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A Multilateral Competition Agreement and the Developing Countries

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1 Executive Summary

The argument for introducing competition policy as a 'new' WTO issue – and for setting up a WTO working group to examine it – is that improved market access achieved by lower trade barriers is put at risk by anti-competitive practices. Of course competition policy has a wider remit than simply contributing to market access for exporters. It focuses on protection for consumers against the abuse of market power by dominant firms, cartels or other collusive practices. But the focus of competition policy as a WTO issue is – or at least should be – the trade and market access implications of certain types of anti-competitive behaviour. While increasing numbers of developing countries are choosing to put competition laws in place, these laws are generally useless against the effects of the abuse of market power in other jurisdictions. Indeed, although a number of developed countries proscribe cartels and other forms of anti-competitive action, export cartels are often exempted on self-serving mercantilist grounds.

There are a number of bilateral and regional agreements on competition, largely concerned with the sharing of case-specific information and co-operation. While these are useful in coping with particular instances of anti-competitive behaviour, they do not deal with the systemic problems of hard core cartels, dominant mergers and the willful obstruction of market access. Nor has the traditional Bretton Woods approach on eliminating anti-competitive behaviour by liberalising market access been found adequate, particularly as services are so often outside the tradeable sector.

Competition Law and WTO Principles and Related Policies

Competition rules are already embedded in a number of WTO Agreements, most importantly the GATT, the GATS and TRIPs. There have also been a number of non-binding codes, particularly on restrictive business practices. But for the proponents of an international agreement on competition these are piecemeal and/or non-

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actionable. What they – and in particular the EU which, together with Japan and South Korea, is a principle advocate of a Multilateral Competition Agreement – have argued is that the core WTO principles, in particular transparency and non-discrimination, should underlie the adoption by all WTO Members of a set of minimum legal standards for domestic competition laws and regulations, and minimal requirements as regards international co-operation between competition authorities. In December 1996, at the Singapore ministerial meeting of the WTO, a Working Group on the Interaction between Trade and Competition Policy (WGTCP) was established, though only 'on the understanding that the work undertaken shall not prejudge whether negotiations will be initiated in the future' while its mandate for continued 'educative' work was renewed for 1999 and 2000.

In the working group, to the extent that the developed and developing countries disagree, it is mainly over the scope of the so-called development dimension. For example, many developing countries would argue that the principle of non-discrimination, which includes both national treatment and most favoured nation treatment, is not inconsistent with sectoral exceptions, exemptions and exclusions from national competition regimes, provided that these provisions are applied in a totally transparent way and discrimination between foreign enterprises is avoided. After all, even in developed countries, competition rules are used with discretion in order to avoid damaging, or in order even to positively contribute to, the international competitiveness of the sector. Some, mainly developing, countries continue to argue that the case for a multilateral competition policy has not been made, particularly since opportunities for increasing co-operation between jurisdictions remain largely unexploited.

The paper identifies the main forms of anti-competitive behaviour, concentrating on those with clear transborder implications. The clearest of these are export cartels. Research by the World Bank and the OECD has shown that these have imposed massive costs on developing country imports and, by implication, the distortion of resources and economic growth. Horizontal agreements are both easier to define, and so prohibit *de facto*, than are vertical agreements, abuses of dominance and publicly sanctioned monopolies.

A Multilateral Competition Agreement would have implications for other policies, most obviously consumer protection, which may or may not be subsumed into competition law, but where it is clearly necessary that legislative inconsistencies and conflicts are avoided. In the case of policy with regard to foreign investment, or more precisely foreign investment policy, there is a parallel WTO working group. As in the discussions about a possible MCA, the emphasis of the developing countries is on ensuring that under an Multilateral Investment Agreement there are substantive and binding provisions to ensure that individual countries, while subjected to certain disciplines, nevertheless be allowed sufficient policy discretion to protect their developmental goals and policies. It is likely that the MIA will be based on the GATS model,

with national treatment (NT) only applying to the sectors listed in the schedule of commitments and even then is subject to conditions and qualifications. As far as TRIPs are concerned, there have been many allegations of instances of the exploitation of intellectual property rights for anti-competitive purposes. The TRIPs agreement does include some protection against that but it is clearly inadequate. Opening up the TRIPs agreement to re-examination could take many years, but it is argued that this is something that could be entrusted to the proposed World Competition Forum (WCF) rather than making an MCA hostage to the reform of that agreement. The same approach is recommended as regards anti-dumping. Anti-dumping laws are widely made use of as a trade barrier for anti-competitive purposes. Certainly in principle competition laws could replace AD laws and this abuse could be prevented, though initially it might necessitate a plurilateral agreement between Members who accepted each others' laws against export predation and the relevant legal processes.

Developing Country Concerns

The concerns of the developing countries about an MCA are firstly that it would significantly reduce their 'policy space' as regards development policy: in particular, they may wish to emphasise what as been called 'dynamic efficiency' as opposed to allocative efficiency. For example, the high level of profit and of investment that may be required for the rapid development of a particular sector might imply that certain key public or private enterprises, in return for ensuring a high level of investment, should be protected at least temporarily from the full rigours of competition, for example through licensing.

Another major concern is that national firms would be at a competitive disadvantage vis-à-vis the larger and lower cost transnational companies, and that the TNCs might even exploit the competition rules to place themselves in a dominant market position. The developing countries are worried about their right to prevent foreign take-overs of domestic firms. Competition rules, arguably, should allow this in certain circumstances while not inhibiting mergers of domestic firms. Indeed, given that by international standards developing country firms are usually small or at most medium-sized, the merger of existing national firms may be the only way to provide competition for some TNCs.

On the other hand this paper comes firmly down against Special and Differential Treatment for developing countries in an MCA. Demands for SDT have become major sources of resentment in multilateral trade negotiations. Since the Uruguay Round was completed in 1995, disputes about whether the SDT has been implemented and whether SDT has been eroded through case law created by the disputes mechanism procedures have contributed to a major loss of confidence in WTO procedures on the part of developing countries. In general accommodating the concerns of the developing countries within the MCA itself rather than in SDT clauses

would be vastly preferable.

The developing countries are generally opposed to giving responsibility for the implementation of the rules agreed under an MCA to the WTO dispute resolution process. It is the case that the experience of the DSU has been limited to inter-government disputes concerning the implementation of the WTO Agreements and it would be appropriate to maintain that principle. In other words Members could bring to the WTO cases about the non-implementation of the MCA, if, for example, one Member does not enact the agreed laws on market access or refuses systematically to co-operate in transborder competition cases. But individual cases between state and private enterprises would remain the sole responsibility of national courts and authorities.

Not the least concern among the developing countries is the cost, both directly financial and in terms of resources of legal and other skills, that would be imposed on them by an MCA which required them to establish an extensive corpus of competition law and the necessary institutions for its implementation. Insofar as there is a role for an agreement under the auspices of the WTO, it is because there is a strong link between market access and anti-competitive behaviour, and an MCA should be limited to this facet of competition policy. Developing countries would be the major beneficiaries if an MCA meant that market access for their exports is not blocked by anti-competitive practices of international cartels, abuses of dominance by multinational firms and large mergers intended to create situations of such dominance, and other restrictive practices by private firms, since most of those firms are based in developed countries. Similarly they would gain disproportionately from lower import prices where hard-core cartels are broken up. Bilateral and regional agreements are inadequate for this task. However, beyond an agreement to outlaw anti-competitive practices which effect trade in goods and services and ensure international co-operation in prosecuting such behaviour, the scope and details of the competition law and the competition agencies should be for the individual country to decide without obligations imposed by a WTO or other international agreement.

Regional Approaches

Some of the burden of complying with an MCA might be shared among countries who are members of a regional grouping. They could join together to develop an appropriate set of competition laws and even share a competition authority, though even within such a group there may be problems of a 'one-size-fits-all' nature. There is also the need to police trade within a free trade area or common market, and several free trade areas, including the Caribbean Community (CARICOM), the Union Économique et Monétaire Ouest Africaine (UEMOA) and the Common Market for Eastern and Southern Africa (COMESA), have either established an authority for preventing anti-competitive practices in regional trade or are planning to do so.

With the establishment of Economic Partnership Agreements (EPAs) between groups of developing countries and the European Union, the co-ordination, not of competition policies, but of the negotiating stances within each of these groups, is needed. The EU negotiators are likely to insist that competition law requirements be included in any FTA or customs union (CU). The African, Caribbean and Pacific states, in negotiating EPAs with the EU, may find themselves constrained to accept certain rules over specific competition issues while any exceptions to NT rules for EU firms are disallowed. Pre-empting such pressures by pressing for an Multilateral Competition Agreement in Geneva may be advantageous to the ACP countries in their Brussels negotiations.

A Minimalist MCA

The World Bank, in association with the OECD and, separately, UNCTAD, have produced model competition laws. The EU has proposed the universal adoption of a set of minimum legal standards and 'core principles' for domestic competition laws and regulations, and minimal requirements as regards international co-operation between competition authorities. The EU proposals are less broad-ranging than their earlier proposals which appeared to put a lot of emphasis on opening up developing countries markets to developed country exporters. Perhaps as a result of their dilution they are now rather vague.

These model laws and the EU proposals serve as useful starting points. But the role of the WTO should be limited to issues closely related to market access. Secondly, it is important to minimise the costs of competition policy to the developing countries and to avoid requiring developing countries to adopt a legal and administrative structure for competition policy greatly in excess of what the level of development implies or what they could effectively manage. Thirdly, it is important to avoid imposing on the developing countries an uncertain but escalating commitment such as has emerged from other WTO Agreements, for example the TRIPs, while avoiding exemptions and exceptions from commitments for developing countries that are time-limited or subject to periodic review.

This paper proposes an MCA under WTO auspices. This would require of all Members:

- That all anti-competitive practices that significantly impair the access for foreign exporters of goods or services to a country's markets through private or public restraints be prohibited;
- That hard-core cartels be outlawed in all Member countries;
- That Members should agree to consider the interests of third countries in their merger authorisation procedures;
- That to assist in enforcement actions in partner countries, Members practice positive and negative comity, international notification and consultation;

- That fair and equitable legal procedures – modelled on those in the TRIPs Agreement – would be agreed, including equal application of competition law enforcement to foreign and domestic persons (natural and legal), the right of appeal and the availability of remedy measures, and the avoidance of undue delays in the proceedings.

The Proposed World Competition Forum

The competition issue goes beyond the formal competence and practical expertise of the WTO. In order that WTO Members can continue to share experiences in the competition field, with the more experienced offering the others technical assistance with capacity-building in the area, a more mutually supportive organisation is needed. This report proposes the establishment of a World Competition Forum, which would bring WTO Members and other countries together voluntarily in a non-confrontational grouping for the promotion of the 'culture of competition', for sharing experience and for mutual assistance in the establishment of best practice law and procedures.

The WCF would engage in exchanges of experience and discussions on competition policy issues. For example, it would organise conferences on global competition issues that affect international trade and global economy. It would engage Members in debate and negotiation with a view to improving and expanding the MCA in appropriate directions. These include the prohibition of various types of vertical agreement or abuses of dominance, in the private or public sectors, which are not prohibited initially in the MCA because of difficulties in the precise identification and definition of the anti-competitive activities, the replacement of the existing much abused anti-dumping measures by competition law and the improvement of the TRIPs Agreement to prevent it being used to justify anti-competitive behaviour, including the prohibition of action to stop parallel imports.

Voluntary peer reviews of each member's competition laws, policies and perhaps even their enforcement record would be undertaken under the WCF umbrella. Perhaps the ultimate proof of the success of a WCF would be the establishment, under its auspices, of an international authority for the investigation of proposed mergers and acquisitions.

