Consumers, Multilateral Competition Policy and the WTO: Technical Report

March 2003

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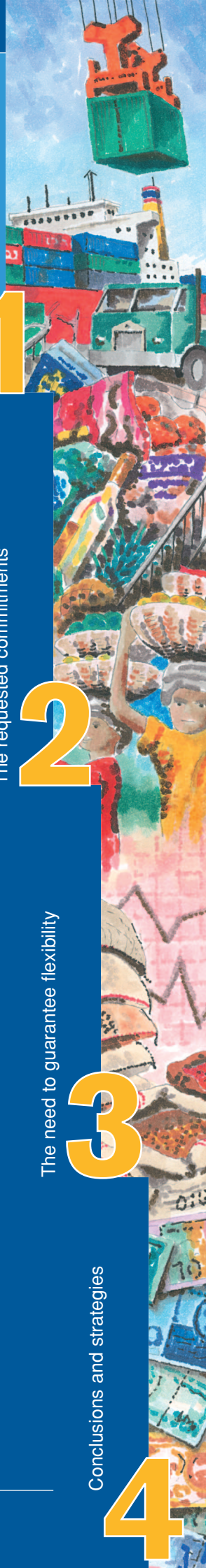

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Foreword

Consumers International (CI) has been actively concerned with competition policy for over a decade. Recognising that competition policy is of direct benefit to consumers in promoting competitive or "fair" markets, rather than promoting the interests of individual competitors, CI urged the inclusion of competition policy at the WTO in 1993. CI then welcomed the establishment of the Competition Working Group at the first Ministerial Conference in 1996. At Doha, CI continued to articulate a need for competition to be kept on the agenda, whilst stressing that it would be premature to move to negotiations without further deliberation and discussion.

In this post-Doha context, CI has increasingly worked to develop the expertise and capacity of consumer organisations to have an effective voice in discussions and decision-making processes at the national, regional and multilateral levels. CI Member Organisations undertook research into competition regimes at a national level,[1] and commissioned discussion papers on regional and multilateral competition policy. The results of the Multilateral Competition Discussion Paper indicated that there was a clear need to further explore the more technical issues involved in framing a multilateral competition agreement.

Consequently, in October 2002 Consumers International commissioned a Technical Report, identifying contributors with extensive legal, economics and policy expertise and experience in the field of trade and competition. The Technical Report is designed to analyse the implications of the primary proposals for commitments at the WTO for a multilateral competition agreement, should the decision to negotiate a WTO competition agreement be taken at the Cancun WTO Ministerial Meeting in September 2003.

The objective of this report is to identify the various consumer perspectives that should be incorporated into any multilateral competition agreement discussion. It will also ensure that the consumer movement has the resources to undertake informed lobbying in these discussions and build on the consumer movement's natural role in encouraging a competition culture.

The Technical Report is not intended to produce Consumers International's policy on a multilateral competition agreement in the WTO, but rather to develop the global consumer view on the type of competition-related negotiations and modalities that should or should not go forward at the WTO's 5th Ministerial.

The first draft of the report was put before a round table of experts for a peer-group review in January 2003. The final report will be available on the Consumers International web site, along with the Multilateral Competition Agreement Discussion Paper, Competition Handbook and Information and Advice Kit. This resource suite was developed within the Consumer Movement and Competition Policy Post-Doha Programme, supported by the UK Department For International Development.[2]

Designed and produced by Steve Paveley

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Acknowledgements

This technical report was prepared by 6 trade and competition experts commissioned to write about specific issues relating to multilateral competition agreements (MCAs) and the implications of locating any such agreement within the WTO. This process resulted in a collaborative report identifying issues of importance to consumers, while maintaining the individual perspectives of each of the experts.

CI would therefore like to warmly thank Dr. Simon Evenett for his leading work on hard core cartels, development strategies, and capacity building, Professor Peter Holmes for providing an overview of the issues and conclusions, Dr. James Mathis for leading the discussion on UNCTAD and WTO submissions and negotiating strategy options, Philippe Ruttley for transparency and Dr. Taimoon Stewart for her work on maintaining flexibility, international cooperation, and the usefulness of core principles for small and less developed economies, and to Dr. Philip Marsden, who was both leading contributor on national treatment and non-discrimination and editor for the completed report.

As a part of the process of producing this Technical Report, an initial draft was reviewed at a meeting organised in January 2003. We would therefore like to thank the 30 or so competition experts who attended this meeting and contributed positively to the final report.

The work of the Technical Report was undertaken within the Consumer Movement and Competition Policy Post Doha programme, funded by the UK Department For International Development (DFID). In addition to gratefully acknowledging the support of DFID, this work built on existing activities with CI, that were funded by the Ford Foundation, the ministry of foreign affairs of the Dutch Government, the European Union, the International Development and Research Centre (IDRC), and Oxfam.

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Executive summary

- Existing national measures to tackle hard-core cartels are inadequate. Some countries do not have enforcement regimes; others do but don't use them enough to deter cartels. The experience of the 1990s shows that these cartels cost consumers billions of dollars every year.

- There is a case for minimum standards for national cartel enforcement, so that trading partners are not harmed by any one country's under-enforcement (which creates safe havens for cartels.)

- Binding commitments may be necessary as non-binding international accords (specifically, the UNCTAD Set and OECD Cartel Recommendation) have only secured improvements in a piecemeal fashion.

- At present, a binding agreement can only be achieved in the WTO. Competition provisions already exist within the WTO, and GATT Article III currently requires de facto non-discrimination for all laws that might affect trade in goods.

- There are some aspects of competition law and policy – particularly with respect to enforcement co-operation for example – for which voluntary arrangements and best practice guidelines in any fora should be pursued.

- There are numerous ways in which flexibility could be built into a multilateral framework on competition policy and overcome concerns that a binding agreement might impose a particular (and inappropriate) framework of national competition policy on developing economies.

- The concern that such a framework should not involve extensive outlays, which could be used on more pressing health/safety/development issues, may do a disservice to consumers in developing economies as it ignores the benefits of competition policy. Multilateral obligations should not be viewed solely as burdens.

- The necessary basic principles of the multilateral trading system have been applied to competition policy matters in certain existing WTO agreements; these could provide some guidance to policymakers and trade negotiators.

- Precise explication of Special and Differential Treatment (SDT) is essential to protect the interests of countries at very different stages of development and with different levels of legislation and experience with handling competition cases. Existing proposals for a multilateral framework on competition explicitly entertain the use of exemptions, exclusions, and other modalities that could effectively create different obligations for signatories.

- Many commentators and Consumers International Members still question whether the WTO is the appropriate forum to consider competition policy matters; this reflects an underlying distrust and also fear that any negotiations will mutate into ones about market access.

- It is a particular concern that many WTO Members lack the expertise and experience to participate effectively in negotiations on a competition agreement.

- In so far as a competition agreement might affect market access, it must be appropriately managed to ensure the most pro-competitive, pro-consumer and pro-development outcome.

Introduction to the issues

The consumer interest identified

There is a well-recognised convergence between consumer interests and the promotion of market competition. From both an economic and legal perspective, the consumer interest argument in favour of competition policy – legislation and its effective implementation – has an impressive philosophical and scientific support. Consumer interests could therefore be assumed to lie in the promotion, preparation, adoption and implementation of national competition laws[3] and where necessary and appropriate, in international agreements to deal with anti-competitive activity.

However, strategies to achieve these objectives need to be practical and realistic. Some countries see national competition laws as a tool which states can use to address the market imperfections resulting from international competition and the process of globalisation. Others see these laws (and those promoting them), as aiming to pry open domestic markets to transnational enterprises. This view can be found in countries that while relatively closed, are actively seeking to generate rivalry among domestic firms, as well as in more open markets that choose to shelter particular domestic dominant state or private businesses by the non-application of competition policy. From both perspectives, the prospects of an international competition policy framework that is enforced from outside is suspected of attempting to either bypass a state's otherwise lawful trade and investment barriers and/or, seeking to unravel the private restrictive arrangements that may be serving as a last bulwark to ensure domestic participation in the market.

These are nearly diametrically opposite points of view – one that competition laws enhance state power to address globalisation, the other that the same laws are instruments of globalisation itself. Although both cases can be challenged on economic or legal grounds, the perceptions and expectations of participants in negotiations will certainly matter.

At this stage, there is clearly no common understanding of the importance of competition regimes and how they may be used and consumer interests can readily be caught between opposing positions. This report has been prepared to help to clarify the consumer interest in competition at a multilateral level, and how this might be best served by an international agreement.

1: Is there a need for a multilateral competition agreement?

An historical and economic overview

The interaction of trade, consumer and competition policy is not a new one. The first author to devote extensive space to this was Adam Smith whose *Wealth of Nations* devoted a large part of Book 2 to the evils of trading monopolies. He found that exclusive trading monopolies such as the British and Dutch East Indies Companies both drove down the prices paid to impoverished inhabitants of the developing countries they dealt with and also overcharged consumers in Europe.

Smith anticipated one of the widespread critiques of modern multinational corporations. His ultimate target of criticism was of course the governments who had not merely tolerated but had actually established these international monopolies. Smith believed that the cure to this was not to regulate the monopolies (after all who would do the regulation but the very governments that created them?) Rather the monopolies should be broken up and anyone who wanted to trade should be allowed to do so; some traders would merge, but all would end up competing in the same rather than separate markets, and inevitably this competition would help to offer the best prices to both European consumers and to overseas suppliers.

To some extent this did happen with the rise of free trade in the nineteenth century, but with the emergence of modern industrial structures two countervailing forces have constantly been at work. On the one hand it is in the very nature of dynamic capitalist business to innovate by creating new products, entering new markets and undertaking every strategy possible to preserve the resulting profits. Cartels, wide patents, barriers to entry, mergers with potential rivals are part of this market struggle. At the same time the very existence of dominant or even highly profitable market positions leads rivals to imitate, enter, improve their competitive offer, and counter-attack.

Globalisation in the last 30 years has witnessed - and even helped - large firms with a degree of dominance in their home market trying to extend their market position to the whole world; at the same time it has given opportunities for new players to enter and challenge these dominant players where they once thought they were safe. We have seen some giant firms achieve truly global dominance, while others who once might have felt they could take their home market for granted have been left humiliated in the face of new entrants. The process of "competition" is not therefore a simple

matter of smooth equilibrium; rather it is a dynamic process in which the pursuit of profit can lead to many different kinds of outcome.

The dynamism of competition

In considering the various attempts that have been and are being made to create a multilateral framework agreement on competition, the most crucial point from a trade, competition, consumer and even developmental perspective is not to let anything sacrifice the essential dynamism that is at the heart of true competition. It is from this that innovation comes, and with it new products, new competition, the profits to enter and invest in new markets, and the healthy competitive discipline necessary to keep existing competitors in check.

While many firms recognise that they can benefit from this dynamism, some are also afraid of it and seek private and state means of protecting themselves. Because of this, the period 1920-45 was one in which the globalisation process set off in the 19th Century slowed down and even ground to a halt. From a free trade perspective the world suffered from the twin evils of state sponsored protectionism and the rise of a remarkable number of little known cartels, for example in steel and chemicals. Despite their rivalry, the big firms recognised that they had a common interest in maintaining closed markets. It is often forgotten that a monopoly in country A will be ready to unite with its "competitor" in country B to persuade both governments that a protectionist trade policy in both could minimise competition and maintain stable and separate market shares.

