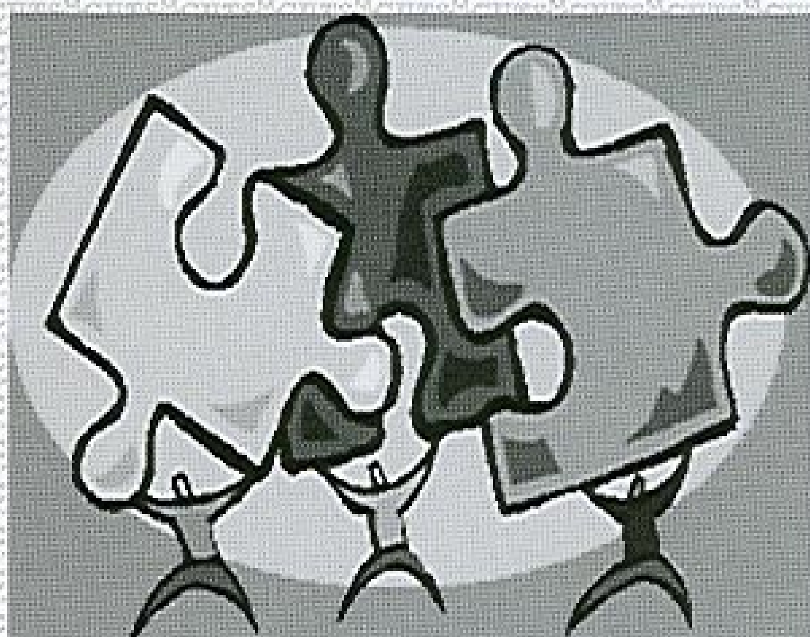
CUTS Centre for
Competition, Investment
& Economic Regulation
Discussion Paper

Multilateral Competition Framework:

In Need of a Fresh Approach



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Published by:

CUTS Centre for Competition, Investment & Economic Regulation
D-217, Bhaskar Marg, Bani Park, Jaipur 302 016, India
Ph: 91.141.228 2821, Fax: 91.141.228 2485
Email: c-cier@cuts-international.org
Website: www.cuts-international.org

Printed by:
Jaipur Printers P. Ltd.
Jaipur 302001

ISBN 81-8257-055-7

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#0506, Suggested Contribution: Rs.100/US$25

Contents

Abstract .... **i**

CHAPTER-1
Introduction **8**

CHAPTER-2
Types of Cross-border Practices **11**
2.1 Market Power in Global or Export Markets 11
2.1.1 International Cartels 11
2.1.2 Export Cartels 15
2.1.3 Mergers & Acquisitions with International Dimensions 18
2.1.4 Anticompetitive Practices by Foreign-based or Globally Dominant Companies 19
2.1.5 Cross-border Predatory Pricing 22
2.2 Barriers to Import Competition 23
2.3 Foreign Investment 25
2.4 Intellectual Property Rights 28

CHAPTER-3
Existing and Proposed Cooperation Arrangements **33**
3.1 Bilateral and Tripartite Tracks 34
3.2 Regional Approach 35
3.3 Global Initiatives 36

CHAPTER-4
The Proposal at WTO and its Implications **39**

CHAPTER-5
The Way Forward **46**

Endnotes **53**

List of Tables

Table 1: National Exemptions to Competition Laws for Exporters 15
Table 2: Breaking up Floating Cartels could Help Developing Countries 22
Table 3: A Cross-country Analysis of Unit Price of ANSAC 23
Table 4: Market Share Estimate of Major Seed Companies in Selected Southeast Asian Countries, 1997 – Whose Agenda? 29

List of Boxes

Box 1: The Graphite Electrodes Cartel and its Effects on Developing Country Steel Producers 14
Box 2: The American Natural Soda Ash Corporation (ANSAC) Cartel and Developing Country Competition Authorities 16
Box 3: The Telmex Dispute 24
Box 4: FDI and the Latin American Agri-food System 27
Box 5: International Patent Laws Hurt Developing Countries 30
Box 6: The Pilkington Case 31
Box 7: US Senate Adopts a New Act for Cross-border Consumer Abuses – Bill Seeks Multilateral Cooperation 34
Box 8: US-Brazil Competition Cooperation Agreement 35
Box 9: Positive and Negative Comities 42
Box 10: Cooperation between South Africa and the EC 43

Abstract

Recognising the challenges posed by cross-border competition issues, the paper identifies the relevant competition problems and issues, and suggests a way forward for international cooperation to deal with them.

Several cross-border competition issues, such as international cartels, export cartels, mergers and acquisitions (M&As), import cartels, abuse of dominance in export or global markets, foreign investment related competition problems, intellectual property rights (IPRs) related competition problems, are identified, which affect the interest of countries, especially the weaker ones.

The paper examines the existing bilateral and regional cooperation arrangements to deal with such issues and finds them to be grossly inadequate, which includes the existing United Nations Conference on Trade and Development (UNCTAD) Set. Nonetheless, the need for a multilateral framework remains urgent.

The paper also examines the proposed competition framework, at the World Trade Organisation (WTO), in greater detail and finds that except for (export and import) cartels, this framework is not likely to be effective. It appears that the proposal will address mainly the market access issues, whilst the competition related issues that have a more adverse effect on development, will continue to remain unattended.

The paper suggests that a brand new organisation, dedicated solely to competition issues under the auspices of the UN, will be the most suitable. The new agency can combine the principles and structures of World Intellectual Property Organisation (WIPO) and Interpol, and similar multilateral bodies, rather than those of the WTO.

Key Words: Competition law and policy, cross-border abuses, international cooperation.z

Chapter 1
Introduction

The issue of competition problems, both domestic and cross-border, is not new and is increasing as the world heads towards greater economic integration. Whilst countries are adopting competition laws, their capacity to deal with competition issues, which have their roots outside their borders, continues to remain an enigma. To deal with such issues, the national competition authorities would need cooperation from foreign competition authorities, but how far such cooperation will be available is a debatable proposition.

The need for a multilateral approach to competition policy was recognised in the Havana Charter of 1948, whose efforts to set up an International Trade Organisation (ITO) just after the Second World War did not succeed due to intransigence of the US

The need for a multilateral approach to competition policy was recognised in the Havana Charter of 1948, whose efforts to set up an International Trade Organisation (ITO), just after the Second World War, did not succeed due to intransigence of the US. The General Agreement on Tariffs and Trade (GATT), which emerged instead, was based on the Havana Charter. Competition issues, however, remained outside the GATT framework.

The Havana Charter obligated each member to take appropriate measures, and cooperate on regulating business practices (by private or public commercial enterprises). These restrictive business practices would include those affecting international trade, which restrain competition; limit access to markets; or foster monopolistic control – whenever such practices have harmful effects on the expansion of production or trade, and interfere with the achievement of any of the other objectives set forth in the Charter. The Charter, though, could not be ratified by the US Congress, primarily because of the fear amongst the legislators that the proposed ITO would impinge on the sovereignty of the US. This concern was particularly pronounced in the regulation of restrictive business practices, rather than in other areas. These issues have come up for discussion at multilateral forums, time and again.

In December 1980, the UN General Assembly adopted the "Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices" (popularly known as the Set)

As the Charter was not adopted, efforts were made at the GATT, the UN and later at UNCTAD, to remedy the absence of rules on anticompetitive practices. In December 1980, the UN General Assembly adopted the "Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices" (popularly known as the Set). But, the developed countries distanced themselves from the instrument, probably due to the liberalisation in the approach to competition matters in the European Union (EU) and the US. Developing countries, however, continued to support the idea of international rules on restrictive practices. In fact, at the Review Conference in 1985, they actively supported the idea of upgrading the Set to a binding instrument, and the Inter-governmental Group of Experts to a committee. These initiatives failed and the developed countries repeatedly rejected the efforts by the developing countries to make the Set a binding international legal instrument.

Developing countries have generally favoured the development of international disciplines on restrictive business practices, including binding rules. The support for the UNCTAD Set, and the insistence on the need of providing it with some teeth, by making it into a binding instrument, are sufficiently illustrative in that regard. It is rather the group of developed countries, which has been on the defensive, and which has so far blocked the establishment of a more solid basis for dealing with firms' anticompetitive practices[1].

The issues pertaining to competition, and measures to deal with restrictive business practices were raised in the Uruguay Round negotiations, and finally entered the WTO arena through the Agreement on Trade Related Investment Measures (TRIMs)

The issues pertaining to competition, and measures to deal with restrictive business practices were raised in the Uruguay Round (UR) negotiations, and finally entered the WTO arena through the Agreement on Trade Related Investment Measures (TRIMs). Under Article 9 of the agreement, the issue of competition policy (and investment policy), as built-in agenda, was added to any future proposals to expand the ambit of the TRIMs agreement. The Singapore Ministerial Declaration, in 1996, agreed *inter alia* to launch a study process on this issue, of whether a multilateral framework be adopted at the WTO, with the note that consultations be held amongst members, with the cooperation of UNCTAD and other inter-governmental organisations. The three other issues, which have been termed as the Singapore issues, included investment, transparency in government procurement, and trade facilitation.

At the Doha Ministerial Meeting, multilateral competition framework made further progress, though conditional, as the need for a multilateral framework on trade and competition was recognised in the Declaration. There was huge pressure by the EU, and some other countries, to launch negotiations on the issue at the Fifth Ministerial held at Cancun, in September 2003. Still, many countries were sceptical about the benefits of, and rationale for, such an agreement. Firstly, the main objection of developing countries in this regard is that they do not have adequate experience and expertise. Secondly, the proposal on cooperation was also dismissed with scepticism, because rich countries may not find it worthwhile to offer information to poorer countries, and may not also need any cooperation from authorities of poor countries, to run their own prosecution cases. Cooperation is inherently voluntary, and cannot be turned into a mandatory arrangement. Following the collapse of the Cancun Ministerial, during the July 2004 negotiations at Geneva – to revive the Doha Round – it was agreed to launch negotiations on trade facilitation, and to drop the other three Singapore issues from the negotiating agenda. Moreover, the emerging July Framework did not say anything on the study process on the three dropped issues, which, in all likelihood, may continue.

Following the collapse of the Cancun Ministerial, during the July 2004 negotiations at Geneva – to revive the Doha Round – it was agreed to launch negotiations on trade facilitation, and to drop the other three Singapore issues from the negotiating agenda

Be that as it may, one cannot overlook the fact that with the opening up of domestic markets to foreign competition, countries have become increasingly vulnerable to anticompetitive practices that originate outside their own territory. Many such practices take place through transnational corporations (TNCs), which have entered developing-country markets and/or increased their activity within these countries.

The entering of TNCs can have many positive effects on developing country economies. At the same time, there is a serious concern amongst these nations that competition could suffer because of the

entry of TNCs, as their ability to deal with cross-border competition problems is either inadequate or non-existent[2]. A recent study on the infamous vitamin cartel has validated this. It has found that the extent of overcharges by the cartel was relatively higher in countries without any anti-cartel enforcement[3]. These were all developing countries.

How do competition authorities in developing countries deal with these cross-border (international) challenges? This is clearly a difficult task. As Karl van Miert, former EU Competition Commissioner, observed, national or even regional authorities are ill equipped to grapple with the problems posed by commercial behaviour occurring beyond their borders[4]. When competition authorities from highly developed countries/blocks, like the European Union, face difficulties in handling cases with a cross-border dimension, it is clear that the authorities in developing countries face even greater and more serious problems. Against this backdrop, the paper makes an effort to critically look into the desirability of a multilateral framework, and particularly, whether the WTO is an appropriate forum to host such a framework.

When competition authorities from highly developed countries/blocks, like the European Union, face difficulties in handling cases with a cross-border dimension, it is clear that the authorities in developing countries face even greater and more serious problems

Chapter 1 of the paper lays out the background scenario, whilst Chapter 2 examines the types of cross-border practices which adversely affect developing countries, such as international cartels, abuse of dominance, etc. How countries cooperate with each other, in the area of competition law, has been laid out with some examples in Chapter 3, whilst Chapter 4 analyses the proposals discussed at the WTO, as that was where the agenda was situated until now. Finally, Chapter 5 discusses the possible ways forward in promoting international cooperation on competition issues.

Chapter 2

Types of Cross-border Practices

The types of cross-border anticompetitive practices are quite similar to those perpetrated within national borders. The only difference lies in the cross-border (international) dimensions of the anti-competitive behaviour

Before we look further into the issue of tackling cross-border anticompetitive practices, let us briefly look into the various types of such practices that affect countries. The types of cross-border anticompetitive practices are quite similar to those perpetrated within national borders. The only difference lies in the cross-border (international) dimensions of the anticompetitive behaviour. A number of areas, where enterprise behaviour is perceived to give rise to competition concerns with international dimensions, are discussed here. There is no simple formula by which one can estimate the damage that these cross-border anticompetitive practices are causing. But, one can get a fair idea of the nature and dimensions of the problems through the analysis of anecdotal evidence. These issues can broadly be classified into four groups:[5]

- market power in global or export markets;
- barriers to import competition;
- foreign investment; and
- intellectual property rights.

2.1 Market Power in Global or Export Markets

Anticompetitive practices under this category are:

- international cartels;
- export cartels and related arrangements;
- international mergers or mergers with international spillovers;
- abuse of dominance in overseas markets;
- cross-border predatory pricing; and
- price discrimination.

2.1.1 International Cartels

"*People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.*"

...the numerous international cartels uncovered so far, suggest that market forces alone do not offer complete protection against price-fixing and the market-allocation arrangements that raise prices to the detriment of developing countries and their consumers

The words of Adam Smith, the founding father of free-market economics, in his 1776 book, "The Wealth of Nations," continue to be valid in today's world. Trade reform and the expansion of potential competitors in markets, around the world, have undoubtedly reduced the scope for private cartels. In addition, the numerous international cartels uncovered so far, suggest that market forces alone do not offer complete protection against price-fixing and the market-allocation arrangements that raise prices to the detriment of developing countries and their consumers.

The 1990s saw the uncovering of several international cartels, all of which were constituted by producers mostly from industrialised

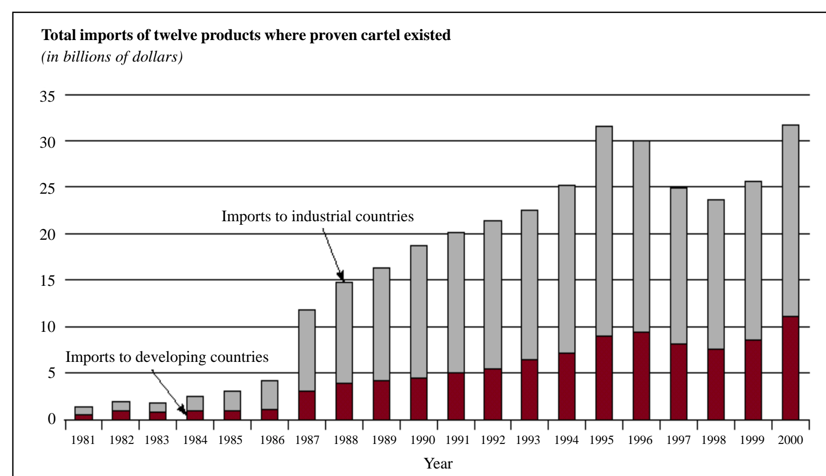
countries. Many studies conducted during the early part of this decade, have brought into light the costs to developing countries caused by these cartels, during their operational period.

In a background paper prepared for the World Bank's *World Development Report 2001*, Levenstein and Suslow (2001)[6] identified the international trade flows, in 1997, that best matched the products sold by sixteen international cartels, which operated during the 1990s. Developing countries' imports of these goods in 1997 amounted to US$81.1bn, an amount that represents 6.7 percent of these countries' imports and 1.2 percent of their national incomes. With an estimated increase in prices of between 20 and 40 percent, one can then calculate a range of estimates for the overcharges paid by developing countries in 1997, had all sixteen of these cartels been in operation during that year. These overcharges are in the range of US$16-32bn, which are equivalent to between one-third and two-thirds of the total annual multilateral and bilateral aid received by developing countries in the late 1990s.

If the price collusion resulted in a price rise, by an average 20 percent, the total overcharges would have reached over US$2bn in this year

An alternative approach presented in the World Bank's *Global Economic Prospects 2003* showed the estimated total value of developing country imports, affected year-by-year throughout the 1980s and 1990s, by twelve out of the sixteen international cartels studied by Levenstein and Suslow. Taking the year 2000 only, developing countries are found to have imported US$11bn worth of products sold by those cartels. If the price collusion resulted in a price rise, by an average 20 percent, the total overcharges would have reached over US$2bn in this year (Figure 1).

Figure 1: Imports Affected by Cartels Rose from 1981 to 2000



Source: Global Economic Prospects 2003, World Bank

Cartelisation is not only about loss in consumer welfare; it hampers the development of poor countries, and growth of their firms, in several ways. Some cartel members use their excess profits to engage in predatory pricing against newcomers, particularly from developing countries, to reduce their competitiveness, and, sometimes, their very existence

Anyhow, this is just one side of the story. Cartelisation is not only about loss in consumer welfare; it hampers the development of poor countries, and growth of their firms, in several ways. Some cartel members use their excess profits to engage in predatory pricing against newcomers, particularly from developing countries, to reduce their competitiveness, and, sometimes, their very existence. For example, predatory pricing drove the independent local manufacturers of steel in Brazil to bankruptcy[7].

Levenstein and Suslow (2001) found that international cartels did use various techniques, ranging from the threat of retaliatory price wars, use of common sales or distribution agency (i.e. vertical foreclosure), to patent pooling that effectively blocked developing country competitors' entry into the relevant international product markets.

For example, there was a price-fixing conspiracy in the EU steel beam market between 1988 and 1994. Steel makers, who were colluding to fix the price of steel beams, "restricted the flow of information … in order to freeze out any new competitors," according to Karl van Miert, the EU Competition Commissioner[8] at the time. It is not clear, from the published record, what type of information steel producers were trying to restrict in the steel beam case. Even so, it is an established fact that in the past – in many industries – information about technology, and more formally, patent pools, have been used by cartels to create barriers to entry[9].