The WCF would also serve as the focal point for the co-ordination and monitoring of technical assistance, especially to developing countries. Capacity-building is required if countries are to fully benefit from competition laws in general and international co-operation in particular. This not only applies to countries about to institute a system of competition laws with the necessary agencies to make them work, but also to the roughly 90 WTO Members who currently have competition laws on their books. Even the most sophisticated exponents of competition law can benefit in various respects from the experiences of others.

1 Introduction

The interaction between trade and competition law is one of the 'new trade-related issues' proposed as a subject to be included in the Doha round of multilateral trade negotiations. Trade law and competition law most clearly intersect where market access is blocked by anti-competitive restraints. At this point trade law and competition law are two sides of the same coin.[1] Rules that require countries to open their doors to trade may be rendered meaningless by commercial constraints – on the part of national or foreign firms – which block access.

However there is a major difference between trade policy and competition policy. The former focuses on liberalising the access of enterprises to markets; the latter, traditionally, on the protection of consumers against the abuse of market power. Competition policy goes beyond market access issues to protect consumers' interests threatened by cartels, where, for example, groups of firms from the same or different countries conspire to force up prices on international markets. Another threat to consumers arises from mergers and acquisitions where large firms combine to achieve a dominant position in international markets.

At the last known count, about 90 WTO Member countries, including some 50 developing and transition countries, have adopted competition laws, also known as 'anti-trust' or 'anti-monopoly' laws. Generally these laws are aimed at such anti-competitive practices as price fixing, market sharing and other cartel arrangements, abuses of a dominant position, mergers that limit competition and agreements between suppliers and distributors that seek to exclude new competitors from the market. Under the heading of competition 'policy', it is sometimes useful to include other such goals as the promotion of competition in the national economy, through sectoral regulations and privatisation and even liberalising imports.[2] In this chapter, however, competition 'policy' is defined *in senso stricto* to refer to strategies for the enacting of legislation to prohibit behaviour that interferes with the contestability of markets and establishing the institutions necessary for the implementation and policing of these laws.

The heightened interest in competition policy shown by a number of developing countries is to some extent associated with the wave of privatisation in so many countries. Privatisation may be indicative of disenchantment with the effectiveness of public ownership from an economic efficiency standard or with evidence that public ownership creates problems of accountability and corruption. However transforming a state-owned enterprise (SOE) monopoly to a private firm or firms operating under competitive market conditions is a complex process, particular in a situation of so-called natural monopoly. Competition policy is no panacea but may be of some value though sectoral regulatory institutions may also be necessary. Another factor encouraging the adoption of competition laws is the lack of progress in dealing with the

restrictive business practices (RBPs) of TNCs despite a number of initiatives by multilateral organisations in this area.

As regards the developed countries, the renewed interest in issues relating to competition may have been aroused by a number of large-scale mergers and frustrated merger plans between US and/or European TNCs which has put stress on the 'comity' arrangements between US and European regulatory bodies.[3] Clearly there are limits to the effectiveness of bilateral and regional agreements on competition policy and this raises questions about whether such problems might be better resolved through a Multilateral Competition Agreement.

Market opening as an instrument for achieving competitive markets was until lately the orthodoxy preached by the Bretton Woods institutions, which used the conditionality associated with structural adjustment programmes to insist on the reduction of trade barriers without any requirement as regards competition policy.[4] More recently there has been a realisation that market opening through reducing trade barriers is in itself an inadequate instrument for ensuring the contestability of markets. This is partly because services are largely outside the traded sector and so an increasing share of the economy is denied the benefits of competition from imports.[5] Another reason is that imports themselves can be subject to anti-competitive pricing, either because of export cartels or because of mergers between foreign and domestic suppliers.

Indeed, the consensus has swung towards the view that the existence of competitive markets is itself the *sine qua non* for the successful use of market opening and other liberalisation policies as instruments for bringing about integration into the world economy and, more generally, raising the trend rate of economic growth. This view has informed the attitude of the developed countries towards an MCA within the WTO structure. To a large extent the interest of the developed countries is in using competition policy to lever open new markets for their exports. That rationale seems to have informed the EU's original proposals for a multilateral agreement.[6] But within the developed countries many policy-makers now claim to be convinced that the developing countries specifically would gain from the domestic impact of competition policy.

Historical Perspectives

In, fact the link between trade and competition policy is by no means a new issue. The importance of competition law as a back-up to trade liberalisation was recognised in the Havana Charter of 1950. The original International Trade Organization (ITO) was to proscribe 'business practices which restrain competition, limit access to markets or foster monopolistic control ...' in breach of the basic notions of free competition.[7] However, the ITO was stillborn and the GATT included no such clause on competition.

Since then there have been a number of initiatives to limit anti-competitive prac-

tices, directed primarily at multinational companies. In particular, efforts to codify unacceptable TNC practices have resulted in the non-binding OECD Guidelines for Multinational Enterprise (1976, revised 2000); the UN Centre for Transnational Corporations Draft Code of Conduct for Transnational Corporations, promulgated in 1977 and intended to be binding but abandoned in 1992; and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy of 1977.[8] In 1980 the UN General Assembly adopted the voluntary 'Set of Principles and Rules on Competition'. A binding code remains elusive though the 1999 Global Compact project of the UN Secretary-General to link the activities of TNCs with the Universal Declaration of Human Rights, the ILO Declaration and the Rio Declaration on Environment and Development are still alive. One of these initiatives could still result in the comprehensive and actionable agreement sought by the developing countries but the slow progress in that direction has encouraged some developing countries to pursue the idea of an MCA.

The developing countries would like to see binding rules on such matters as corporate disclosure, accountability through corporate governance structures to different stakeholder groups, responsibility over such matters as illicit payments, advertising and product safety and quality, transparency in transfer pricing, restrictive and unfair business practices, labour and environmental standards, technology transfer, and commitments to respect national laws for the promotion of local entrepreneurship.[9] Some of these issues might be better addressed in other existing or proposed WTO Agreements such as the MIA currently under discussion by a WTO working group but some, such as on RBPs, could find their way into an agreement on competition policy.

Today, despite the continuing concerns of the developing countries, the emphasis is less on anti-competitive practices by TNCs, and more on an MCA as a means to eliminate, or at least limit, both private and public practices that restrict international trade. In December 1996, at the Singapore Ministerial Meeting of the WTO, a Working Group on the Interaction between Trade and Competition Policy was established though only 'on the understanding that the work undertaken shall not prejudge whether negotiations will be initiated in the future', while its mandate for continued 'educative' work was renewed for 1999 and 2000. The establishment of this working group, together with the Working Group on Trade and Investment, emerged as part of the built-in agenda under the Agreement on Trade-Related Investment Measures (TRIMs) and the interrelatedness of any reforms of the TRIMs agreement and proposals for new agreements in trade and investment and in trade and competition policy will be of importance as these issues develop.

The WGTCP has had a number of discussions on, for example, the relevance of the WTO principles of national treatment, transparency and the MFN rule to competition policy and on the contribution that a competition policy agreement might make to the objectives of the WTO, including the promotion of trade. The group has not

sought to define a consensus, let alone the contents of such an agreement, but has adumbrated certain core principles and providing a forum for the ventilation of the concerns of the developing countries.

Competition Policy in Existing WTO Agreements

Considerations of anti-competitive practices are not new within the WTO. Competition-related provisions already feature in existing WTO Agreements. The abuse of a monopoly position and other anti-competitive practices is dealt with in Articles VIII and IX of the GATS, which explicitly raises the use of comity, though without using that word. In particular, Article VIII deals with monopoly and exclusive service suppliers and the possible abuse of monopoly power, while Article IX deals with constraints on competition arising from other business practices. The latter article states that '[e]ach Member shall, at the request of any other Member, enter into consultations with a view to eliminating practices [which may restrain competition]. The Member addressed shall accord full and sympathetic consideration to such a request and shall co-operate through the supply of publicly available non-confidential information of relevance to the matter in question.'

In TRIPs, members are given the right to take measures in the event of abuse of property rights (Articles 8.2, 31 and 40). Licensing agreements among competitors can readily serve as vehicles for establishing cartels. Article 8.2 allows Members to take action against holders of intellectual property rights who use these in unreasonable restraint of trade. Article 31 recognises such anti-competitive practices as constituting grounds for 'use without authorisation of the right-holder', i.e. compulsory licensing, while Article 40 authorises Members to outlaw anti-competitive practices that constitute an abuse of IPRs.

Article 9 of TRIMs requires the Council for Trade in Goods to consider whether there need be complementary provisions on investment policy and competition policy. This is indeed the justification of the two working parties. There are other references to anti-competitive practices, and remedies prescribed, in the Safeguards, the Technical Barriers to Trade (TBT) and the Sanitary and Phyto-sanitary (SPS) Agreements and in Article XVII of GATT 1994 concerning state trading enterprises. Any new MCA would clearly have to be designed to dovetail with existing provisions. But it is also clear that the piecemeal set of existing WTO rules against anti-competitive behaviour is inadequate to counteract the proliferation of widespread anti-competitive activities.

Competition Law and WTO Principles

A considerable amount of the WGTCP's time has been devoted to the examination of the relevance of WTO principles to the formulation of a strategy of competition

policy. However, an absence of consensus as to what these principles consist in, let alone their interpretation, has meant that the discussion has hardly justified the many hours spent thereon, let alone in the preparation of the background documents.[10] Nevertheless, such principles have served as useful hooks on which various Members have hung their particular ideas about the development of competition policy.

One particular strand of argument that has garnered much support among the developing country Members is that traditional WTO principles such as non-discrimination (including both national treatment and MFN treatment), transparency and flexibility (though not everyone would include the last as a fundamental WTO principle rather than an acknowledgement of *real politik*) do not imply a one-size-fits-all or harmonised approach.[11] In particular, within a multilateral approach, there is scope for the inclusion of a strong development dimension.[12] In addition, the principle of non-discrimination when applied to the scope of competition law and/or policy embodied in a multilateral framework does not stretch to wider issues of industrial or development-related policy. In other words, sectoral exceptions, exemptions and exclusions from national competition regimes are not inconsistent with non-discrimination, provided that these provisions are applied in a totally transparent way and discrimination between foreign enterprises is avoided. As Woolcock points out, 'national competition rules whether in developed or developing countries have been used with discretion in order to allow concentration/rationalisation of the domestic industry in the hope that this will contribute to the international competitiveness of the sector'.[13]

Against this view that there are benefits to be gained from a multilateral agreement with the appropriate scope for exceptions and exemptions, some Members have reacted against the idea of such an *à la carte* view of competition policy by coining a new WTO principle, that of comprehensiveness. Others, in particular certain developing countries, have argued that the case for any multilateral agreement has not been convincingly made. But a broad view among Members appears to be that insistence on the principle of transparency will, in effect, guard against many of the problems that worry some developing countries about a multilateral agreement, in particular excessive intrusiveness and standardisation, as well as contributing to compliance and credible enforcement procedures.[14]

2 Forms of Anti-competitive Behaviour

The role of national competition rules in improving resource allocation and raising consumer welfare is well-known. The gains may take the form of higher productivity and lower prices for consumers, better choice, a clearer operating environment for business and even reduced compliance costs. Here we look more specifically at the anti-competitive practices that are particular transborder threats to free trade and/or

consumer interests. They are horizontal and vertical agreements (to collude), the abuse of market dominance and publicly sanctioned restrictive practices.