Modern international trade theory tells us that one of the most powerful benefits of international trade is its potential to prevent domestic firms from abusing their positions in this manner. Such efforts to open closed markets to competition also needs to be supplemented by an active competition policy, to ensure that companies do not simply re-erect private barriers to foreign entry themselves.

The issue of international cartels in particular was high on the agenda of policy makers after 1945 when the Havana Charter proposed a worldwide programme of trade liberalisation and also a global agreement to control restrictive business practices that could distort trade. But the Havana Charter was never signed, and only the *GATT (General Agreement on Tariffs and Trade)* came into force in 1947. The *GATT* committed signatories among other things to:

- freeze ("bind") their tariffs at their initial levels
- periodically negotiate a lowering of these bound levels
- introduce various other non-discrimination provisions into their laws and remove "non tariff barriers"
- to depart from these basic principles only in special emergencies and according to special procedures (e.g. for anti-dumping and safeguards)

The GATT itself did not impose any obligations to deal with anti-competitive private practices that might frustrate the binding and ultimately lowering of tariffs and government initiated barriers to trade.

On the other hand the authors of the *Treaty of Rome in 1957*, which established the European Union, did expressly take this into account. Governments in the new common market were clearly concerned that private barriers to trade might replace the tariffs and other barriers due to disappear totally by 1969. The *Treaty of Rome* only targeted restrictive business practices that affected trade between Member States: it was for Member individual governments to deal with their own domestic problems.

The key danger was that dominant firms in (say) Germany might be able to erect private barriers to entry to prevent French firms taking advantage of the market opening. This could take a number of possible forms. The dominant firm might seek to control distribution chains in Germany. It might deliberately seek to make targeted prices cuts in the areas where any upstart rival tried to enter. Usually the new entrant would have to cut prices in its new market: the incumbent firm could respond by cutting prices in the entrants home market while not cutting prices in its own, thus signalling that it would prefer to keep prices up, but was ready to fight if it had to. At the same time, firms across Europe could form a cartel to agree that they would not compete in each other's markets.

Faced with this, most competition authorities simply had no experience, powers or sometimes even the political will to enforce their laws against influential companies. Even if they had the tools and the will to use them, some Member States may still have been reluctant to do so, because they did not trust their partners to be tough enough on their own firms. When in the 1970s the British car industry signed an agreement with the Japanese that the British car market would be split 11% for the Japanese and 89% for the rest, the government applauded (secretly) and welcomed the higher prices consumers would have to pay which would relieve the government of the obligation to subsidise British producers, ignoring the even greater subsidy that car buyers would pay to foreign owned firms as a result. Positive action was required by the central authority to prevent these kinds of behaviour in order to ensure that consumers got the full benefit of the new competition.

Europe needed not just a binding agreement that the completely free trade in the Common Market should not be frustrated by private business behaviour but also an agreement that a supranational competition authority had to be set up in the European Commission to deal with this.

The pressures that faced the EC in integrating a common market and economic union are of course not the same as those facing Members of the WTO. Any negotiations on competition in a WTO context would be about the Member States undertaking certain commitments about how they themselves would operate and cooperate and not about setting up an international agency. That said, there is much to learn from the European experience, if not institutionally then at least about which practices were the most dangerous to trade and competition itself. The European experience showed that even when all trade barriers were removed restrictive business practices in the form of cartels and price fixing agreements, abuses of dominant position and restrictive selling practices continued.

At the level of the *GATT* and the WTO, the commitments to remove trade barriers have been lower than within the EC and as we noted there have

been no parallel commitments to deal with abuses of the emerging global market by private firms. During the 1980s it was widely felt that market opening resulted only in the good effects of new entry into closed markets and the risks of the creation and abuse of new dominant positions were hardly considered. During the 1990s the perception changed and the need for a global reconsideration of the benefits of a multilateral agreement on competition policy was revived.

Reconsideration came from several angles. On the one hand there were consumer groups who became increasingly anxious that the benefits of globalisation might not be being fully shared without some commitment by governments to prohibit anti-competitive behaviour. At the same time, there were trade officials in the EC and the US who were worried that their exporters might be unable to sell into certain markets, especially Japan, as a result of private barriers to entry. Also there were competition authority officials in the US and the EC who found themselves repeatedly dealing with the same cases and realised the need for some form of co-operation. But some governments, NGOs and expert commentators were - and some remain - very reluctant to see trade negotiators get involved with competition policy.

In particular some Asian countries fear that the interests of business lobbies might prevail over those of consumers: they see an international agreement on competition policy as a way of forcing developing countries to adopt competition laws that would favour the entry of multinational firms at the expense of local firms.

In fact research carried out in the last 10 years or so indicates that the biggest problem for the trading community may be not that competition laws or their absence constitute barriers to trade, but rather that, much as was the case when the EC liberalised its internal market, free trade alone is not enough to prevent world wide price fixing and market sharing arrangements.

The US has prosecuted international cartels that are raising prices to its own consumers; in doing so it has revealed the extent of the problem facing the wider world but actions by the US do not prevent abuses continuing elsewhere, in countries that either don't have a competition law or cannot access the information to use it successfully. Among the industries found to be heavily cartelised have been vitamins, steel, shipping, chemicals, and heavy electrical engineering. Importers in developing countries in particular are affected by cartel price fixing in these sectors. Although the immediate impact of this is on business-to-business transactions, higher prices for businesses eventually lead to higher prices for consumers.

The international debate has got to the point where the choice facing developing countries is whether to sign up to an international agreement which may require them to have tougher competition laws at home and in return get the advantages of information sharing that would help deal with transnational abuses.

There remain sceptics, however. Some say that developing competition policy would be an expensive distraction for developing countries, which

should get on with more pressing priorities (such as the provision of basic necessities and the development of the physical, technological and regulatory infrastructure to create and support functioning markets) before applying a regulatory framework to police such markets. This view is held both by free trade liberals and those who favour state-led development policies. The former call for the sole priority of policy and of negotiations to be the removal of the remaining trade barriers in developing and developed countries. The latter group call for continuing support for national champions and local businesses in the face of international competition.

With these issues in mind the following sections of this report examine the primary commitments that have been proposed for a multilateral competition agreement (MCA) to contain. It will then examine how such commitments could be implemented in a manner which respects the special and different position of various Members, particularly developing economies, without sacrificing overmuch the pro-competitive, liberal trade, and pro-consumer focus of such commitments.

The EC is currently proposing that WTO Members should agree two things

1 All WTO Members to have competition laws incorporating some core principles including "national treatment" (see below) and a ban on cartels, (all with the possibility of some form of negotiated exceptions for certain countries in certain areas.);

2 A voluntary code on co-operation between the countries that have competition laws

The EC also proposes that Members and the Secretariat provide technical assistance and capacity building to facilitate compliance with such an accord.

In examining these commitments, the Technical Report's analysis is not primarily about what national development strategies are desirable but it will address the question of whether any international agreement would get in the way of a country's seeking balance between the benefits which may be obtained from more competition and those that may accrue from leaving business free to make high profits as a platform for entering and competing in the international market and/or as at least temporary protection for inefficient producers in order to protect local employment.

2: The requested commitments

Multilateral commitments to prohibit hard core cartels

Measures to attack cartels have been central to discussions on international competition policy fora ever since the Havana Charter was first proposed during the Bretton Woods Conference of 1944. This interest has never waned, and has if anything increased in recent years (in particular at the OECD, UNCTAD, and the WTO). This may reflect several factors. First, there has been a surge in cartel enforcement in certain industrial economies since 1993, and many developing economies prosecuted cartels for the first time in the 1990s. Second, the growing empirical record shows that cartels have imposed billions of dollars of overcharges on customers. Third, cartel enforcement represents the high ground of competition policy; few defend cartelisation or measures to promote cartels.

Much of the discussion of cartels refers to "hard core" cartels. Such a cartel has been defined by the OECD as "an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating consumers, suppliers, territories or lines of commerce" (OECD, 2002). Hard core cartels are anticompetitive when they raise prices paid by consumers above levels that would have prevailed in a market with much rivalry between firms.

Hard core cartels have been found to distort commerce in both industrial and developing economies (Evenett, Levenstein and Suslow, 2001) (Evenett and Ferrarini, 2002). The European Union and the United States have prosecuted 40 cartels with an international dimension since 1993. One of those cartels (in sorbates) lasted 17 years; 24 of the 40 lasted at least four years. Twelve developing economies reported that they had prosecuted 28 cartels to the First and Second OECD Global Forums on Competition. In addition to hurting customers, six of these cartels involved bid rigging, which implies that taxpayers have also suffered at the hands of cartels in developing countries. Worse still, such bid rigging often involved infrastructures (schools, sewage facilities, etc) that improve the life chances and livelihoods of the poor.

The available evidence about private international cartels suggests that they have exploited the very open markets that the world trading system has sought to promote. Moreover, a recent study of the vitamins cartels—some of which lasted ten years—presented evidence that these cartels' Members

deliberately targeted economies with no or weak cartel enforcement regimes (Clarke and Evenett, 2002). These findings reinforce the case for vigorous national anti-cartel enforcement measures. But what about the case for international collective action against hard-core cartels?

Specifically, is there an argument for having some minimum standards for national cartel enforcement? Two arguments, borne out in the enforcement experience of the 1990s, suggest that this may well be case. First, public announcements in one nation about cartel enforcement actions tend to trigger investigations by trading partners. For example, Korea began investigating the graphite electrodes cartel after reading about American enforcement actions against this cartel. Trading partners therefore benefit from active enforcement abroad – and these benefits are likely to be reinforced over time as formal and informal co-operation between competition authorities deepens.

The second argument is based on the fact that prosecuting an international cartel almost always requires securing testimony and documentation about the nature, extent, and organisation of the conspiracy. To the extent that an international cartel hides such documentation in a jurisdiction that cannot or will not cooperate with foreign investigations into the cartel's activities, this jurisdiction's actions have adverse effects on their trading partners' interests. The key point is that when a nation does not rigorously enforce its cartel laws then the damage done is rarely confined to its own borders. An international accord on the enactment and enforcement of cartel laws can go some way to eliminating safe havens for domestic as well as international cartels.

Even a jurisdiction as aggressive in its cartel enforcement as the United States can be powerless against a cartel that hides its evidence abroad—especially if each conspirator refuses to come forward and apply for corporate leniency and the evidence is placed in a jurisdiction that will not or cannot collect evidence for the American authorities. The current patchwork of national cartel enforcement regimes is thus far from perfect.

So what are the options? The first is persuasion and awareness raising. Arguably, all of the recent discussions on cartels at the OECD, at UNCTAD, and at the WTO have helped galvanise interest in cartel enforcement and to disseminate best practices. The second option is to adopt non-binding accords to enact and enforce anti-cartel laws. The OECD Recommendation on Hard Core Cartels and the UNCTAD Set are two such accords and both, in different ways, have stimulated national enforcement efforts. Whether these accords have had similar effects on all jurisdictions is doubtful, and this raises the question of the desirability of a more comprehensive initiative.

