trade issue. Moreover, India has consistently insisted that Members must discuss the movement of natural persons (labour) in any discussion on capital flows. Pakistan has also repeatedly stated that it remains unconvinced of the need for an agreement adding that it would weaken the bargaining position of host countries vis-à-vis investors.

Most DCs are in favour of a narrow-based definition of foreign investment and long-term scope for the MFI if there is to be one at all. But the US is of the opinion that a broad-based and open-ended definition (which includes portfolio investment) and pre-entry applicability are necessary to maximize the benefits of investment liberalisation and protection. Canada in turn would like to see a broad-based but long term approach for the MFI scope with an exhaustive list. This it considers is the best means of facilitating a “common understanding”. Australia is exploring the idea of having a narrower definition for entry (pre-establishment treatment), and a broader definition for post-establishment treatment, in part for consistency with BITs.

With regard to transparency, both developing and ICs consider this to be an indispensable and integral part of the agreement but they differ in scope and reach.

Taiwan has been controversial by suggesting that Members should consider provisions for investor-state disputes through the dispute settlement system patterned after the Independent Entity Scheme for



WTO Pre-shipment Inspection disputes. Most countries have objected to this proposal on the ground that it is beyond the Doha remit.

Keeping the above in view, DCs need to take the following into consideration before they embark on any negotiations on an MFI at the WTO:

- They must be convinced of the importance of foreign investment to their economy first before considering the necessity of an MFI within or outside the WTO framework. Subsequently, if it is found important enough to warrant the need to regulate investment multilaterally, the existing frameworks and agreements should be explored.
- Most trans-border investment takes place among ICs while most of the international investment agreements are between developed and DCs. The only attempt at a multilateral framework among the industrialised countries, the Multilateral Agreement on Investment (MAI) at the OECD did not succeed. It is thus essential for DCs to carefully study the effects of the existing IIAs as well as the failed MAI process.
- Any negotiation must include discussions establishing the obligations of investors and the rights of host countries. A legally binding international framework on corporate accountability and liability should therefore be considered as a concomitant requirement for negotiations on an MFI.
- If the decision to go ahead with negotiation is taken, then the proposed MFI must include as per the paragraph 22 of the Doha Declaration:
  1. A degree of flexibility with a development dimension that considers developing country's national policy objectives keeping in view their level of development;
  2. A balanced reflection of the interests of home and host countries;
  3. The right of the host country to regulate in public interest; and
  4. The special development, trade and financial needs of DCs.
- As regards the issue of checking the incentive race among the nations, i.e., balancing the TRIMs Agreement with provisions on positive TRIMs as well, a code of good practices can be annexed to it, as in TBT Agreement. This approach can also be followed with regard to the obligation of the investors and the home countries.

### **Discussion**

The presentation was followed by discussions that started with comments on the presentation made by three discussants of the session, John Gara, an investment expert based in Uganda, Peter Nunnenkamp of the Kiel Institute of World Affairs, Germany and a South African lawyer, Loretta Ferris, currently based at Washington College of Law, American University, USA. This was followed by general discussions in which almost everybody from the floor participated actively. Following are the main points that emerged from the discussions:

- What type of investment should be covered and what constitutes an investment is a debatable issue. The formula to distinguish FDI from portfolio investment is also quite *ad hoc*. The American approach is very broad and has deeper implications for DCs.
- FDI has to be of the type allowed by the host country. Size of the investment is also important. The issues of importance in this regard are:
  - What are the objectives?
  - Whether it is possible to have S&DT?
  - What are the substantive provisions?
  - What are the types of obligations – all binding or some are voluntary?
  - Whether there will be any role for DSM?
- Countries do not urgently need an MFI. However, both the proponents and opponents take various things for granted. There is no empirical evidence that FDI always has positive impact. Proponents argue that capital mobility is a good thing to have even though it is well known that there have been some crises.
- Even if only a narrow definition is included – FDI may not be panacea to all economic problems of DCs. There are evidences where benefits are marginal or even negative.
- Whether DCs are well advised to have policy flexibility is another important issue. Performance requirements do not have a good record. In most cases they have not worked well. There is bad news even on technology sharing and domestic content requirements. DCs' hands will be tied but that may be good for them. However, it was pointed out that local content requirements played a significant role in industrial development in some countries, e.g., Brazil.