Horizontal Agreements

The clearest examples of this type of arrangement affecting transborder trade and competition are export cartels. In this case, a number of producers from one country may enter into an agreement which sets prices or output levels for foreign markets. Governments have often 'turned a blind eye' towards, or even encouraged, cartels which have helped their exports.[15] Transborder mergers and acquisitions may be attempts to create monopoly positions which are not under the jurisdiction of any one competition authority, while international cartels are joint actions by corporations from more than one country, under which they agree to divide markets, set prices or divide up bids for projects. Import cartels may be a defensive response by companies that purchase the goods of export cartels, or could be simply an attempt to force down import prices from foreign suppliers.

Currently some 25 investigations of export cartels are underway. Recently revealed cartels include: a) the vitamins case, in which collusion between European and Japanese firms resulted in 70 per cent higher prices for consumers; b) the Archer Daniels Midlands case which involved international co-operation between American, Japanese and European firms to fix prices in the worldwide food and feed additives industries; and c) the UCAR International Inc. case in which that firm pleaded guilty in participating in an international cartel which agreed to fix prices and allocate market share in the US$ 500 million graphite electrodes market.

A World Bank study found that '[i]n 1997, the latest year for which we have trade data, developing countries imported $81.1 billion of goods from industries which had seen a price-fixing conspiracy during the 1990s. These imports represented 6.7% of imports and 1.2% of GDP in developing countries. They represented an even larger fraction of trade for the poorest developing countries, for whom these sixteen products represent 8.8% of imports.'[16] The prevalence of hard core cartels, both domestic and international – the OECD investigated over 120 cases between 1996 and 2000 – and the magnitude of the welfare losses that they have caused is probably the single greatest justification for international action on competition policy.

Vertical Agreements

These arrangements describe special and sometimes exclusive relationships along the production-distribution chain, such as those between manufacturers and retailers or material providers and assemblers. They include tied selling where a seller forces a buyer to purchase more of a product than the buyer wants, exclusive dealing where two or more sellers create local monopolies by agreeing to divide markets into regions (by product or geographically) and refusals to deal where a supplier forces a purchaser *into*

restraint of trade under threat of withdrawal of products or services. Such agreements have anti-competitive effects if they restrict market entry by domestic or foreign products and/or result in artificial price maintenance.

The best known of the vertical agreement cases is the Kodak-Fuji case. This was brought to the WTO as a so-called 'non-violation' complaint under Article XXIII of the GATT which allows members to challenge government measures that 'nullify or impair' trade liberalisation commitments even though the measures themselves are not subject to WTO rules. 'The US claimed that because Fuji controlled the distribution system, this allowed it to exclude Kodak from access to film wholesaling networks, obliging it to sell directly to retailers, a much less efficient method of market penetration. The key allegation was thus of an anti-competitive vertical relationship between Fuji and its primary distributors. Japan responded that the control by Fuji of wholesale networks was irrelevant since most of the retailers they served also bought imported film and that Kodak's own distribution system amounted to the creation of a wholesale system of its own, the exclusion from the Fuji system, such as it was, therefore being irrelevant.'[17] The WTO dispute panel found that US access rights were not impaired on the grounds that importers were not disproportionately affected by Fuji's marketing strategy, that there was nothing in the distribution systems in Japan that excluded foreigners and that Fuji's marketing strategy was the norm for photographic film, even in the US.

Abuse of Dominant Positions

A major concern in national competition policy is the actual (or potential) abuse of market power by dominant enterprises. For example, a large company may use predatory pricing to drive its smaller competitors out of a particular market. The potential for abuse is a significant consideration in the scrutiny of mergers to determine whether they could result in excessive market power or its exercise. The interpretation of what constitutes a dominant position, or a particular abuse of such a position, can be a matter of considerable complexity in a domestic market. The issue is even more complicated if the alleged abuse involves foreign or international markets.

Concentration levels are typically higher in developing countries than in industrialised countries.[18] Often a few large enterprises dominate a sector, accounting for the greater part of output. Such a situation serves to facilitate collusion. Secondly, privatisation has often led to the transfer of the monopoly from the public to the private sector, whether there may be little restraint on the exploitation of monopoly power. Competition laws may help prevent the dominant firm from exercising market power and to enable competitors to enter and survive whereas in the case of natural monopolies, regulation in the form of setting of prices, profits and possibly quality standards is generally necessary.

Pakistan's privatisation policy provides some useful examples of the inherent diffi-

culties.[19] In particular, the evidence on growth of output and change in prices in the activities so far privatised shows that the producers have been able to exercise their monopoly power at the expense of consumers. Interestingly, the weakness of the regulatory framework in Pakistan has led the government to adopt a policy of reducing import duties in order to expose the industries to competition from abroad.

Publicly Sanctioned Restrictive Practices

These might include public or regulated private monopolies, the granting of favourable conditions to state-owned companies, provision of subsidies and other state aid to local private companies and preferential consideration for government procurement. The *World Bank Development Report* for 2001 states that in developing countries 'the main institutional barriers to domestic competition are government regulations on exit and entry of firms. Even in the tradeable sector, international competition may not lead to domestic competition, partly because institutional barriers to competition, such as government regulations in product and factor markets that deter firm entry, exit, and growth. Excessive and costly government regulations also facilitate corruption and lead to adverse distributional consequences by inducing workers and firms to escape into the informal sector.'[20] This is one aspect of the problem of contestability. Another is market segmentation. A market may be so fragmented, possibly as a result of ownership or control by a multiplicity of different local governments, that it is of little interest as a target for other enterprises.

There are problems both with regard to the commitment to reform in many countries where there are powerful vested interests in favour of the *status quo* and, even where that commitment is present, with respect to the capacity to implement reforms. Often government enterprises are kept going – and competition from the private sector prohibited – in order to sustain employment even where resources are being used inefficiently and the social costs of closure could be more productively offset by fiscal transfers and retraining. Furthermore, 'poor infrastructure, underdeveloped financial markets and overly complex administrative arrangements may provide formidable obstacles, not just to the entry prospects of new enterprises, but to the growth prospects for smaller existing enterprises'.[21]

3 Competition Law and Other Related Policies

A number of references have already been made to the conflicts that may arise between industrial policy and competition policy. In particular, deepening diversification and the achievement of economies of scale in the manufacturing sector may be constrained by competition policy. A liberal trade policy in the form of low barriers to imports increases market contestability. These are the fundamental 'development dimensions' of competition policy and the question of where any potential MCA

draws the line will be crucial in getting the developing countries on board. But there are other significant overlaps between competition policy *per se* and other policies that bear critically on competition.

Consumer Protection, Privatisation and Price Liberalisation

Competition policy may include a section devoted to consumer protection through, for example, the outlawing of tied selling. Alternatively, there may be separate laws to protect consumers but in that case they should be carefully worded to avoid duplication or inconsistency.[22] The same is true as far as the regulation of privatised companies is concerned. In the event of a natural monopoly, competition law may never replace direct regulation but they both serve a distinct and complementary role. However, it is important that the regulatory and competition agencies avoid overlapping or contradictory judgments.

Investment Policy

The momentum towards an MIA is being maintained primarily by the developed countries. Clearly, most foreign investment between the developed and the developing worlds moves from the former to the latter. Multinational firms want 'an appropriate stable, predictable and transparent foreign investment framework' and freedom from threats of appropriation, nationalisation or restrictions on the repatriation of profits or capital. The governments of the developed countries broadly share the interests of their multinationals. They also see an MIA as of value to the developing countries in that through creating an investor-friendly environment foreign investment flows would expand to the benefit of the host countries.[23]

As in the discussions about a possible MCA, the emphasis of the developing countries in the trade and investment working group (WGTI) is on safeguarding the 'development dimension', that is, ensuring that under an MIA there are substantive and binding provisions to ensure that individual countries, while subjected to certain disciplines, nevertheless be allowed sufficient policy discretion to protect their developmental goals and policies. But it is generally accepted that these provisions need not involve discrimination among foreign investment inflows on the basis of country of origin.

An MIA might embrace non-discrimination between foreign and domestic enterprises both at the pre-establishment stage and at the post-establishment stage or only at the latter. In the former case, the appropriate standard is most favoured nation: in the latter, it is national treatment (NT). The former ensures that no country receives any more favourable treatment than any other – without affecting the policy of the host country as regards, say, the sectors to liberalise. Non-discrimination at the post-establishment stage requires NT, i.e. equal – or as this is sometimes impractical, *no less favourable* – treatment for all foreign investors to that given to domestic investors.

However, in the GATS model NT only applies to the sectors listed in the schedule of commitments, and even then it is subject to conditions and qualifications detailed in the schedule.[24] This could well be copied in an MIA.

There are clearly a number of interfaces between investment policy and competition policy. The latter would not normally come into play – although the competition authority might be asked to give an opinion – until after a foreign company has established itself. At this point, as far as competition policy is concerned, NT is the touchstone. But if a proposed acquisition of a national firm by a foreign firm is suspected of leading to a dominant position, the competition authority may assume an appropriate role in preventing such an acquisition, though it should be subject to the same scrutiny and criteria as would have applied had the proposed acquisition been by another national firm. Again, it is important that the rules are clear and transparent and all inconsistencies between investment and competition laws are avoided.

In addition, competition law would not impinge on any exclusions and exceptions to foreign investment in national markets provided that they were clear in a country's 'offer' under a MAI. Similarly, even where foreign investment was welcomed in a particular sector, the government still has the prerogative of supporting national enterprises in a discriminatory way – allowing market-sharing for example – but here the exceptions would have to be made transparent as a qualification in the MAI as well as in the competition law. The problem of discrimination between foreign enterprises would be less likely to arise in the context of competition policy than through a MAI. One such situation might arise if one foreign investor was favoured over others because of a bilateral or regional preferential trade agreement with the country from where that enterprise had come. Again, where such agreements might include special treatment, say, over mergers, it would be important that such rules were transparent to all potential investors.

Intellectual Property Rights

There is a view prevalent among developing countries that the protections provided by the TRIPs Agreement against the exploitation of intellectual property rights for anti-competitive purposes are inadequate. In particular, there have been allegations that certain firms have engaged in 'patent pooling' to establish cartels. This has led to the suggestion that the implementation of an MCA should be held hostage to the reform of that agreement although there is a counter-argument to the effect that competition rules should in fact outlaw the misuse of IPRs and enable firms who have suffered to find redress through the courts, either in their own or a foreign jurisdiction.

Anti-dumping Rules

Another possible gain from a multilateral agreement on competition is in limiting the abuse of anti-dumping laws. Developing countries are concerned about the frequency

of predatory pricing, dumping, cross-subsidisation and similar practices on the part of TNCs and increasingly have joined the developed countries in adopting and resorting to AD measures. But they are also concerned about the use, and abuse, of AD measures against their own exports.[25] It would appear that an MCA could lead to the elimination of existing AD laws which are often exploited simply as protective devices or another form of RBP. If the MCA outlawed dumping as anti-competitive behaviour and laid down in some detail the criteria for judging the existence of dumping and the appropriate penalties, aggrieved domestic suppliers could take their case to the relevant courts in either their own or the exporting firms' jurisdiction. However it has been suggested that the attraction of AD measures as a way of giving domestic companies relief from highly competitive imports will be too great for the developed countries to sacrifice.[26] On the other hand certain free trade areas, including the EU and ANZCERTA, the free trade agreement between Australia and New Zealand, have replaced AD procedures with competition rules.[27]

4 Developing Country Concerns

The submissions made to the WGTCP by developing countries show a wide range of views about the possible role of the WTO in competition policy. For example, there is disagreement at the most fundamental level, with some countries arguing that networks of bilateral competition agreements are adequate to deal with the issues at stake, while others support some sort of role for the WTO. Some would allow that all Members should sign up to multilateral undertakings, but there are major differences about the content and the degree of harmonisation. Many developing countries are emphatic about the importance of retaining flexibility and believe that the level and nature of commitments in any multilateral agreements must be subject to that priority.