A third option is to consider adopting provisions on hard-core cartels as part of a multilateral agreement on competition. The European Union and its Member States put forward such a proposal on the potential disciplines on private international cartels in a submission to the World Trade Organisation on July 1 2002 (WT/WGTCP/W/193). This submission characterises hard core cartels as '…cases where would-be competitors conspire to engage in collusive practices, notably bid-rigging, price-fixing, market and consumer allocation schemes, and output restrictions. These practices can appear in a number of shapes and combinations.' (EC 2002, page 1).

On the basis of this submission, the EC envisages that a potential WTO agreement on hard-core cartels[4] could include the following provisions:

1 'A clear statement that [hard core cartels] are prohibited' (EC 2002, page 5). This presumably includes domestic hard-core cartels as well as private international cartels.

2 'A definition of "what types of anti-competitive practices could be qualified as "hard core cartels" and would be covered by the multilateral ban' (EC 2002, page 5). The EC notes, in this respect, that such a definition might include a description of the permitted exceptions and exemptions to such a multilateral ban, although the EC did not take a stand on what those exemptions and exceptions might be (EC 2002, page 6).

3 A commitment by WTO Members 'to provide for deterrent sanctions in their domestic regimes' (EC 2002, page 6); while noting that a variety of sanctions are available.

4 'Appropriate procedures in the field of voluntary co-operation and exchange of information. Indeed, transparency is an essential element of a framework of competition. Provisions have therefore to be developed on notification, information exchange and co-operation between competition authorities. These would include provisions regarding the exchange of information and more generally, co-operation procedures, e.g. when authorities are launching parallel investigations into the same practice. Negative and positive comity instruments could also be addressed' (EC 2002, page 7).

It would appear, therefore, that the EC envisages a cartel enforcement architecture that includes strong national pillars (enforcement authorities) and a mechanism that links the pillars (information exchange and notification). Although the EC's submission leaves the reader in no doubt that there are many subtle parameters to be negotiated, the construction of such an architectural edifice would, in their view, constitute: 'a major step towards effectively curbing such cartel activity and eliminating their adverse impact' (EC 2002, page 7). Each of the four issues identified above would need to be fleshed out and the European Commission has repeatedly made it clear that no one blueprint is being proposed and that there is considerable flexibility to accommodate the varied needs of all WTO Members—developing countries and industrial economies alike.[5]

National Treatment and non-discrimination in relation to competition policy

Introduction

If WTO negotiations propose that domestic competition policy accord with a 'core principle' of non-discrimination, what issues would have to be dealt with, especially by developing countries? Of what relevance to this debate are the existing WTO commitments to National Treatment? Is something other than confirmation of the existing commitments being considered, and if so, what would- and what should - that new 'competition' commitment look like?

Initial 'broad brush' issues

A non-discrimination commitment is a crucial means of preventing pro-market commitments from being nullified or impaired. It is also an important pro-market commitment in itself. The potential application of non-discrimination commitments raises issues for domestic competitors and for the government departments that support them; and it is not a key demand of countries which want to increase their exports. Prospective market entrants want to see firm non-discrimination commitments, while domestic incumbents may demand vague (or no) commitments with clear exceptions. Competition authorities themselves are going to be concerned to ensure that their analyses – while conforming to the non-discrimination commitment –remains independent, objective and grounded on evidence of economic harm.

Meaning and scope of the commitment

The current standard under *GATT* Article III:4 and *GATS* Article XVII is that in the application of their laws and other measures Members must ensure that foreign products or producers are afforded no 'less favourable treatment' than that accorded to 'like' domestic products/producers.[6]

A ban on discrimination only prohibits measures that afford foreign products/producers less favourable treatment. If there is no less favourable treatment, then the measures are not subject to the prohibition of discrimination. This is so, even where the measures allow an impediment or barrier to foreign entrants to exist.[7] The first conclusion is that there will be some trade-restrictive measures (and, by extension, some practices) which a commitment of non-discrimination cannot address.

Competition law and policy covers almost all sectors of an economy, save where there are clearly set out exclusions, and is most usually worded in a non-discriminatory manner. How would a ban on discrimination apply to such a measure? By definition, a ban on de jure discrimination, for example, would have no impact on a non-discriminatory measure. Thus, a second conclusion is that what is needed is a ban on discrimination in fact, regardless of what a measure says that it provides. This leads to a need for clarifying in which cases is it possible for a non-discriminatory competition policy to tolerate discriminatory business practices. And relatedly, how many business practices are in fact 'discriminatory'?

National treatment and competition in the WTO: Four possible approaches

There are four main ways in which National Treatment in its WTO sense could be included in a competition agreement:

i Confirming that existing de jure and de facto National Treatment (NT) commitments which already exist in WTO law apply fully to competition policy

As mentioned above, the existing commitments in the GATT, GATS etc are far more extensive than what is being proposed by the EC at present. The obvious question therefore arises: why have foreign competitors and their trade representatives not made more use of these existing commitments in order to address the toleration of allegedly exclusionary practices?

Recall the limits of the National Treatment commitment set out above. It can only prohibit discriminatory measures (which, for this example, can be assumed to include the toleration or encouragement of discriminatory business practices). As such, it will not apply to the toleration or encouragement of non-discriminatory practices; i.e. those which exclude all-entrants, domestic or foreign.

To date, the primary practices most complained about in the context of 'trade and competition' are the more generally applicable exclusionary business practices. The practices at the heart of the private aspects of the Kodak-Fuji case were exclusive purchasing commitments that induced Japanese distributors to source directly from the major domestic incumbent, thereby 'excluding' Konica, Agfa and Kodak. How would the proposals on the table address the toleration of these arrangements? The simple answer is that they would not, and were not designed to do so. They were only intended to apply to discriminatory measures. We return to the need for something more than a ban on discrimination.

ii Redefining and narrowing National Treatment in a competition context (commitments only to de jure NT)

No less favourable treatment of foreign products/producers on a law's face

The EC proposals for a confirmation of the National Treatment commitment restrict it to non-discrimination on a law's face (rather than in its actual operation). This would dilute the existing commitment in the GATT and GATS, at least with respect to competition policy measures. Does it follow that once such a specific 'de jure'-only commitment is made for competition policy, then no challenge of competition law enforcement could be made under GATT or GATS? Of course, no challenges have been made to date, but is that any reason to expressly prevent such a challenge in the future? Also, would this diluted National Treatment commitment affect the application of those other existing National Treatment commitments to other non-competition measures?

A commitment to de jure non-discrimination would obviously address discriminatory laws. However, those industries that are currently benefiting

from discriminatory treatment will still pressure their Members to make the required carve-outs from the commitment so that their protection can continue.

With respect to addressing discriminatory enforcement, the EC has argued that a commitment to de jure National Treatment might be enough, as the likelihood of any discriminatory treatment in fact may be lessened through the application of other commitments (i.e. to transparency and due process in the application of laws).[8] How likely is that desired effect?

Set all of this in the context of the fact that there are existing commitments of National Treatment. As above, what is this narrow de jure commitment going to do to the application of those commitments to competition laws or measures? To put this at its extreme, would it, not operate to *permit* discrimination in enforcement (or at least preclude it from being challenged)?

Exceptions from the principle of non-discrimination[9]

National Treatment will operate to favour foreign companies over domestic companies in any case where less favourable treatment is made out. Public policy-related exceptions exist in WTO law of course, but there will be pressure on Members to provide for other exceptions from the commitment for either expressly protectionist reasons, or for other unrelated reasons. Some negotiating options might be:

- Schedules of specific commitments, setting out particular sectors for each country where the Member's competition authority would - and would not - agree to provide National Treatment

- Broader horizontal carve-outs from the National Treatment commitment itself, for example for 'small business'; 'historically disadvantaged people'; 'indigent industries', etc

- Even more general carve-outs to ensure that the National Treatment commitment for competition law only applies to competition law, and does not impact on development or industrial policy[10] (Would this not be impossible to operate in practice? Would it also restrict the operation of existing National Treatment commitments?)

- Phase-ins of the National Treatment principle using Special and Differential Treatment (SDT) for developing and least-developed countries; or for particular sectors / Small and Medium Sized Enterprises (SMEs).

- To allow Members more flexibility, allow them to apply National Treatment on a case-by-case basis (How dangerous would this be to the goal of a predictable and certain multilateral trading system?)

iii Something in-between – developing best practice guidelines

A starting point might be the ICN Guiding principles for merger notification and review, with respect to National Treatment. (i.e. in the merger review

process, jurisdictions should not discriminate in the application of competition laws and regulations on the basis of nationality). This is further than a mere de jure commitment; but then again it is also non-binding.

Non-binding 'best practice' guidelines may be of great help to WTO dispute settlement panels in clarifying and interpreting the commitment in question. But why do such guidelines need to be agreed at the WTO? Many much more detailed commitments exist at UNCTAD. Can the Set be used as guidance of multilateral intent, or does the fact that it was negotiated outside the remit of a binding agreement make it of less value in identifying Members' intentions?

iv The full monty: extending de facto national treatment into competition law

No less favourable treatment of foreign products/producers in fact

This commitment is the most 'intrusive' or 'effective' commitment, depending on your perspective. Despite already existing and applying to competition policy measures under WTO law, it appears to be a long way from being 'confirmed' or 'committed to' expressly in relation to competition policy.

What would constitute de facto discriminatory treatment? Obviously, a discriminatory law is not required. Some examples illustrate the problems:

Cartels a priority
A competition authority makes fighting cartels its priority, rather than other potentially anti-competitive practices, and this – in fact – means that more foreign suppliers come under competition law investigation, while domestic producers that may be abusing their dominant position etc do not. Is this discriminatory treatment? Given that the enforcement intent is to prevent a direct domestic consumer harm – and that presumably is to be supported – what is the alternative enforcement policy approach?

Anti-monopolisation a priority
A competition authority makes a priority of acting against abuses of a dominant position, and the firms that have attained a degree of dominance in this particular market are primarily foreign, while the domestic firms are for the most part SMEs. Is this discriminatory treatment? Given the potential for domestic consumer harm following any exclusion of its rivals by the dominant firm, what is the alternative?

Export cartels
A competition authority decides that for a period of time it will devote significant resources to prosecuting cartels that export into its market. Or that even without any evidence of an agreement, it will target suppliers that engage in pricing activities in its market which the competition authority believes harmful. Is this discriminatory treatment? Given the direct domestic consumer harm from the export cartel's prices in the jurisdiction, what is the alternative?

Mergers
A competition authority may decide not to challenge a merger between domestic companies because the deal results in domestic efficiencies that offset any local anti-competitive effect, or which ensure that any harm lies beneath the relevant domestic threshold for prohibition (i.e. Significant Lessening of Competition, undue lessening, adverse effect on competition, creation or strengthening of a dominant position, etc). However, where mergers have efficiencies that occur outside the jurisdiction (i.e. where there is a foreign party), then the same competition authority may find that the harm is not outweighed by a sufficient degree of domestic efficiencies, and thus may block the deal. Is this discriminatory treatment? If it is viewed as being discriminatory under trade policy analysis, but is viewed as simply being a result of a differing economic review under competition policy analysis, then what is the alternative?

Translation requirements
Many competition authorities require that all submissions are made in the domestic language. Depending on the circumstances, this can create enormous translation costs for foreign companies. The legal requirement is the same but the requirement itself has a disproportionately negative impact on foreign companies (a so-called 'dual burden' issue). Is this discriminatory treatment? What is the alternative? Then again, doing away with the requirement puts the costs directly on the competition authority itself or, if there is to be no translation requirement or a reduced filing requirement, then the competition authority may have inadequate information on which to base its decision (which may mean that either an anti-competitive practice/merger is not prevented in this jurisdiction, or that a pro-competitive deal is delayed, or blocked outright.)

