

# IWOGDA POLICY BRIEF\*

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## *Multilateral Competition Agreement*

### **Introduction**

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

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

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

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

development, the issues that need further discussion and the way forward.

### **The agenda**

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

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

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

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

### **The case for an MCA**

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

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dominant position) and those that rob the trading nations of the benefits of trade; export cartels, abuses of dominant position, anticompetitive mergers and international price fixing cartels.

There is mounting evidence that all countries have been victim to the abuse of dominant positions created by TNCs in their markets. However the impact on DCs is more severe. For example, a World Bank commissioned study<sup>1</sup> conservatively estimates that the DCs imported US\$81.1bn of goods from sixteen publicly known cartel-infested industries and the amount was likely to be an underestimate. These imports represented 6.7 percent of total imports and 1.2 percent of combined GDP of DCs.

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

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

### ***The case against an MCA***

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

However, what remains as the issue of contention is whether the WTO is the right forum to address the same. The underlying *raison d'être* for opposing an

MCA in the WTO is that such a framework is seen as a tool to gain market access for the goods and services of OECD countries-based TNCs in developing economies. DCs fear that their enterprises would be wiped out in the so-called level playing field created by an MCA. When competition is isolated within a local economy, then failure of weaker firms results in gains to the stronger, i.e. the more efficient firms within the economy.

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

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

### **Specific Concerns of DCs**

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

### Current Country Positions on a potential MCA

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

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

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

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

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

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

### The Way Forward

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

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

<sup>1</sup> CUTS (2003) Pulling Up Our Socks—A Comparative Study of Competition Regimes of Seven Developing Countries under the 7-Up Project: India; Kenya; Pakistan; South Africa; Sri Lanka; Tanzania and Zambia.