The Development Dimension

By flexibility, the developing countries usually mean the so-called development dimension. They argue that the same rules are not suitable for countries at different levels of economic and institutional development or with different cultural and legal traditions. In particular, it is argued that it would be inappropriate for the developed countries to insist that their model of competition policy be adopted wholesale by the developing countries. In any event, in economic theory the gains from competition policy are allocative efficiency and achieving that efficiency, for example realising the output and prices of a competitive market rather than a monopoly, would bring a once-and-for-all gain. What the developing countries need is dynamic efficiency where some of the potential gain from the optimal static market structure may be worth sacrificing in favour of maximising economic growth, reducing poverty or focusing on whatever objective function the policy makers adopt.

For example, the high level of profit and of investment that may be required for the rapid development of a particular sector might imply that certain key public or private enterprises, in return for ensuring a high level of investment, should be protected at least temporarily from the full rigours of competition, for example through licensing. Thus, it is argued, the optimal level, rather than the maximum level of competition, should be the goal.[28] Secondly, it is argued that there is 'an optimal combination of competition and co-operation' between enterprises. Thirdly, there must be coherence between industrial policies – including protection for infant industries – and competition policy. This implies that competition policy should not restrict a developing country's ability to prevent foreign take-overs of domestic firms or inhibit it from encouraging mergers of domestic firms. Indeed, given that by international standards developing country firms are usually small or at most medium-sized, the merger of existing national firms may be the only way that will provide competition to some TNCs. Allowing national firms to merge, while preventing mergers involving TNCs, may represent a reasonable exception to the principle of national treatment. As the 2002 summary of the WGTCP proceedings puts it, '... in a sense a discriminatory competition policy could be a concomitant to a non-discriminatory trade policy'.[29]

A country may also have certain essentially non-economic goals that perhaps should be protected from competition law. A good example is the South African Competition Act which contains provisions 'to extend and promote control of those historically disadvantaged' which were designed to advance the interests of small and medium-sized and, in particular, black-owned enterprises.[30]

There is a more general worry to the effect that, if an MCA is reached through the WTO, it may be too 'pro-trade' at the expense of consumer interests.[31] On the other hand, it can be argued that, insofar as there is a role for an agreement under the auspices of the WTO, it is because there is a strong link between market access and anti-competitive behaviour, and that the role of the WTO should be limited to this facet of competition policy. But there is a danger that the role of a WTO agreement on competition will be pushed beyond this point with market access becoming the be-all-and-end-all at the expense of any sovereignty issues or developmental concerns. This could happen if the process of reaching an agreement were 'captured' by Members whose primary concern was the opening of markets in developing countries.

Another aspect of the development dimension is Special and Differential Treatment. Demands for SDT, generally in the form of longer transition periods for developing countries to implement a particular regime and/or exceptions and derogations from global rules, are typically hornets' nests in multilateral trade negotiations. Since the Uruguay Round was completed in 1995 they have led to disputes about whether SDT has been implemented, in particular 'the best endeavours' clauses supposedly binding the developed countries, and whether SDT has been eroded through case law created by the disputes mechanism procedures or through subsequent

agreements. In general, it would be preferable to find ways in which the concerns of the developing countries can be accommodated within the MCA itself rather than in SDT clauses.

The TNC Threat

One of the major concerns about an MCA among developing countries is whether big TNCs will use the competition rules to reach a dominant position in the economy, putting domestic firms out of business through price competition or taking them over. It is because of concern over the competitive threat to national firms from TNCs that a number of developing countries accept that competition policy agreements at the bilateral or plurilateral level could be valuable but are not in favour of a multilateral agreement. In other words, NT would be reserved for firms from countries where bilateral or plurilateral agreements had been negotiated. On the other hand, negotiating such agreements with larger countries may be difficult for a small developing country with little to offer in return.

In their presentations to the WGTCP, many developing countries have focused on this issue, their concerns stemming from the small size of their enterprises compared with most TNCs and the fact that they already face anti-competitive practices from TNCs in their markets. There are clear suspicions about the extent to which an MCA could deal with these problems. For example, Egypt has said there should be a studies of the extent to which national competition laws can effectively deal with RBPs of TNCs at international level, and how to control the international mergers that create monopolies or dominant positions in the national market, of how international co-operation could enable countries to deal effectively with TNCs and of the possible scope of a multilateral framework.[32] International co-operation to deal with anti-competitive practices clearly needs to be strengthened. At the same time, where they have not yet done so, developing countries could often make some headway against such behaviour in their own markets by developing appropriate competition laws and authorities. We will return to these issues in Section 7.

Judicial Processes

There is a general concern about whether the WTO DSU is the appropriate process for adjudicating on competition cases. These cases must be judged in terms of national law, even though that national law might have to meet various criteria established in the MCA. The WTO disputes settlement process is not an appropriate forum for the arbitration of specific competition cases, typically involving governments on the one hand and private companies on the other, even where there are transborder elements as, for example, in cases dealing with export cartels. Nor could it easily take on the role of international authority responsible for vetting mergers and acquisitions.

The WTO has had no experience of these matters. It has not had to protect the

confidentiality of documents in the past. Its experience has been confined to questions of the implementation of international agreements by governments. If it were to take a role in individual cases, it would be necessary to broaden the WTO dispute settlement process to allow private firms and individuals to claim that countries have not properly implemented the agreed competition rules, or, arguably even more radical, to allow appeals against judicial decisions by national courts. The latter may be seen as a threat to national sovereignty. Moreover, among many developing countries there is a concern that the rules and procedures of the DSU are stacked against them.[33]

The WTO would, however, be the appropriate judicial forum for issues concerning whether or not a country has respected an agreement on competition signed within the WTO structure, such as the proposed MCA. Thus the DSU should only be used to challenge whether a country has abided by the MCA – to be established through a WTO agreement – and in no circumstances whether an individual firm is in violation of national law. Even then, the EU is reluctant to bring in the DSU. 'As regards dispute settlement, any review of individual decisions should be ruled out. Issues relating to the way in which the law is being applied (or not applied) could only be considered within the framework of 'peer review' and outside the context of any possible dispute settlement mechanism. Any dispute settlement case would therefore be strictly limited to the consideration of any possible lack of conformity of domestic legislation with multilateral commitments.'[34]

The OECD Competition Committee already has a system of peer review (known as 'regulatory reform review') and UNCTAD has suggested that the system could be adapted for use in the WTO. It would be analogous to the existing Trade Policy Review System.[35] The problem is that it would be onerous in resource costs, particularly the time spent by lawyers and officials.

When there is a disagreement over one country's implementation of competition law, for example its interpretation of hard-core cartels may be particularly strict or excessively easy-going but still arguably consistent with the agreement, moral suasion through peer review is likely to be more practicable than judicial rulings. Such peer reviews on a regular basis could best be undertaken by the proposed World Competition Forum to be discussed in Section 6.4.

Costs

The developing countries are clearly and justifiably concerned about the costs of establishing and implementing fully-fledged competition laws. Anti-competitive practices are closely related to the existence of and opportunities for collusion. Thus, competition policy must largely involve an assessment of the potential for collusion, whether in the form of a proposed merger or existing cartel structures. The number of firms involved, and the share of output they supply, are both important factors but neither is paramount. High levels of concentration do not necessarily mean the

absence of intense competition, nor do large numbers of firms mean that there is intense competition when there are ways of dividing the market through geographical or informational barriers, or because the local infrastructure is so lacking.[36] These are particular problems in developing countries as may be participation in collusion by local officials, or, when that is suppressed, even with the regulators themselves. In any event a commitment to the proactive investigation of collusion is perhaps the *sine qua non* for all competition policy and competition agencies. This is inevitably costly. Lack of financial resources could, in the extreme, make a mockery of the whole competition policy.

Some developing countries have suggested that the cost of legislating and implementing a comprehensive competition policy would exceed the benefits that this would bring. True, a Western-style competition policy does imply a high level of investment, particularly in trained lawyers and judges. Many developing countries would argue that that sort of level of legal sophistication is not appropriate.

5 Competition Law and the Developing Countries

Gains from Internal Competition Law

The most obvious beneficiaries from competition laws are the consumers. They will benefit from the regulation of anti-competitive behaviour within developing countries. Consumers – and industrial users of domestically produced goods – will benefit from lower prices and increased output. In addition, the increased transparency and more competitive markets will enhance the attractiveness of an economy to foreign investors, as well as increasing the benefits of that investment to the host country. Competition policy may also have a specific role in the process of privatisation and deregulation. Both privatisation and deregulation are likely to lead to greater economic efficiency and lower prices where there are competition rules.

However, these gains from establishing a corpus of competition law, with the necessary legal and administrative institutions to make it effective, are primarily internal to the country. A developing country may well need technical and financial assistance to put in place such a legal framework and this paper will argue for a wide-ranging international capacity-building exercise. But, with one important exception, the scope and details of the competition law and the competition agencies should be for the individual country to decide without obligations imposed by a WTO or any other international agreement.

The exception arises where access to one country's markets is being obstructed by anti-competitive activities. Then a national competition law is required to realise the positive goals of trade liberalisation – in particular reductions in tariff and non-tariff barriers. It will make foreign goods and services available or, where they have previously been available, cheaper, and this could be critical for economic diversification

and industrialisation. Small developing countries are particularly dependent on exports. They will benefit from unimpaired access to foreign markets. But their exports usually require imported inputs or capital equipment and these will be cheaper and the choice will be greater in the absence of anti-competitive behaviour on the part of importers.[37]

Gains from International Co-operation

International anti-competitive practices can be particularly damaging in small countries. 'Developing countries are mostly price takers on world markets; outside of certain natural resources, their firms generally have no market power.'[38] The available evidence points to the presence of international cartels, abuses of dominance by multinational firms and large mergers intended to create situations of such dominance, and other restrictive practices by private firms operating in international markets, all designed to limit competition in international trade and maintain high prices. These arrangements can be quite durable and detrimental to economic development, particularly for developing countries that rely heavily on imports given their own restricted industrial base. Efforts to build a competitive industrial or services sector may be stifled by the excess prices charged by international cartels. Again, as mentioned in the previous section, developing countries tend to have small, narrowly based domestic markets, which means that exporting is necessary if they are to enjoy the economies of scale available to producers in larger countries. But even where their costs suggest that they can be competitive, they may find access to export markets blocked by anti-competitive practices.

National competition laws are restricted to operating within national boundaries. An international framework agreement is needed to deal with international abuses of competition. Moreover, a country whose exports are boosted by export cartels operating within its borders, or whose enterprises may be involved in cartel arrangements with foreign companies, may have little incentive to attack such practices. A domestic competition law may not be totally ineffective against export cartels but many jurisdictions with domestic competition laws specifically exclude export cartels, including Canada, Japan, Mexico, Portugal, Sweden and the United States.[39] Even the broad EU-US bilateral co-operation agreements do not deal with anti-competitive behaviour by export cartels.[40]

It is easier to identify and prohibit horizontal agreements – usually collusion among suppliers of similar products or services – than vertical agreements where market power is used to distort relationships up and down the supply chain. When it comes to defining the types of anti-competitive behaviour that are to be prohibited as obstacles to market access, the horizontal agreements can be generally banned *de facto*, whereas vertical agreements – the Kodak-Fuji case is a good example – are legally more complex and may only be judged *de jure*. This implies that the MCA will inevitably

concentrate on horizontal agreements. However, where market access is impaired by anti-competitive practices, these arise very largely because of horizontal agreements.