Non-recognition of legal privilege of foreign lawyers
If a competition authority does not allow companies' communications with foreign lawyers to be privileged, foreign firms' interests may be jeopardised through disclosure of solicitor-client communication. Is this discrimination?

Mandatory filing of all international contracts
or agreements with a foreign party (i.e. foreign joint venture agreements) may be required by a competition authority, though there is no requirement to file domestic-domestic arrangements. Is this discriminatory?

Most-Favoured-National (MFN) treatment

The logic of non-discrimination also applies in any MFN commitment. As with National Treatment, commitments to the principle of MFN are an important cornerstone of existing WTO agreements. Here the discrimination that is prohibited is not as between domestic and foreign goods, but among foreign goods themselves. Essentially, the MFN commitment is designed to ensure that if a Member provides favoured treatment to the products of one of its trading partners, then it will offer that level of treatment to the products of all other signatories to the GATT, for example. Obviously this raises problems in situations where two or more Members have a closer trading relationship than is provided for under WTO commitments. Exceptions from MFN are thus permitted for such – usually regional – trading areas. In the competition policy context, though things might get a

bit more complicated. Suppose that two governments have a very close enforcement co-operation relationship, and help one another with the prosecution of anti-competitive conduct more so than they might help the agencies of other Members. Bilateral co-operation naturally evolves into an ever-closer relationship between the parties, and which is closer than with other governments. The same could be said for trilateral/regional enforcement co-operation initiatives, under APEC, FTAA or NAFTA, for example.

If the assistance available between the parties to the close enforcement accord helps the products of those two Members to trade more favourably into each other's markets than the products from other Members, then some might argue that a violation of MFN has occurred. It may seem bizarre that a pro-competitive outcome would raise the hackles of trading partners, but it is not any less likely a scenario just because of that. After all, some products could be trading more easily between the two markets, because, say, a dominant undertaking in one market is not being allowed to refuse to deal with a particular competitor from another country, or to deny access to that competitor to its market. Once the enforcement co-operation effort has broken the dominant company's stranglehold on that market, then other competitors are going to want access as well. What will bend, this evolution or the MFN principle? What are the harms and benefits from amending either side of the equation? Is there a way around this conundrum? Is a simple carve-out from the MFN principle for such bilateral or regional accords really all that is needed to cover such situations of close enforcement co-operation?

Transparency issues in a WTO competition policy agreement

Introduction

A key component in any WTO agreement on competition policy is transparency. This is not simply a reflection of the general desirability of open and accountable government but to answer the need for clear and universally applicable rules applying to trans-border transactions with an anticompetitive impact. There are three essential considerations:

- Transparency of *information* about the domestic competition laws of WTO Members; including any exceptions from those laws
- Transparency of *decision-making* in the application of domestic competition laws
- Transparency in the *process* of the formulation and enactment of domestic competition laws

With respect to these three areas, common harmonised rules at the WTO level might seem, in principle, achievable without infringing national sovereignty to an unacceptable degree. After all, as with the National treatment commitments discussed above, Members have already made detailed commitments regarding the transparency of their domestic legal measures and administrative regimes, which would include their competition laws and enforcement. Nevertheless, it is necessary to examine the types of issues that would arise from a confirmation of the transparency commitments in a competition policy context, if only to examine the kinds of obligations (and costs) that Members would have to confirm that they can assume, or have already assumed.

A. Transparency of information

GATT Article X already provides for the non-discriminatory application of national laws, an obligation which the *Fuji-Kodak* case indicates includes a requirement on WTO Members to publish laws.[11] Under this provision, transparency of information includes at least the following:

- prompt publication of national laws and regulations;
- publication of proposed new laws and regulations;
- publication of decisions applying national law;
- clearly defined exceptions to national competition law (e.g. national defence);
- reasonable and inexpensive access to information on any of (a) to (d) above.

B. Transparency of decision-making

Even without Article X's commitments, having an open and accountable democratic government and respect for the rule of law requires that decision-making be transparent. In the context of competition law enforcement, this includes:

- open decision-making by competition authorities;
- reasonable access to files and other records of an enforcement procedure to third parties with a legitimate interest (complainants, competitors and consumer representative groups);
- open and public hearings in enforcement proceedings and court hearings;
- fully-reasoned decisions or court judgments;
- regular public reporting by national competition authorities of:
  – their policy
  – their plans for future enforcement,
  – their cooperative authority with other national competition authorities;[12]
  – clear guidelines on the criteria for exemption.

Transparency in law making

Transparency in the process of law making is an essential component of a national and democratically accountable system of government. In the context of competition policy, it involves:

- open and public consultation of interested/affected groups on proposed new law;
- prompt publication of the results of consultations;
- either free or inexpensive prompt publication of laws and regulations.

Special and differential treatment for developing countries

Any transparency obligations in a WTO competition agreement must avoid placing onerous administrative burdens on developing countries. Adequate resources must be made available in terms of IT, translation, publication budgets, etc. to assist developing countries to comply.

As with the commitments of National Treatment and MFN, the commitment that laws and to an extent their enforcement also be transparent already exists in the WTO agreements. That said, this does not necessarily makes things more clear in terms of how such a commitment would apply to competition law enforcement itself. Under Article X of the GATT, WTO Members are already required to publish explanations of how their laws are to be interpreted and applied, as well as reasons for their judicial decisions or administrative rulings. Again, as with the commitments of non-discrimination considered above, it may seem that a specific commitment for competition law decisions would be superfluous.

Any further requirement specific to competition law would appear to risk taxing already over-burdened governments or those with scarce resources, such as developing countries. It would also fly in the face of Article X's additional commitment that such publication will not require the disclosure of confidential information that could impede law enforcement, or otherwise prejudice the legitimate commercial interests of companies. Either considerable negotiation will be required to tailor a transparency obligation to the peculiar aspects of business/government interaction that comprise competition policy and which differs drastically between jurisdictions[13] or trade negotiators should leave well alone.

As with any prospective obligation to ensure non-discriminatory access to the competition law regime, or due process in its operation, a commitment to ensure that the local regime is transparent is not costless The EC has suggested that companies should at least have "access to the local competition authorities," but US submissions have queried what this means. Should all companies have a right to be heard by a competition authority, a right to a formal meeting and a right to be answered formally? This all comes at a price. Perhaps some exceptions will need to be made for many authorities. The costs of explaining the reasoning of every competition policy decision are likely to be enormous.

This is even a challenge for the governments in more developed economies. Many highly-advanced and relatively well-funded competition authorities receive and deal with many thousands of complaints a year, and are only able to do so effectively by addressing many of these with a mere phone call to the complainant. That provides the complainant with an answer – which it may not even be able to challenge – however it does not provide a fully transparent regime. Indeed, a fully transparent regime may be too expensive to administer, and not necessary in any event.

Another consideration is whether the same right of access and openness should be accorded to competitors and downstream customers of merging parties, let alone other third parties like employees and others affected by the deal, albeit not in the traditional antitrust sense.

It is important for all Members to understand the costs of the obligations that they would be prepared to assume in order to ensure that the competition policy regime that they are providing is transparent, or at least is transparent enough for the Member to comply with its multilateral commitments.

3: The need to guarantee flexibility

Maintaining sufficient flexibility to allow for national development strategies

What is flexibility?

Developing countries, in their contributions in the WTO Working Group on Trade and Competition Policy, have been adamant that they require flexibility to develop competition regimes suited to the specific needs of their economies, rather than simply adopt models from the industrialised countries. In these discussions, flexibility was defined as "… the ability of a country to choose from the menu of prohibitions that could be embodied in competition law those aspects that were relevant for its particular economy, in view of its market structure, level of development and types of anti-competitive conduct that were prevalent, and other characteristics." (WT/WGTCP/5 8 Oct. 2001, p. 12).

Why the need for flexibility?

Economic strategies in developing countries must, of necessity, be different from those in the industrialised world, because of differing structural characteristics and different socio-economic needs. Industrial countries generate technology, and have diversified and integrated economies, allowing for backward and forward linkages in economic activities. With leadership in cutting edge technologies, and corporations that dominate world production and trade, competition law evolved in these economies to protect consumers from these powerful players, and in the case of the EC, to enforce the single market.

Developing countries, by contrast, are technology takers, dependent on foreign direct investment (FDI) to generate economic activity, which, for the most part, are limited to low value added ends of the product chain, and are generally an enclave part of the economy, including commodity production for export in markets where the price is externally fixed, and subjected to the vagaries of global economic trends. Large sectors of the population are left out of this development strategy, so it becomes necessary for these governments to stimulate economic activities to promote local entrepreneurial development that would absorb labour and retain capital in the economy. This is being done in very challenging circumstances: lack of cutting edge technologies, low national savings because of drainage from the economies to service external debt, and low levels of skills. Therefore, they feel the need to protect industries from foreign competition (goods and services) that are critical to income and employment generation in the local economy, so as to

alleviate or prevent socio-economic pain. Competition provisions may conflict with specific policies in place to support developmental needs. In industrialised countries, there are healthy and resilient domestic firms, in developing countries, domestic firms can be easily crowded out, with serious social dislocation.

Some examples where flexibility may be needed

Merger control regulation may not be relevant where there are micro firms operating in liberalised markets. The argument is that economies of scale would allow those firms to become more competitive internationally. In addition, administering merger control is very costly and complex, and the benefits to be derived from the regime in small economies in particular (including the presumed possibility of intervening in mega international mergers if your economy is affected), would be far outweighed by the costs.

The economies of scale argument could also be used to justify the existence of import cartels, because in small economies that export what they produce and import their consumption needs, there is a pressing need to lower the costs of imports by increasing the sizes of shipments. Indeed, such practice is prevalent among certain business groups in CARICOM countries, and consumers get better prices as a result.

Sole distribution agreements were found to be prevalent in the micro economies of CARICOM countries, for instance, St. Vincent. The argument justifying them was that in such a small economy, with a population of 200,000 people, there is a problem of achieving economies of scale. It is more efficient to have a single supplier. Both suppliers and distributors agreed that this is a valid argument.[14] It may be necessary to consider excluding such agreements from a competition regime. However, an examination of the effects on consumers is necessary before granting such exemption.

What needs to be done to apply the concept of flexibility?

The very argument that the "one size fits all" notion cannot apply to developing and developed countries alike, also applies within developing countries. There is no blanket formula. Rather, each economy has to be examined to understand the impact which will result from enforcement of the full complement of competition principles, and this has to be weighed against development objectives in sectors and industries which play a critical role in development, but which could be adversely affected by the competition regime. Measures could then be taken to find a balance between consumer welfare, and protection of critical sectors that support socio-economic needs, remembering that consumers are also producers.

Multilateral rules and development strategies

With the goal of sustainable development in mind it is a legitimate question whether proposals for a multilateral competition agreement (MCA) strengthen or compromise national development efforts. First, competition policy enforcement – or non-enforcement – is only one of a large array of policy instruments that are typically associated with national development efforts. This has an important implication for those who wish to argument against an MCA on the grounds that it would compromise national development strategies.

