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EU-INDIA STUDY

REPORT ON

COMPETITION POLICY

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Introduction and Summary

This research report consists of four sections. It goes without saying that the opinions expressed in our report are those of the authors, and not necessarily those of the Consumers Union Trust Society of India (CUTS) or of the European Commission (that funded this project). The goal of this report is to analyse several of the issues at stake in the discussions on trade and competition at the World Trade Organization (WTO). In the view of the European Community and its member States these discussions should lead to negotiations on a possible multilateral framework on competition policy under the auspices of the WTO, negotiations which India argues will only take place once full agreement on “modalities” is reached.² While we do not enter into the question of the appropriate modalities for negotiations, our report may be of interest in the pre-negotiation stage as it analyses the stated positions of EC and India and explores whether there is any common ground between them.

We start by surveying the formal submissions of India and the EC to the WTO Working Group on Trade and Competition and then identify the crux of the differences between them. Despite the very strong reservations by India about the EC’s proposals, we nevertheless find that where India does explicitly or implicitly state what it would seek from any multilateral approach to competition policy, the Indian position is actually not as far removed from the EC’s current proposals as one might expect. We go on to note that India has expressed support for the UNCTAD “Set of Multilaterally Agreed Equitable Principles and Rules for the Control Of Restrictive Business Practices” (known as the “Set”³). Close examination reveals that, in many regards, the EC’s current proposals differs little from the UNCTAD Set. The Set was prepared by a group of experts working for UNCTAD in 1980 and was subsequently adopted by the United Nations’ General Assembly. The Set, however, has no binding force and this is significant as the EC is arguing for some binding commitments on the content and operation of domestic competition law. The first section concludes by noting that whatever the content of any multilateral disciplines on competition policy, the heart of the disagreement lies in the basic legal distinctiveness of agreements under the auspices of the WTO.

The second section of our report, looks in more depth at the EC’s proposals. This section asks just what are the new rights and obligations implied by the EC’s proposals and what a WTO agreement inspired by them would mean for a country like India. The analysis reveals that the EC’s current proposals involve surprisingly limited additional obligations for signatories to a multilateral agreement. In some important respects the EC’s proposal would actually reduce the extent of WTO obligations in competition policy, by confining Article III National Treatment obligations in competition law to *de jure* discrimination (ie exempting *de facto*

² It is conventional to refer to the “European Community and its member States” as the “EU”, even though meanings of these terms are subtly different. However in the context of the WTO the European Commission represents the *European Community* as a co-signatory of the WTO agreement and speaks on behalf of the Community and its members. In the competition context submissions to the working group state that they are on behalf of “European Community and its member States”; on the other hand dispute settlement documents usually refer to the “European Communities” as a complainant or respondent. It is customary to refer to “the EC” in a WTO context and we have tried to standardise on this; but we could have used the term EU.

³ <http://r0.unctad.org/en/subsites/cpolicy/docs/CPSet/cpsetp4.htm>

discrimination from WTO disciplines in this field) and by making further provision for special exceptions.⁴ However, *without further exclusions*, any agreement would extend the scope of the *de jure* national treatment requirement beyond its present application; that is to say beyond imported goods and scheduled services to non-traded goods and non-scheduled services. Merger review policies would be an issue in this regard, but as is noted in the first section of this report, the EC has framed its proposals so they do not affect national industrial or development policy options. We go on to explore a variety of different means by which exclusions could be spelled out, with a discussion of the “GATS” model and the possibility of simply codifying existing obligations. The section concludes that, from India’s point of view, the weakness of the current EC proposals is not so much that they would be invasive of India’s sovereignty as that they would deliver relatively little of what latter seeks.

The third section of our report, examines the rationale for, and the costs and benefits of proposed provisions on *hard core cartels*. It begins by showing that recent evidence makes it hard to sustain the view that free trade alone guarantees contestable markets. In particular, private international cartels have been active in industrial and developing countries. Moreover, recent evidence suggests that the deterrent effect of effective anti-cartel enforcement measures is considerable for developing and industrial countries. The argument also casts doubt on the often-heard claim that the enforcement of competition law is an unjustifiably expensive activity.