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Besides, many of these cartels are engaged in the manufacture and sale of 'intermediate' goods (steel, graphite electrodes, lysine, citric acid, etc), which suggests that the production costs of the users, of intermediate products are also adversely affected by cartelisation. To the extent that the developing country buyers (of these intermediate inputs) face stiff competition for sale of their finished products in international markets due to increased costs, their export performance is being hindered by international cartels too (Box 1).

Furthermore, these cartels have been targeting, overcharging, and harming developing countries' development course, to make unjust profits, and, at the same time, also hindering them by restricting technology transfer. The US Congress, investigating the electrical equipment cartel, noted in one place: "Most of the importing countries are developing countries with little or no domestic manufacturing capacity for heavy electrical equipment. These countries are typically engaged in ambitious programmes of industrialisation and development. As a group, the developing countries thus represent the fastest growing segment of world demand in the industry, and hold the greatest potential for future growth. No leading manufacturer can afford to be foreclosed from these markets and still expect to retain its long-term position of technological leadership"[10].

Technological cooperation with independent, uncontrolled manufacturers in developing countries is foreclosed by the fact that parties collectively agree never to submit tenders for public procurement in collaboration with such firms

Some agreements (for example on water generators) have special provisions applying to licensees in developing countries and joint ventures with local manufacturers. Technological cooperation with independent, uncontrolled manufacturers in developing countries is foreclosed by the fact that parties collectively agree never to submit tenders for public procurement in collaboration with such firms. "These cartel arrangements directly harm importing countries because of the onerous mark-up on cartelised sales, as well as common policies amongst members restricting technology transfer to non-producing countries."[11]

There has been negligible participation by developing country competition authorities, in the international crackdown on those private cartels. Sadly, most of the Southern countries have not been

Box 1: The Graphite Electrodes Cartel and its Effects on Developing Country Steel Producers

Graphite electrodes are used primarily in the production of steel in electric arc furnaces. In a highly concentrated world market, two firms (one German and the other American) had a combined market share of roughly two-thirds, at the start of the 1990s. Japanese producers supply a considerable part of the remainder, with modest contributions from a number of smaller producers based in certain developing countries, principally India and China. All of the major producers in this market operate production facilities in a number of countries, including developing countries, such as Brazil, Mexico, South Africa, Russia and Poland, and sell their products throughout the world.

The Organisation for Economic Cooperation and Development (OECD) estimates that "the cartel affected US$5-7bn in sales worldwide. Throughout the world, the cartel resulted in price increases from roughly US$2000 to US$3500 per metric tonne, in various markets" (OECD 2000)[12].

Clearly, the cartel's negative effects on developing country purchasers were significant, especially for those depending on imported graphite electrodes for steel production. High prices, in the graphite electrodes markets, translated into higher import prices of steel-based intermediate products for developing countries (Levenstein and Suslow, 2001).

The only direct estimate of pecuniary harm, caused to purchasers in developing countries, comes from the Korea Fair Trade Commission (KFTC), which, in March 2002, convicted six graphite electrode manufacturers from the US, Germany, and Japan. According to KFTC, Korean steel manufacturers "imported graphite electrodes amounting to US$553mn, from the six companies, between May 1992 and February 1998. During this period, the import price increased from an average of US$2,225 per tonne in 1992, to an average of US$3,356 in 1997 (about 48.9 percent). The losses incurred by the companies importing graphite electrodes is estimated at approximately US$139mn. Korea's major industries that consume much steel, such as automobile and shipbuilding, were also influenced by this international cartel" (KFTC 2002)[13].

Source: Evenett, Simon J. (2003). "Study on issues relating to a possible multilateral framework on competition policy", WTO Document No. WT/WGTCP/W/228.

...in various cases where international cartels were uncovered and prosecuted in the developed world, developing country purchasers have not benefited from any of the enormous fines imposed on those cartels, despite the huge losses they suffered

able to discipline these powerful 'liaisons' between developed country producers, due to lack of an appropriate legal regime, or the required technical capacity for intensive investigation. As a matter of fact, in various cases where international cartels were uncovered and prosecuted in the developed world, developing country purchasers have not benefited from any of the enormous fines imposed on those cartels, despite the huge losses they suffered. To date, amongst the developing countries, only Brazil made an attempt, in vain, to investigate and prosecute the companies involved in the infamous "vitamins cartel", and Korea, as recorded in the graphite electrodes cartel. In India, repeated requests by CUTS to the competition authority and the relevant government department, as well as raising the issue in the national parliament, did not yield any results.

2.1.2 Export Cartels[14]

Many governments follow a 'beggar thy neighbour' policy by legally permitting their own private firms to cartelise in export markets, as long as affected markets are outside the country

Export cartels have been categorised as 'officially sanctioned restraints on trade'. Many governments follow a 'beggar thy neighbour' policy by legally permitting their own private firms to cartelise in export markets, as long as affected markets are outside the country. Indeed, many countries have explicitly exempted export cartels from their domestic competition laws – essentially providing legal exemptions to their national firms, but not foreign firms (Table 1). Generally, these cartels attempt to raise prices in their export markets to the detriment of overseas consumers. Their success depends on the number of other competitors, both foreign and domestic, in these markets. As competition is more likely to be limited in the smaller markets of developing countries, it is probable that these countries are adversely and disproportionately affected.

Table 1: National Exemptions to Competition Laws for Exporters

Country	Type of exemption	Reporting requirement
Australia	contracts for the export of goods or supply of services outside Australia	Submission of full particulars to the national authority within 14 days
Brazil	Joint ventures for exports, as long as there are no effects on the Brazilian market	Approval by the national authority
Canada	Export activities that do not affect domestic competition	None
Croatia	Agreements that contain restrictions that aim to improve the competitive power of undertakings on the international market	Notification of the agreement to national authority within 30 days after conclusion of the agreement
Estonia	Activities that do not affect the domestic market	None
Hungary	Activities that do not affect the domestic market	None
Japan	Agreements regarding exports or among domestic exporters	Notification of and approval by the industry administrator
Latvia	Activities that do not affect the domestic market	None
Lithuania	Activities that do not affect the domestic market	None
Mexico	Associations and cooperatives that export	None
New Zealand	Arrangements that relate exclusively to exports and do not affect the domestic market	Authorisation of the national authority
Portugal	Activities that do not affect the domestic market	None
Sweden	Activities that do not affect the domestic market	None
United States	Webb-Pomerene Act: Activities that do not affect domestic competition Export Trading Companies Act: Strengthened immunities granted by Webb-Pomerene Act	Webb-Pomerene Act: filing of agreements with the US Federal Trade Commission Export Trading Companies Act: Certificates of Review provided by US Department of Commerce

Source: Global Economic Prospects 2003, World Bank. Drawn from Evenett and Ferrarini (2002)[15]; OECD (1996)[16], OECD (2000)[17] and <http://www.gettingthedealthrough.com>

Whilst economies of scale, coordinated marketing, financing of technology development, etc, are quoted amongst the justifications for exempting export cartels, from the purview of national antitrust laws, their operations are very often, subsequently, abused by foreign exporters. Recent evidence, from a 1993 OECD study of 94 US export trading companies, showed that "only four engaged in foreign government liaison, nine in joint promotion activities, four in promotion of a US region, four in warranty service, and seven in project coordination. Thirty-seven fixed prices, thirty-six coordinated bids, and fourteen allocated customers."[18] In other words, most of them acted as hard-core cartels. Taking into account the market power often enjoyed by developed country firms, the greater loss on developing countries is obvious.

...developing country producers, importers or consumers will, subsequently, suffer more than their counterparts in the developed world, even if both might be exempt from national antitrust laws and policies

Unequal footing regarding market power between developed and developing country export cartels amounts to bigger losses for developing countries, as mentioned above. Also, from a jurisdictional perspective, developing country authorities are not in a position to take action against developed country export cartels operating in their own territories. Whilst the application of the "effects doctrine"[19] is quite common in the developed world to deal with such practices; developing countries have not really used such options, or have attempted to, with much success. They either lack a clearly established legal framework, or the necessary investigative capacity, or simply cannot countervail the retaliation pressures exerted by developed country governments, which are induced by business lobbies or narrow national interests. This means that developing country producers, importers or consumers will, subsequently, suffer more than their counterparts in the developed world, even if both might be exempt from national antitrust laws and policies.

The story of US soda ash producers portrays an interesting case in this area. Attempts by the competition authorities in India, South Africa and Venezuela to deal with the American Natural Soda Ash Corporation (ANSAC) cartel, have led to serious problems. The US Government threatened to take "actions" in completely unrelated areas, even though a similar action by the European Community against ANSAC was complied with, without much ado (see Box 2).

Box 2: The American Natural Soda Ash Corporation (ANSAC) Cartel and Developing Country Competition Authorities

Soda ash, or sodium carbonate, is used in the manufacture of glass, detergents, and paper. US soda ash production consistently exceeds domestic consumption. In foreign markets, there are relatively small numbers of competing producers. They are located in close proximity to each other, and the ore deposits (thus have similar costs in production and transportation). This fact, in addition to the US' constant attempts to break into these foreign markets, makes the US soda ash industry a prime candidate for export cartelisation.

Six soda ash producers in the US, namely the FMC Wyoming Corporation, General Chemicals, North American Chemical Company, OCI Chemical Corporation, Solvay Soda Ash Corporation and Tg Soda Ash Inc, have assembled under an apex export promotion organisation, named the American Natural Soda Ash Corporation (ANSAC). ANSAC was established in 1982 under the US Webb-Pomerene Act; which effectively exempted it from antitrust regulations.[20] ANSAC is the world's largest soda ash exporter with sales of approximately US$500mn, operating extensively all over the world.

The Indian saga

India (1996): the Alkali Manufacturers' Association of India (AMAI), whose members include the major Indian soda ash producers, filed a complaint alleging that ANSAC had infringed several provisions of India's Monopolies and Restrictive Trade Practices (MRTP) Act 1969 (to be replaced by the 2002 Competition Act). These practices included cartelisation, so the MRTP Commission ordered an *ex parte* interim injunction on ANSAC, restraining it from cartelised exports to India[21]. Quoting from the ANSAC membership agreement, it held that ANSAC was *prima facie* a cartel, which was carrying out part of its trade practices in India, giving the Commission jurisdiction under Section 14 of the MRTP Act, even though the cartel itself was formed outside India.

The MRTPC reiterated the same in its interim order in March 2000. ANSAC then appealed to the Indian Supreme Court, which, in a far-reaching verdict delivered in July 2002, overturned the MRTPC's orders[22]. The Court did not delve into the allegation of cartelisation, but instead held that the wording

Contd...

of the MRTP Act did not give it any extra-territorial jurisdiction. The Commission could not, therefore, take action against foreign cartels or the pricing of exports to India, nor could it restrict imports. Action could be taken only if an anti-competitive agreement involving an Indian party could be proved, and that too only after the goods had been imported into India. The only remedy available, to the domestic manufacturers, was an anti-dumping complaint. In passing the order, the Court observed that *prima facie*, ANSAC's contention that it was the Indian producers who had formed a cartel, did "merit consideration, perhaps in another case".

ANSAC's South Africa chapter[23]

Botswana is second only to the United States, as a producer of natural soda ash, most of which is exported, with neighbouring South Africa being a major buyer. In October 1999, Botswana Ash (Pty) Ltd. (Botash) filed an application for interim relief before the South African Competition Commission, alleging that ANSAC was infringing the provisions of the Competition Act, which prohibited agreements involving price-fixing and market sharing. The Commission, after conducting an investigation and finding that a prohibited practice had been established, referred the matter to the South African Competition Tribunal. In the ensuing interlocutory proceedings, ANSAC raised procedural and jurisdictional objections. ANSAC argued that even if price-fixing or market sharing could be established, a 'purposive' reading of the relevant sections of the Act (i.e. taking legislative intent into account) would allow its agreement to be seen as resulting in an efficiency, or pro-competitive, benefit, outweighing its negative effects. In March 2001, the Tribunal overruled all these arguments, holding that legislative purpose would be relevant only if the statute were ambiguous. But Section 4(1)(b) of the Competition Act explicitly condemned price-fixing and market sharing as illegal *per se*, as distinct from 4(1)(a), which allowed an efficiency defence for horizontal agreements that adversely impacted competition.

Later, in the same year, ANSAC tried to introduce the beneficial effects of its agreement before the Tribunal, in a more roundabout manner. It contended that it needed to establish these effects in order to dispute the Tribunal's jurisdiction, because the "effects doctrine", contained in Section 3(1), pertained only to *deleterious* effects on competition. Again, the tribunal dismissed this, on the basis of a plain reading of the Act. ANSAC's appeal on both these grounds (the admissibility of the efficiency defence, and the effects test being applicable only to negative effects), along with other procedural objections, was subsequently dismissed by the Competition Appeals Court. Noting various provisions of the ANSAC membership agreement, the Court dryly observed: "It is, therefore, no surprise that ANSAC's activities attracted the attention of the European authorities". The Court upheld the Tribunal's decision that the clear wording of Section 4(1)(b) made price-fixing illegal *per se*, without the possible extenuating circumstances allowed in the EU law.

Source: Bhattacharjea, Aditya. 2004. "Export cartels: A developing country perspective". Working Paper No. 120. Centre for Development Economics, Delhi School of Economics.

ANSAC requested the suspension of tariff concessions on some products, given to India, under the Generalised System of Preferences (tariff concessions granted to developing country goods), until there was progress toward fair and equitable access into the Indian soda ash market

This problem of textual meaning and interpretation of legal provisions is just one amongst many other factors, which might indeed affect developing country authorities' decisions, who have sometimes acted adversely against their own countries' domestic producers. Following the MRTPC's decisions, ANSAC filed a petition with the US Trade Representative. ANSAC requested the suspension of tariff concessions on some products, given to India, under the Generalised System of Preferences (tariff concessions granted to developing country goods), until there was progress toward fair and equitable access into the Indian soda ash market. Subsequently, the US Trade Representative, Charlene Barshefsky, and Secretary of Commerce, William Daley, in January 2000, sent a letter to the Indian Minister of Commerce and Industry, Murasoli Maran, warning that the MRTPC's "temporary" injunction was of "serious bilateral concern" and "should be resolved at the earliest possible opportunity". They further noted that India's

38.5 percent tariff is "the highest in the world" and, "along with other import fees, yields an unacceptable 69.9 percent burden on US soda ash exports." Referring to ANSAC's petition, the US authorities found that "by any standard, US access to India's soda ash market has been rendered unviable"; and threatened to block up to US$1bn of India's concessional-duty imports into the US, due to the existing "*de facto* embargo on US soda ash". It might, indeed, be a strange coincidence that in the following budget (2000-2001), the Indian import tariff for soda ash was reduced from 35 to 20 percent in 1999-2000. In 2002, the Indian Supreme Court overturned the MRTPC's decision.

...developing countries may also be affected by merger and acquisition activities that take place outside their territory, without any local presence. As these companies operate in multiple markets, they can also adversely affect developing country markets

2.1.3 Mergers & Acquisitions with International Dimensions

Large companies merge in the developed world and consequently their subsidiaries and associates in developing countries too end up in new combinations. This can create positions of dominance for merging firms having a potential of subsequent abuse. Moreover, developing countries may also be affected by merger and acquisition (M&A) activities that take place outside their territory, without any local presence. As these companies operate in multiple markets, they can also adversely affect developing country markets.

Developing countries, to our knowledge, have dealt only with the first type of cases, i.e. subsidiaries' merging, as a result of a merger between parent companies, internationally. Although, even stopping the subsidiaries from merging would not serve any purpose, as both will continue to be controlled by the same parent company. Thus, the issue could possibly be dealt with appropriately only through the application of the "effects doctrine," and regulating the merger in the home country.

The question remains whether a developing country could enforce any such action on the parent companies in the home country.

When Gillette tried to take over Wilkinson Sword (then a unit within Eemland Holdings NV) in a leveraged buy-out case, in 1989, the transaction raised serious questions from the start, since Gillette competed directly with Wilkinson Sword in the wet shaving market of many countries. Even before the transaction, Gillette was aware that the competition authorities of the United Kingdom, Germany and the European Community were likely to prevent Gillette from acquiring control of the Wilkinson Sword business in the European Community. So, the parties carefully structured the transaction so that Gillette would acquire the Wilkinson Sword trademarks and wet-shaving activities only in countries outside the European Community, which include Australia, Brazil, South Africa *et al*.

Developing countries, to our knowledge, have dealt only with the first type of cases, i.e. subsidiaries' merging, as a result of a merger between parent companies, internationally

Inspite of the above, the German competition authority, Bundeskartellamt, initiated an extensive investigation into the effects of the transaction on competition in the German market, including the possible effects of the non-EC acquisition on the German market. Considering that the market share within Germany was substantial enough (61 percent for Gillette, 28 percent for Wilkinson) to trigger the oligopoly presumption of Section 23a(2) of the German competition law, the Bundeskartellamt raised certain objections to the transactions in August 1990. With a view to settling those

proceedings, Gillette submitted to the Bundeskartellamt that it would be prepared to sell back to Eemland the Austrian and other trademarks and distribution operations; to give up the various pre-emption rights; and not to undertake any renewals of regular supply arrangements with Eemland. Anyhow, a settlement could not be reached between Gillette and Bundeskartellamt, and on July 23, 1992, the transaction was prohibited.

A multilateral competition framework can protect the interests of developing countries by ensuring that anti-competitive mergers, which may have serious repercussions in a number of developing countries, are either not allowed, or allowed with appropriate conditionalities to ensure competition

The Australian Competition and Consumer Commission (ACCC) was also able to oppose the acquisition successfully in the Federal Court of Australia. The ACCC was able to have a divestiture imposed upon the companies, with the selling off of the Wilkinson Sword brands to an independent buyer for ten years.

In the meanwhile, the Brazilian authorities conducted a simple investigation, and then approved the transaction in June 1991, following a submission from Gillette, without any conditions. In the latter part of 1990, the authority, however, had publicly expressed concern about the proposed acquisition of the Wilkinson Sword business (including manufacturing operations) in Brazil, by Gillette.