To be convincing such an argument would have to demonstrate that whatever competition policy-related measures are to be ruled out by a proposed MCA happen to target specific goals that no other policy instrument can attain as effectively. For example if, as a very small number of influential scholars believe[15], lax competition enforcement helps firms to raise prices and thereby increase the funds for investment then, perhaps some other policy instrument (such as investment subsidies, tax credits, or interest rate subsidies) can better encourage firms to invest in the first place. In this example, lax competition policy enforcement is a sub-optimal means to bolster investment and signing an MCA could be a way to encourage governments to find measures that better meet existing national development goals.

Second, as noted in earlier sections, current proposals for an MCA are confined to only a subset of competition policy instruments and its enforcement; namely, provisions on hard core cartels, core principles, transparency, procedural fairness, and voluntary co-operation. The question this begs is whether there is any widely accepted evidence that ignoring hard-core cartels and implementing discriminatory, opaque, and procedurally-biased competition policy has promoted economic development in the past; theorising, conjecture, and outright assertions provide little basis upon which to resolve this important matter.

East Asia is the region where there is the most extensive literature on the role of competition policy in development. Some of the key contributions are Amsden (1989), Amsden and Singh (1994), Porter, Sakakibara, and Takeuchi (2000), Rodrik (1995), Wade (1990), and World Bank (1993). There appears to be little disagreement among these authors that there was active state intervention during the periods of rapid economic growth in Japan, Taiwan, and Korea. Likewise, Nolan (2001) reports that current and former Chinese governments employed policies to alter the domestic industrial structure of the economy and to promote competitiveness between domestic firms.

What is disputed – especially in the case of Japan – is whether government attempts to constrain rivalry between firms played an effective role in promoting development. Amsden (1989), Amsden and Singh (1994), and Tilton (1996) argue that the Japanese government discouraged excessive rivalry between firms by – amongst other means – promoting the formation of cartels. The factual record shows that in the mid-1960s, when Japan's economy was growing at unprecedented rates, over 200 of these cartels were active in different industries. These cartels were said to enable firms to raise funds internally for investment. As a result, it seems that suppressing

competition stimulates one of the key drivers of development; namely, private sector investment.

The empirical relevance of this analysis for policymakers has been seriously called into question by Michael Porter and his co-authors. Porter, Sakakibara, and Takeuchi (2000) examined not only those successful Japanese industries but also less well performing industries (that is, less internationally competitive industries). The findings are quite surprising as it turns out that efforts to restrict competition through cartels were rarely found in successful industries but were far more prevalent in unsuccessful industries. Perhaps the punch line is whatever Japanese cartels were promoting, it wasn't competitiveness.

East Asia is not the only region that has been the subject of substantial empirical research. The countries of Eastern Europe and the Members of the Commonwealth of Independent States (CIS) provide further evidence about the relationship between the extent of competition in markets and subsequent dynamic economic performance of firms. In the transition economies an important issue for long term growth is how quickly firms restructure their operations along more market-oriented lines. Such restructuring often results in greater productivity levels and growth, innovation, and export performance; all of which support development. In a review of 54 analyses of the determinants of the pace of firm restructuring in Eastern Europe and the CIS, Djankov and Murrell (2002) found that increasing the intensity of competition in a market—which itself is determined, in part, by national competition policies – consistently helps to improve the productivity levels of firms in that market. Such productivity increases typically fund wage increases and lift workers out of poverty.

In sum, therefore, there is no intellectual consensus in favour of restraining rivalry to promote development. In fact, empirical research in recent years points to the opposite conclusion and implies that promoting rivalry between firms furthers development. Such research is important as one of the advantages of adopting and enforcing an anti-cartel law, whether under the auspices of an MCA or not, is that it deters firms from attenuating such rivalry.

Notwithstanding the above arguments, there is still the legitimate concern whether developing countries have the resources and expertise to implement cartel laws. As technical assistance will be discussed later, here the focus is on resource costs. The right way to think about this issue is not to *solely* emphasise either the resource costs of cartel laws or the benefits from such laws. What is needed are assessments of as many elements of both as possible; a point which should be borne in mind when reading the one-sided critiques of an MCA on resource cost grounds found in Hoekman and Mavroidis (2002), Winters (2002), and World Bank (2002). Two related but distinct issues, which Hoekman and Mavroidis (2002) correctly raise but fail to offer on any empirical evidence to resolve, is whether the paucity of governmental negotiating talent in developing countries is best served by mastering a new topic such as competition policy and whether an MCA offers better potential returns for developing economies than other areas of international trade reform (which presumably this negotiating talent could focus on).

There have been few attempts to fill this empirical vacuum. One such attempt is by Clarke and Evenett (2002) whose analysis of the international vitamins cartel showed that active cartel enforcement by Brazilian, Mexican, and 10 European Union countries reduced the overcharges paid on vitamins imports by an amount that substantially contributes towards the annual cost of running these countries' entire competition authorities. This paper helps shed light on some of the costs and benefits of cartel laws. However, more research in this area is definitely needed. Prudent policymakers, like prudent scholars, should not take definite positions on issues on the basis of one paper. Even so, it is worth noting that – to the best of this author's knowledge – there is no comparable paper that quantifies as many of the costs and benefits of national cartel enforcement.

The focus of the MCA on disciplines on hard core cartels is also consistent with the long standing argument that, if developing countries are to adopt and enforcement competition laws at all, then they should start with less resource intensive measures such as anti-cartel laws; leaving merger review and laws on vertical restraints and other forms of competition law until later (Khemani and Dutz, 1995) (Oliveria, 2002).

An analogy may help. Proponents of an MCA are asking developing countries to learn first-aid, not open heart surgery.

Particular problems for small and developing economies

What should special and differential treatment look like?

Special and Differential treatment has several elements that can be related to national competition laws and an international framework that might govern design and applications. These include, for examples, variations in obligations, differing compliance periods, and promises to consider the interests of developing countries prior to taking certain enforcement actions. Any commitments within an MCA to have a competition law or to apply a law according to certain principles could, in principle, be modified by S&D treatment to provide for a less burdensome requirement.

A more comprehensive suggestion for S&D has been advanced, albeit generally, in the competition policy context. This would treat S&D itself as a core principle, and to then somehow imbed its application into the legal texture of the framework. No precise formula has been advanced for achieving this. One possibility would be to recite the objectives of competition policies from this S&D perspective and attempt to identify the developmental criteria that can be advanced by these laws, even while not resulting in a purely efficiency outcome. These objectives would find expression in the preamble of the framework and to be available by reference for the interpretation and context of other provisions.

Following on, developmental criteria, if able to be enunciated in a framework, could establish the qualifications for granting exemptions from the application of national laws as to particular cases. This "exemption approach" is found now in most laws to provide decision-makers the flexibility to excuse restrictive agreements that nevertheless generate certain pro-competitive effects, or for another example, to exempt small and medium enterprises from the requirements of the law. While development exemption criterion would not necessarily relate to the same pro-competitive outcome, it could establish a legal basis in the framework that would permit a distinction between protectionist applications and those serving a legitimate development objective.

What can be accomplished by an exemption approach for S&D is to permit developing countries the flexibility of ruling upon agreements within an established framework of criteria that would tend to insulate them from challenges on the application of their competition laws. As contrasted to the use of "exceptions" that can be invoked only after a violation of a framework obligation is found, an exemption approach rather retains the burden of proof upon a complainant to demonstrate that a development criterion has been applied in some arbitrary manner.

Composing the actual criterion appears to be more difficult than describing its legal effects within a framework, as above. A question can be suggested however to assist the formulation of such a criteria: according to what conditions should a Member be permitted to grant more favourable treatment to its domestic producers by the application of its competition policy?

The usefulness of core competition principles for small and lesser developed economies

Hong Kong/China has been the major proponent in the WTO Working Group on Trade and Competition Policy (WGTCP) of the argument that once there is pro-competition policy in small open [and lesser developed] economies, then there is no need for competition law. The view is that import penetration, given open trade, investment and other policies that are competition enhancing, will be sufficient to discipline domestic producers. This makes it unnecessary to have competition law with core competition principles. By this we mean prohibition of anti-competitive agreements, abuse of a dominant market position and merger control regulation. It is further argued that a cost/benefit analysis would show that the cost of enforcing a competition regime far outweighs the benefits in small open economies, and lesser developed economies where anti-competitive conducts may be minimal, and there may be a severe lack of human and financial resources to manage a competition regime.

This argument rings true only to the extent that economies are fully open, and there are no natural barriers to entry. Yet, even if governments' policies are completely open, there will necessarily be natural barriers to entry in small and lesser developed economies. Small size, either physically in terms of population size or purchasing power of populations in lesser developed countries, could be a disincentive to entry by foreign firms, given low profit margins. This may be particularly true in the services sector, such as ground transport and distribution and retail sectors. Small markets would lead to concentrations, because of the limited demand, and the need to achieve a viable level of economies of scale. Competition issues could also arise because of the inevitability of natural monopolies in small economies, or undeveloped markets given the need for large investment in infrastructure in some industries. Such could be the case with setting up a cement plant, for instance. Pre-mixed cement must of necessity be in the non-tradable sector, given its short life span and special conditions of storage, placing temporal and geographic constraints on storage and delivery. It is taken as a given that public utilities would necessarily be monopolies because of small market size.

Policies in small or lesser developed economies may be largely open, but not fully, and this could have a serious impact on competition dynamics in the market. For instance, in the Bahamas, seventy-five percent of total economic output (tourism and financial services) is open to foreign investment, and there are no barriers to trade beyond border tariffs. Yet, there are serious competition problems in a small part of the economy (e.g., wholesale, distribution and retail trade, some professions, ground transport and downstream tourism services) because government policies reserve these areas for nationals, and competition is limited because of entrenched historical advantages of one sector of the society. Core competition principles applied in these circumstances would go a long way to ensure that consumer welfare is protected.

There is another important perspective for small and lesser developed countries to consider. Foreign Direct Investment (FDI) largely dominates these economies. In the pre 1980s, FDI was controlled through the

application of trade related investment measures (TRIMS). However, in the new dispensation, TRIMS have been removed, and FDI are given free reign in the economies. Having core competition principles entrenched in the law would allow these countries some leeway to discipline resident MNCs that are abusing their dominant market position. This is however subject to the constraints of power asymmetry between weak governments and powerful MNCs. Yet, having the law in itself would provide a disincentive to misconduct.

Whether or not merger control regulation is useful to small and lesser developed economies is highly debatable. This hinges on the level of openness of the economy. In liberalised markets, small firms have to compete with imports in their domestic markets and need economies of scale to gain efficiencies and survive. Further, if they want to become competitive in international markets, there is a need to allow concentration in the productive sector so as to increase efficiencies. It is for this reason that CARICOM countries did not include merger control regulation in their competition policy regime.

However, the other side of the coin is that multinational corporations are adopting the strategy of entering liberalised markets in developing economies by buying out local competitors and establishing themselves as monopolies. In this way, they can cream off the profits from the market, thus making it viable to enter. Small and lesser developed markets are particularly vulnerable to such take-over. For instance, South African firms bought out domestic firms in neighbouring markets and mopped up the competition within SADAC. Argentina introduced merger control regulation in 1999 precisely to stop foreign firms from wiping out local competition through acquisitions. If small and lesser developed economies have merger control regulation, they would be able to take action to prevent such concentrations in their economies.