A multilateral agreement is required if such anti-competitive practices as hard-core cartels are to be effectively policed and prosecuted. An agreement is also necessary if international co-operation is to be effective in the pursuit of other anti-competitive behaviour with transborder elements. A number of states have adopted bilateral co-operation agreements, either state-to-state or agency-to-agency. For example, Canada currently has two state-to-state type agreements relating to competition law enforcement, one with the United States and the other with the European Communities.[41] But Canada believes that bilateral co-operation can never be enough.

> *The growing network of bilateral competition co-operation agreements is demonstrable evidence of the recognition of the value and necessity of anti-trust cooperation in an interconnected global marketplace … . However, Canada sees the need for a more ambitious vision for cooperation. To achieve true efficiency in international competition law enforcement, cooperation must go beyond the bilateral front. There is a need to establish a nexus between countries in the enforcement of competition law. A commitment towards cooperation in the context of a WTO framework agreement on competition policy would provide the cohesion and stability necessary for the establishment and development of international anti-trust cooperative relationships.… The central theme in Canada's efforts to engage in anti-trust cooperation has been to promote a level of compatibility in the application and enforcement of the basic objectives and rules, without compromising a country's fundamental jurisdiction over conduct affecting its own territory. A similar theme should be at the core of anti-trust cooperation in a WTO setting.*

As regards case specific co-operation, provision should be made for the notification by authorities that are currently investigating and prosecuting such cartels to promptly alert competent authorities in other countries where these cartels could be operating, together with regular information on progress in the investigation. The second element would be a consultation whereby governments that are investigating an alleged cartel would engage in discussions with other Member countries whose interests could be affected. The third element would be assistance in the enforcement process through positive and negative comity.

Furthermore, there has to be a commonly agreed means whereby the government, firms or individuals in one jurisdiction can pursue, in their own courts, anti-competitive practices practiced in foreign jurisdictions, or the former can request that the authorities in the foreign jurisdiction take action to pursue the anti-competitive behaviour. This implies some general understanding and acceptance of the 'effects doctrine'.[42] The MCA should provide for the minimum required extra-territorial

reach among all Members though this minimum, together with rules on co-operation over evidence, the exact interpretation of the 'effects doctrine' and so on, could be enhanced through co-operation agreements among different states or regional groupings. In due course the World Competition Forum proposed below might, after extensive debate, agree the extension of the international consultation commitments of Members through later amendments to the MCA.

The TRIPs agreement is a good example of how 'fair and equitable' procedures for implementation of a WTO agreement in domestic courts can be safeguarded. If that model is followed the MCA would require that:

- All processes pertaining to competition law enforcement should apply equally to foreign and domestic persons (natural and legal) in a fair and transparent manner;
- All parties have the right to appeal against an unfavourable decision made by a competition authority or court;
- Both domestic and foreign individuals or firms should be guaranteed the right to appeal to and to request remedy measures from competition authorities or courts against anti-competitive practices;
- The proceedings must proceed in a timely fashion in order to ensure prompt measures to protect rights and prevent uncertainty or excess costs resulting from undue delays.[43]

International co-operation, together with the 'effects doctrine', can only be fully effective if the notion of 'positive comity' is accepted, and indeed pressed, within the MCA. The OECD Recommendation defines investigatory assistance (or 'negative' comity) as 'co-operation with another country's law enforcement proceeding. Such assistance may include gathering information on behalf of the requesting country, sharing information with the requesting country, and discussing relevant facts and legal theories' while 'positive comity may be described as the principle that a country should (1) give full and sympathetic consideration to another country's request that it open or expand a law enforcement proceeding in order to remedy conduct in its territory that is substantially and adversely affecting another country's interest, and (2) take whatever remedial action it deems appropriate on a voluntary basis and in considering its legitimate interests.'[44]

Comity must include the sharing of confidential information if it is to be effective. It must be voluntary. Some countries may not have the capacity to respond to all requests for information or legal action. There may be situations where a country's own interests are put at risk. But there needs to be the assumption that co-operation will take place and disputes proceedings within the WTO must be available in the event that a country clearly and systematically refuses to co-operate.

One issue over which divergent views have been expressed in the WGTCP is whether a obligation to participate in comity, both negative and positive, does imply that a country must have a competition authority.[45] Some argue that a Member without any kind of domestic enforcement capacity could not be involved in case-specific co-operation. The alternative view was that co-operation was possible even if the participating countries had different systems of competition law, and even if a particular country did not have a comprehensive competition law or did not incorporate all the WTO principles in its national legislation. This report takes the view that a multilateral agreement on competition policy without an obligation to adopt a fully-fledged domestic competition law – though it does argue for a minimal mandatory law – or set up a competition authority would still facilitate co-operation and the efforts to stop anti-competitive behaviour. It would also be a useful source of assistance for countries in the process of developing or implementing a law.

The threats of mergers and acquisitions within or between one or two jurisdictions on markets in third countries need to be acknowledged. The main criterion in consideration in a merger review is whether the proposed merger – or that already consummated if reviews are undertaken *post facto* which is a second-best alternative – will substantially prevent or lessen competition. Where it is found that competition is likely to suffer, other criteria can be considered, such as technological or efficiency (including economies of scale) gains, and other public interest concerns, such as employment or the development of small businesses.[46]

The criteria for deciding whether a particular merger is likely to create a position of dominance, and thus a threat to the contestability of markets, are by no means harmonised, even between the US and the EU. It will be a long time before an international body takes over the role of vetting proposed mergers on behalf of all jurisdictions, though this is a worthy goal for the medium term.

Mergers by two or more large firms, within or across borders, may give rise to concerns about global dominance – even in markets where neither firm is currently operating. The regulation of mergers and acquisitions has become a major issue within large developed countries. In particular the EU and the USA have both developed institutional capacities, through the Competition Directorate of the European Commission and through the Commerce Department respectively, to examine mergers and acquisitions involving firms trading, though not necessarily headquartered, within their jurisdictions. These two jurisdictions view the authorisation of mergers and acquisitions rather differently, with the EU emphasising size in itself as a potential threat. In any event, decisions to allow a merger by these institutions may have a major impact on the global market in a particular sector and this will have spill-over effects in countries which presently have no say in the issue. Even if third country jurisdictions had the resources to determine whether such a merger could lead to a serious reduction in competition within its borders, it is not at all clear what impact it

would have. If a merger has been 'passed' by the EU and the USA, the companies would in most cases go ahead, regardless of the decisions of other jurisdictions.

But as Hoekman and Holmes stress, it is by no means clear that these large jurisdictions would willingly relinquish their powers to determine whether a proposed merger was in the public interest – which they point out may be construed as the interest of competing companies in their own jurisdiction. 'For an international agreement to have prevented a similar dispute [to the Boeing-Macdonald Douglas merger] or the eventual negotiated outcome, it would have to impose clear standards for examination and review of mergers. The EU and the US already co-operate on anti-trust matters under the auspices of a bilateral agreement that includes positive comity language. This was not sufficient to prevent the dispute. One can question whether international rules could be devised that would be effective in requiring any one jurisdiction to back off [given that] efforts to put competition-related issues on the WTO agenda are largely driven by classic producer interests in major OECD countries, with governments pursuing a traditional "export promotion" objective. The primary concern is not welfare or efficiency – the major focus of many national anti-trust regimes.'[47] It is also unlikely that many developing countries would accept a national treatment clause which treated all proposed mergers identically. The ambition that national firms should grow, combine and eventually compete with the TNCs is perfectly acceptable.

However, Singh and Dhumale argue that, on balance, the boom in mergers and acquisitions has led to a significant reduction in competition which is likely to be welfare-reducing.[48] Whether an international competition authority to prevent anti-competitive practices by international companies, and pronounce on the acceptability of mergers, would be practicable in the near future is doubtful – though we argue that that should be the ultimate aim through a newly-formed World Competition Forum. What can be required is that competition or other authorities in all Member countries, when then are investigating proposed mergers, consider the possible anti-competitive impacts of those on third countries. This may not appear as a proposal with significant teeth. It should be remembered, however, that failure to do so could be cause for a complaint through the disputes settlement procedures of the WTO. Moreover, key pieces of information which one authority may need in order to complete a review could lie in jurisdictions outside a country's set of bilateral or regional arrangements.[49] As the practice of comity becomes more established, it will become normal for authorities to exchange confidential information, including the impact of a proposed merger on third country markets.[50] Indeed, authorities in third countries who feared the results of a merger could request that the merger not be approved.

International co-operation on competition policy can take many forms, including the establishment of channels of communication between competition authorities, the exchange of information and mutual assistance in the implementation of competi-

tion law. It should go further than these proposals for the content of an MCA. In Section 7.2 below the establishment of an international body, outside the scope of the WTO, to vet mergers and acquisitions is proposed.

Thirdly, 'competition policy should use multiple factors to determine whether a firm has a dominant market position rather than simply looking at size'.[51] Generally, competition law should not restrict the growth of firms where competition from either foreign or domestic firms is present and there is no identifiable threat of collusion. In general, though criteria based on size or market shares in the event, say, of a merger or other threat to market dominance may have some role to play, it is conduct, rather than structure, that is critical in determining whether firms are acting anti-competitively.[52]

Fourthly, there must be a clear role for competition law in the stemming of the abuse of IPRs. Clearly the relationships between IPRs and competition laws are complex and these give rise to difficult cases even in countries with many years of experience. The rules covering the granting of IPRs, whether in the form of patents, trademarks or copyrights, need to be tightly drawn up and the role of competition laws in preventing the abuse of the temporary exclusivities that these rights provide has to be made clear.[53]

Competition Law and RTAs

Co-operation between countries can be facilitated by working within a regional grouping. Such co-operation may also be particularly valuable in avoiding problems of cross-country collusion, anti-competitive mergers and RBPs that could be damaging throughout a free trade area or other trade grouping. But membership of a regional trading bloc, particularly with a preferential or free trade arrangement, implies the desirability not only of regional co-operation but also regional co-ordination of competition rules. Otherwise, firms proposing mergers or export cartel arrangements may 'shop around' for the most lenient jurisdiction. In addition, competition policy at the regional level could be a way forward for small states that would find the implementation of a national competition policy both expensive and superfluous. A regional approach may imply significant resource savings, particularly in terms of qualified personnel.

Already a number of regional organisations, including CARICOM, UEMOA and COMESA, have established or are examining regional competition frameworks.[54] CARICOM, however, is a good example of the institutional problems that arise in the development of a regional approach to competition policy. A strong governmental commitment throughout the region for the creation of a CARICOM competition commission has been lacking. Similarly, there have been lengthy wrangles about the powers of and the appropriate mechanism for financing the proposed Caribbean Court of Justice. COMESA, on the other hand, has displayed a greater degree of unity and resolution. This is seen in the rapid progress to a customs union within the COMESA

free trade area, as well as in matters of competition law and the establishment of a regional court. There are already nine countries within this customs union while a further two have announced timetables for joining. A draft competition law and draft competition regulations have been under discussion by the COMESA Member States since August 2002. The 1993 COMESA agreement 'includes a provision, in Article 55 (similar to Article 81 EEC), which prohibits RBPs that distort trade within the future common market. There is scope for exceptions to this provided the COMESA Council agrees. Work is underway on studies of how to apply this provision and develop a common competition policy within the region. It is expected that the COMESA Court would play a role in interpreting the competition as well as other provisions of the agreement.'[55]

Article 55 of the draft treaty constitutes a general prohibition on agreements between undertakings, decisions by associations of undertakings and concerted practices that may distort competition within the common market.[56] To trigger the jurisdiction of a regional competition authority the conduct in question must have, or be likely to have, an appreciable negative competitive impact on trade between Member States. 'Trade' encompasses all activity that results in a profit, and also covers services as well as goods. The definitions are closely based on EU competition rules. For example, Article 55(1) of the COMESA Treaty prohibits 'any agreement between undertakings or concerted practice which has as its objective or effect the prevention, restriction or distortion of competition within the Common Market'. This is taken almost verbatim from Article 81 of the European Community's Treaty of Rome. Horizontal agreements are *per se* illegal. Vertical agreements are analysed from a 'rule of reason' perspective. What constitutes abuse of a dominant position is carefully spelt out. A subsidy is also outlawed 'in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between the member states'.[57] Mergers above a certain size will require pre-notification and will only be authorised by the COMESA Competition Commission in the event of positive net benefits. The proposed law will also specifically address consumer protection.