The South African Competition Board (operating under the now defunct Maintenance and Promotion of Competition Act, 1979) wrote to Gillette, early in 1990, asking for information about its acquisition of the Wilkinson Sword business, but took no further action[24].

On the contrary, successful blockage, or imposition of serious conditions to maintain competition are quite common in the developed world. For example, the EU blocked the merger between General Electric and Honeywell, both US-based corporations, on the ground that it would have led to a dominance in the EU market. Obviously, developing countries lack the technical capacity for intensive investigation, as well as the required power for regulating TNCs. A multilateral competition framework can protect the interests of developing countries by ensuring that anticompetitive mergers, which may have serious repercussions in a number of developing countries, are either not allowed, or allowed with appropriate conditionalities to ensure competition.

There are many good examples of this. One in Zimbabwe is worth reporting here. BAT and Rothmans agreed to merge their subsidiaries in Zimbabwe, and shut down one manufacturing plant. The merger was allowed on the condition that the plant (proposed to be shut) would be sold to a private investor. This directive was carried out and a local party is successfully operating the plant, manufacturing its own brands of cigarettes.

...the size and scope of TNCs make it possible for them to engage in a variety of anti-competitive practices. They usually get away with whatever restrictive conditions they set on developing country business counterparts

2.1.4 Anticompetitive Practices by Foreign-based or Globally Dominant Companies

Other than collusion or combinations, the size and scope of TNCs makes it possible for them to engage in a variety of anticompetitive practices. They usually get away with whatever restrictive conditions they set on developing country business counterparts. They take the liberty to set prices, and developing country consumers have to accept them without question.

Take the example of Microsoft. The company has been hauled up for indulging in anticompetitive practices time and again in the US and the EU. By and large, it has not faced such action in other jurisdictions, especially in the developing world, where the effects of Microsoft's conduct have been increasing at the same pace as its business; but where people are mostly unaware and ill-equipped to deal with cases of the same nature. Billions of consumers in developing countries, no less than their counterparts in the US and the EU, have been using the Windows operating system as part of their everyday lives. Yet, they have no other option than to take whatever quality, price, as well as licensing conditions set by the tech-titan.

...developing world consumers do not need that much product differentiation, especially as these operating systems are sold to them at thrice the prices prevailing in the early 1990s, which they can hardly afford

As reported by CNET News.com in 2003, "Microsoft offers about half a dozen different versions of each of Windows XP, Windows Server 2003 and Windows CE.Net. It still considers Windows 2000 to be a 'current' product. Including the 64-bit editions, Microsoft offers about six different Windows 2000 versions, bringing the total to about 24. These two dozen versions do not account for older products, such as Windows 98, which is still sold by retailers and some PC makers", and Windows 95, which is still popularly used in developing country markets. Apart from techno-savvy and software workers, normal consumers in the developing world make very limited use of these various functions offered by Microsoft's ubiquitous operating systems. Hence, developing world consumers do not need that much product differentiation, especially as these operating systems are sold to them at three times the prices prevailing in the early 1990s, which they can hardly afford.

The Monopolies and Restrictive Trade Practices Commission (MRTPC) of India made some initial, though unsuccessful, efforts into the way Microsoft imposed restrictions on the buyers, in the form of an end-user license agreement (EULA). The Fair Trade Commission of Taiwan managed to force the company to cut its retail prices, for key products, by up to 54.5 percent (not a small figure, which only shows that the price Microsoft is charging is exorbitant) to escape a competition lawsuit and possible sanctions. The case in the US was resolved out of court, and billions of dollars were handed out to consumers as compensation. Whilst the EU also took action against the software giant (which is under appeal), nothing much has happened in other parts of the world.

...the final consumers of agricultural products do not get the advantage of a competitive market. Hence, a huge gap exists between the prices the consumers pay, and the prices the primary producers receive

The market for agricultural products is another case in point. It is very often considered to be an example of a perfectly competitive market. This might be the case for farmers, as there are a large number of them, particularly in poorer parts of the world. Still, for consumers, the experience is different. Farmers do not reach the consumers directly, as there is a chain of intermediaries. Unfortunately, this set of intermediaries, especially when they happen to be huge transnational agribusiness groups and retail chains, does not always work in a competitive manner. Thus, the final consumers of agricultural products do not get the advantage of a competitive market. Hence, a huge gap exists between the prices the consumers pay, and the prices the primary producers receive.

The intermediaries abuse their monopolistic dominance in the market for final products, whilst in the market for primary products, they abuse their monopsonistic dominance. A World Bank report estimated that the divergence between producer and consumer prices may have cost commodity-exporting countries more than US$100bn a year; and suggests that imperfect competition at the intermediary level is the key factor[25]. The case of the international coffee market is illustrative in this regard. According to an UNCTAD report, annual export earnings of coffee producing countries, in the early 1990s, were US$10-12bn and global retail sales about US$30bn[26]. About a decade later, retail sales exceeded US$70bn, but coffee-producing countries received only US$5.5bn[27]. The main reason for this divergence is that coffee distribution is a roaster-driven chain and four big roasting companies control 45 percent of the global market. It is quite obvious that it is impossible for a single country to deal with such global problems.

A World Bank report estimated that the divergence between producer and consumer prices may have cost commodity-exporting countries more than US$100bn a year; and suggests that imperfect competition at the intermediary level is the key factor

The maritime transport industry is another area where, even collectively, shippers from developing countries are not able to counter the various cartel-like arrangements, often made up as conferences, between developed country liners. These conferences are exempt from most OECD antitrust laws, under the justification that entering into conferences helps liners achieve economic efficiency through better coordination, and avoid destructive unfettered competition.

Unfortunately, these exemptions have been abused quite often, inadvertently putting shippers at the mercy of price-fixing, by a handful of dominant private carriers, through collusive arrangements. The recent decisions ordered by the European Commission on member liners of the Trans-Atlantic Conference Agreement (TACA), and the Far East Trade Tariff Charges and Surcharges Agreement (FETTCSA) point to this sad fact. Shipping lines operating within liner conferences benefit from an exceptionally generous exemption from the normal European competition rules.

It is important that a conference is faced by effective competition from independent shipping lines operating outside the conference. The FETTCSA case shows that the Commission will act firmly where "conference and non-conference shipping lines *conspire together as a cartel*", states Mario Monti, the European Commissioner for Competition[28].

Be that as it may, even without illegal price-fixing by these conferences, developing countries' international trade activities, already restrained by international cartels, are still burdened by shipping costs, reducing their competitiveness greatly further. Fink, Mattoo, and Neagu (2001)[29] found that a break-up of cooperative working agreements, and price-fixing arrangements amongst the major private carriers could reduce transport prices by 20 percent on US routes, with savings of US$2bn or more (Table 2).

The maritime transport industry is another area where, even collectively, shippers from developing countries are not able to counter the various cartel-like arrangements, often made up as conferences, between developed country liners

Table 2: Breaking up Floating Cartels could Help Developing Countries (Economic effects of ending private restrictions on ocean liner competition)	
Effect	Amount
Reduction in price of ocean transport	20 percent
Projected total savings for US imports	US$2.1bn
Projected savings for developing country import	US$2.3bn

Source: Global Economic Prospects 2003, World Bank, drawn from Fink, Mattoo, and Neagu (2001)

Due to some striking similarities, such pricing is very often equated with dumping, and, thus, action is usually taken under anti-dumping legislation

2.1.5 Cross-border Predatory Pricing

Cross-border predatory pricing can also lead to market distortions. Due to some striking similarities, such pricing is very often equated with dumping, and, thus, action is usually taken under anti-dumping legislation. Nevertheless, the principle underlying anti-dumping is different from that underlying competition law in that it *prima facie* seeks to protect competitors and not competition. Though, in most developing countries, due to the small size of markets and low levels of market contestability, there is a greater convergence between anti-dumping and anti-predatory actions. Ironically, until recently, the main users of anti-dumping laws were developed countries, though increasingly developing countries too are taking recourse to these laws[30].

The case of the ANSAC mentioned in Section I.2, serves as a good example of a typical cross-border predatory pricing case.

One of the allegations lodged by the Alkali Manufacturers Association of India (AMAI) to MRTPC, was on ANSAC's predatory pricing behaviour. Based on the past track record of ANSAC's export prices, AMAI alleged that ANSAC deliberately exported to countries where there were local competing producers, at a substantially low price (which covered only the variable costs, like shipping, transportation, etc). AMAI alleged that ANSAC was attempting to kill the domestic industry, so that it could exercise its monopolistic power once the domestic players had been outplayed (see Table 3).

...in most developing countries, due to the small size of markets and low levels of market contestability, there is a greater convergence between anti-dumping and anti-predatory actions

Though the MRTP Commission did not conclusively assert the charge of predatory pricing, it referred to ANSAC's affidavit of October 16, 1996. This showed that, of the Free on Board (FoB) prices ranging between US$89.50 and US$153 per tonne (given for the period April to August 1996) at which ANSAC exported to different countries, it sold in India at the lowest price. The Commission held that the pricing pattern of ANSAC's exports shows "inference of predatory pricing".

Table 3: A Cross-country Analysis of Unit Price of ANSAC				
Year	**1997**	**1998**	**1999**	**2000**
Soda ash producing countries (US$ per tonne)				
France	108.76	103.89	112.18	105.04
China	130.13	111.19	81.10	86.23
Soda ash non-producing countries (US$ per tonne)				
Chile	138.29	146.68	145.46	144.06
Indonesia	144.08	140.41	123.65	108.02
Brazil	133.07	133.84	130.61	138.86

Source: India Info Online at <http://www.indiainfoline.com/bu03/wish/rgfp.html>

Import cartels formed by domestic importers or buyers, and similar arrangements (such as boycotts of foreign competitors, or collective refusals to deal with them) may be a threat to maintaining competition in a market

Earlier, the soda ash producers in Europe also brought forward an anti-dumping complaint before the European Commission (EC), alleging that US exporters were following an aggressive pricing policy. After an investigation in 1995, the EC imposed an anti-dumping duty on the imports of soda ash into EEC countries, originating from the USA. Unfortunately, it has not been that easy for developing country authorities to do so in similar cases.[31]

2.2 Barriers to Import Competition

Import cartels, vertical market restraints creating import barriers, private standard setting activities, abuse of monopsonistic dominance (dominance of a buyer), etc, may fall under this category. Import cartels formed by domestic importers or buyers, and similar arrangements (such as boycotts of foreign competitors, or collective refusals to deal with them) may be a threat to maintaining competition in a market. In principle, a national competition law may normally be able to tackle such market-access barriers to foreign supplies and suppliers. Although, in practice these barriers have been very much deliberately tolerated. In some cases, import cartels were allowed to counter export cartels.

In the United Kingdom, exemption has been granted for a joint buying pool to counter the power of foreign suppliers of sulphuric acid, and in Sweden permission has been granted for an import cartel of films

For example, after the Organisation of Petroleum Exporting Countries' (OPEC) massive price rise in 1971, US companies got permission from their Government to negotiate as a block against the Persian Gulf nations. In the United Kingdom, exemption has been granted for a joint buying pool to counter the power of foreign suppliers of sulphuric acid, and in Sweden, permission has been granted for an import cartel of films[32].

From a protectionist stand point, these barriers are very convenient means, which can be used by government, to limit or block imports, when these might offer competition to domestic producers. Yet, in the converse, whilst these barriers to import competition, erected by their enterprises, are very much tolerated and conveniently ignored by developed country competition authorities, these very authorities do not hesitate to take vigorous action when their firms face any difficulty in entering a foreign market.

A well-known example, in this regard, is the dispute between Japan and the US, where it was alleged that Fuji effectively prevented Kodak's exports to the Japanese market by controlling the distribution channels. In the early 1990s, such concerns prompted a revision of US guidelines regarding international enforcement, to permit application of the US antitrust laws to foreign-based activities, such as import cartels, that restrict US producers' access to foreign markets.

Whilst such unilateral actions by countries could be dangerous for the international economic order, at the end of the day, it is only the developing world economies as well as private firms that suffer. Developing countries do not have a sufficiently strong and sophisticated competition policy and law to protect their own firms at home (where international private cartels or export cartels operate at ease). Developing country firms, much more often, don't have the necessary economic power to overcome the private barriers in foreign markets themselves; and, at the same time, may easily step on the line where developed countries find their firms' legitimate competitive interests being harmed.

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A very recent WTO case, involving a dispute between the US and Mexico over the Mexican telecommunications market, sheds some light in this direction (See Box. 3). It is not intended for discussion here whether the WTO judged well in the case. Anyhow, when referring to other cases where barriers to competition, from foreign rivals, by domestic players were deliberately tolerated, it can be seen how a fair and appropriate multilateral competition framework, enforced at an appropriate forum, may help developing countries. This is especially in view of the foreign governments' partisan tendency to favour their own firms.

Box 3: The Telmex Dispute

The case is based on WTO competition rules, agreed in 1997, to help open telecommunication markets. The rules in the WTO Reference Paper on Pro-competitive Regulatory Principles are quite basic, obliging signatories merely to enact "appropriate measures" to prevent "major suppliers" from engaging in "anticompetitive practices."

In the mid-1990s, American telecom services provider, Sprint, partnered with Mexico's largest supplier of telecom services, Telmex, to provide long-distance services between the two countries. AT&T and MCI had to settle for deals with lesser Mexican players and could not benefit from Telmex's considerably larger network. They called on the US Trade Representative to help them get the kind of access that Sprint had.

What were the main allegations?

Mexico's international long distance (ILD) rules require that Telmex negotiates a settlement rate, for incoming calls, with foreign suppliers, and applies that rate to interconnection for incoming traffic from the US. Telmex must also give up traffic to, or accept traffic from, other suppliers, depending on whether the proportion of incoming traffic surpasses, or falls short of, its proportion of outgoing traffic. To this end, Telmex may enter into "financial compensation agreements" with other operators, which are then approved by the Mexican authorities.

The US alleged that this was a state-authorised cartel, benefiting Sprint and Telmex, and was foreclosing their American rivals' entry into the Mexican telecommunication market. Subsequently,

Contd...

the US demanded that Mexico require Telmex to provide these US firms with non-discriminatory access as provided for by the "pro-competitive regulatory principles" in the WTO Reference Paper. Mexico argued that its ILD rules set up a pricing mechanism that allocated revenues with responsibilities, and prevented predatory pricing by foreign entrants with deep pockets. It submitted that the US was seeking to overturn a typical interconnection agreement, just to benefit AT&T.

Unsatisfied, AT&T complained that it was still being overcharged for access, costing US callers an extra billion dollars a year. The US complained to the WTO's Dispute Settlement Body, arguing that the access rate was not cost-oriented and that, effectively, Mexico had set up a cartel of telecom operators – with Telmex as the ring-leader – who were colluding on prices, overcharging US rivals, and thus inhibiting foreign entry.

The US won on both grounds at the WTO. The panel recommended that Mexico's access rates conform to its international obligations. (This recommendation may have been superseded by events, as the rates have fallen by 75 percent since the dispute was launched). After a few months, under the pressure of strained trade relations with the US, the Mexican telecom regulator, Cofetel, also issued a set of "asymmetric regulations for Telmex" which ordered it to provide all foreign long-distance operators with access to its network, at cost.

Source: Marsden, Philip (2004). "WTO decides first competition case – with disappointing results". Competition Law Insight, May 2004 issue.

2.3 Foreign Investment

Foreign Direct Investment (FDI) has always been recognised as having complex effects on host countries' market structure and competition. At first glance, greenfield investment may add to the number of enterprises – potential competitors – in a host country, reducing market concentration; or even an acquisition may actually not reduce the number of firms. The net effect on market structure is, nevertheless, more complex than this. M&As, in particular, can be used to reduce competition via "monopolising M&As"[33], which can occur when[34]:

- the acquiring firm was exporting substantially to a market before it buys a competing firm in it;
- a foreign firm with an affiliate, already in the market, acquires another, thereby acquiring a dominant or monopolistic market share;
- the investing TNC acquires a market leader with which it had previously competed; and
- the acquisition is intended to suppress rather than develop the competitive potential of the acquired firm.

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The adverse effects of these monopolising M&As on a host country's market structure and competition can be tackled if the host country has an adequate legal framework to apply remedies. Whilst this has happened in many cases in the developed world, evidence about this remains anecdotal in developing countries. This is due to the oft-repeated fact: many of them do not have competition laws, and even if they had them, they lack resources to implement them effectively. Secondly, it has also been seen that their laws may not have merger control provisions. In one country that provides such evidence, the Republic of Korea, the situation seems to be similar to that in developed countries. The Korean Fair Trade Commission had ordered corrective measures for only 3 out of 132 cross-border M&As noted

in 1998. In Mexico, all 55 noted cases of cross-border acquisition of Mexican firms, in 1997, went through unhindered as "no competition risk was registered"[35].

At the same time, there are examples of M&As between TNCs and incumbent firms resulting in the former assuming dominant or quasi-monopolistic positions. These cases, though, went through smoothly due to the inadequacies of the host countries' competition laws.

Privatisation, therefore, raised the very real possibility of monopoly positions being maintained or strengthened

In India, for instance, in 1994, Hindustan Lever Limited (HLL), the Indian subsidiary of Unilever, acquired its main local rival, Tata Oil Mills Company (TOMCO)[36]; and arrived at a dominant position in the toilet soap (75 percent) and detergent (35 percent) market share[37]. The HLL Employees' Union challenged the proposed merger on various grounds, including that the merger would result in a large share of the market being controlled by a TNC, and that consumers' interests might be adversely affected.

However, no measures have been introduced since the 1991 amendment of India's then competition law, the MRTP Act (1969), which had abolished the review provisions on mergers, acquisitions and take-overs involving "large" and/or "dominant" firms[38]. After that, HLL also acquired several local companies in other sectors, such as the ice cream makers Dollops, Kwality and Milkfood. This raised its market share in the ice cream market, from zero in 1992-1993 to 69 percent in 1996-1997, and over 74 percent in 1997-1998[39].

In Central and Eastern Europe Countries (CEECs), many industries had monopolistic structures before the transition to market-based systems. Privatisation, therefore, raised the very real possibility of monopoly positions being maintained or strengthened. In the Czech Republic, concentration in manufacturing fell during 1989-1995 as a result of the splitting of large companies into smaller units; in the second half of the 1990s, domestic mergers raised concentration in a number of industries. A number of the merged firms were later sold to foreign investors[40].