- How should governments be empowered to attract high quality FDI? Many countries are not able to decide which sector to liberalise. Then how will they be able to use performance requirements judiciously? Will they be able to channelise high quality FDI? It is also important to consider if S&DT is a good thing. According to Jagdish Bhagwati, S&DT is not a good thing in the international trading arrangement. However, it was pointed out that Bhagwati himself considers MFI to be a Wall Street agenda. It was also pointed out that giving DCs a fixed transition period for implementation of MFI provisions might not be effective, given that many DCs might take more than 10 to 15 years to reach the desired levels of development. Provisions of exemptions until the time DCs reach a certain level of development might be more meaningful.
  - Discussion on incentive competition is important. It is the other side of performance requirement and can also lead to distortions. Competition for FDI is primarily among DCs. Sometimes ICs also compete, but for different types of FDI. It was, however, pointed out that very often countries offer incentives due to political instability or some other disadvantages. But if price-based incentives are banned then countries may go for other forms (hidden) of incentives, which might have significant socio-economic implications.
  - The OECD MAI was very specific as to what areas would be covered. The failed initiative may actually give some indications of the kinds of problems or issues that countries may face in this context. The OECD MAI was actually targeted at DCs. Once adopted at the OECD, it was meant to be a model for the whole world.
  - In WTO negotiations, it has always been a mercantilist game – give and take. DCs also have to offer something that does not hurt them. They have to make bold looking offers. So far the experience has been that the ICs have been proposing and others responding to them and sometimes block the same. However, the questions remain what to do if the issue really comes up for negotiations. It may be noted that some of the EU members are also not so enthusiastic about an MFI, but would go along.
  - Protection of indigenous rights and environmental objectives have to be taken into consideration. For example, advancement of black empowerment is a legitimate state objective in South Africa. However, the question is whether the specific measures designed to achieve these objectives are consistent or not.
  - Protection of investor is a very important goal. But the definition and the issue of expropriation are also contentious. The concept of taking over of property has taken a new dimension now. It is sometimes defined as “deprivation of reasonable economic benefits” – the question remains, what is reasonable?
  - The goal of the dispute settlement mechanism at the WTO is a political one and recognises only state-to-state disputes. How does one go about addressing this inconsistency with the fact that investor-state dispute is so common? However, given the experience of NAFTA, bringing in provisions for investor-state dispute may not be advisable. If investor-state disputes are included, there should be a clear provision stating that domestic remedies would be exhausted first before going to an international forum.
- However, some felt that investor-state dispute resolution at the WTO will never be accepted by the members. Hence, it is a non-issue as countries are not even willing to allow for the acceptance of amicus brief at the WTO DSM process, which could possibly be the lowest level of involvement of non-state actors in the process.
- In the WTO regime there have been a few shifts from the earlier regime. One is regulating the behaviour of actors more directly. The concept of sovereignty has also come into picture. The proposed MFI can empower foreign investors to challenge the law making system. The question is what will be the impact on legislative and executive capacity? It should be worthwhile to see the extent to which the issue of sovereignty is confronted in the Multilateral Investment Guarantee Agreement. It was, however, noted that sovereignty is involved in all multilateral agreements but the question is to what degree.
  - Article XX of GATT provides policy flexibility. However there is incoherence in some countries’ stand. The same countries are opposing MFI to retain policy flexibility and at the same time opposing competition policy which is a good policy to pursue. Theoretically, labour and capital movements play the same role in promoting efficiency. Thus investment liberalisation can be balanced with equal commitments in labour mobility. The question remains, however, whether all Members will agree to such a proposition.
  - Liberalisation of goods is good for almost all countries but the same is not true for investment. Is there anything positive that can be gained by the DCs from an MFI? If not then why should

one go for such an agreement? Are DCs ready for a commitment? Can one type of investment policy be appropriate for all the countries? Of course not. Many DCs are also not convinced of the utility of an MFI. There is no guarantee that it will lead to higher FDI flows.

- One of the pros of an MFI is that transaction costs will be lower. It is agreed by many that a multilateral setting may be better than a bilateral setting as a multilateral setting provides a more predictable environment. However, are all existing IIAs going to be abandoned once an MFI is there? If not, then what benefits will an MFI bring? Can we avoid an MFI and do with some modifications in TRIMs, GATS and TRIPs? These are some important questions that need to be addressed.
- WTO may set some normative standards for home country obligations. How many home countries will like clauses on home country obligations? When a country becomes a home country from a host country its behaviour changes. In the context of the UN Code of Conduct for TNCs under the aegis of United Nations Centre on Transnational Corporations (UNCTC), the US was vehemently opposed to it even though it was voluntary in nature. The US sent three cablegrams to three sets of countries. The main message was, “if you press for the code you may not get FDI”.

## **Conclusion**

At the end, a brief discussion was held on further activities that need to be undertaken under the project. It was decided that the two policy briefs would be revised further in the light of the discussions that took place during the meeting. It was also decided that the participants will go through the policy briefs once again and may send further comments to CUTS on them, if any, within a reasonable time period, preferably two weeks. Considering the achievements made under the project, participants suggested that similar work may be undertaken on the other issues on the Doha Agenda, especially trade facilitation and transparency in government procurement.

The meeting came to a close with a vote of thanks proposed by Pradeep S Mehta, who expressed sincere gratitude on behalf of CUTS to the participants of the meeting, the members of the group and of course the donors, the Ministries of Foreign Affairs of The Netherlands and Sweden and the Department for International Development, UK, without whose support the project could not be implemented. He also expressed hope that all concerned will provide the same whole-hearted support in taking the activities of the group further.

*International Working Group on Doha Agenda*  
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