But it is worth emphasising that in COMESA, and in the future in CARICOM, anti-competitive practices that do not impinge on intra-member trade are left for the Member State to deal with – four of the COMESA members have already legislated a corpus of competition law and established competition authorities. But where there is a regional trade organisation, a single competition law may suffice for all Member States. A single law could be both cost-effective and avoid some of the problems that might arise through discrepancies in different laws. While the question of whether one size fits all may also arise in this context, there is room for national adjustments and qualifications to a common regional competition law intended to deal with anti-competitive practices whether or not they have transborder effects.

With the establishment of Economic Partnership Agreements between groups of developing countries and the EU, the co-ordination, not of competition policies, but of the negotiating stances within each of these groups is needed. The EU negotiators are likely to insist that competition law requirements be included in any free trade agreement or customs union, whether with individual ACP states or regional groupings of ACP states. Indeed, it is significant that the EU–South Africa Agreement goes significantly further than the Cotonou Agreement as regards competition policy. That could become a model that the EU tries to impose on future FTAs with ACP states.

In Article 35, the EU–South Africa Agreement states that

> *... the following are incompatible with the proper functioning of this Agreement ... (a) agreements and concerted practices between firms in horizontal relationships, decisions by associations of firms, and agreements between firms in vertical relationships, which have the effect of substantially preventing or lessening competition ... (b) abuse by one or more firms of market power ...*

There is nothing exceptional about that; it does not go far beyond the Cotonou Agreement and a case could be made that the benefits to a developing country from legislating to implement that article could be significant. But then in Article 38, under the title 'comity':

> [t]*he Parties agree that, whenever the Commission or the South African Competition Authority has reason to believe that anti-competitive practices, defined under Article 35, are taking place within the territory of the other authority and are substantially affecting important interests of the Parties, it may request the other Party's competition authority to take appropriate remedial action in terms of that authority's rules governing competition ....*

Thus it is entirely possible that the ACP states, in negotiating EPAs with the EU, will find themselves constrained to accept certain rules about close co-operation with the EU over specific competition issues, including comity, as well as to adopt rules which preclude any exceptions to NT rules, at least as regards EU firms. In general, it would be preferable to pre-empt such pressures by reaching agreement within the WTO rather than to face pressures in the Brussels negotiations where the ACP countries are arguably in a weaker negotiating position. An MCA might also pre-empt pressures for more extensive competition rules in bilateral or regional negotiations with other developed economies.

6 Possible Ways Forward

The World Bank-OECD, UNCTAD and Canadian Models

While this paper argues that an MCA should require only that Members outlaw anti-competitive practices which have clear transborder effects, as countries continue to

adopt new or amend existing competition laws they will reflect the experiences of those countries, as well as perhaps their political biases. The report on the CUTS 7-Up project draws attention to the differences in emphasis in the seven countries under examination.[58] Some competition laws specify the control of inflation, even the encouragement of innovation, some even the fair distribution of income or the reduction in unemployment.

The World Bank, in association with the OECD and, separately, UNCTAD, have produced templates for competition laws in developing countries; these models differ in some important ways.[59] They are summarised in Annex 1. The principal differences between the model laws are the omission of extra-territoriality and any prohibitions on unfair trade practices in the UNCTAD model. The World Bank-OECD model does not include the compulsory pre-notification of mergers and acquisitions. It is broader as regards the justifications for preventing mergers and acquisitions while throughout it shows a greater concern for consumer interests relative to opening markets as the underlying principle. In both cases government activities are totally excluded though mixed public-private enterprises would be covered by the World Bank-OECD model if they were intended to be profit-making.

Within the WGTCP over the last year Canada has proposed a framework agreement on competition policy that includes:

- Countries' adoption of a 'sound' competition law;
- A commitment to the principles of transparency, non-discrimination and procedural fairness, including private right of action or procedures to petition the competition authority;
- An advocacy role for the competition authority;
- Common substantive approaches to international cartels;
- Mechanisms to facilitate and foster co-operation between competition authorities;
- Undertakings on technical assistance to developing countries, for example, via World Bank programmes, to reinforce their ability to negotiate and implement a competition agreement.

But though it favours a broad MCA under the WTO, Canada's view is that it would not be appropriate for WTO dispute settlement procedures to apply to countries' commitments on competition policy. Competition decisions must reflect specific economic and legal considerations which WTO panels are not in a good position to evaluate. Rather, it argues that a process of 'peer review' is the only constructive option relevant to general undertakings on competition policy.

The EU Proposals

The European Union is the major proponent of an MCA. It has proposed the universal adoption of a set of minimum legal standards and 'core principles' for domestic competition laws and regulations, and minimal requirements as regards international co-operation between competition authorities. It calls for:

- Agreement on core principles to be reflected in domestic competition laws; the EU argues that WTO Members should negotiate a binding framework agreement which would set out a set of core principles to serve as the basis for domestic competition laws within each Member. The legislative framework would be based on the principles of non-discrimination and transparency, guarantees of 'due process' in competition investigations (including protection of confidential information) and the right of petition to competition authorities and/or judicial review;
- Agreement on a ban on hard-core cartels;
- Establishment of a flexible framework for international co-operation; this could include the establishment of an international 'clearing house' for the exchange of information on domestic laws, practices and developments; co-operation between investigatory organisation on particular cases; and discussions on issues of concern with regard to policy and its developments in different jurisdictions.

The EU supports the recently launched International Competition Network (ICN), which includes, besides the EU itself, Israel, Japan, Korea, Mexico, South Africa, the United States and Zambia. It is intended to provide competition authorities with a stronger and broader network for addressing practical competition enforcement and policy issues. It will encourage the dissemination of experience and best practices to facilitate international co-operation building on the work of other international organisations such as the OECD, the WTO and UNCTAD. Initially, the ICN will focus on the merger control process as it applies to multinational mergers and on the competition advocacy role of anti-trust agencies, particularly in developing and emerging economies.[60]

As regards the role of the WTO, under the EU proposals, an MCA would not limit the independence of domestic competition authorities in the exercise of their enforcement responsibilities, nor allow the WTO to overrule their decisions.[61] 'However, it is likely that Members of the WTO could challenge the compatibility of another Member's national law with the Agreement if the law is not based on the principles of non-discrimination and transparency.'

7 A Minimalist Approach

The model laws and the EU proposals serve as useful starting points. But it can be argued that the model laws incorporating, for example, rules for mergers and acquisi-

tions, would be superfluous in a country where there was no industrial base. The EU proposals remain rather vague as to what would be included in the minimum set of rules. In any event it is likely that a multilateral agreement on a comprehensive set of competition rules involving many obligations would be impossible to reach, given the divergences between the practice and philosophy of different countries. Many developing countries now feel that they made mistakes in agreeing to the TRIPs and TRIMs agreements which had much more far-reaching implications as regards their discretion to make policy than they had envisaged at the time.

This paper has raised some strong arguments in favour of a minimum set of rules agreed in an MCA. Clearly, however, that should not be seen as the end of the story. There is a strong rationale for moving much further towards a harmonised set of best practices as regards competition policy – always bearing in mind that what is most appropriate is not identical for all countries. History, domestic economic conditions, developmental objectives and the capacity to implement mean that, in some respects, the optimal laws and the structure of the institutions for their implementation will not be the same in all countries.

Content of a Multilateral Competition Agreement

The argument in favour of a minimum set of rules is that it could enable the developing countries to benefit further from trade liberalisation while not involving them in major, resource-intensive and ultimately uncertain international commitments. They broadly accept that domestic anti-competitive practices, whether through cartels, vertical restraints or government-sanctioned monopoly situations defeat the very purpose of free trade. The developed countries broadly agree that the special needs of the developing countries need to be recognised. They accept a certain flexibility in the implementation of the core principles and the needs of these countries as regards co-ordinated technical assistance and help in capacity-building. Excessive demands on the developing countries through pressing for a comprehensive competition policy including both a far-reaching set of statutes and the appropriate agencies to put them into practice could be counter-productive. The commitments, both as regards domestic legislation and international co-operation, agreed in a MCA should be manageable from the point of view of the capacity of all the WTO members to legislate and enforce those laws and to establish the necessary structures for international co-operation, including the allocation of responsibilities among competition agencies and/or government departments.

Another general concern among developing countries is that exemptions and exceptions from commitments are typically time-limited or subject to periodic reviews. In the former case, simply the passage of time, rather than any economic criteria, will mean that these derogations will be disallowed or in the latter there will be constant pressure from developed countries for their removal. To some extent this

process is already evident in the ongoing negotiations on services. An important advantage of minimising the set of agreed competition rules and practices under the WTO umbrella would be the avoidance of the problems associated with exemptions and exceptions.

Fox proposes a law, agreed multilaterally, to prohibit the impairment of market access through private or public restraints, including exclusions by dominant firms, cartels with boycotts or exclusive dealings by a few dominant firms.[62] The law would require no international negotiation or new bureaucracy. It would not be a bonanza for lawyers. It would be transparent and non-discriminatory. It would only come to a WTO disputes panel in a dispute as to whether the international agreement was being implemented. It would limit the occasions for extraterritorial applications of anti-competitive action and reduce anti-dumping cases, the latter because domestic firms would be less able to price-discriminate in the domestic and foreign markets.

This minimal competition law is consistent with the Canadian and EU proposals. Of course, many developing countries have gone, or will want to go, beyond these minimal requirements to develop more wide-ranging anti-trust legislation. They will want to curb anti-competitive behaviour whether on the part of national firms or TNCs. Many of the large new national companies are privatised utilities and often natural monopolies. The market power of TNCs and their scope for anti-competitive practices depend more on the economies associated with bulk buying of inputs, finance and marketing than with technological economies of scale – which are typically exhausted at a smaller size – but this market power can be disastrous for local producers.[63] However the competition laws and regulatory mechanisms appropriate for developed countries may appear both too expensive and unnecessarily sophisticated for many developing countries. There is much to be said for leaving the choice of going beyond, and if so how far beyond, a simple mandatory law against access impairment to the individual countries concerned. However, as far as the transborder dimensions of a MCA are concerned, we would want to go considerably further.

Under these proposals the MCA would require of all Members:

- That all anti-competitive practices that significantly impair the access for foreign exporters of goods or services to a country's markets through private or public restraints be prohibited;
- That hard core cartels are outlawed in all Member countries;
- That Members should agree to consider the interests of third countries in their merger authorisation procedures, even though taking into account issues beyond simply those of dominance will lead to some difficult judgments;
- That, in order to deal with the problem intensive information-sharing by competition authorities (or the appropriate branches of government), enforcement actions

in partner countries, the practice of positive and negative comity, international notification and consultation are all required;

- That fair and equitable legal procedures, modelled on those in the TRIPs Agreement, would be agreed, including equal application of competition law enforcement to foreign and domestic persons (natural and legal), the right of appeal and the availability of remedy measures and the avoidance of undue delays in the proceedings.