One way or the other, whether FDI comes to developing countries as greenfield investment or via M&As, the threat of the abuse of market power is always present. TNCs operating in countries with weak regulatory frameworks are, by no means, immune to the temptation to use this power to achieve dominant positions, or secure higher levels of protection; or to engage in anticompetitive practices in pursuit of excessive profits.

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In some cases, the competitive conduct of TNCs is perhaps even more important than their impact on market structure. Whilst conduct is not expected to vary by mode of entry, in M&A/FDI, the assets of the acquiring company are supplemented by those of the acquired one, access to which may have been a major motive for the acquisition, especially in a TNC's global business strategy. This can give the new business entity significant competitive advantages over incumbent or overseas rivals, greater than those achieved by greenfield FDI. At the time of a firm's entry into their domestic market, it is, however, hard for regulatory authorities to envision the outcome in terms of market dominance etc.

An example worth reporting here is the agri-food system in Latin America, where FDI has totally altered the market structure and the competition scenario against local competitors. More alarmingly, the takeover of local retail chains – supermarkets, the most established distribution network – by giant TNCs, adding up their advantages of global sourcing, has driven most local small farms and firms out of business or into market niches, with serious implications on income and employment (see Box 4).

Box 4: FDI and the Latin American Agri-food System

Product market trade liberalisation in Latin America, over the past two decades, has spurred a giant river of investment in part of the agri-food system. This has occurred mainly downstream – in retail, food services, and second-stage processing. This surge in investment is very different from the pre-liberalisation era, when the relative trickle of FDI was found upstream in the chains (in farming and first-stage processing). This change has resulted in a supermarket revolution, and rapid consolidation and internationalisation in the second-stage-processing sector, which has multi-layered effects on market structure and competition in the sector.

The first impact of FDI into the sector is the exceedingly rapid consolidation rate, which pushed most of the agri-food export firms in Latin America into the hands of TNCs. Take the Brazilian export agribusiness, for example, which is very concentrated (17 firms controlled 43 percent of exports; 42 firms, 60 percent; 156 firms, 80 percent; but 70 percent of exporters (4000 firms), have only one percent of exports[41].

A second impact is the substantial exclusion of small farms and firms, mostly local, because of the increase in trade. The shakeout of small players is due to a multitude of reasons, including technical change and consolidation of production facilities. Still, the main reason is the low elasticity of substitution, between unskilled labour and the diverse forms of capital required to meet the standards of products for export, as reflected in the third impact.

Most deleterious, nevertheless, are the effects of FDI in the supermarket sector – which is experiencing more and more importance as the main distribution network – subsequently affecting the whole agri-food system in regional countries.

There has been rapid consolidation and internationalisation in this sector. Competition for growing markets and increased FDI in the sector, mainly from the leaders Wal-Mart, Carrefour, and Ahold (which are also the top supermarkets in the world), has driven the process. Between 50 and 60 percent of the supermarket sector in Mexico, Brazil and Argentina (about two-thirds of the Latin American economy) is controlled by a few firms, which are mainly multinationals.

As supermarkets have taken over most of the retail sector in the region, small farms and firms now have to deal with them. Supermarkets are clearly dominant in urban (even town) food markets, and within those, in the most dynamic parts of those markets. Half, or more, dairy products, and a minority, but growing, share of fruits and vegetables are being sold through supermarkets. Moreover, whereas urban markets were considered as promising for the poor, to sell to these now, means mainly selling to supermarkets.

Supermarkets are restructuring the agri-food chains from which they buy their products in Latin America, in several crucial ways, all of which tend to shake out small farms and firms from the agri-food industry.

This is not just a Latin American situation: the Ahold supermarket chain in Thailand, Tops, recently cut its 250 vegetable suppliers to 50 and is aiming for the 10 best producers. The changes in procurement systems, with the large increase in scale and the increase in system coordination, via private standards of quality and safety, are a double-edged sword. On the one hand, they expand the total market. But on the other, they remove the distinction between the export and the domestic economy, because of higher standards, which are being imposed in the local market by the supermarkets. The supermarket brings global rules of the game, and global competitors, into the backyard of the local, small farms and firms.

Source: FAO (2003). "Capital market liberalisation and the Latin American agri-food system", Trade Reforms and Food Security: Conceptualising the Linkages.

2.4 Intellectual Property Rights

The balance between intellectual property (IP) and competition issues has always been a delicate one. Whilst the protection of intellectual property rights (IPRs) ensures that the innovators will have ample incentives for innovation, which is a major driving force behind the dynamics of markets, it may constitute effective barriers to entry or confer market power on the holder(s) even in the global context. Though such market power cannot be considered in a normal antitrust sense, and does not constitute any violation by itself, a situation where only a small number of transnational firms enjoy global monopoly through the protection of IPRs, should not be taken lightly. Without a suitable and sufficiently strong legal framework in place, to check the anticompetitive behaviour of these IPRs' holders, the possibility that TNCs will be tempted to abuse their market power cannot be ruled out. Also, the sustainability and welfare of billions of people in developing countries will be under constant threat, when patents on medicines and goods, which support livelihoods, are under the control of a handful of such TNCs.

Whilst the protection of intellectual property rights (IPRs) ensures that the innovators will have ample incentives for innovation, which is a major driving force behind the dynamics of markets, it may constitute effective barriers to entry or confer market power on the holder(s) even in the global context

Agriculture, for example, represents an overwhelming portion of the economy in the South. However, with the internationally recognised protection of seed patents or *sui generis* plant variety protection, billions of farmers in the developing countries are having to pay high prices for patented seeds, and are being prevented from reusing the seed freely. This essentially means that their livelihoods and welfare are subject to the patent holders' whims and commercial strategies. As an example, the top 10 seed companies are currently controlling 30 percent of the world's US$23bn commercial seed market. The monopolies they are enjoying, through patent protection, are far-reaching. Breeders are patenting entire species (cotton), economic characteristics (oil quality), plant reproductive behaviour (*apomixis*) and basic techniques in biotechnology (gene transfer tools).

A recent report, from four research organisations in Southeast Asia, points to an alarming level of concentration in the commercial corn seed markets of Thailand, the Philippines, Vietnam and Indonesia. The report claims that three companies, Cargill, Pioneer and CP-DeKalb, control 70 percent of the Asian seed market (See Table 4). With Monsanto's recent acquisitions, that effectively leaves the continent with only two competitors in the commercial corn seed markets: Monsanto and Pioneer.

Though such market power cannot be considered in a normal antitrust sense, and does not constitute any violation by itself, a situation where only a small number of transnational firms enjoy global monopoly through the protection of IPRs, should not be taken lightly

In another example, a lawsuit was brought by 39 pharmaceutical companies against the South African Government, which intended to stop them from making cheaper medicines available in their country – in the context of the HIV/AIDS pandemic, which generated global outrage. This would also shed some light on how IPR protection, though perhaps "legally right", is discriminatory towards developing countries all over the world (See Box 5).

Table 4: Market Share Estimate of Major Seed Companies in Selected Southeast Asian Countries, 1997 – Whose Agenda?		
Country & Company	**Market Share (in percent)**	**Notes**
Indonesia		
PT Cargill (Monsanto)	67	Established in 1988; undertakes production of its hybrids with the national seed centre, PT Sang Hyang Seri. Now wholly owned by Monsanto.
PT Pioneer Hybrida	25	Established in 1988; uses the national seed centre, PT Pertani as its main seed distributor
Bright Indonesia Seed Industry	8	Established in 1983 as a joint venture between Charoen Pokphand of Thailand (80 percent) and Central Pertiwi Indonesia (20 percent)
PT Monagro Kimia (Monsanto)	Not known	Wholly owned by Monsanto, producing the popular herbicides and pesticides: Polaris, Roundup and Spark. Donated 5 tons of hybrid seeds and 1 ton of Polaris, a Roundup-based herbicide, to farmers in East Java. Strongly promoting and expanding the market for its Roundup herbicides through the "low-till" or "no till" agricultural system programmes implemented by the Government throughout Indonesia. Plans to upscale its hybrid corn seed production by 2001.
Philippines		
Pioneer	65	
Cargill (Monsanto)	31	
CornWorld	2	Currently testing corn hybrids with Novartis
Ayala Co.	<1	In October 1998, Ayala Agricultural Development Corporation formed a joint venture with DeKalb Genetics (USA) to produce and market DeKalb hybrid corn. It plans to introduce Roundup-Ready corn in the future. DeKalb-Ayala Philippines Research Co. is another joint venture (Oct 1998) working on tropical corn varieties.
CP-Dekalb (Monsanto)	<1	
Thailand		
Charoen Pokphand (CP)-DeKalb (Monsanto)	55	Principal foreign affiliate and licensee of DeKalb Genetics (owned by Monsanto); undertakes R&D on corn hybrids for Thailand and the ASEAN and evaluation of corn hybrid varieties in Indonesia, Vietnam, Burma and Laos. In 1997, it donated 20 metric tonnes of hybrid corn seed to Cambodia to be distributed free to farmers.
Cargill (Monsanto)	18	
Pioneer	13	
Pacific/ICI	7	
Novartis	5	Already testing hybrids in Vietnam and Indonesia, and collaborating with CornWorld in the Philippines
Vietnam		
National Maize Seed Research Institute	80	Major companies engaged in the market are BioSeed, Charoen Pokphand (CP)-DeKalb (Monsanto), Pacific/ICI

Source: BIOTHAI, GRAIN, MASIPAG and PAN Indonesia (1999). "Whose Agenda? The corporate takeover of corn in SE Asia".

Box 5: International Patent Laws Hurt Developing Countries

Patents cannot generate innovation where there is no market. Even with patents, it is not profitable for companies to produce drugs for diseases that primarily affect the poor. So, for example, only 13 out of the 1393 new drugs approved between 1975 and 1999 were for tropical diseases, which primarily affect poorer regions of the world. This suggests that the patent system is a raw deal for developing countries, because it gives them monopoly prices without generating innovation. It also suggests a need for substantial public funding for drug development for neglected diseases.

In South Africa, in 1998 approximately one in five adults is living with HIV/AIDS. Since 1996, the world has known that "cocktails" of antiretroviral drugs save lives. They are not a cure for AIDS, which is an almost chronic disease, akin to diabetes. The rate of AIDS deaths in the US has been plummeting, but in South Africa, it is rising as no one except the exceedingly rich can afford the drugs. In the US, taxpayers subsidise the cost of the drugs, treatment of which costs around US$15,000 per year. In South Africa, making treatment universally available at such prices would have bankrupted the Government. But it was not the drugs themselves that were expensive – it was a result of the patents. Where there are no patents on these drugs, as is the case in India, for example, one can buy equivalent versions of the US$15,000 treatment for US$200. India does not currently grant patents for products (pharmaceutical or otherwise), although they soon will have to, according to the deadline under the Agreement on Trade-Related Aspects of Intellectual Property (TRIPs).

The South African Government was in a bind. It has a strong patent system – the legacy of apartheid; and also due to pressure from countries like the US, drugs, though affordable, were unavailable to them. So, in 1998, they did what any responsible government would do: They passed a law that would give them the power to bring drug prices down. The law would have allowed them a "parallel import" of cheaper medicines, which is completely legal under the TRIPs Agreement[42], to take advantage of the fact that patented drugs are sold at different prices in different countries.

The South African law might also have given the Government the power to use generic drugs, harnessing the power of competition to drive prices down. The TRIPs Agreement allows governments to override patents, and allows generic production through "compulsory licensing".

Both measures are internationally legal, and developed country governments, all over the world, have resorted to them. During the 2001 anthrax crisis, the US Congress threatened to use compulsory licensing to obtain the antibiotic, Cipro, more cheaply and quickly from generic manufacturers. Bayer, who holds the patent on Cipro, immediately offered to lower its prices and increase the production.

Faced with a potential public health crisis, the US Congress recognised what many other countries have been arguing all along: that patents are not "rights" but rather privileges – and that they do not come before the rights to health and life. But that is not how they – or the drug industry – approached the issue when it came to South Africa. The possibility that South Africa – a tiny percentage of the world's drug market – might start using generic drugs was treated as a colossal threat to the interests of the US pharmaceutical industry. It did not matter that the US had signed the TRIPs agreement in 1994, recognising that developing country governments have the ability to do just what the US would later do with Cipro. It also did not matter that literally millions of lives were at stake. According to Charlene Barshefsky, the then US Trade Representative: "We all missed it.... I didn't appreciate at all the extent to which our interpretation of South Africa's international property obligations were draconian".

Activists around the world realised it, and mobilised against the lawsuit, with slogans like "Patient Rights Over Patent Rights," and "Stop Medical Apartheid." In March 2001, when the case finally reached the courtroom, the drug companies, fearing a public relations backlash, withdrew their suit.

Source: Kapczynski (2002). "Strict international patent laws hurt developing countries", YaleGlobal Online at http://yaleglobal.yale.edu/display.article?id=562.

When the IP holders are not in a position, themselves, to engage in commercial exploitation of the IPRs on a global scale, they typically engage in licensing arrangements with firms in different countries. Despite the generally pro-competitive benefits of these licensing arrangements, they can effectively raise antitrust concerns, especially when such agreements involve entities that would have been actual, or likely, potential competitors in the relevant market, in the absence of the licence arrangement. In many cases, cartels have been built around such licensing schemes, substantially harming competition (see Box 6 for an illustrative case).

When the IP holders are not in a position, themselves, to engage in commercial exploitation of the IPRs on a global scale, they typically engage in licensing arrangements with firms in different countries

Box 6: The Pilkington Case

The US Department of Justice's (DoJ) 1994 case against Pilkington Plc addressed an international cartel orchestrated by a licensing arrangement that imposed restraints on competition, long after such restraints were reasonably necessary to advance the licensed technology.

Pilkington, a British company, licensed major world float glass manufacturers, many years earlier, to use its patents and related know-how only in specified territories. These original licensing agreements contained stringent territorial, use, and sublicensing restrictions; and together with grant-backs of improvements developed by the licensees, substantially limited competition amongst the licensees and Pilkington.

Pilkington's licences did not terminate upon expiry of the patents, but continued indefinitely until the licensee could prove that all of the licensed technology was publicly known. According to the DoJ's complaint, Pilkington then over-claimed what was "secret" as a way of deterring or inhibiting the ability of licensees, and other rivals, from inventing around whatever legitimate IPRs it possessed. Pilkington also entered into other agreements, including export limitations – with its licensees outside of and apart from the licences – allegedly as a way of limiting and controlling competition in float glass markets. The DoJ charged that, as a result of the licensing agreements, US companies were prohibited from exporting their own glass manufacturing technology, and, thus, from building glass-making plants overseas. As stated in the complaint, there was also an adverse effect on domestic output and innovation. This conduct violated the US Sherman Act's prohibition of anticompetitive conduct that adversely affects US domestic commerce and export trade.

The case was settled by a consent decree[43] whereby the burden of proving the continued secrecy, of the previously licensed float glass technology, was essentially shifted to Pilkington from the licensees. Pilkington was enjoined from threatening intellectual property litigation against potential customers (located anywhere in the world) of American glass plant vendors that were not Pilkington licensees. The elimination of these artificial barriers to competition benefits not only the formerly constrained US manufacturers, but also float glass customers worldwide, who now enjoy the benefits of competition to get glass at lower costs.

Source: WTO (1998): Competition policy and intellectual property rights in the international trade context. Communication, from the United States, to the WTO Working Group on the Interaction between Trade and Competition Policy. Document No. WT/WGTCP/W/101.

IPRs may also constitute an important factor in many transactions, which may raise competition concerns on a global scale. For instance, the global research, development, manufacture and markets of major drugs were found to be affected when Sanofi-Synthelabo recently proposed to acquire Aventis SA, in a move that would have created one of the largest pharmaceutical companies in the world. Both, the US and the EU regulatory authorities, having "serious doubts that competition might be reduced to the detriment of patients,"[44] ensured better competition by getting Sanofi to sell, or to grant, licences for a series of pharmaceutical products in their market, before authorising the acquisition. Though the same effects could be felt in other developing markets, the transaction was not further challenged elsewhere.

the IPRs are protected globally, and rights holders have free licensing, contracting and trading rights across borders; competition and consumers in developing markets are certainly affected by such practices and transactions as much as developed markets

IPRs-related anticompetitive agreements and transactions are common phenomena in the world economy. To the extent that the IPRs are protected globally, and rights holders have free licensing, contracting and trading rights across borders; competition and consumers in developing markets are certainly affected by such practices and transactions as much as developed markets. However, not all countries have the capacity and resources to tackle these practices as the US has.

To make matters worse, though the TRIPs Agreement enables the broad framework, for all countries, to take necessary action if an IPR is abused, leading to anticompetitive outcomes, it does not 'empower' all of them to do so. The Agreement simply refers member states to their national laws, which might be weak in the case of many developing countries, to take "appropriate measures" to regulate "licensing practices or conditions pertaining to IPRs which restrain competition."[45] Since then, its significance and legal scope may heavily depend upon what competition rules the member states will adopt, so as to ensure "effective protection against unfair competition,"[46] and control of anticompetitive practices related to IPRs.

The Doha Declaration on TRIPs and Public Health has taken care of this problem in the case of medicines that have public health dimensions. However, abuses of IPRs would not be limited to medicines only, and developing countries would have no remedy available to deal with abuses in various other areas

Whether developing countries have the capability to protect their own interests with national laws and regulate TNCs are matters of concern. Even the suggested remedy of compulsory licensing would not be available to a country that does not have domestic production capacity. The Doha Declaration on TRIPs and Public Health has taken care of this problem in the case of medicines that have public health dimensions. However, abuses of IPRs would not be limited to medicines only, and developing countries would have no remedy available to deal with abuses in various other areas. Of greater concern are seeds, which will affect the food security of the poor countries (see Table 4).

Chapter 3
Existing and Proposed Cooperation Arrangements

...competition authorities in developing countries should have adequate resources, and competition law enforcement officials be technically competent

Whether it is to deal with anticompetitive practices that occur at the national level, or those that have international dimensions, having a strong and well-oiled competition regime is an essential prerequisite. This requires that competition authorities in developing countries should have adequate resources, and competition law enforcement officials be technically competent.