There is also the argument that having an MCA would allow these small and lesser economies to intervene in the large mergers taking place in industrialised countries if these would lead to concentrations in their own markets, and to require undertakings by these firms that would address the problem. This is theoretically true, but very difficult to apply when technical staff would necessarily be so scant, and power asymmetry would make intervention difficult. It seems, therefore, that having a MCA for this reason does not have sufficient persuasive power on its own. However, if there is an MCA, then there is the possibility of intervening in mergers that could have serious effects in the domestic economy. The down side is that this could lead to a risk of discrimination against foreign firms which bring needed economies of scope and scale and other efficiencies to a national market and its consumers.

The cost implications of administering a MCA regime must be considered, however. The technical and financial resources needed are prohibitive for these economies. One way of managing this would be to have the MCA on the books, but apply the rules only when a real threat to competition arises. In such instances, the Competition Authority may be able to call upon technical assistance from more mature Authorities to conduct the rule of reason procedure.

International co-operation where one party has no competition authority or provision, or where competition institutions are weak

Competition law is designed to deal with anti-competitive conducts that take place within a national jurisdiction, which adversely affect domestic consumers. Most competition laws explicitly exclude from their scope those anti-competitive conducts that have no effect on the domestic market, including export cartels. Some laws include provisions that allow authorities to investigate cases in which perpetrators of anti-competitive conduct are outside the national jurisdiction, but their conduct affects national consumers (the effects doctrine).

The problem with investigating and applying sanction to firms outside one's jurisdiction which are engaging in misconduct affecting one's consumers is that there is no legal access to the firms involved, and no legal basis upon which to conduct investigations in another country's jurisdiction, without the explicit consent and preferably, co-operation, of that country. It is in this context that bi-lateral co-operation agreements were developed, by which there could be exchange of information, including informing the other competition authority when action is to be taken that affect their interests, assistance in investigations, positive comity, mutual legal assistance, and so on. Sharing of confidential information without the consent of the parties is rare.

Such deeper levels of co-operation are a very recent phenomenon, though; as late as the early 1990s, there was great reluctance on the part of OECD countries to cooperate with one another. The work being done in the OECD Secretariat on hardcore cartels was a major trigger to deepening co-operation modalities amongst these countries. Even now, sharing confidential information is done very sparingly, and most countries have laws that prohibit sharing information that is not in the public domain, or was acquired in the process of an investigation. The experience of OECD countries has been one of gradual deepening of co-operation as they gain credibility with one another's competition authorities, and a level of personal relationships and trust developed amongst staff. It is noticeable that deep co-operation is largely limited to those developed countries which are culturally compatible, that is, Europe and its diaspora.

The "Friends of Competition" in the WTO WGTCP have argued that unless there is a minimum level of compatible core competition principles enshrined in national competition laws, there would be no basis upon which to develop co-operation modalities. And they advocate that all WTO Member countries should have in their national laws, at a minimum, provisions against hard core cartels and for the establishment of competition institutions. They have also warned that already it is becoming burdensome to have as many bilateral co-operation agreements as they do, and that they would not be able to manage many more. They therefore are promoting co-operation within a multilateral framework.

Most anti-competitive conducts with cross border effects are hardcore cartel agreements between multinational corporations (MNCs) from the US, Europe and Japan. Further, these cartels are increasingly targeting

developing countries because of the more stringent enforcement activities in OECD countries on the one hand, and the lack of competition laws and institutions or weak enforcement in developing countries. It is clear, then, that for developing countries, the most pressing need for co-operation is not amongst themselves, but between themselves and industrialised countries. Yet the only co-operation agreement between competition authorities in industrialised and developing countries is the one between the authorities of the US and Brazil. There are provisions in trade agreements that address co-operation, such as Canada and Costa Rica.

It is difficult to see how a developing country which has no competition law and institution could co-operate on competition issues with a country that does. No industrialised country would consider this at the bi-lateral level, given that co-operation takes place between competition authorities, whether the agreement is at the government or institutional level. Further, there must be a legal basis upon which countries could act, and without a law, there would be no monitoring and sanctioning of firm's anti-competitive conduct. Given the extreme reluctance displayed by developed countries to share information, it is most unlikely that there would be international co-operation on competition issues with countries that have no law and institution, except to promote the development of a competition regime.

Even when there are laws and institutions, difficulties remain, since there is extreme reluctance on the part of industrial countries to develop bi-lateral co-operation with developing countries, given the asymmetric developmental levels of their competition regimes. It takes time for deep co-operation to happen, and one competition authority has to earn the respect and trust of the other. Rather, they are willing to extend technical assistance. Thus, any consideration of a multilateral agreement on competition policy must be balanced in terms of the benefits to be gained by signatories. The usefulness of a multilateral agreement to developing countries to investigate and sanction international cartels depends on the depth of co-operation possible. National laws restricting the sharing of confidential information and the reluctance of firms to allow disclosure of shared information to other jurisdictions because of the risk to confidentiality are serious hindrances to co-operation.

If developing countries agree to establish national competition laws with a minimum of prohibition of hardcore cartels, and provide for institutions, industrialised countries would get what they want from the negotiations. What would be the benefits to developing countries? Offering technical assistance cannot be viewed as the trade-off, since that is simply to support the very process that is their objective. The argument is put forward that this would allow a learning process, and would eventually lead to deeper co-operation. However, developing countries need support from industrialised countries now to deal with international and export cartels, not some time in the distant and uncertain future.

With weak institutions, scarce human and financial resources, and lack of know how to investigate the conduct of sophisticated and powerful MNCs, developing countries need more than simply an offer to share non-confidential information. MNCs have shown scant respect for competition

authorities in developing countries, and have on occasions ignored their request for information. In such circumstances, pro-active help in investigating and ruling on such cases is needed. Even enforcing the ruling may be difficult where there is great power asymmetry between the government of the country and the MNCs involved. Therefore it is necessary to go beyond the traditional thinking and modalities for co-operation that applies to countries with equivalent levels of development, and explore new ways of co-operation that serves the needs of developing countries.

Types of technical assistance that are most effective

Capacity building

For a multilateral competition agreement's (MCA's) disciplines on hard core cartels to have pro-competitive outcomes in developing economies, expertise must be developed and retained in cartel enforcement. Research on the implementation of competition policies, especially in transition economies, suggests that two types of expertise are needed to support enforcement efforts (Kovacic, 2001).

The first relates directly to enforcement activities and includes both legal and economic expertise. The second is expertise in those institutions that supply talent to, advise, evaluate, or comment on the actions of the competition enforcement agency. Having university professors that are knowledgeable about competition law and its enforcement is important as they are a source of advice (and criticism!) of these agencies as well as a source of talent. The press, consumer associations, and other government officials play an important role in highlighting and discussing the activities of the competition enforcement agency. In sum, promoting a sustainable "competition culture", as it is so often put, requires the development of expertise on competition issues in civil society as well as inside government. Although the focus of the following remarks is on the latter, the importance of the former over the longer term cannot be understated.

Current proposals for an MCA do not specify precisely how anti-cartel provisions should be drafted or implemented, leaving considerable discretion to WTO Members. Allowing for some flexibility is important given economic pre-conditions, the current and future availability of legal and economic expertise, and different legal traditions. Almost certainly the optimal way to implement a cartel law differs across developing countries. In this critical respect, advocates of an MCA are not proposing that WTO Members adopt the same specific blueprint for their anti-cartel laws. No one size is being recommended for all.

At least four types of expertise is often needed to enforce cartel laws:

- Talent to successfully detect and investigate a cartel,
- Talent to estimate the damage done to purchasers by a cartel, to evaluate the cartel's operation, and the markets in which the cartel operates,
- Talent to successfully prosecute cartel Members,
- Officials to cooperate with other antitrust agencies, when the latter make requests or requests are made of them.

In each case the specific provisions of a nation's cartel law will have a considerable bearing on the amount of expertise needed. For example, in the absence of a well functioning leniency programme – which encourages cartel Members to bring evidence of theirs and others' illicit acts to enforcement officials – more investigative talent will almost certainly be needed. To the extent that penalties or punishments for cartelisation are (initially at least) decided by administrative fiat rather than through judicial deliberation, the need for prosecutorial talent will be reduced. The amount of economic analysis of a cartel can be reduced if fines for this illicit act are based on the current observed turnover of the cartel Members rather than on estimates of the profits gained.

Finally, the provisions of an MCA that determine the obligations on voluntary co-operation between enforcement agencies and requirements this imposes on developing countries in this regard could be more relaxed than the provisions for industrial economies. The suggestions above all point to ways to reduce the legal and economic expertise needed to implement an anti-cartel law. This is not to say that doing so will not compromise the deterrent value or effectiveness of such laws. Good policy requires picking the combination of inputs (talent needed) and expected outcomes (deterrent value etc) that best suits a nation's circumstances.

Much careful thought has gone into the relative merits of different types of technical assistance and capacity building, as the numerous submissions to the Second OECD Global Forum on Competition can attest. It appears that developing countries place a premium on experts that visit for several months at a time, especially former antitrust enforcement officials who can work on "live" cases with local officials. Workshops and other shorter term programmes have been found to be less effective.

If an MCA is negotiated there is a case for investigating whether the current mix of bilateral aid-driven and international organisation-driven capacity building efforts needs to be altered to ensure that no country that seeks assistance is denied it over a reasonable time frame. There is also probably a case for developing a set of best practices in cartel investigations that can guide developing country officials. Furthermore, mechanisms could be devised to ensure that such practices are circulated more widely and, where appropriate, case histories too.

4: Conclusions and strategies

There seems to be wide, though not universal, acceptance that competition policy is an appropriate subject for international agreement. This is not a trivial point: many commentators argue that there are areas of economic policy where states should go their own way. However in the case of competition policy, only a few hard line sceptics argue that developing countries should concentrate their scarce administrative and negotiating expertise solely on trade liberalisation.

Proponents of a competition agreement argue that there is an overwhelming case both in principle and reality that anti-competitive practices and the policies to deal with them can and do have major cross border impacts.

There is however disagreement about what form any international agreement should take and where it should be sited. Many analysts argue that if an agreement is to be binding on signatories it would have to be at the WTO, though some suggest that WTO rules should not be regarded as the only legally binding form of international law. However, "soft law" is not always ineffective particularly where countries may be mindful of loss of reputation for not meeting its requirements. But only the WTO has a specific enforcement mechanism, for better or worse, and the concrete political issue before the world community is how to deal with this at the WTO, if at all.

Any agreement would have two aspects – generalisation of the adoption of certain principles of competition policy and a framework for international co-operation.

This would imply an increase in both obligations (to have a competition law) and rights (to co-operation in dealing with cross border problems and also, where appropriate, to general provision of technical assistance.)

Any agreement at the WTO would also have to clarify what existing and new WTO obligations might mean and provide for exceptions.

For developing countries the main problems are:

- Whether any agreement would impose an excessive compliance burden, whether through administrative costs, imposing more liberalisation than is desired, or by constraining policy choices
- Whether an agreement would bring enough useful assistance to developing countries suffering from anti competitive behaviour by foreign firms.