Towards a World Competition Forum

Clearly establishing the basic commitment to an international competition authority would be a lengthy process. It is also clear that it would be valuable to bring along the entire WTO membership in the process. Many of the issues that have been raised in the debate within the WGTCP are not directly related to the dismantling of trade barriers or more broadly to questions of market access. The question of market access – and competition by way of unimpaired market access – is *the* purview of the WTO and this chapter has proposed an agreement that covers national legislation and international co-operation to deal specifically with the market access issue.

The competition issue – and arguably other new issues currently being mooted for inclusion in trade negotiations such as labour standards – go beyond the formal competence and practical expertise of the WTO. For intense international co-operation and capacity-building in the area of competition policy, a more mutually supportive body is needed and one that can readily embrace non-governmental players such as bar associations and chambers of commerce. All states, particularly perhaps the developing countries, could benefit from further engagement in dialogue and the exchange of views across the full range of competition policy issues. Through the OECD there is already co-operation which promotes the adoption of 'best practices' and, ultimately, the convergence of approaches, rather than strict harmonisation, towards competition law and institutions.[64] What is required is a body that includes both developed and developing countries, a World Competition Forum, which would bring WTO Members and other countries together voluntarily in a non-confrontational grouping for the promotion of the 'culture of competition', for sharing experience and for mutual assistance in the establishment of best practice law and procedures.

The International Competition Network (ICN) is a forum in which national competition authorities are addressing competition issues; it already is considered as a promising forum for co-operation and the promotion of best practices. It is plausible that the ICN could form the nucleus of the new WCF proposed here. The WCF would be the principal locus for the general exchange of experiences, views and advice among competition authorities and their officials, while the more specific forms of mutual assistance that would take place between competition authorities in regard to

individual cases would be the function of the comity provisions of the MCA. The WCF would engage in exchanges of experience and discussions on competition policy issues. For example, it would organise conferences on global competition issues which affect international trade and global economy. It would be the forum for developing a long-term vision of enhanced co-operation, in particular by discussing issues relating to procedural and substantive convergence An important activity that would be undertaken within the WCF would be voluntary peer reviews of each member's competition laws, policies and perhaps even their enforcement record. It would also serve as the focal point for the co-ordination and monitoring of technical assistance, especially to the developing countries. Perhaps the ultimate proof of the success of a WCF would be the establishment, under its auspices, of an international authority for the investigation of proposed mergers and acquisitions.[65]

In particular the WCF should engage the Members in debate and negotiation with a view to improving and expanding the MCA in appropriate directions. These include:

- Since horizontal agreements are both easier to define and thus prohibit *de facto* and are responsible for the greater part of anti-competitive action which impairs market access, it is proposed that they be singled out for immediate prohibition through the MCA. Any clearly definable vertical agreements which also impair market access should also be outlawed. However, other types of vertical agreement or abuses of dominance, in the private or public sectors, need to be carefully examined in order that appropriate definitions can be derived and such abuses added to the list of agreements outlawed through the MCA;
- The replacement of the existing much abused anti-dumping measures by competition law. As countries develop laws against predation and their legal processes are open for foreign individuals or firms to take legal action against predatory behaviour, those countries may associate under a plurilateral agreement to eliminate AD procedures against one another;
- Whether it is practicable to agree on a list of prohibited and actionable RBPs, and whether such a list could be enacted throughout all Members as part of an extended MCA;
- The improvement of the TRIPs Agreement to prevent abuse of the agreement to justify anti-competitive behaviour, including the prohibition of action to stop parallel imports, i.e. imports of branded goods bought in markets where they are cheaper to avoid costly official marketing channels.

The existing TRIPs agreement makes clear that IPRs are 'exhausted' once the right holder releases the intellectual property, but certain jurisdictions, including the EU, have nevertheless sought to restrict certain parallel imports. Both the EU and the US have protested about laws permitting parallel imports in other developed economies,

the latter against a law in New Zealand based on the principle of international exhaustion. Both the EU and the US accept national exhaustion, under which traders have the right to move goods across internal borders after the initial sale has occurred and sell those goods at whatever price the traders may decide, but have not accepted that that is legal where the movement is into a foreign market. In addition, the abuse of IPRs should lead in appropriate cases to 'compulsory licensing', that is the required licensing of the IP to third parties, and rules governing this should be made explicit in the competition law.[66]

8 The Need for Financial Support and Technical Assistance

The Doha Ministerial explicitly recognised the need for enhanced technical assistance and capacity-building in this area, 'including policy analysis and development so that they (the developing countries) may better evaluate the implications of closer multilateral co-operation for their development policies and objectives, and human and institutional development. To this end, we shall work in co-operation with other relevant intergovernmental organisations, including UNCTAD, and through appropriate regional and bilateral channels, to provide strengthened and adequately resourced assistance to respond to these needs. In the period until the Fifth Session, further work in the Working Group on the Interaction between Trade and Competition Policy will focus on support for the progressive reinforcement of competition institutions in developing countries through capacity-building.'[67]

Capacity-building is required if countries are to fully benefit from competition laws in general and international co-operation in particular. This not only applies to countries about to institute a system of competition laws, with the necessary agencies to make them work, but also to the roughly 90 WTO Members who currently have competition laws on their books. Even the most sophisticated exponents of competition law can benefit in various respects from the experiences of others.

Many developing countries clearly lack trained lawyers and other experts in the implementation of competition law. In this regard, scholarships for academic and professional training, internships at competition authorities abroad, visiting staff from experienced agencies in other countries, financial assistance for workshops and help with international databases of competition law and cases are all areas where assistance would be valuable. 'For example, in relation to long-term secondment programmes, apart from the obvious benefits of having an experienced anti-trust official on site, it ensured that the 'capacity builder' developed an understanding of the country which he or she was assisting and that a long-standing connection developed between competition authorities in the respective countries which, in turn, meant that assistance could continue to be sought long after the capacity builder had returned to his or her home country.'[68]

Assistance in drafting legislation would often be valuable. The developed countries could also help with establishing a network, both of individuals and computers, for the exchange of opinions, experience and information and with a detailed and ongoing comparison of competition law in different countries matched to the experiences of implementing different laws. It is clear from the CUTS 7-Up project that financial constraints are a significant handicap to the work of some of the competition authorities examined, particularly given that some of their legal opponents were employed by large corporations, sometimes TNCs, with resources able to command the finest legal skills. This is hardly surprising given that the authorities are not yet an integral part of government and, indeed, are more likely to stand on the toes of aspiring politicians or businessmen than to be enthusiastically embraced by them.[69] It is clear from the CUTS interim report that competition authorities need both financial support and long-term help with training and development. They need the support of strong advocacy of their contribution to economic development.

With respect to the development dimension, Canada has argued that developing and emerging economies will gain particular advantage from a multilateral agreement on competition law and policy, notably from co-operation with more experienced competition authorities, but only if they are in a position to participate as full and equal partners. The WTO would need to seek the co-operation of UNCTAD, the World Bank and other international institutions to ensure the delivery of a coherent program of technical assistance in the competition policy field as a means of enhancing the capacities of developing countries in the implementation and enforcement of competition law and policy. However, the WTO was not envisaged as a major provider of technical assistance and currently has neither the structure or funds for that role. In addition, it lacks the full confidence of the developing countries.

The proposed World Competition Forum could serve better as the main source of capacity-building and co-ordinator of the technical assistance currently offered by the WTO, other existing international organisations (UNCTAD, the World Bank and the OECD are already involved) and national governments. In this respect the peer review system could serve, not only to enforce international obligations, but also to foster understanding and the adoption of best practices among countries adopting or reforming their competition laws.

9 Conclusions

Many developing countries are pressing ahead with fully-fledged competition laws and agencies. The goal of an active competition policy is reliance on market forces to determinate allocation of productive resources, subject to the constraint of ensuring that certain social objectives – including distributional goals – are not compromised. Progress towards this goal will be advantageous both to consumers who will gain from

lower prices and greater choice, and to economic growth which will benefit from improved economic efficiency. But what is important is that the international community ensures the availability of financial and technical assistance to the countries that are embarking on this path – and indeed to those who have already made some headway but where further progress is being pursued.

A number of WTO Agreements – in particular the GATS and the agreements on TRIPs and TRIMs – already embody a number of competition rules, but competition issues are dealt with piecemeal and inadequately. If anti-competitive practices are not to frustrate the access to international markets that the WTO was intended to safeguard, a much more thoroughgoing approach is needed. Moreover such a comprehensive approach could have major, often beneficial, implications for the implementation of other WTO Agreements where there would be a fair measure of overlap – in particular, the agreements on TRIMs, TRIPs and anti-dumping. In any event, the piecemeal nature of the treatment of competition issues in the Uruguay Round Agreements has resulted in the setting up of the WTO Working Group on the Interaction of Trade and Competition Policy.

The WGTCP has spent many hours discussing the relevance of WTP principles – what these are is a matter of varying interpretation – to competition rules and, in particular, to a Multilateral Agreement on Competition. There seems to be a general consensus that non-discrimination, transparency and flexibility – a code word for the 'development dimension' – are critical. But there has been little debate about what an MCA should cover and the role of the WTO in its implementation.

This chapter has addressed the question of whether the WTO has a role in establishing competition laws and agencies among all its Members and developing a system of international co-operation:

- At the case-specific level for mutual assistance in the prosecution of anti-competitive behaviour by national authorities;
- Through providing a judicial forum for the prosecution of anti-competitive behaviour of a transborder nature, for example export cartels, and/or an international authority for the vetting of merges and acquisitions where there are transborder implications;
- At the more general level helping Members to pursue best practice in the establishment of laws or agencies and, in so doing, advancing the gradual process of harmonisation of the formulation and implementation of competition law among Members.

The analysis has come down in favour of a minimal corpus of domestic competition law to be agreed in a Multilateral Competition Agreement and implemented by all Members. These laws would be designed to prevent the impairment of market access

by anti-competitive actions. A number of clearly identified anti-competitive practices which restrict exporters' access to markets would be proscribed.

The extent to which Members wish to institute more sophisticated or comprehensive competition rules to limit anti-competitive behaviour which essentially affects only their own markets is a question for them, not for the WTO, whose mandate is one of preventing obstacles to trade rather than looking to improve economic structures willy-nilly.

As far as international co-operation is concerned the MCA should require considerably more. In particular the MCA would include three principal elements:

- All Members would agree to wide-ranging information-sharing and intensive co-operation through both negative and positive comity to assist in the elimination of threats to competition;
- Outlawing of hard-core cartels in all Member countries. Clearly a definition would be required and the broad outline of that could be included in the Agreement.[70] There should also be a mechanism for allowing countries to grant exclusions to purely domestic cartels while ensuring appropriate transparency regarding such exclusions;[71]
- An agreement that in the examination of the threat to competition of new mergers or proposals for new mergers (or acquisitions) in any Member, the interests and arguments of other Members, particular in respect of the potential dominance in their individual markets, would be taken into account.

The reasons for rejecting a more extensive prescription for domestic competition law within the proposed MCA, using for example the World Bank-OECD or the UNCTAD codes, are mainly that concern to protect their development interests will make many developing countries reluctant to participate in such an agreement. Consideration of the development dimension raises the question of whether the necessary policy scope and required institutional backing is the same for a small economy as a big one: whether in short 'one size fits all'.

There are also major resource concerns not only with regard to the financial implications of setting up the necessary institutions to make competition law effective but in the lack of qualified lawyers and other needed personnel. In this respect there is much to be said in favour of a regional approach, particularly where there are already existing regional institutions.