Even so, a strong competition regime, at the national level, may not be enough to tackle cross-border anticompetitive practices that are affecting developing countries. Indeed, it would be a good idea to have provisions for extra-territorial jurisdiction in their legislation, on the "effects doctrine," to legally empower competition authorities to deal with such cases.

Nevertheless, most developing countries will not have enough muscle to actually enforce such provisions. Therefore, there are some *prima-facie* arguments to suggest that a multilateral framework can help weaker nations too. In this context, the setting up of a global competition agency could possibly be the optimal solution. Although, this may be a difficult proposition, given the existing geo-political situation.

Quite clearly, the level of activity in seeking across-the-border cooperation has increased in line with the globalisation of economies. This need has been accelerated by the increasing number of cross-border issues cropping up, which cannot be dealt with properly without access to information from foreign governments and/or competition agencies.

Still, there is a glimmer of hope, if a US proposal sails through (see Box 7).

...most developing countries will not have enough muscle to actually enforce such provisions. Therefore, there are some prima-facie arguments to suggest that a multilateral framework can help weaker nations too

International cooperation is particularly important in four areas:
i) strengthening the institutions and promoting competition culture;
ii) reducing the costs of transactions for transnational mergers;
iii) promoting market access by reducing/eliminating private barriers; and
iv) fighting international cartels and other anticompetitive practices.

If cooperation and coordination could be promoted in an appropriate manner, then international competition disputes could be resolved and even avoided. Realising this, attempts have been made to promote cooperation amongst the competition authorities (or countries) through bilateral, regional, as well as multilateral channels. Some of these

are formal, whilst others are more of informal initiatives. Bilateral cooperation is only one of the various forms of cooperation. Plurilateral and multilateral arrangements can also play an important role, and are not in conflict with bilateral initiatives.

3.1 Bilateral and Tripartite Tracks

Bilateral cooperation is only one of the various forms of cooperation. Plurilateral and multilateral arrangements can also play an essential role, and are not in conflict with bilateral initiatives

The US, the EU and Canada have signed a number of bilateral agreements with other countries to cooperate in the area of competition enforcement. Whilst the US has such agreements with Australia, Brazil, Canada, Germany, Israel, Japan and Mexico, the EU has such an agreement with Canada. Similarly, Canada has signed bilateral agreements with Chile and Mexico. It has also entered into a trilateral cooperation agreement with Australia and New Zealand, which, between them, have a strong bilateral agreement.

Box 7: US Senate Adopts a New Act for Cross-border Consumer Abuses – Bill Seeks Multilateral Cooperation

On September 15, 2004, the US Senate passed the International Consumer Protection Act (2004), which seeks to empower the Federal Trade Commission (FTC) in challenging scams, against US consumers, by foreign entities.

Senator John McCain, Republican Chairman of the Senate Commerce Committee, sponsored the Bill.

Senator McCain said that the FTC needs authority not only to share its confidential information on cross-border fraud with foreign consumer agencies, but also to secure such information from those agencies.

The Bill can only become a law when the House of Representatives passes it, and the President signs it.

The Bill expressly provides for information to be furnished for a foreign consumer protection agency, to prohibit fraudulent or deceptive commercial practices, or other practices similar to those prohibited by the laws administered by the FTC. Unfortunately, the Bill excludes antitrust or anticompetitive practices from its purview.

Prima facie, this news will reassure the doubting Thomases, who thought that cooperation between enforcement agencies of rich and poor countries, under a multilateral competition framework agreement at the WTO, will not fly. At least this is a good beginning (subject to the Bill becoming a law) with consumer frauds, which often include many anticompetitive practices. Many of the more heinous variety are prohibited under the competition laws of the world, which will thus qualify for demanding information, if the perpetrators are in the USA.

Surely, over time, the US law will be extended to cooperation on anticompetitive practices due to increasing integration of world economies. After all, if US-based businesses indulge in anticompetitive practices, so do others, which affect the US economy, businesses and consumers.

Source: www.thomas.loc.gov

The primary objective of adopting a regional competition policy within the EU was to use it as a vehicle to further integrate the common market

Similarly, there is a tripartite agreement between Denmark, Norway and Iceland. France has an agreement with Germany. China has bilateral agreements with Russia and Kazakhstan. Taiwan has such agreements with Australia and New Zealand. Papua New Guinea has an agreement with Australia, which makes a lot of sense, as its economy is heavily dependent on it.

Box 8: US-Brazil Competition Cooperation Agreement

Brazil and the United States reached a bilateral agreement on competition aiming at:

- mutual cooperation in the application of their antitrust laws;
- technical cooperation; and
- reciprocal consideration of the objectives, of each party, in the application of the national antitrust laws (positive comity).

However, effectiveness of the agreement is doubtful. Firstly, no confidential information can be exchanged. This seems to be problematic, even when the agreement is in force, especially considering that most of the information obtained by the US Antitrust Authorities is protected by a sort of confidentiality, and the Cooperation Agreement does not oblige the party to provide confidential information. Secondly, positive comity is a promising step towards international cooperation, but authorities are not obliged to take action.

Cooperation between the US and Brazilian competition authorities has been noted, especially through the US sharing knowledge with Brazil. This knowledge transfer concerns the analysis of different anticompetitive practices, such as exclusive dealing in the cigarette and credit card sectors. Brazil also reciprocated, in a few merger cases affecting both itself and the US (e.g., Metal Leve).

Nevertheless, when the Brazilian competition authority approached the US for cooperation in the investigation on the infamous vitamin cartel, nothing substantial was received. The US argued that much of the information was confidential, and, hence, could not be shared. As a result, Brazil has not been able to complete its investigation on the case to date.

Similarly, efforts made by the Brazilian authority to obtain information on a recent cartel case in the US steel industry did not yield much. The Brazilians and Americans could not cooperate in this case, mainly because the US trade authorities had reservations that the two governments would have quite different views on the anti-dumping policies in the steel sector. The US trade authorities were of the opinion that passing on relevant information to Brazil, on the case, could potentially harm US trade interests.

Source: Oliviera, G. and Werneck, B., Bilateral Cooperation Agreements: The US-Brazil Experience, ReguLetter 7, CUTS (2002).

3.2 Regional Approach

The main objective of the CARICOM regional competition policy is to apply competition rules in respect of cross-border anti-competitive business conduct; promote competition in the Community; and coordinate the implementation of the Community Competition Policy

A comprehensive, regional approach to competition policy was first adopted by the EU, and, subsequently, by CARICOM (Caribbean Community). The primary objective of adopting a regional competition policy within the EU was to use it as a vehicle to further integrate the common market. The main objective of the CARICOM regional competition policy is to apply competition rules in respect of cross-border anticompetitive business conduct; promote competition in the Community; and coordinate the implementation of the Community Competition Policy. Such an approach is at various stages of discussion/adoption in many other regional groupings, for example,

in MERCOSUR (Common Market of the South, also known as Southern Cone); COMESA (Common Market for Eastern and Southern Africa); SADC (Southern African Development Community); EAC (East African Community); CEMAC (Economic and Monetary Community of Central Africa), etc. Simultaneously, the competition authorities of Southern and Eastern Africa have floated a joint forum to discuss issues of common interest. In October 2004, at a WTO Asia-Pacific Seminar held in Hyderabad, India, the Competition Commission of India also highlighted the need for an Asia-level joint forum of competition authorities. Each will act as a building block for a multilateral cooperation framework, and thus, need to accelerate its efforts in this regard.

...the competition authorities of Southern and Eastern Africa have floated a joint forum to discuss issues of common interest

The typical agenda, of regional economic cooperation blocks, has usually dealt with the issue of harmonisation of national competition laws. In some cases, it even included the creation of a new legal framework in certain countries, as in the case of some Central and Eastern European Countries (CEECs) who have recently joined the EU.

3.3 Global Initiatives

Over the last few years, several global initiatives have been taken up to deal with competition problems, especially those having international dimensions.

The United Nations Conference on Trade and Development

As noted before, the issue of the control of Restrictive Business Practices (RBPs) figured on the agenda of UNCTAD II, and again at UNCTAD IV, where a decision was made for starting a work programme at the international level, which led to negotiations under the auspices of UNCTAD. In December 1980, the UN General Assembly adopted, by resolution, a Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices.

The importance of the Set and UNCTAD, in this area of work, cannot be overestimated. The adoption of the Set was an extremely far-sighted move by the international community, and has stood UNCTAD in good stead in helping developing countries to adopt comprehensive competition laws. The 4th Review Conference, in 1990, indicated a high degree of consensus on the contributions of the Set and on UNCTAD's role. UNCTAD has been very active in providing technical assistance to developing countries.

UNCTAD has not been active in dealing with competition problems, with international dimensions through promotion of cooperation amongst its member states or otherwise; whilst the Set does cover the issue of International Cooperation

Unfortunately, UNCTAD has not been active in dealing with competition problems, with international dimensions through promotion of cooperation amongst its member states or otherwise; whilst the Set does cover the issue of International Cooperation. Its mandate comes from its member governments, who have not been able to appreciate the need for better international cooperation to tackle cross-border problems.

Global Forum – Organisation for Economic Cooperation and Development

The Organisation for Economic Cooperation and Developments (OECD) is an influential organisation with 30 member states – the

rich countries of the world. It has a Standing Committee on Competition Policy and Law, which comprises all member countries and five observers: Argentina, Brazil, Israel, Lithuania and Russia.

The OECD has been regularly cooperating with a variety of non-OECD countries to provide capacity building. With the advent of its Global Forum on Competition, the OECD claims that its cooperation with non-OECD countries will extend beyond capacity building, to include high-level policy dialogues to build mutual understanding; identify 'best practices'; and provide informal advice and feedback on the entire gamut of competition-policy issues. The forum can also be used to promote cooperation amongst countries.

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So far, the OECD has been engaged in promoting cooperation for capacity building purposes only. Also, it does not have any intention of promoting cooperation to solve competition cases of an international nature, at least in the near future. Though, the OECD has promoted various codes on dealing with international issues amongst its members.

International Competition Network

The concept of the International Competition Network (ICN) has evolved as an outcome of the recommendations of the International Competition Policy Advisory Committee (ICPAC), a group formed in 1997 by the Antitrust Division of the US Department of Justice. Subsequently, the two giants: the US and the EU established the ICN as a membership body of competition authorities of the world. ICN is intended to encourage the dissemination of competition experience and best practices, promote the advocacy role of competition agencies and facilitate international cooperation. ICN is not intended to replace or coordinate the work of other organisations, nor will it exercise any rule-making function. After all, it is working as an informal platform for promoting cooperation and the exchange of information amongst competition authorities.

For example, the ICN has agreed to adopt a common set of guiding principles for merger notification and review. A study group of the ICN has already identified the possible set of principles and practices, and adopted them. Similar initiatives are likely to be taken in other areas of competition enforcement. ICN has also played a catalytic role in the US and the EU agreeing to simultaneous reviews of mergers, when officials from both sides of the Atlantic met at the sidelines of the First Annual Conference of the ICN held at Naples, Italy, in September, 2002. Anyhow, what is missing is that such a cooperative effort does not include developing and other developed countries where the merging firms operate.

ICN is intended to encourage the dissemination of competition experience and best practices, promote the advocacy role of competition agencies and facilitate international cooperation.

The ICN's set of merger principles and practices has also been criticised on the ground that it would help merging companies, who would require to get their deal cleared in multiple jurisdictions, by smoothening the process. However, it has ignored the fact that a particular merger would have varied impacts in different jurisdictions, and ideally the deal should be cleared only after looking at its impact in all such jurisdictions, including the weaker ones. Another area of concern, in this regard, has been that ICN has been active only in

the area of merger evaluation whilst ignoring other areas of competition enforcement, especially international cartels, which are most harmful, especially from the perspective of developing countries. Fortunately, at its 3rd annual conference in Seoul, South Korea, in April 2004, the ICN has created a new working group to work on cartels.

Consideration for a possible framework on competition policy (and investment policy) has been provided, as a built-in agenda under the agreement on TRIMs

World Trade Organisation

Competition policy is not a new issue in the GATT/WTO framework. The issues pertaining to competition were raised in the Uruguay Round negotiations. Although no agreement on trade and competition policy was signed, the issue is very much present in many of the provisions of the existing WTO Agreements. The Agreements that refer to competition issues are GATS, TRIPs and TRIMs.

Although the WTO Agreements touch on a number of competition issues, both directly and indirectly, nothing substantial has emerged on these issues through negotiations. Consideration for a possible framework on competition policy (and investment policy) has been provided, as a built-in agenda under the agreement on TRIMs.

The WTO proposal on the multilateral competition framework under the Doha Development Agenda — mooted mainly by the EU – is a statement of core principles on transparency, non-discrimination, procedural fairness and recognition of the ills of hardcore cartels

The WTO proposal on the multilateral competition framework under the Doha Development Agenda – mooted mainly by the EU – is a statement of core principles on transparency, non-discrimination, procedural fairness and recognition of the ills of hardcore cartels. It also includes development of flexible cooperation modalities and technical cooperation. Amongst all the global level forums, the WTO, until recently, has been most active in discussing a multilateral agreement on competition. Hence, the proposals at the WTO are discussed in greater detail in the next section.

Chapter 4

The Proposal at the WTO and its Implications

The proposals, under the Doha Development Agenda, are a statement of core principles on transparency, non-discrimination, procedural fairness, recognition of the ills of hard-core cartels, development of flexible cooperation modalities and technical cooperation.

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

Transparency has been one of the core principles of the GATT system since its inception. In the context of competition, transparency is likely to mean that the administration of competition regulation must be based on published laws, regulations and guidelines. This publication requirement might also encompass an obligation to make known all the general enforcement priorities, as well as notification of exemptions and exceptions from competition laws.

The reasons why a competition agency may decide to pursue an individual enforcement action would have to rely on confidential action 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.

Non-discrimination is, again, a fundamental tenet of the WTO. The WTO jurisprudence of non-discrimination has clarified that equality of competitive opportunity (not outcome) underpins this concept – a perspective that is also relevant in the competition policy context.

Many of the existing WTO agreements already contain the procedural fairness obligation. Due process does not require any given institutional structure. But, in the competition context, one may presume that the decisions made by the competition authorities or courts must be well reasoned and published; and the competition law must be applied in a non-discriminatory manner.

The WTO jurisprudence of non-discrimination has clarified that equality of competitive opportunity (not outcome) underpins this concept – a perspective that is also relevant in the competition policy context

The proposal says hardcore cartels are to be banned. Technically, this will include price-fixing domestic, international, export and import cartels. Although export and import cartels are exempt in much jurisdiction, such exemptions may not be allowed if the agreement was to be developed on the proposed lines.

Cooperation, to be extended amongst the members, will be voluntary in nature. The cooperation will be exchanged for capacity building, especially of developing countries, as well as providing specific information and assistance in dealing with cases. Since cooperation would be voluntary, it would be difficult to imagine that substantial

information will be available, on demand, from one member to another (see Box 8 on US Brazil Bilateral Cooperation).

Now, the question that assumes importance is how far an agreement, designed on the above lines, will help in tackling the different types of cross-border ant-competitive practices, especially from the perspective of developing countries.

...the task of enforcement on hard core cartels would be on a national rather than international basis, it will not be easy for developing countries, which do not have resources and the required technical expertise, to break international cartels

International Cartels

The international cartel has been considered to be the most injurious anticompetitive practice affecting the developing countries, and the proponents have also showcased its harmful effects in making their point that the competition agreement is more to promote development rather than market access. Even so, the substantial provisions in the proposals may not be able to take care of this problem.

Since the task of enforcement on hard core cartels would be on a national rather than international basis, it will not be easy for developed countries, which do not have resources and the required technical expertise, to break international cartels. Even in some developing countries, with substantial experience of implementing a competition law, the record of busting domestic cartels is abysmally poor. Thus, developing countries can handle such international cartels only if they get substantial cooperation from developed ones. Yet, the experience so far in winning cooperation, by a developing country, for dealing with international cartels is not at all satisfactory.

Developed countries have already warned that developing countries should not expect much on this front because much of the information collected by them, in this regard, is confidential and cannot be passed on. It is, indeed, strange that such information is considered to be confidential, even though it is more about secret meetings amongst the players to fix prices and share markets rather than any confidential business secrets. Moreover, in most of the cartel cases, it is argued that information collected through a leniency programme cannot be passed to other countries, as that will undermine the effectiveness of such a programme. Given the existing discourse, the proposed agreement will not be able to provide any credible mechanism to tackle international cartels.

Export Cartels

If hard core cartels were banned, an affected country, subjected to non-discrimination, would be able to force the country of origin of an export cartel to take measures. Still, this would require the affected country to have sufficient evidence to prove that an export cartel exists, which would not be an easy task for a developing country.

...in some developed countries, with substantial experience of implementing a competition law, the record of busting domestic cartels is abysmally poor.

It should, nevertheless, be noted that in this era of globalisation, it would be quite difficult for an export cartel (where all the players are from one single country) to make any substantial impact on any particular market. There is little information in the public domain on the existence of export cartels, except ANSAC. Technically, though, a country can tackle such problems simply through the 'effects doctrine,' as was done in some jurisdictions in the ANSAC case. It may be noted that the Indian attempt was substantially jeopardised

by both the lack of a clear provision in the law,[47] and by political pressure from the US Government. Such pressure will continue to operate in spite of a multilateral accord.

Tackling export cartels through the 'effects doctrine', nevertheless, runs another risk. If an export cartel is banned from exporting into a particular market, the cure could be worse than the disease, as post-ban there will be a lesser number of players, and, hence, reduced competition in the market. ANSAC was, of course, a cartel of a different nature that was allegedly engaged in predatory pricing, rather than charging higher prices.

If an export cartel is banned from exporting into a particular market, the cure could be worse than the disease, as post-ban there will be a lesser number of players, and, hence, reduced competition in the market

Import Cartels

Import cartels will also be banned. After all, just like export cartels, the affected country must have sufficient evidence to prove that an import cartel exists in the importing country's market, which is adversely affecting its exports. This will definitely prove to be difficult for developing countries, which very often find it difficult to prosecute even their domestic cartels due to lack of evidence, capacity or even procedural problems.