In the discussions for the preparation of this report most contributors emphasised the second more than the first. Legally, the *GATT* already imposes some "horizontal disciplines" on competition laws, above all the obligation for a Member to provide no less favourable treatment (non-discrimination) for the internal sale or distribution of imported goods. There are similar but more complex implications for the *GATS*, where national treatment is not a general obligation, but non-discrimination does apply when a Member makes a market access commitment for a particular sector. The relationship between a possible general competition policy framework, National Treatment obligations and the manner in which non-discrimination is taken up in *GATS* requires further examination.

The issue therefore is what these disciplines currently imply and whether a competition agreement would tighten, clarify, or even relax them by specific derogations. There seems consensus that an agreement relating to competition policy itself would not affect such rules as do or do not already exist for other aspects of development policy. Any clarification of the rules on competition would have to be carefully worded and allow for exemptions, and the implications for the extension of disciplines beyond trade in goods clearly understood. Supporters of an agreement are aware, for example, that South Africa has very specific provisions in its constitution and competition laws that would have to be respected.

These views are supported by many who specialise in the field. However, some groups remain hostile to widening the formal scope of the WTO, citing the imbalance of expertise which can be applied to the detailed negotiations required and the negative results which many developing countries consider other WTO agreements, negotiated in similar circumstances, have had for them.

The second issue provokes more controversy. The proposals of the EC for a framework for voluntary co-operation on competition matters is welcomed by those who believe it would be a first step towards institutionalising a "global" view of competition policy. Sceptics consider that although the EC has tried to respond to criticisms that its initial proposals focused too much on market access, its approach will result in a plan that *requires* developing countries to ensure that private barriers to entry into their markets (import cartels) are policed, but merely *allows or encourages* developed countries to offer real assistance in dealing with export cartels.

Critics, especially from smaller economies, see almost no benefit to be had from an agreement that does not provide for exchange of confidential information without which a poorly resourced competition agency may be unable to act. Mixed evidence is cited. For example, South Africa has profited from being given access to non-confidential but important technical advice on how to proceed in certain cases. (Does the kind of co-operation South Africa can expect to get in future depend on the formal agreements it might sign?) The Brazilian experience of co-operation suggests that an amnesty in one country might make information sharing harder. But some accounts of this case suggest that an institutionalised framework could increase the chances of successful co-operation.

For developing countries a key issue will be what co-operation any proposed WTO agreement brings and what they have to do to be able to benefit from it: a country with no competition agency is unlikely to be able to profit from information exchanges.

The commonest view to emerge in the debate for this report is cautious and tentative – that the right agreement could bring benefits to all participants, but that there is still much work to be done to decide the most constructive framework.

A possible outcome of negotiations could be a competition agreement that is itself of little or no value to developing countries but which is generally accepted because it is part of a package that is beneficial overall. However, contributors to this report agree that the aim must be to achieve a competition agreement that is *in itself* beneficial to consumers and economic development worldwide.

Competition policy, consumers, developing countries and trade interests

Since the emergence of the EC's proposals for an MCA, most commentators agree that the market access elements that it contained have been moderated, and the EC argues that a sustainable balance between competing interests has now been struck. Not everyone is convinced.

Should the consumer movement work with the EC approach – as the most developed proposal – and simply argue the case for modifying it in specific areas? One practical difficulty is that many countries are not prepared to consider an MCA in the context of broad negotiations where progress on Competition may have to be traded off against vital existing problems (agriculture, textiles) and perhaps other new issues. Memories of the Uruguay Round remain strong. The consumer movement would have to consider whether it was prepared to consider competition policy as a bargaining counter.

There is also a widely held view that more affirmative action is required from a framework on behalf of developing countries. This indeed will be a practical necessity in order to engage developing countries in a meaningful voluntary agreement, wherever it is sited. This requires negotiation and understanding of achieving economic development within a global market. Countries without strong international players are simply unwilling to forego domestic participation irrespective of the long-term economic rationale that argues in favour of (more efficient) foreign participation.

Although special and differential treatment means a narrower scope for the application of competition law by some Members, and a commensurate reduction in the potential consumer welfare obtainable, some S&D arrangements are likely to be needed.

a) Options on exemptions

Exemptions define the degree of flexibility to be provided for the non-application of competition laws, primarily by the suspension of national treatment in the form of exceptions or exclusions. There is great diversity among developing, lesser developed, transitional, small, island and landlocked economies, and in their cultural circumstances. Even among similarly situated developed countries, legal evolution and unique market circumstances have led to variations in national competition laws. How is it possible to reconcile and be responsive to these considerations, while at the same time making progress in implementing functional competition laws? How can the special cases be accommodated without undermining the longer-term objectives of consumer welfare?

In practice, legitimate *non-efficiency* objectives are pursued by all competition laws to one degree or another, and the issue is how to define these. The EC approach has been to propose at least at the outset a transparent declaration of each Member's intended exclusions, for developed and for developing countries alike. From a consumer perspective, this may be too limited. And it may in any case be desirable to negotiate more specific criteria at this stage (as the EC did to establish its own exemption criteria found in EC Article 81(3)).[19] Since the consumer interest is

not only limited to those of developing countries, a back and forth process might yield a sharper instrument that incorporates economic as well as regional development criteria while leaving behind the more blatantly protectionist exemptions otherwise preserved by countries at all development levels.

While this may seem to be asking a lot of delegates not so willing to engage in negotiation of a framework at the outset, it may have real practical advantages. The concept of national treatment is dedicated to eliminating protectionism through the use of internal regulations or requirements. GATT/WTO panel law has developed legal tests to determine de facto violations of national treatment, for which national competition policies are in no way exceptional. In the absence of stated criteria within a competition framework, there is at present no meaningful defence on behalf of either developed or developing territories applying exclusions. This appears to hold as well for developed countries (agriculture, shipping), as it does for the myriad of infant industry projects favoured by developing countries. Thus, the choice may be waiting to see what happens when a challenge to exemptions is made, or start the process now of defining the terms by which domestic competition exclusions are appropriate in order to realise agreed legitimate policy objectives.

This presents an interesting possibility for advancing the consumer interest, not only by removing some developed country exemptions, but also in the opportunity to promote its own exemption criteria with a consumer orientation. Some questions will arise. Is a one-size fits-all approach to consumer issues appropriate where consumption is itself underdeveloped? Can consumer interest be served by the preservation or temporary stimulus of employment schemes in order to establish meaningful consumer participation in a domestic market? Is it within the wider consumer interest to support the development of consumption at all? In more developed countries, what limitations to competition may be relevant in order to advance the objective of sustainable consumption?

b) Options to emphasise capacity

Countries differ about whether competition law is a threat to sovereignty or a necessary response to globalisation. One possibility is that the degree of market openness achieved affects whether competition law is viewed positively. Whether via trade liberalisation or other geographic/historical factors, those with more experience with the global market may place a higher priority on functional domestic competition laws. This interest in laws may be aimed at retaining domestic participation in the market or at ensuring that foreign entrants are faced with a competitive environment. Either way, many states are trying to make these laws effective. While framework obligations can provide an additional push, the problem is very likely to be resources and capacity and the need for technical assistance, rather than a type of legal framework.

For the states that have not advanced the process of open markets, some would agree that the consumer interest should support a degree of legal coercion (binding agreement and obligations) on competition. However, if this is to be delivered by the institutional mechanisms of the WTO, it is a significant extension of the traditional role of the multilateral trading system.

While the rules define the forms of protectionism permitted, and guarantee certain treatment for the Members of the club, they do not now establish any minimum conditions of domestic market contestability. While the telecomm example suggests movement in this direction, it does not reflect the larger body GATT and GATS law.[20]

At the same time, there is good evidence that, for the economies with more liberal trade regimes, the sequence between market opening events and effective competition was not well integrated in a number of cases. While trade barriers are relatively easy to change by administrative action, adopting and implementing a new competition law is a far more daunting task. While there are still those who argue that market opening itself is a sufficient substitute for competition policy and these laws may not be necessary, this proposition has worn increasingly thin in the light of market experience. Whether verifiable or not, developing country officials tend to believe that the result of rapid market opening has been the reduction of domestic participants and the entry of single dominant firms or a collaborative group of foreign actors.

One conclusion for countries maintaining comparatively closed markets, is the desirability of developing a competition regime before liberalisation bites. This can generate domestic policy experience that over time could support confidence in market opening measures.

c) Options to narrow the focus:

i. As to existing commitments to National Treatment in existing WTO annexed agreements

As proposed by the EC (and supported by the International Chamber of Commerce (ICC))[21], the national treatment provision in a competition policy framework would apply on the basis of the nationality of firms under the requirement of domestic competition laws. While the proposed EC framework has other limitations on national treatment, this establishes the broadest possible base of action, as it would be seeking to ensure contestable markets (right of private action) across the full range of domestic economic activities.

It seems inevitable that this will be viewed as too broad an application of the principle by many developing countries. In fact, within the context of the WTO technical explorations, there is nothing that obliges Members to consider only such a broad framework. A framework can just as easily be established for specific application *(GATT, GATS, TRIPS)*.

This would allow time and more flexibility to consider how any new NT commitments for competition policy would impact on the structure of commitments undertaken (and not yet undertaken) in the GATS. Further, by treating competition policy provisions only as subsets of individual agreements, the risk of incorporating provisions relating to investment and investor protection is also reduced. The WTO does not yet include a multilateral agreement on investment, and there has been concern that competition provisions may introduce investment obligations where these have not been otherwise subject to an agreement to negotiate within the Doha framework.

ii) As to trade-related aspects
An accompanying issue is that if a new commitment defined National Treatment on the basis of nationality of *firms*, then there is an apparent separation of the GATT and GATS from competition policy provisions, as these agreements are centred on trade as cross-border movements for goods, or for services in their possible delivery modes across boundaries. While *GATT* Article III addresses internal regulatory regimes, including competition policies, its scope is more limited in dealing with laws that affect the internal sale of imported goods. Only the *TRIPS* agreement now requires a domestic policy response for matters not specifically related to the effects of practices on imports or exports.[22]

While domestic competition laws can and certainly do treat business arrangements broadly, rather than focussing only on those which are trade-related, the argument for a competition policy framework in the WTO to be broader at the outset than the scope of its annexed agreements has not been clearly made. Rather, it may appear to pose a barrier to the acceptance of a framework designed along these lines.

Although the EC proposal for a ban on hard-core cartels shares the OECD definitional base it focuses on arrangements that "affect trade". The EC prescription suggested for national treatment, as above, has taken a more expansive approach without being tied to these trade-related aspects. While developing countries have not suggested many alternatives to the EC proposals, a number have supported the approach adopted by the UNCTAD Set. The Set is noteworthy as it also has its focus on addressing restrictive business practices that may undermine the benefits to be derived from trade liberalisation, but concentrates on arrangements that impede market access alone, or monopolise markets thereby lessening competition.

iii) Emphasis upon a "prohibition" and as to structures other than cartels
In this narrower trade-related framework, the centrepiece provisions would be a ban on hard-core cartels. Other multi-state (regional) competition policy provisions are based upon obligations to address certain types of restrictive business practices subject to the condition that these practices may affect trade between the states. While this emphasises the trade-related aspect as well, many of the provisions are not limited to cartels. Thus it seems that even within this narrower space of "trade related", there is scope to consider whether a prohibition could be broadened to include dominant positions that have the power to reduce output or supply as also affecting trade.