In addition, there is an understandable suspicion of entering into multilateral agreements under WTO auspices on the part of the developing countries, who feel that they have had their fingers burnt in both the TRIMs and the TRIPs agreements. They fear that the details of the agreement are liable to be 'captured' by the developed countries, in particular the USA and/or the EU.

There is no need to wait for all countries to adopt competition law before an MCA is agreed at the international level. Such an international agreement will be likely to encourage countries to act more rapidly on the domestic arena, in some cases proving helpful in overcoming domestic opposition to the implementation of pro-competitive policies.[72]

However, this chapter proposes a new instrument to serve as an international forum for discussion on experience in competition policy – dubbed the World Competition Forum – which would be open to all WTO Members and ideally attract most of them to join. It would be an intergovernmental body but would be run informally with major participation from academics and lawyers. To some extent the International Competition Network is already serving as such forum and could serve as the nucleus of the WCF.

The WCF would have a major role in technical assistance and capacity-building in the developing world. It would run peer reviews – along the lines of the OECD peer reviews of competition policy in the OECD states – to examine competition law and agencies in all its member countries and encourage the best practice and thereby a useful, but not slavish, harmonisation. It could ultimately be the focal point for a world mergers and acquisitions authority.

Annex

Table 9.1: Comparison of the UNCTAD and World Bank-OECD Models of Competition Law

	UNCTAD model law	World Bank-OECD Model Law
Objectives	To limit restrictive agreements between enterprises or M & A or abuse of market power, which limit access to markets or otherwise unduly restrain competition	To maintain and enhance competition in order ultimately to enhance consumer welfare
Coverage	All enterprises in regards to commercial agreements and transactions regarding goods, services or IPRs All natural persons, who in capacity as owner, manager or employee, authorise or engage in restrictive practices prohibited by law Does not apply to sovereign acts of the state	All areas of commercial economic activity Does not derogate the privileges and protection conferred by laws to protect IPRs, but it does apply to the use of such property in such a manner as to cause the anti-competitive effects prohibited by competition law
Extra-territorial jurisdiction	Not explicit	The law is applicable to all matters specified in having substantial effects, including from acts done outside the country
Dominance	Prohibition on acts or behaviour involving an abuse of a dominant position of market power: – where an enterprise, either by itself or acting together with others, is in a position to control a relevant market; – where the acts of a dominant enterprises limit access to a market or otherwise unduly constrain competition – having adverse effects on trade or development – acts or behaviour considered abusive – predatory or discriminatory pricing – resale price maintenance – restrictions on parallel imports	A firm has a dominant position if it can restrain competition for a significant period and has 35 or more per cent of the market. Abuse of dominance is prohibited including creating obstacles to entry, or to expansion of competitors or eliminating competing firms, other than by increasing efficiency. Where no other remedy is available, the competition authority could reorganise and break up the abusing firm, provided the results would be economically viable

	UNCTAD model law	World Bank-OECD Model Law
Restrictive trade practices	Agreements prohibited are those which – fix prices or other terms of sale – collusive tendering – market allocation – restraints on production or sale – concerted refusal to purchase or supply – concerted denials of access to an arrangement crucial to competition	Agreements prohibited are those meant – to fix prices, tariffs, discounts etc. – to fix the quantity of output – to divide the market by any means – to eliminate actual or potential sellers or purchasers – to refuse to deal and any agreement significantly limiting competition
Mergers and acquisitions	Mergers, takeovers, joint ventures, horizontal, vertical or conglomerate should be *notified* when – at least one of the enterprises is established within the country and – the resultant market share is likely to create market power, especially when there is a high degree of concentration, barriers to entry or lack of substitutes It should be *prohibited* when – the ability to exercise market power is substantially increased – a dominant firm or significant reduction in competition will result	Concentration will be deemed to arise when two or more firms or parts of firms merge; or one or more natural or legal persons controlling one firm acquire control of the whole or parts of other firm(s) Concentrations that will probably lead to a significant limitation of competition are prohibited
Unfair trade practices	No specific suggestions	These include the distribution of false information capable of harming another firm or false or misleading comparisons of goods
Enforcement agency	No specific suggestions	– an independent, autonomous, accountable competition agency – specialised court with procedures and rules of evidence suited to competition cases with appropriate composition
Status, powers and functions	– inquiries, investigations upon complaints – taking necessary decisions, including sanctions, or recommending them to minister – studies, reports and information for public – making regulations – assisting in the making or review of legislation on RBPs or related areas – exchange of information with other states	– independent from any government department, receiving budget from and reporting directly to president/legislature – the right to make submissions to state authorities on legislation or regulations that could affect competition. When hearings on proposed laws are held, the competition authorities should have right to intervene and publish such interventions

	UNCTAD model law	World Bank-OECD Model Law
Sanctions and relief	The imposition of sanctions for – violations of the law – failure to comply with decisions of the competition authority or judicial authority – failure to supply information on time – false or misleading information. Sanctions could include – fines, imprisonment – interim orders or injections, cease and desist etc. – divestiture or recession (mergers and acquisitions or restrictive contracts) – restitution to injured parties	Orders to prohibit firms carrying on the anti-competitive practices, and actions to eliminate the harmful effects, and ensure against recurrence – fines for cartel or restrictive agreements, abuse of dominance, unfair competition and to ensure unfair competition and to ensure mergers and acquisition notification compliance – interim injunctions when necessary – parties may apply for an advance ruling, which would be binding on the competition agency. Advance ruling is for a limited period but can be renewed or modified or revoked under certain conditions

Sources: UNCTAD (2000), World Bank/OECD (1999), Basant (2002)

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Notes

1 Fox (1999), p. 665.
2 WTO (2003), *Trade and Competition*, background information, available at http://www.wto.org/english/tratop_e/comp_e/comp_e.htm#top
3 Paul Cook (2002), *Competition Policy, Market Power and Collusion in Developing Countries*, University of Manchester.
4 Tybout (1992).
5 Even in Hong Kong anti-competitive practices in the services sectors have shown the need for competition policy: '[c]ost pressures felt in Hong Kong have highlighted the need for improved competitiveness and cost effectiveness throughout the economy. While free and open competition has long been the case in the traded sectors of the Hong Kong economy, this has not been the case in some non-traded sectors. Since they do not face direct competition, it is important to ensure that the monopolies and oligopolies found in Hong Kong operate at maximum efficiency'. Vision 2047 Foundation (July 1996), p. 6. This is apparently not yet the case in Singapore.
6 EU Commission (1995).
7 WorldTradeLaw.net (2002).
8 CUTS (2002).
9 Ibid.
10 A good overview of the proceedings of the WGTCP is available in the yearly reports; see WTO (2000, 2001a, 2002).
11 WTO (2001a), para. 15 f.
12 In a number of submissions to the WGTCP, 'progressivity' is cited as a WTO principle: in these it appears to refer to the acceptance of a gradualist and time-differentiated approach to the introduction of multilaterally-agreed laws and institutions.
13 Woolcock (2003), p. 4.
14 It is important not to underestimate the complexity of – and costs attached to – a commitment to transparency. It involves much more than the provision of information of competition law. It includes, for example, implementing procedures and the decisions and guidelines of courts and competition authorities. See Woolcock (2003).
15 For example, in the US in 1982 export cartel exemptions to anti-trust laws were enacted with a view to promoting exports.
16 Levenstein and Suslow (2001). See also Evenett, Levenstein and. Suslow (2001) for further evidence from World Bank research on the topic.
17 Hoekman and Holmes (1999), pp. 7–8.,
18 Cook (2002) p. 20.
18 Kemal, Bilquees and Malik, (2002).
19 World Bank (2001), p. 135.
20 Cook (2002), p. 19.
21 CUTS (2001).
22 See, for example, WTO (2002a),
23 The GATS also has elements of a negative list approach. In sectors where market-access commitments are undertaken, there are a number of qualifications that are not permitted, including limitations on the number of service providers or on the value of transactions or employment or restrictions on the participation of foreign capital. See GATS, Article XVI.
24 Basant (2002), p. 8, notes the extensive use of AD measures by India, Pakistan and Zambia in recent years.
25 Hoekman and Holmes (1999).
26 WTO (2002b).
27 For the development of these arguments, see in particular Singh and Dhumale (1999).
28 WTO (2002), para. 26.
29 WTO (2002), para. 44.
30 Fox (1999).
31 Raghavan (2000).
32 Even then the EU is reluctant to bring in the DSU. 'As regards dispute settlement, any review of individual decisions should be ruled out. Issues relating to the way in which the law is being applied (or not applied) could only be considered within the framework of 'peer review' and outside the context of any possible dispute settlement mechanism. Any possible dispute settlement case would therefore be strictly limited to the consideration of any possible lack of conformity of domestic legislation with multilateral commitments.' European Commission (2000).

33 Commonwealth Secretariat (2001).
34 WTO (2002b).
35 WTO (2002b).
36 Cook (2002), p. 20.
37 The ratio of trade (exports plus imports) to GDP is highly correlated with size. The average ratio for the Commonwealth Secretariat-World Bank set of small states was 1.25 in 1986, for least developed countries 0.54 and for other developing countries 0.72.
38 Hoekman and Holmes (1999), p. 10.
39 Evenett et al. (2001), Table 3.
40 CUTS (2000), p. 7.
41 See WTO (2000a) for a description of Canada's experience and its reasons for favouring a multilateral agreement on competition.
42 The 'effects doctrine' deals with any behaviour taking place abroad which adversely affects competition in the home country. There might be disagreement, inter alia, over the extent where intent has to be established.
43 WTO (2002c).
44 WTO (2000a).
45 WTO (2002), para. 78.
46 See, for example, the discussion of the South Africa Competition Law in WTO (2002), para. 44.
47 Hoekman and Holmes (1999), p. 9.
48 Singh and Dhumale (1999), p. 5.
49 WTO (2000), para. 46.
50 It is important not to minimise the dangers from the exchange of information. These have been brought out by the International Chamber of Commerce, see ICC (1999).
51 CUTS (2001), p. 2.
52 Basant (2002), p.18.
53 CUTS (2001), p. 2.
54 DFID (2001).
55 Woolcock (2003).
56 For details see COMESA (2002, 2002a and 2002b).
57 COMESA (2002b), p. 13.
58 CUTS (2000).
59 World Bank/OECD (1999); UNCTAD (2000); also see CUTS (2001) for an alternative overview of the scope of the competition law which might be mandatory under an MCA.
60 ICN (2002).
61 Department of Trade and Industry (2001).
62 Fox (1999).
63 Singh and Dhumale (1999), p. 6.
64 This is largely through two OECD Recommendations: the 1995 Recommendation on Co-operation and the 1998 Recommendation on Hard-Core Cartels. For an update on the latter, see OECD (2002).
65 The ICN already has a Merger Review Working Group though this focuses on best practice rather than on the challenges of an international authority. 'The mission of the ICN Merger Review Working Group is to promote the adoption of best practices in the design and operation of merger review regimes in order to: (i) enhance the effectiveness of each jurisdiction's merger review mechanisms; (ii) facilitate procedural and substantive convergence; and (iii) reduce the public and private time and cost of multijurisdictional merger reviews.' See ICN (2002).
66 Hoekman and Holmes (1999), p. 8.
67 WTO (2001).
68 WTO (2002a), para. 90.
69 Basant (2002), p. 33.
70 The process of defining hard-core cartels would not be easy. The OECD has defined them in terms of certain behaviour: price-fixing, bid-rigging, market allocation and output restrictions. But arguably this should constitute only a 'starting-point'. The 2002 WGTCP discussion also raised the question as to whether the definition of hard core cartels would include a *per se* or rule-of-reason approach. WTO (2002), para. 55 ff.
71 WTO (2000), para. 53.
72 Hoekman and Holmes (1999), p. 16.