However, the impact of import cartels operating in developing countries may not be necessarily bad. Import cartels that try to get better bargains from foreign exporters may be welfare enhancing, especially in developing countries where there is no production base in many sectors. Nevertheless, even such beneficial import cartels will be forced to disband, as the proposals suggest a ban.

M&As with International Spillovers

The effective remedy in this area would depend on the level of international cooperation that could be ensured. Thus, only mandatory cooperation with positive and negative comities can ensure that. Voluntary cooperation will not be sufficient. The experience so far shows that the cooperation achieved in this area — driven by the bar – has been more to reduce the transaction costs of mergers that needed clearance from multiple jurisdictions, rather than to take into consideration differential impacts of mergers in different markets.

Typically, when two companies with presence in multiple markets merge, the costs due to the lessening of competition fall on all such markets. Nonetheless, the benefits of efficiency gains tend to get concentrated in the home country/countries of the merging companies. Thus, cooperation can be promoted only if a suitable solution is found to distribute the gains as well as losses equitably, in all affected markets. But this is easier said than done. The US and the EU found such a solution in the Boeing/McDonnell Douglas case. Though, they could not agree in the GE/Honeywell case, as they had different perceptions about the costs and the benefits, and this led to the breakdown of cooperation. Effectively, the EU used its muscle power to block the merger. Obviously, it would not be easy by smaller countries to take such actions, which would simply be ignored by big merging companies or their authorities.

Import cartels that try to get better bargains from foreign exporters may be welfare enhancing, especially in developing countries where there is no production base in many sectors

Box 9: Positive and Negative Comities

Positive Comity

According to OECD (1999), positive comity means, "the principle that a country should:

(i) give full and sympathetic consideration to another country's request that it opens or expands a law enforcement proceeding in order to remedy conduct in its territory that is substantially and adversely affecting another country's interest, and
(ii) take whatever remedial action it deems appropriate on a voluntary basis and in considering its legitimate interests".

Practical experience with positive comity is limited. A case regarding the investigation into practices of AC Nielsen Company, a provider of retail tracking services, demonstrates how positive comity is expected to work in practice. Both the EC and the US DoJ received a complaint from a competing firm, IRI, that Nielsen was abusing its dominant position in Europe, and, thus, preventing IRI from establishing a competitive presence there. As the complaint was primarily addressed to contractual practices implemented in Europe, and had its greatest impact within Europe, the US DoJ let the EC take the lead once it was confident that it had a firm intention to act. The EC conducted negotiations with Nielsen to arrive at an acceptable solution, ensuring that competition was not distorted. At every stage of negotiations, the US DoJ was informed of progress and given an opportunity to comment on the undertakings from Nielsen; the US DoJ was able to conclude that the practices it had been investigating would not continue, and thus it closed its investigation.

Negative Comity

Negative comity means, "that each party will, at all stages in its enforcement activities, take into account the important interests of the other party."

Negative comity involves stronger commitment, and hence, practical experience with it is even more limited. The Boeing/McDonnell Douglas merger case shows how this principle can be applied. On June 26, 1998, the EC requested the US authorities to take into consideration the EU's important interest, i.e. the maintenance of competition in the market for large commercial jet aircraft. The US government drew the EC's attention to some of its concerns, including US interests in the field of defence. Consideration of these issues played an important role in consultation, which subsequently took place between the EU and the US on the case. After intensive consultation with the US authorities, and following the acceptance of certain undertakings by Boeing, which addressed the EC competition concerns, the EC cleared the merger.

Source: OECD (1999), "Competition Law and Policy Committee Report on Positive Comity", Organisation for Economic Cooperation and Development DAFFE/CLP (99) June 19, 1999 p18 and & EC (1999), "Communication from the EC, and its Member States, to the WTO Working Group on the Interaction between Trade and Competition Policy" (WT/WGTCP/W/129).

It is true that there has been some cooperation in this area, when a developing and a developed country have been involved

It is true that there has been some cooperation in this area, when a developing and a developed country have been involved. The examples being the cooperation between the US and Brazil in the Metal Leve case; and that between South Africa and the EU in the SmithKline Beecham and Glaxo Wellcome case. In these two cases, both the parties agreed to a common solution; it is anybody's guess what would have happened if they had disagreed.

Box 10: Cooperation between South Africa and the EC

South Africa-European Union Free Trade Agreement (SA/EU-FTA), which 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 interests in the course of their enforcement activities. However, cooperation between the EC and the South African competition authorities has not taken place as a result of the EU/SA-FTA, but has instead been voluntary.

The South African competition authorities obtained extensive cooperation from the EU in the international merger of SmithKline Beecham PLC and Glaxo Wellcome PLC. In its judgement, the South African Competition Tribunal specifically stated that its decision was largely based on the decision of the EC. The EC found that the merger would negatively affect competition, in the same areas, as was identified by the South African Competition Commission. Finally, the EC approved the merger, subject to the merging parties' out-licensing some of the products in the identified areas to reduce their market share, post-merger, as was done in South Africa.

Source: Case Study Report on Glaxo Wellcome PLC-SmithKline Beecham PLC Merger in South Africa (7Up Project), CUTS.

Many developing countries feel that they might use different standards whilst dealing with merger between two domestic companies, than in a case where at least one of the companies is big and of foreign origin

Another concern that may be noted, in this context, is the issue of national champions and public interest, especially in developing countries. Many developing countries feel that they might use different standards whilst dealing with merger between two domestic companies, than in a case where at least one of the companies is big and of foreign origin. This is because they think that their domestic companies are very small, compared to global players, and, hence, mergers between domestic companies need to be dealt with leniently to promote national champions. However, if their national competition laws become subject to non-discrimination, using differential standards may be difficult, unless there is an explicit exception, or exemption, which may have been agreed to in an international framework.

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Anticompetitive Practices by Foreign-based or Globally Dominant Companies

This is another area that has not been elaborated in the proposals. Let us take an example. Suppose a dominant company, like Microsoft, is engaged in abusive practices in a small, developing country like Zambia. As the focus of enforcement will remain national, even after the agreement is signed, it will be for the Zambian competition authority to take any action. Now, what happens if Microsoft refuses to comply with an order of the Zambian authority? Microsoft can do that, as even forgoing business in Zambia will not be a substantial loss for them, whereas if Microsoft stops doing business in Zambia, the country might have serious problems.

These kinds of problems can be best handled through an international enforcement mechanism. Another option could be, if the home country government, i.e. the US, fully cooperates with the Zambian Government to take appropriate action against Microsoft. However, on the proposals at the WTO, there is no suggestion that can bind another country to extend such cooperation.

Indeed, the scope of taking anti-dumping actions under the GATT is quite broad, and, hence, it is capable of taking care of predatory pricing as well

Similarly, the abusive practices of agribusiness, in the markets of both primary products as well as processed final products, will continue to remain unchecked even if the existing proposals at the WTO get adopted. Such a problem can hardly be tackled with national level enforcement. The root of the problem lies elsewhere.

Cross-border Predatory Pricing

As mentioned before, due to some striking similarities, cross-border predatory pricing is very often equated with dumping and, thus, action is taken under anti-dumping legislation. Indeed, the scope of taking anti-dumping actions under the GATT is quite broad, and, hence, it is capable of taking care of predatory pricing as well. However, this is again a case of the cure being worse than the disease. Indeed, developing country exporters are more affected by arbitrary anti-dumping actions by developed country governments. Of late, some developing countries have also shown high tendency to take misguided anti-dumping actions, which subvert the process of competition rather than protecting it.

Needless to say, most of these actions are unlikely to pass the test of "predatory dumping". For example, in a study, Singh (2003)[48] finds that only five of the 92 Indian cases analysed by him could possibly have been consistent with predatory dumping. The proposals do not mention the predatory dumping issue, and it appears difficult to hope for the issue to be discussed under the existing framework.

Foreign Investment

Anticompetitive practices arising out of FDI operations can, by and large, be tackled by domestic competition authorities if they have adequate legal provisions and institutional capability related to merger control. This may, however, be problematic in smaller countries where governments are rather weak whilst the TNCs concerned can be powerful. The competition authorities in such countries should be over-cautious before the entries have been made as, post-establishment, it may be more difficult to handle them. Moreover, should the state find the TNCs concerned too powerful, the proposals at the WTO would not provide any remedy in this regard.

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Intellectual Property Rights

The proposed agreement on competition would have no impact on this type of anticompetitive, abusive practice. Such IPR abuses will continue to be governed by the TRIPs framework, which as explained before, is not fully equipped to deal with the fairness of such practices. Based on the above analysis, it can reasonably be said that the proposals at the WTO do not offer solutions on the whole range of cross-border anticompetitive practices. In fact, except for export and

import cartels, all other problems will remain, by and large, unattended. Even in these two types of practices, developing countries would be in a comparatively disadvantageous position to utilise them effectively, due to incapability of enforcement and lack of cooperation from foreign countries. If one considers that, in this era of globalisation, export cartels operating from a single country are unlikely to pose any major challenge, the expected gains for developing countries will remain elusive.

...the proposals give primacy to market access for developed countries (in developing countries) without bringing developing countries other benefits

This gives credence to the allegations made by most developing countries that the proposals give primacy to market access for developed countries (in developing countries) without bringing developing countries other benefits. The controversial Telmex case is a glaring example of how a competition agreement is likely to be used for market access only whilst ignoring the development dimensions of competition. It is illustrative that in the Telmex case, the WTO panel found it prudent to look at the UNCTAD Set, and even the aborted Havana Charter, for guidance. Meanwhile, the panel completely ignored the Mexican plea that the domestic players should be allowed to coalesce, in order to combat the predatory behaviour of the US giant. This is not surprising at all, because the primary aim of the WTO is to promote market access, subject to few conditions.

Chapter 5
The Way Forward

As anticompetitive practices on a global scale are quite prevalent, consumers world-wide are losing out everyday due to absence of a global regulatory framework. Whilst the governments continue to debate whether to have a multilateral competition framework (MCF) within the WTO or not, consumers continue to lose. There is, by and large, an overall consensus that there is a case for a multilateral competition framework, but there is no agreement as to:

- What should be its scope and contours, and
- Where it should be situated.

UNCTAD has a long history of working on competition policy issues. Yet, there are very few countries, especially those who matter more in international policy making, that still consider it to be the appropriate forum to deal with international competition challenges

A comprehensive MCF that can effectively meet international competition challenges should ideally contain:

- the core competition principles, including prohibition of hard-core cartels, control of vertical restraints, and abuse of dominance as well as regulation of M&As;
- enforceable special and differential treatment for developing countries;
- cooperation rules, including positive comity, exchange of information, including confidentiality safeguards, peer review, and
- some sort of dispute settlement or mediation mechanism.

There is also a good case for including predatory dumping rules in this framework.

Regarding the forum, some suggest that UNCTAD already has a long history of dealing with competition issues and is a non-controversial forum. Hence, it is the best place to anchor an MCF. Some, of course, plug for the WTO. A third way is to have a joint WTO-UNCTAD body, like the International Trade Centre, which engages in assisting developing countries in their export efforts. Lastly, it has also been suggested, to have it in an independent forum, away from UNCTAD and the WTO. Let us examine the various options.

UNCTAD has a long history of working on competition policy issues. Yet, there are very few countries, especially those which matter more in international policy making, that still consider it to be the appropriate forum to deal with international competition challenges. UNCTAD is considered to be pro developing countries, hence, the rich do not like it much or they just about tolerate it. On the other hand, the WTO is considered to be pro rich countries, and the poor, therefore, would not like new rules to be crafted here, which smack of market access and will create onerous obligations on them.

...the WTO is considered to be pro-rich countries, and the poor, therefore, would not like new rules to be crafted here, which smack of market access and will create onerous obligations on them

However, looking at the state of affairs in the geopolitical arena, it is quite unlikely that such an agreement can be adopted at the WTO

in the near future. Moreover, even if such an agreement is adopted at the WTO, it is quite unlikely that the desired level of cooperation, which is the most substantial remedy for most of the cross-border anticompetitive practices, could be ensured. An effective and successful cooperation arrangement can be possible only when there is enough mutual trust and goodwill amongst the parties involved. However, at the WTO, mutual trust is conspicuous by its absence, and a group of countries is often stridently pushing its views on another group. Thus, it is quite difficult to envisage how the WTO can promote 'constructive cooperation,' given the tensions involved in its overall functioning.

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It should also be considered that both UNCTAD and the WTO are bodies devoted primarily to trade issues; but related issues, including competition, are addressed structurally and periodically. In UNCTAD, it is done through the Intergovernmental Group of Experts and the quadrennial conference to review the Set. At the WTO, whilst a few agreements, such as GATS, TRIMs and TRIPs speak about competition issues, the matter got a boost, post-Singapore, when the working group on trade and competition was set up. Both bodies are also conducting regular meetings and capacity building projects. However, both are also victims of their own success, and the international community is thus divided about the issue of hosting the MCF in either of them. It is, therefore, imperative to have a body that will be dealing with competition policy issues exclusively. With this in mind, only the ICN would qualify to host the MCF, though it would require substantial transformation in its structure and functioning. At the moment, it is not a legal entity, but purely an informal network of competition authorities around the world.

In view of these points, the advocates of a multilateral approach for competition policy must seek an alternative way out, rather than sticking to existing 'sticky' proposals. The hosting forum could be the ICN or a completely new body. For a suitable structure, some of the existing arrangements dealing with similar multilateral issues could be looked at.

There are various multilateral issues, where the international community cooperates through agreements and conventions, and there are specialised bodies to administer them. These are in several areas, such as shipping, banking, police, intellectual property rights, standards, environment etc. There is also an International Court of Justice, which deals with crimes of a serious nature, covering genocide, etc.

For the purpose of cooperation on cross-border competition issues, whilst there is great merit in exploring this cooperation in the form of the WTO and/or UNCTAD, we fear that it may be difficult to achieve any movement at the current junctures

For the purpose of cooperation on cross-border competition issues, whilst there is great merit in exploring this cooperation in the form of the WTO and/or UNCTAD, we fear that it may be difficult to achieve any movement at the current junctures. Therefore, in this paper we explore two models of international cooperation, which may help to move the agenda.

These are WIPO and the International Criminal Police Organisation (Interpol). Indeed, combining the features of both of these organisations, as well as borrowing specific ideas from other multilateral fora could evolve the proposed structure.

WIPO is one of the specialised agencies of the United Nations system of organisations. WIPO's principal objective is to promote the protection of intellectual property throughout the world through cooperation amongst States, and, where appropriate, in collaboration with other international organisations. It administers 23 international treaties, dealing with different aspects of intellectual property protection. The Organisation counts 180 nations as its members. Looking at various aspects of WIPO, such a model may be an optimal structure for an international organisation administering a possible multilateral competition framework.

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Taking into account that an MCF, under the WTO and/or UNCTAD, may possibly be dominated by trade and market access issues, having a separate and specialised forum may help avoid this problem. Simultaneously, the focus of the forum could be centred on the specific issue of competition policy and law, rather than looking at it from a trade-related perspective. With around 23 international treaties dealing with different aspects of intellectual property protection, WIPO has been setting the standards and core principles for countries throughout the world, during their policy formulation and legislation process, in this specific area.

Considering that the UN General Assembly has been amongst the pioneers to recommend the Set, there should be no problem with such an initiative under the auspices of the UN. Besides, instead of having only one framework agreement covering all areas of competition policy and law, with the option of having one founding treaty setting out the most general objectives, several others can be developed later to take care of various cross-border competition issues. It may provide a more detailed and clearly structured set of legislative principles and, hence, possibly better protection of competition. WIPO, too, operates through international treaties, covering a variety of IPR issues. These treaties have been evolving over time, rather than in one go – as per the following examples: the Berne Convention for the Protection of Literary and Artistic Works was conceived in 1886, then administered at WIPO since 1967 and lately amended in 1979. The issue of protection of industrial property was agreed to under the Paris Convention in 1883, revised in 1967, and lately amended within the WIPO *acquis* in 1979.

The WTO has often been criticised for not being democratic enough, and development-friendly in its functioning. Having a WIPO-type model, for multilateral cooperation on competition, would possibly help to eliminate this drawback for the protection of developing country interests against more powerful trading partners. One should note that the decision-making mechanism designed for WIPO has enabled developing countries to block expansions to intellectual property treaties. These treaties (such as universal pharmaceutical patents) might have occurred through WIPO during the 1960s and 70s, in the context of the significant North-South divide in the politics of intellectual property[49].

Looking at various aspects of WIPO, such a model may be an optimal structure for an international organisation administering a possible Multilateral Competition Framework

Taken as a whole, the WIPO structure was built on the basis of the WIPO Convention (Stockholm, 1970), which provided the umbrella administrative framework for this organisation. Rights and obligations of members are not detailed therein, but provided in accordance with

respective treaties in various areas of IPRs. This is the striking difference between this model and a WTO framework. WIPO, unlike WTO, provided a menu of treaties, from which members could pick and choose and, in some cases, make reservations about. The diversity of rules, and permissive nature of WIPO treaties, means that developing countries could tailor their intellectual property regimes to meet their development objectives, and join the higher level of cooperation at a later stage. The same can be applied to the area of competition policy and law.

The diversity of rules, and permissive nature of WIPO treaties, means that developing countries could tailor their intellectual property regimes to meet their development objectives, and join the higher level of cooperation at a later stage

Nonetheless, a Cooperation for Development Programme is embedded in WIPO, which is aimed at enabling developing countries all over the world to establish or modernise their intellectual property regimes, consistent with national objectives and requirements; and to utilise them for their social, economic and cultural benefits. Such a system should be suitable for technical assistance and capacity building on competition policy issues, under the multilateral competition framework as well. It is recognised that, in the IP system, there is a need to maintain a balance between the interests of the holders of intellectual property rights and those of the public at large. There should also be a balance between national policy objectives and international IP laws and international agreements. This implies that in a possible multilateral competition framework, the rights of developing countries to be entitled to special and differential treatment, though in compliance with the international framework, should also be recognised and protected.