As far as discussions on potential multilateral disciplines on hard core cartels are concerned, we look in considerable detail at the implications for developing countries, including India, of the EC’s proposals regarding cartels, exploring in part 3.4 a number of specific aspects of these proposals for cartel enforcement including the Indian concern about the withholding of “confidential” information. The section argues that developing economies’ interests might be best served by exploring arrangements in which amnesty provisions in industrialized countries’ competition laws could be used to provide incentives for cartel conspirators to willingly reveal the extent of their activity to enforcement officials in developing countries as well.

We conclude this section by observing that, given the existing positions of the EC and India, agreement only on very rudimentary multilateral disciplines might be possible. This may change, however, if the EC’s and India’s positions evolve or clarity emerges on a number of critical issues.

Our study is a preliminary one and is largely based on an evaluation of the EC’s stated proposals and what can be pieced together of the Indian position. The authors are aware that there is wealth of further ideas and reflections within the Indian government and within the European Commission and its member states; it is our hope that we may be able to receive more feedback from such experts. Our ultimate aim is not to promote any solution, though naturally the authors of this study have their own views and these are offered as contributions to the debate. Rather we wish to stimulate reflection in the hope that whatever may be the outcome of the current discussions on the appropriateness and scope of potential multilateral disciplines on competition policy, it might profit more from thoughtful dialogue than from the repetition of entrenched positions.

⁴ Existing obligations under Article III of the GATT 1947 are customarily held to outlaw both explicit (“*de jure*”) discrimination against foreign goods in domestic taxes and regulation and implicit (“*de facto*”) discrimination where rules are uniform but in practice harder for foreign firms to comply with. See section 2.2.

1. A Comparison of EC and Indian submissions to the WTO on the Interaction between Trade and Competition Policy

1.1 Historical background

Probably the earliest systematic analysis of the trade and competition s issue is in “The Wealth of Nations”. Adam Smith first drew attention to international trade monopoly issues in a UK – India context! He fiercely denounced the East India Company arguing that its monopoly and monopsony position made both British and Indian populations worse off than if there was free trade between independent states. He thought that even distorted trade was worse than no trade but said “ The trade has benefited British Manufacturers in spite of the monopoly, not in consequence of it”. It is interesting to see that the major part of Book IV of the Wealth of nation is devoted to this issue.

The issue of international monopolies and cartels was a constant theme in Marxist writings, notably Lenin’s *Imperialism*, and after 1945 the role of the big German cartel members such as IG Farben and the Japanese Zaibatsu was a high profile political concern. Concerns about such anti-competitive practices were reflected in the ITO’s Havana Charter. The ITO constitution would have obliged member states to police restrictive business practices that distorted trade.⁵ But the nature of the ITO was such as to provide for an investigation and consultation/conciliation process rather than the adversarial dispute settlement process of the WTO.

Of course, the GATT text that was adopted was only one section of the Havana Charter and international action on Restrictive Business Practices became a low priority. Discussions continued on such matters not only in the GATT, but also at the OECD and UNCTAD. The OECD adopted certain recommendations and of course UNCTAD in 1980 adopted the “Set of Multilaterally Agreed Equitable Principles and Rules for the Control Of Restrictive Business Practices” (known as the “Set”⁶) of which India has been a keen supporter, a point to which we will return later.

The revival of interest in international competition issues was associated with a wave of suspicion about the possible abuses of dominance by multinational firms, during the 1970s, even though more countries began to see the positive benefits of direct foreign investment. Work continued at GATT and OECD in parallel, but the Trade and Competition debate did not really revive until the 1990s when for separate reasons both the EC and the US began to take a major interest. The result was the

⁵ See Robert D. Anderson and Peter Holmes “Competition Policy And The Future Of The Multilateral Trading System” *Journal of International Economic Law* volume 5, number 2 2002, and J.Mathis, UNCTAD, Conference Papers, for Regional Competition Policy Seminar for COMESA National Representatives, Lusaka, June, 1999, UNCTAD, Geneva, 2000.