Thus the emphasis of a framework provision could be placed upon private practices that affect trade, imports and exports. Narrowing the regime may make sense from a developing country perspective. It removes some of the 'stigma' of non trade-related aspects (as in the TRIPS), and also shifts the focus to the developed country experts. For developing countries, the focus on trade will emphasise domestic enforcement regimes capable of addressing vertical restraints which affect imports. Export restraints, whether made effective through export cartels, dominant positions, or as territorial components in larger international restrictive agreements, have not yet been addressed sufficiently to satisfy most developing country observers. Voluntary co-operation to permit developing countries to address export-related problems under their own domestic laws appears to many to be a

"papering over" exercise that is tacitly failing to recognise the reality of firms that have sufficient market power to make output restrictions effective on other markets. However, many developing countries lack the capacity to do this.

The question of de jure and de facto National Treatment

Both the ICC commentary and the EC proposals exclude the possibility of de facto national treatment commitments that would apply to individual enforcement decisions. These are the situations where origin-based distinctions are not made in the law, but in its application, the effects of the law is to provide for favourable treatment for foreign firms, or more often imported goods or services. Since the WTO practice has treated de facto cases both in MFN and NT contexts, it is not necessarily the case that the system of dispute resolution is incapable of ruling on these cases as well. However, since developing countries mostly oppose the application of GATT law as it stands now to competition, there seems little to be gained from arguing the more pro-consumer approach that would favour a full application of the NT principle.

Conclusions

The attraction of a broad horizontal approach to competition policies is obvious to consumers. If there are to be competitive markets, by all means let us have them in whatever sectors markets are operating. However, the limitations to the approach should also be recognised. To the extent that the consumer interests in developing and transition market economies need to be carefully fostered, a quick alignment with the broader proposals may not be the best long-term solution. The possibility of short-term gains for consumers has to take into account the possibility that these could come at the expense of employment and general economic development which enable participation in the market place. In the long run, consumer interests are not served by domestic protectionism, but they have a direct interest in a well-managed transition from a protected to an open economy. Effective competition policy can make an important contribution to this. And whenever there is lowering of domestic trade and/or regulatory barriers, domestic consumers must be entitled to a meaningful share of the benefits.

Where an MCA could be located

The key issue for determining 'where' an MCA should be located is whether any or all of any new international agreement should be "binding". The fact that commitments are binding and subject to dispute settlement is the primary benefit of the WTO system; indeed it is what distinguishes the WTO from its multilateral 'trade and competition' neighbour in Geneva: the United Nations Conference on Trade and Development (UNCTAD). Nevertheless, some have suggested that UNCTAD as a pro-development forum should remain the appropriate locus for an international competition agreement. UNCTAD is the home of the "Set of Multilaterally Agreed Equitable Principles for the Control of Restrictive Business Practices" – a non-binding multilateral instrument. The development dimension of the Set is found in its non-obligatory provisions calling upon states to address international Restrictive Business Practices that may detrimentally affect the trade and development of developing countries. Members of UNCTAD have already agreed a number of detailed texts on competition policy, but from a legal point of view these cannot become binding. Nevertheless, the international agreements, discussions and research coming from UNCTAD have an important part to play in the wider debates, nationally, regionally and at the WTO itself.[23]

Similarly it has been suggested that the OECD could be a good place for an international competition agreement. Once again, the Members of the OECD cannot make binding treaty commitments. In addition the OECD, though its Membership has widened, is essentially an organisation of more developed countries. The recent disastrous experience of using the OECD as a forum to negotiate the "Multilateral Agreement on Investment" is likely to be a warning on not trying to 'pre-agree' too much at this forum without the involvement of developing countries. But again, like UNCTAD, the OECD is a valuable forum for technical discussion among its Members and has often collectively devised codes of conduct that are urged on and agreed to by its Members, albeit in a non-binding manner. While commitments at the OECD are non-binding, they carry weight because of the efforts put into agreeing them. The Hard Core Cartel Recommendation clearly shows how a technically non-binding commitment was taken so seriously by Members

that it became riddled with exceptions, almost as it would have if negotiated in an organisation where binding commitments are made.

If an international agreement on competition is to be made on a formal and binding basis, it will have to be negotiated at the WTO. Occasionally people speak as if WTO negotiations imply that "the WTO" might be given powers to regulate international competition. This is of course not true. The WTO dispute settlement panels and Appellate Body are the prime interpreters and adjudicators of commitments that Members make, but the enforcement mechanism itself is applied through the action of the complainants against a recalcitrant respondent Member. Members of the WTO have ceded authority (to adjudicate upon disputes amongst one another) to the WTO dispute settlement process already, of course, with respect to the many competition related provisions in the GATT, GATS and TRIPS and the Telecoms Reference Paper. One argument in favour of continued negotiations is in fact that (as Part III of this report shows) WTO and especially GATT rules do already contain provisions that can be and have been used to challenge competition related national policy measures. But these provisions are written in very general terms and for clarifying them through some form of 'horizontal' MCA. Others prefer to leave them imprecise until every Member of the WTO is ready to negotiate a more detailed agreement, trusting in the meantime that key matters will not be brought up prematurely in dispute settlement.

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Endnotes

[1] Phase 1 of the Consumers and the Global Market Programme (CGM) produced a Global Report on Competition using the research and analysis of competition in 7 developing and transitional economies. The research being conducted in Phase 2 includes over 16 case studies on specific sectors and product markets within the CGM countries. It is supported by the Ford Foundation, the ministry of foreign affairs of the Dutch Government, the European Union, the International Development and Research Centre (IDRC), and Oxfam.

[2] For further information please contact Kamala Dawar (kdawar@consint.org)

[3] See for example, Consumers International (CI), (2001), Consumers and Competition, Consumers International Global Competition Report, Executive Summary, p. 4, London.

[4] It should be noted that the European Communities is also proposing that WTO Members also adopt other competition-related provisions. As the latter are not directly related to the subject of this section, namely hard-core cartels, they are not discussed here. They are, however, discussed in other sections of this Technical Report.

[5] Subsequent sections evaluate the propriety and feasibility of these proposals.

[6] Article III of the GATT and Article XVII of the GATS already require that public measures (including competition laws) not be discriminatory on their face, and also - and more importantly – not discriminate in fact.

[7] For example, consider a general entry barrier to all-comers. One example of this is a refusal to deal with any competitor by the owner of an existing essential facility; another might be a market structure where single brand distribution is the norm – with or without exclusive purchasing commitments that tie distributors to one particular supplier.

[8] EC proposal to WGTCP

[9] These would also apply to commitments to de facto non-discrimination considered below.

[10] EC proposal to WGTCP

[11] One of the issues in the *Japan-Film* case was the availability of domestic and/or local distribution regulations in Japan.

[12] e.g. the EC-US, EC-Canada, EC-Japan competition co-operation agreements.

[13] Possibly a seemingly hopeless task.

[14] Findings in ongoing work in project, "An Empirical Study of Competition Issues in Six CARICOM
Countries: Towards Policy Formulation". SALISES, The University of the West Indies, St. Augustine.

[15] See, for example, Amsden and Singh (1994), Singh (2002), and Tilton (1996).
[16] This is not to say that East Asian governments always took measures to constrain rivalry. Even some of the authors who believe that these governments took some measures to constrain competition also point out that the same governments took different measures in different contexts to bolster competition (see, for example, Amsden and Singh 1994). Characterisations of government policy as always pro-competitive or always anti-competitive are simply inappropriate. If this sounds messy and complicated, it is; but that itself contains an important lesson for interpreting the sweeping claims made by some about East Asian development and its implications for other developing economies' current development strategies.
[17] Preliminary findings of current ongoing research, "An Empirical Study of Competition Issues in Six CARICOM Countries: Towards Policy Formulation". The Sir Arthur Lewis Institute of Social and Economic Research, the University of the West Indies, St. Augustine Campus, Trinidad and Tobago, 2002-2003.
[18] There is dissent about whether the *TRIPS* agreement was indeed a sensible part of the multilateral trading system
[19] EC Article 81(3) imposes two positive and two negative conditions. An otherwise captured agreement must contribute to improving production or distribution of goods while allowing consumers a faire share of the benefit. It may not impose restrictions not indispensable to the objective and/or afford the firms the possibility of eliminating competition. What is being suggested in the text is that a similar paragraph be drafted for economic development.
[20] For the GATT, domestic market economy is not a stated obligation, other then those Articles that require normal market behaviour for state trading enterprises or state monopolies (GATT Article XVII, GATS Article VII). The state cannot facilitate restrictive import or export agreements, but it does not carry an obligation to root out these restrictive business practices. (GATT Article XI). In addition, domestic regulations act as unnecessary obstacles to trade are actionable. (TBT, Art 2.2). However, compare GATS Article IX where Members agree to provide consultation for certain business practices of suppliers which may restrain competition. GATT has no comparable article.
[21] International Chamber of Commerce, (ICC), (2003), Competition Policy in the WTO, 2d revised, 30 January, Doc. 225/580, p. 3. The report also favours a limitation on the national treatment principle to cases de jure.
[22] TRIPS scope is decidedly non-trade related in protecting the enforcement rights of private parties whether or not the commodities in question have been imported. The agreement does have provisions regarding the treatment of importation of counterfeit goods, which is a trade related matter. The other qualifier is the GATS mode for commercial presence, but again here, a commitment made is negotiated rather than a general commitment.
[23] The UNCTAD has the status of an observer in the WTO Working Group on Trade and Competition. In this position it does not submit proposals for a competition policy framework agreement, nor is it commenting directly upon the viability of other country proposals. While active in monitoring the discussions and submitting documents on discussion points, it appears to play a role more oriented to facilitating developing Members to coalesce their own opinions and to assist in putting them forward. Since developing country opinions vary widely on the desirability of having a WTO framework agreement, the UNCTAD is also not able to attempt to

orchestrate any common position to be advanced. Rather, it has sponsored conferences and has collected the variety of opinions and questions expressed by developing country Members. These have been submitted to the Working Group. (For an example see, Closer Multilateral Co-operation on Competition Policies, Consolidated Report of Four Regional Seminars on the Post-Doha Mandate, UNCTAD Technical Series on the Development Dimension of Competition, 15 May, 2002, submitted also to the WTO Working Group.)

What is Consumers International?

Consumers International (CI) supports, links and represents consumer groups and agencies all over the world. It has a membership of over 250 organisations in 115 countries. It strives to promote a fairer society through defending the rights of all consumers, especially the poor, marginalised and disadvantaged, by:

- supporting and strengthening member organisations and the consumer movement in general
- campaigning at the international level for policies which respect consumer concerns.

Consumers International was founded in 1960 as the International Organisation of Consumers Unions (IOCU) by a group of national consumer organisations. The group recognised that they could build upon their individual strengths by working across national borders. The organisation rapidly grew and soon became established as the voice of the international consumer movement on issues such as product and food standards, health and patients' rights, the environment and sustainable consumption, and the regulation of international trade and public utilities.

Consumers International is an independent, non-profit organisation. It is not aligned with or supported by any political party or industry. It is funded by fees from member organisations and by grants from foundations, governments and multilateral agencies.

Consumers International's Head Office is based in London. It has Regional Offices in Kuala Lumpur (Malaysia), Santiago (Chile) and Harare (Zimbabwe), and in London.

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