WIPO has an Arbitration and Mediation Centre, which was established in 1994, to offer Alternative Dispute Resolution (ADR) options including arbitration and mediation service, for the resolution of cross-border commercial disputes between private parties. The subject matter of arbitration and mediations, being filed with the Centre, includes both *contractual disputes* (e.g. patents and software licenses, trademark coexistence agreements, distribution agreements for pharmaceutical products and Research & Development (R&D) agreements), and *non-contractual disputes*[50] (e.g. patent infringement) as well. Both types of disputes can concern individuals (for example, with regard to copyrights or rights of personality), commercial entities (with regard to commercial or competition rights), or even State entities or international organisations.

By nature, competition-related cases are normally categorised as non-contractual disputes[51], and thus, a lot of features in the WIPO model of dispute settlement can be applied to the recommended forum in settling competition cases relatively effectively, in particular, in the following aspects:

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- **Party autonomy**: A major merit of applying the WIPO model of mediation and arbitration for dispute settlement, in place of judicial process, for settling cross-border competition cases in a multi-jurisdictional context, lies in the fact that it recognises and maintains the autonomy of disputing parties.

  Whilst in mediation, the parties construct their own resolution; in arbitration, the views of the arbitrator, on the merits of the

defined issues, are binding on them[52], however, only on the basis of both the parties having voluntarily agreed to enter into the arbitration process. In addition, the parties reserve the rights to "forum shop", *i.e.* they can:

(1) choose the arbitrator(s);
(2) choose the issues to be arbitrated;
(3) choose the place of the arbitration;
(4) choose the substantive law that will control the merits of the dispute;
(5) choose the procedural rules;
(6) choose the schedule;
(7) choose exhibits, witnesses and other evidence to be presented, including arranging for tests and site visits;
(8) choose the form of relief to be awarded;
(9) choose the form of the award; and
(10) agree to facilitate enforcement of the award.

Their national legislation is not overridden by that set out by a supranational body, or principles, or interpretation imposed on them by more powerful trading partners

All these features help to uphold party autonomy, and particularly national sovereignty, in the case of a nation-state being a party to the dispute. Their national legislation is not overridden by that set out by a supranational body, or principles, or interpretation imposed on them by more powerful trading partners.

- **Confidentiality**: The WIPO Mediation and Arbitration Rules also provide for protection of confidential information, whereby the arbitration tribunal determines whether or not a party's information is, indeed, confidential and eligible for protection, pursuant to terms and conditions to be settled by the tribunal.

- **Enforceable award**: In an arbitration case where an arbitral award is decided by the arbitrator/arbitration tribunal. If that award is rendered in a country that is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), it may be enforced relatively easily in any of the more than 120 signatory countries to the Convention. No such all-encompassing Convention, Treaty or legal regime applies to judgements rendered in national courts. Thus, it is far more likely that an arbitral award, as opposed to a court judgement, can be enforced around the world. This has been true with WIPO cases and might apply to cross-border competition cases as well. A decision rendered by a national court or national competition authority (especially in developing countries), on a case involving global or foreign-based entities, may not be enforceable due to lack of extraterritorial jurisdiction. In which case, the situation might be better, with an arbitral award, rendered by a recognised international organisation, which is enforceable by the New York Convention.

A decision rendered by a national court or national competition authority (especially in developing countries), on a case involving global or foreign-based entities, may not be enforceable due to lack of extraterritorial jurisdiction

One important problem is the burden of proof, which normally falls on the claiming parties. In cross-border competition issues, this has always been a near-impossible case for developing country courts or competition/regulatory authorities, whose investigative capacity is normally very limited or non-existent. Whilst WIPO does not have an investigation arm, to supply the dispute settlement body with evidence and facts, a multilateral competition organisation should

be equipped with this power, complementary to its adjudicative power, to overcome this drawback. An Interpol-type investigation body, incorporated into such a forum, will help to solidify the possibility that violations are brought to light and justice carried out. In this case, it may be that the victims and claimants themselves are not in a position, or do not have the required capacity, to produce evidence in support of their claims.

...multilateral competition body could investigate the cases in coordination with local competition authorities/ investigating agencies, rather than just sending its own investigators

Interpol was established in 1923 to facilitate cross-border criminal police cooperation. It is the largest international police organisation in the world. It supports and assists all organisations, authorities and services, whose mission is to prevent or combat international crime. However, it does not have agents who would travel the world over, chasing criminals and conducting investigations in different countries. Interpol, in fact, is an international police organisation extending cooperation for coordinated action on the part of member countries and their police forces, which may furnish or request for information or services for combating international crime; whilst fully respecting the sovereignty of all its members. Similarly, the recommended multilateral competition body could investigate the cases in coordination with local competition authorities/investigating agencies, rather than just sending its own investigators.

Interestingly, there is a branch within Interpol, named the Interpol Intellectual Property Crime Action Group (IIPCAG), which was created in cooperation with representatives from the police, customs, inter-governmental organisations and private sector associations to provide a forum to coordinate, and enhance international action on crimes relating to intellectual property. The IIPCAG aims to facilitate international law enforcement action against IP crime; raise awareness of the economic and social impact of the trade in counterfeit products and pirated goods; create IP crime investigation training programmes; and improve coordination between police, customs and the private sector in intellectual property enforcement matters. There should be no problem if such a model is replicated in the investigative wing of the multilateral competition forum as well.

In short, the sentiments in developing countries are, by and large, against a WTO agreement on competition; developed countries are either seeking a pro-market access approach or putting on an indifferent attitude...

In short, the sentiments in developing countries are, by and large, against a WTO agreement on competition; developed countries are either seeking a pro-market access approach or putting on an indifferent attitude (as they have no big concerns of interests being damaged). With such approaches, at this stage, it is difficult to come out with anything concrete. Recommendations as given above, with respect to building an appropriate forum for administering a possible multilateral competition framework, still remain at a very preliminary level. However, considering the prevalence of cross-border anticompetitive practices in this era of globalisation, the study process should neither be abandoned, nor restricted. Further, details need to be worked out to build up a feasible proposal, which can resolve the current geo-political dilemma, so that legitimate interests of consumers and producers, all over the world, are not sacrificed. In the immediate future, one would need to:

- Strengthen competition policy and law in developing countries, and adopt such regimes where they do not exist;

- Introduce and/or strengthen provisions on the effects doctrine in existing competition laws, to enable them to prosecute cross border abuses;
- Enhance international cooperation on competition issues through the existing bodies, such as UNCTAD, WTO, ICN and OECD; and
- Examine multilateral cooperation efforts in various fields where an arrangement exists, including the pros and cons of such arrangements, to arrive at a model agency for multilateral cooperation on competition.

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20 See Table 1 for the Act.

21 *Alkali Manufacturers' Association of India vs American Natural Soda Ash Corporation (ANSAC) and others*, 1997(5) CTJ 288 (MRTPC).

22 *Haridas Exports vs All India Float Glass Manufacturers' Association*, (2002) 6 SCC 600. The two parties named in this case were involved in another dispute involving similar issues; the ANSAC appeal was joined with it for hearing and adjudication.

23 Based on the judgments of the South African Competition Tribunal, decidedcases/doc/49CRAPR00-1.doc and 49CRAPR00-2.doc and Competition Appeals Court, Case12/CAC/Dec01, from http://www.comptrib.co.za/.

24 Based on OECD (1994). *Merger cases in the real world – A study of merger control procedures*. Paris 1994

25 Morriset J (1997). *Unfair Trade? Empirical Evidence in World Commodity Markets Over the Past 25 Years*. Foreign Investment Advisory Services

(www.worldbank.org/html/dec/Publications/Workpapers/WPS1800series/wps1815/wps1815.pdf)

26 Consumer coffee firms contest this figure, stating that it includes the drink coffee sold across counters in shops, in a personal communication from Nestle's.

27 "Commodities, Markets and Rural Development", Roundtable Meeting organised by UNCTAD, April 30, 2003, New York (www.un.org/esa/coordination/ecosoc/hl2003/RT7%20summary.pdf).

28 See EC Press Release Ref. IP/00/486 at http://europa.eu.int and Clifford Chance's Antitrust Review March 2002 at www.cliffordchance.com for more information on this.

29 Fink, C, A Mattoo, and I C Neagu. 2001. "Trade in International Maritime Services: How Much Does Policy Matter?" *World Bank EconomicReview* 16: 81–108.

30 WTO (2001), *Market Access: Unfinished Business, Post-Uruguay Round Inventory and Issue,* World Trade Organisation, Geneva.

31 Refer to Box 2 for more details on how ANSAC got through (and even strengthened) its pricing policy in India.

32 These cases are quoted by Paasman, Berend R. (1999), "Multilateral rules on competition policy: An overview of the debate", Chile from various sources.

33 UNCTAD, (1997). *World Investment Report 1997: Transnational Corporations, Market Structure and Competition Policy.* New York and Geneva: United Nations.

34 UNCTAD, (2000). *World Investment Report 2000: Cross-border Mergers and Acquisitions and Development.* New York and Geneva: United Nations

35 *Ibid.*

36 Mehta, Pradeep S (1999). "Foreign direct investment, mega-mergers and strategic alliances: Is global competition accelerating development or heading towards world monopolies?". *The Role of Competition Policy for Development in Globalising World Markets*, UNCTAD Series on Issues in Competition Law and Policy. Geneva, United Nations.

37 The actual share may vary according to other estimates, but in the organised sector it is quite large.

38 A section of the MRTP Act requiring government approval for acquisition or transfer of shares in excess of 25 percent of a firm's equity was simultaneously moved to the Companies Act and made applicable only to acquisition by "dominant" firms as defined in the MRTP Act (those with a market share of one-fourth or more). This, however, does not apply to mergers and acquisitions.

39 Nagesh Kumar (2000). "Multinational enterprises and M&As in India: pattern and implications". Paper presented at the *UNCTAD Seminar on Cross-border M&As and Sustained Competitiveness in Asia: Trends, Impacts and Policy Implications* (Bangkok), mimeo.

40 UNCTAD, (2000). *World Investment Report 2000: Cross-border Mergers and Acquisitions and Development.* New York and Geneva: United Nations.

41 Jank, MS, Leme, MFP, Nassar, AM & Faveret-Filho. P., (1999). "Concentration and internationalisation of Brazilian agribusiness exporters", *International Food and Agribusiness Management Review,* 2(3/4): 359-374.

42 The legality of parallel imports under the TRIPs agreement is textually ambiguous, and will perhaps be resolved through jurisprudence over time.

43 *United States v. Pilkington plc*, 1994 Trade Case. (CCH) 70,842 (D. Ariz, 1994).

44 European Commission (2004), Commission approves planned acquisition of Aventis by Sanofi-Synthélabo subject to conditions, Brussels IP/04/545

45 Art. 40(1). TRIPs

46 Art. 39. TRIPs

47 This lacunae has been taken care of in the new Competition Act, 2002, but the new law is yet to be operationalised.

48 Singh, Samir K (2003), *An Analysis of Anti-dumping Cases in India*, Unpublished M.Phil. Dissertation, Department of Economics, University of Delhi.

49 In the 1980s, this lead to the United States "forum shifting" intellectual property standard-setting out of WIPO and into the General Agreement on Tariffs and Trade (GATT) (later the WTO), where the North had greater control of the agenda. This strategy paid dividends with the enactment of the Agreement on Trade-Related Aspects Intellectual Property Rights (TRIPs).

50 It is noteworthy that, when violations of rules in the field are in issue, the parties concerned often are not confronted in the form of a conflict between them, so the question arises whether the situation may properly be classified as "dispute" in the legal sense. Nevertheless, there is considerable potential for conflict in this area, and it is therefore important that the issues be dealt with efficiently.

51 The European Commission, for example, in its Rome II project, included unfair competition claims amongst cross-border non-contractual disputes.

52 Non-binding, advisory opinions of an arbitrator may be sought and agreed to by the parties, but the majority of arbitral awards in commercial disputes are binding on the parties.

CUTS' PUBLICATIONS
Competition, Investment & Economic Regulation

EVENT REPORT

1. **The UN Code of Conduct for TNCs: Why it collapsed...The Way Ahead**
   It contains evidence submitted at the Permanent Peoples' Tribunal, London, November 1994. It includes a statement with supporting enclosures that include several original documents. An extremely good resource material for anyone interested in the issues of regulation of global business. *(pp 121, #9401, Rs.30/US$15)*

2. **Investments: Consumers, Development and the Environment**
   This is a report of the CI-CUTS International Seminar on Multilateral Frameworks for Investment, Geneva, 18-19 October, 1996. It contains 10 papers from eminent experts of different viewpoints. The report covers issues concerning investment liberalisation and its impact on consumer, development and environment. A must-read for those following international investment agreements. *(pp 93, #9602, Rs.50/US$15,ISBN: 81-87222-03-4)*

3. **Liberalised Trade & Fair Competition**
   This is a report of the IOCU-CUTS International Conference on Competition Policy in the Context of Liberalisation, New Delhi, 20-21, January, 1995, containing 19 papers from eminent competition practitioners and economists from all over the world. The recommendations include calling upon the WTO and UNCTAD to develop work programme on trade and competition and governments to involve public interests groups in policy-making. A good documentation for anyone interested in trade and competition issues. *(pp 144, #9501, Rs.100/US$25)*

4. **Too Big for Rules**
   This is a report of the IOCU-CUTS International Conference on Fairplay in Global Business, February 14-15, 1994, New Delhi, which contains several documents relating to trade and Trans-national Corporations (TNCs). It is a comparative statement of the draft UN Guidelines for Transnational Investment, the International Chamber of Commerce's (ICC) Guidelines for Investment and the OECD Declaration for Multinational Enterprises. It also contains the Delhi Declaration adopted in the conference. *(pp 105, #9409, Rs.50/US$25)*

5. **Challenges in Implementing a Competition Policy and Law: An Agenda for Action**
   This report is an outcome of the symposium held in Geneva on "Competition Policy and Consumer Interest in the Global Economy" on 12-13 October, 2001. The one-and-a-half-day event was organized by CUTS and supported by the International Development Research Centre (IDRC), Canada. The symposium was addressed by international experts and practitioners representing different stakeholder groups viz. consumer organisations, NGOs, media, academia, etc. and the audience comprised of participants from all over the world, including representatives of Geneva trade missions, UNCTAD, WTO, EC, etc. This publication will assist people in understanding the domestic as well as international challenges in respect of competition law and policy. *(pp 48, #0202, Rs.100/US$25, ISBN: 81-87222-54-9)*

6. **Competition Policy and Pro-Poor Development - A report of the Symposium on Competition Policy & Pro-poor Development**
   This document covers the deliberations at a one-day symposium looking at how competition policy and law relate to pro-poor development. This report carries the papers, which were produced and presented at the three sessions by young researchers associated with the project. The proceedings carry the rich debates, involving many of the experienced and highly recognised experts from all over the world, which were held around the three presentations.
   (Rs. 250 for India/US$20 for OECD countries/US$15 for others, ISBN: 81-8722-93-X)

DISCUSSION PAPERS

1. **Capacity Building on Infrastructure Regulatory Issues**
   The role of civil society is critical in shaping regulatory capacity. It helps in resource mobilisation and experience sharing, which in turn, helps regulatory agencies to form a strong platform from where they can build further. This document is intended to kick-start debate among the stakeholders – Government, regulatory bodies and civil society – to catalyse an appropriate regulatory environment in India.
   (Rs.100/US$50, ISBN 81-8257-020-4)

2. **Multilateralisation of Sovereignty: Proposals for Multilateral Frameworks for Investment**
   The paper written by Pradeep S Mehta and Raghav Narsalay analyses the past, present and future of investment liberalisation and regulation. It also contains an alternative draft, International Agreement on Investment.
   (pp 148, # 9807, Rs.100/US$25, ISBN: 81-87222-14-X)

3. **Investment Policy in Zambia—Performance and Perceptions**
   Is the current investment framework and legislation sufficient to attract FDI in Zambia? If not, what additional measures need to be put in place? The report addresses these questions through review of Zambian investment

policies and their performance and aims to create awareness about the investment policymaking process by a study of data and perceptions of stakeholders. *(Rs.100/US$25, ISBN: 81-8257-011-5)*

4. **Investment Policy in Brazil—Performance and Perceptions**
This report highlights the important issues in policy reform, investment trends and civil society view on the contribution of foreign investment to Brazil's economy. It is a valuable contribution to the understanding of FDI trends and their impact in the past decade. A useful compendium of information, it is a handy guide for comparative studies of other developing countries.
(Rs.100/US$25, ISBN: 81-87222-95-6)

5. **Investment Policy in Tanzania—Performance and Perceptions**
The report captures the perceptions of the Tanzanian civil society of the contribution and benefits of FDI to Tanzania's social and economic development and its potential in attracting FDI. While development partners and the private sector have a role to play in enhancing FDI inflows, the brunt of making FDI work for the development of Tanzania lies within the remit of the government, says the study.
(Rs.100/US$25, ISBN: 81-8257-009-3)

6. **Investment Policy in India—Performance and Perceptions**
Foreign investment may have begun coming in after India launched its liberalisation programme in 1991, but India's performance in attracting FDI has not been very encouraging. This report attempts to study the investment regime and actual performance of India with a view to build capacity and awareness of investment issues and draw out the lacunae of the present system.
(Rs.100/US$25, ISBN: 8257-007-7)

7. **Investment Policy in South Africa—Performance and Perceptions**
This report reviews key policy issues related to investment in South Africa, and the performance and perceptions of investment with specific focus on FDI. It represents a comprehensive treatment of South Africa's investment regime since the inception of its democracy in 1994. Containing a systematic overview of related policy areas, it provides and understanding of the interface between economic performance and domestic and foreign investments.
(Rs.100/US$25, ISBN: 81-8257-013-01)

8. **Investment Policy in Bangladesh – Performance and Perceptions**
Despite favourable investment regime on paper, Bangladesh has not been receiving FDI in greater quantity, particularly in recent times. The study makes a good attempt at understanding the investment regime and actual performance of multiple actors in the field of FDI in Bangladesh in the global and national context.
(Rs.100/US$25, ISBN: 81-8257-012-3)

9. **Investment Policy in Hungary – Performance and Perceptions**
The transformation process in Hungary had some experiences with FDI even before 1990. It is therefore possible to regard Hungary as an example of FDI-led economic reconstruction and development model. The following analysis tries to sum up both the gains and pitfalls of this FDI-led economic development model.
(Rs.100/US$25, ISBN: 81-8257-020-4)

10. **Restrictive Business Practices in Nepal**
This paper attempts to study the restrictive business practices (RBPs) prevalent in the Nepalese market. The main recommendation of the study is that the bureaucrats and policy makers have to be educated about the need to promote competition in the marketplace. Similarly, there is also a need to formulate and implement a dynamic and comprehensive competition policy that suits the structure of the Nepalese market. The study introduces the reader to the Nepalese history and the process of industrialisation and economic reforms, and throws light on the RBPs experienced at the local level.

RESEARCH REPORTS

1. **Analyses of the Interaction between Trade and Competition Policy**
This not only provides information about the views of different countries on various issues being discussed at the working group on competition, but also informs them about the views of experts on competition concerns being discussed on the WTO platform and the possible direction these discussions would take in near future. It also contains an analyses on the country's presentations by CUTS.
(Rs.100/US$25, ISBN 81-87222-33-6)

2. **The Functioning of Patent Monopoly Rights in Developing Economies: In Whose Interest?**
Advocates of strong international protection for patents argue that developing countries would gain from increased flows of trade, investment and technology transfer. The paper questions this view by examining both the functioning of patents in developing economies in the past and current structural trends in the world economy in these areas. The historical research revealed no positive links between a strong patent regime and FDI and technology transfer. Current trends are largely limited to exchanges amongst the industrialised countries and to some extent, the newly industrialising countries. While increased North/South trade flows are expected, negative consequences are possible.
(Rs.100/US$25, ISBN 81-87222-36-0)

3. **Towards a New Competition Law in Sri Lanka**
This is the Sri Lanka country report, which will feed into the first phase of the Comparative Study of the Competition Law Regimes of select developing countries of the Commonwealth also known as 'the 7-Up Project', undertaken by CUTS, supported by the Department for International Development (DFID),

U.K. The research project aims to identify measures that would assist developing countries in strengthening their competition laws and introducing such laws where they are absent. Sri Lanka is in the process of formulating and adopting a new competition law in the year 2002, twenty-five years after market liberalisation. The issue for Sri Lanka may very well be whether the Sri Lankan economy is sufficiently mature to sustain an effective competition policy regime to reap the many benefits that such a policy has to offer.
(pp 51, #0206, Lankan Rupee (LKR) Rs. 150/Indian Rupees (INR) Rs.100/US$10 ISBN: 81-87222-65-4)

4. **Competition Law & Policy – A Tool for Development in Tanzania**
The report makes a critical assessment and review of the competition regime in Tanzania based on the Fair Trade Practices Act of 1994 and the subsequently created institutions. In this report, economic and law based researchers carefully explore the competition regime in Tanzania, bringing to fore the different facets of competition policy in the country, including the socio-economic and public policy context. These sections explain concentration issues, direct investment, trade orientation, financial sector reforms and various policies important for competition law and policy to work.
(pp 49, #0207, Tanzanian Shilling (TSH) 1000SH/ INR Rs.100/US$10 ISBN: 81-87222-66-2)

5. **Promoting Competitiveness & Efficiency in Kenya – The Role of Competition Policy & Law**
Since the beginning of the 1990s, competition policy has been increasingly recognised as a key component in the ongoing reforms of most developing countries. For Kenya, an important dimension of current changes in competition policy involves the introduction of competition to areas from which it was previously absent, in particular telecommunications and related public infrastructure services. Another important dimension of competition policy in Kenya concerns mergers and takeovers. The Monopolies and Prices Commission (MPC) has responsibility for lowering monopolistic tendencies in the economy. This report examines the scope and context of competition policy and competition law in Kenya, the socio-economic development of the country, an assessment of Kenya's competition law, administrative aspects of the law and capacity and needs of the MPC.
(pp 54, #0208, Kenyan Shilling (KSH) 100/ INR Rs.100/ US$10, ISBN: 81-87222-62-X)

6. **Competition Policy & Law in South Africa – A Key Component in New Economic Governance**
The report assesses the competition framework in South Africa, with a view to the effectiveness in promoting economic efficiency and consumer welfare as part of economic development. The report is an input into the 'Comparative Study of Competition Regimes in Select Developing Countries', co-ordinated by CUTS. The report locates the rationale for competition policy in a South African context. It then outlines the changing competition regime with the enactment of the Competition Act of 1998 and the establishment of the Competition Commission, Competition Tribunal and Competition Appeals Court in 1999.
(pp 45, #0209, Rands (RN) 10/ INR Rs.100/US$10, ISBN: 81-87222-64-6)

7. **Competition Regime in Pakistan – Waiting for a Shake-Up**
The report introduces the existing competition legislation and competition policy issues in Pakistan and gives recommendations on how to improve upon the existing legislation and the capacity of the competition authority. It discusses the economic performance of the country, the nature of markets and competition in Pakistan, provides a brief overview of the available literature on industrial concentration, establishing a case for a well-defined competition policy and law. It also deals with the social and economic policies of the Government that affect competition.
(pp 41, #0210, Pakistani Rupees (PKR) Rs. 100/INR Rs.100/US$10 ISBN: 81-87222-63-8)

8. **Enforcing Competition Law in Zambia**
The paper examines the adequacy of the Competition and Fair Trading Act of 1995 as applied in Zambia. An attempt has been made to relate competition law to economic development policy in general and, more specifically, to market liberalisation policies, policies on FDI, consumer protection and other sector-specific regulations. Since competition law in Zambia seeks to protect consumers by encouraging competition and fair-trading, this project also addresses the effectiveness of the regulatory authorities in prohibiting/regulating the monopolies that operate in the economy. While assessing the effectiveness of the Zambia Competition Commission (ZCC), procedural issues regarding its powers and responsibilities, its functions, coverage, constraints and prospects are also examined.
(pp 54, #0211, Zambian Kwacha (ZK) 5000/INR Rs.100/ US$10, ISBN: 81-87222-67-0)

9. **Reorienting Competition Policy and Law in India**
The Report reviews the existing Competition Law, the Monopolies and Restrictive Trade Practices Act (MRTP) and the proposed new law, focusing on the implementation of the MRTP Act. A number of important issues, such as the division of overlapping jurisdictions between the Central Competition Authority and Sectoral Regulators, the composition of the new Competition Authority proposed under the new law and most importantly, the extent of discretionary powers to be vested with the new Competition Authority, still elude broad consensus in the country. However, by pulling together the diverse elements of the competition regime in India and focusing on the gaps between the laws and their implementation, it is hoped this Report will lead to improved awareness of this critical area of policy reform in the economy. *(pp 47, #0212, INR Rs.100/ US$10 ISBN: 81-87222-61-1)*

10. **Pulling up Our Socks**
    This report is the compilation and synthesis of the research results of the 7-Up Project, which is a comparative study of the competition regimes of seven developing countries of the Commonwealth, namely, India, Kenya, Pakistan, South Africa, Sri Lanka, Tanzania and Zambia, implemented by CUTS, with the support of the DFID, UK. The report compares the institutional framework in the project countries and analyses important issues like legal provisions, autonomy of the institutions, financial and human resources, etc. It concludes with suggestions and recommendations for strengthening the competition regimes in these countries. If you are interested, please ask for a copy. *(pp 68, #0303, INR Rs.250/US$15 ISBN: 81-87222-74-3)*

11. **Putting our Fears on the Table**
    Analyses of the proposals on investment and competition agreements at the WTO
    "Putting our Fears on the Table" is the title of a recently published report of the CUTS Centre for International Trade, Economics & Environment. It provides analyses of the proposals on investment and competition agreements at the WTO, especially in the areas taken up and/or proposed at Doha for possible future negotiations. This volume is a product of comprehensive research and dialogue of leading international experts, practitioners and other stakeholders. It will really help developing countries to comprehend and deal with the issues in the WTO context. This timely and comprehensive report will provide valuable inputs to negotiators and all other stakeholders who play a role in evolving negotiating positions of countries.
    (Rs.300 for India/US$25 for OECD Countries/US$15 for other) ISBN 81-87222-84-0)

12. **State of the Indian Consumer: Analyses of the Implementation of the UN Guidelines for Consumer Protection, 1985, in India**
    The UN Guidelines for Consumer Protection, 1985, outlined eight consumer rights. In India, the Consumer Protection Act, 1986, mentioned six consumer rights. The report analyses the state of implementation of the UN Guidelines in India.
    (pp 218, #0103, Rs.200/US$25, ISBN: 81-87222-21-2)

13. **Approaches to Competition Policy in South Asian Countries**
    There has been a growing concern, both at the international and the domestic level, more particularly among the developing countries, about the need to develop a comprehensive legal framework to deal with anti-competitive practices in order to promote an orderly market growth. This research report of the CUTS Centre for Competition, Investment & Economic Regulation intends to trigger debate and discussions on competition policy in the South Asian Countries from national, regional and global perspective. *(Rs.100/US$25, ISBN: 81-8722-78-6)*

14. **Towards a Functional Competition Policy For India – An Overview**
    The project report, edited by Pradeep S Mehta, comprises of 22 chapters, which highlight various systematic and sectoral issues. The report is being published as two separate volumes. One is an overview, which presents all the papers in a précis form, so that a busy reader can go through them easily and get a flavour of what the issues are. The second is a more detailed report, with all papers offered in a greater depth. The study helps in getting a better understanding of the competition scenario in India and will be useful to those who are interested in economic policies, in general, and competition policy, in particular. (Pp 248, Rs. 495/US$32.95, ISBN: 817188449-0)

MONOGRAPHS

1.` **Role of Competition Policy in Economic Development and the Indian Experience**
    Competition and efficiency are the guiding principles of the liberal economic order. Any healthy competition must have rules that the players should follow. This is more so when the players are business organisations and their activities have a larger impact on the society. This monograph examines the role of an effective competition policy in economic development from an Indian perspective.
    (pp 32, # 9908, Rs.50/US$10, ISBN: 81-87222-25-5)

2. **FDI, mega-mergers and strategic alliances: Is global competition accelerating development or heading towards world monopolies?**
    Foreign Direct Investment, mergers, amalgamations and strategic alliances are the rules of the present day global economy. However, the crucial question is whether the movement of capital leads to further development and welfare of the society or the growth of monopolies. The monograph sheds light on the main contours of the global competition and its implication for consumers. *(pp 24, #9909, Rs.50/US$10, ISBN: 81-87222-26-3)*

3. **Competition Regimes Around the World**
    In this paper, an attempt has been made to compile, briefly, the current state of competition law in some select countries on which information is readily available. The paper steers clear of any value judgements on the design and implementation of competition law in the countries covered therein.
    (pp 40, #2002, Rs.50/US$10, ISBN: 81-87222-31-X).

4. **Globalisation, Competition Policy and International Trade Negotiations**
    This paper maps out the issues concerning multilateral competition policy from a southern perspective. It concludes that there is a need for a realistic assessment of the extent to which developing countries would be able to control MNCs under the disciplines of competition law. *(pp 38 #2003, Rs.50/US$10, ISBN: 81-87222-32-8).*

5. **Trade, Competition & Multilateral Competition Policy**
This monograph clarifies the areas of interaction between trade and competition through case studies and shows such interactions are on the rise. It also highlights efforts being made for a multilateral competition policy after the Second World War in the form of Havana Charter. Most importantly, the paper brings forward the debate vis-à-vis multilateral competition policy that is currently taking place at various policy fora.
(pp 36, #0005, Rs.50/US$10, ISBN: 81-87222-35-2).

6. **All About Competition Policy & Law**
This monograph, meant for the advanced learner, deals with various elements of competition law and policy in a comprehensive manner. It describes various restrictive business practices (RBPs) in the market place. It further draws out interface of competition policy with economic development and foreign investment. Finally, it describes the genesis of competition law/policy and the direction it is moving in. *(pp 70 #0006, Rs.50/US$10, ISBN: 81-87222-37-9).*

7. **All About International Investment Agreements**
This briefing kit for the general reader provides an overview of recent trends in the proliferating number of bilateral and regional investment agreements. The kit highlights the key issues in these agreements and considers past initiatives and prospects at the multilateral level.
(pp 64, #0102, Rs.50/US$10, ISBN: 81-87222-39-5).

8. **Competition Policy & Law Made Easy**
This is a booklet on competition policy and law in a simple language. The purpose of this monograph is to introduce competition policy and law to consumer and other activists and general public. This publication aims to generate awareness that could be helpful for a common person to identify anti-competitive practices in the market place. *(pp 36, #0109, Rs.50/US$10, ISBN: 81-87222-48-4)*

9. **Making Investment Work for Developing Countries**
This publication is another in our series of monographs on investment and competition policy intended to introduce related topics to a wide audience. This monograph will also serve as a reference point for those interested in the complex and sometimes controversial relationship between foreign direct investment and development. *(pp 38. #0110, Rs.50/US$10, ISBN: 81-87222-49-2)*

10. **Foreign Direct Investment in Developing Countries: What Economists (Don't) Know and What Policymakers Should (Not) Do!** Among the different forms of capital flows, academics and policy makers talk about foreign direct investment (FDI) the most. In the past fifteen years, FDI has been the dominant form of capital flow in the global economy, even for developing countries.
We, at CUTS have attempted to highlight various aspects of the debate on FDI through a series of monographs on investment and competition policy. This, being another one in the series, discusses the global FDI trends and determinants, and tries to highlight some of the arguments on the link between FDI and growth. We are extremely grateful to Peter Nunnenkamp of Kiel Institute of World Economics, Germany for allowing us to publish this.
(pp 30, #0216, Rs.50/US$10, ISBN: 81-87222-70-0)

11. **Impact of the Economic Reforms in India on the Poor**
The question is whether benefits of the reforms are reaching the poor or not. This study aims to draw attention to this factor by taking into account inter-state investment pattern, employment and income generation, the social and human development indicators, the state of specific poverty alleviation programmes as well as the impact on the poor in selected occupations where they are concentrated.
(pp 15, #9806, Rs.50/US$10, ISBN: 81-87222-12-3)

12. **Regulation: Why and How**
From consumer's viewpoint, markets and regulators are complementary instruments. The role of the latter is to compensate in some way the failings of the former. The goal of this monograph is to provide a general picture of the whys of regulation in a market economy.
(pp 34, #9814, Rs.50/US$10, ISBN: 81-87222-17-4)

13. **Consumer Protection in the Global Economy**
This monograph outlines the goals of a consumer protection policy and also speaks about the interaction between consumer protection laws and competition laws. It also highlights the new dimensions about delivering consumer redress in a globalising world economy, which raises jurisdictional issues and the sheer size of the market. *(pp 38, #0101, Rs.20/US$5).*

14. **Towards a Healthy Competition Culture…**
This advocacy document, prepared under the 7-Up Project, is intended to build awareness in policy-makers and negotiators and stimulate debate on competition policy in the national and international contexts. It presents action points for key stakeholder groups in order to promote a healthy competition culture.
(pp 68, #0304, Rs.50/US$5 ISBN: 81-87222-75-1)

15. **Friends of Competition**
This handbook, which has been prepared on the basis of the experiences gained from the 7-Up Project, aims to outline an ideal capacity-building programme for promoting an effective and healthy competition regime in the targeted countries. With necessary variations to suit the socio-politico-economic environment, this would be applicable to most developing and transition countries.
(pp 40, #0301, Rs.100/US$10, ISBN: 81-87222-72-7)

16. Market Practices in Zambia: Where do the consumers stand?

This extensive account of market practices in Zambia provides a wealth of information not only for policymakers but also for consumer groups and other reform-minded interest groups. The study delves deep into competition- and consumer-related issues in different sectors of the Zambian economy. Especially, it outlines what types of anticompetitive behaviour are observable in present day Zambia and what actions the state and consumer groups like the Zambia Consumers Association have taken in response.
(Rs.100/US$5, ISBN: 81-87222-81-6)

17. Competition and Consumer Protection Scenario in Uganda

This extensive account of market practices in Uganda provides a wealth of information not only for policymakers but also for consumer groups and other reform-minded interest groups. The study delves deep into competition- and consumer-related issues in different sectors of the Ugandan economy. Especially, it outlines what types of anti-competitive behaviour are observable in present day Uganda and what actions the state has taken in response. *(INR100/US$5, ISBN: 81-87222-85-9)*

18. Why is a Competition Law Necessary in Malawi

Malawi is in the process of complementing the existing legislation to enable competition in the economy. There has not been any comprehensive study in anti-competitive practices in Malawi. This monograph aims at giving an overview of Malawi's regulatory regime (including competition regime); some of the common anti-competitive practices in Malawi; and review the prevalence of each practice and efforts taken/not taken to arrest the problem. *(MWK150/INR100/US$5, ISBN: 81-87222-73-5)*

19. Restrictive and Unfair Trade Practices Where Stands The Consumer

A healthy competition in market can be hampered by a monopoly, restrictive business practices (RBPs) or unfair trade practices (UTPs). This handbook in its simple question-answer format tries to outline the nature of restrictive trade practices, unfair trade practices and unconscionable conducts, and the response of laws to them in different countries. *(Rs. 50/US$10)*

20. FDI as a Source of Finance for Development

Foreign Direct Investment has assumed increasing importance as a source of finance for development in recent years. This monograph, written by Dr. Peter Nunnenkamp of the Kiel Institute of World Economics, Germany, and published by CUTS, is an important contribution towards answering the question: Does turning to FDI put development finance on a more sustainable path?

It presents two broad policy challenges for developing countries, which, if met, could contribute to the fulfillment of development goals: first, making the domestic environment attractive to FDI and second, ensuring that beneficial effects of FDI are reaped. It drives home the point that attracting greater FDI inflows does not necessarily imply that FDI will contribute to poverty reduction through income growth.

The monograph gives a balanced assessment of the role of FDI and thus, makes an interesting read! *(pp 34, #0216, Rs. 50/$10, ISBN: 81-87222-80-8)*

21. Home Country Measures and FDI: Implications for Host Country Development

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ISBN 81-8257-055-7

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