⁶ <http://r0.unctad.org/en/subsites/cpolicy/docs/CPSet/cpsetp4.htm>

decision at Singapore to set up a working group with a mandate to study the linkages between trade and competition policy and the decision at Doha to

The motive that initially drove both big players was slightly different from that which had provoked the revival of interest in the 1970s: it was about market access. The EC had discovered the effectiveness in its own Internal market of Competition Policy as a lever to ensure market openness, and included provisions on competition policy in all its bilateral trade agreements, notably the Europe Agreements, and bi-laterals with Mexico and South Africa. Interestingly, none of these laid down detailed conditions for domestic competition rules, but rather provisions that called for the prevention of anti-competitive practices that affected trade. The success of these initiatives in the eyes of the Commission has been one of their motives for the desire to “multilateralise” them. The EC has also pursued bilateral co-operation with the US, though ironically its initial agreement with the US was challenged by member states who insisted on their competence in this area, and individual member states still have their own bilateral arrangements. For example the UK has a “Mutual Legal Assistance Treaty” with the US and the UK DTI website notes:

“An exchange of notes between the UK and US Governments dated 30 April and 1 May 2001 deleted the provisions excluding criminal prosecutions in competition cases from the UK/US Mutual Legal Assistance Treaty (MLAT). This goes further than any EU-US arrangement.”⁷

The US meanwhile became interested in the possibility that the application or non-application of Japanese “Fair Trade” law was allowing keiretsu groupings to create entry barriers, under the “Structural Impediments Initiative”. But the US soon decided that its interests would be best serviced by *a la carte* bilateral arrangements and above all by a unilateral activism, addressed for the most part at international cartels harming US consumers. The US International antitrust guidelines note that in the US claims global jurisdiction on exports

“the Foreign Trade Antitrust Improvements Act of 1982 (“FTAIA”) applies to foreign conduct that has a direct, substantial, and reasonably foreseeable effect on U.S. commerce”⁸.

The US for most of the 1990s argued that while international co-operation on anti-trust was desirable, this should not be done via the WTO. This opposition changed somewhat in the run-up to Doha, though the significance of this has yet to become clear. In a joint statement by Robert Zoellick and Pascal Lamy of July 17th 2001 ended the outright US opposition to including competition policy in the Doha round, but Mr Zoellick's statement repeated the traditional doubts on the issue and subsequent submissions to the WTO working group mainly raise questions and problem, and offer even less by way of a substantive alternative to the EU's suggestions than do Indian papers.⁹

The Indian position on “Trade and Competition” has, as well known, been deeply sceptical of anything that could lead to substantive negotiations in the Doha Round.

⁷ <http://www.dti.gov.uk/ccp/topics2/internationalpolicy.htm>

⁸ <http://www.usdoj.gov/atr/public/guidelines/internat.htm>

⁹ “What is not clear to us, however, is how competition obligations based on the core principles should be assessed; for example, the important question of how dispute settlement might operate or whether other forms of oversight such as peer review might be more satisfactory.” Statement by Robert Zoellick July 17th 2001 <http://usinfo.state.gov/topical/econ/wto/pp0717a.htm>

But as we shall see, the Indian position as evidenced in submissions to the WTO working group has been more nuanced than outright opposition.

1.2 Comparison of EC and Indian positions on Trade and Competition

Here we will ask whether

- a) the positions interests of the EC and India are fundamentally different and irreconcilable
- or
- b) the two sides have in fact truly common interests so that a compromise should be easy.

The conclusion appears to be that neither of these extremes is right: the EC has moved its position to accommodate those critics who say it is only interested in market access for EC firms and is no longer (if it ever was) seeking major harmonisation of competition policy; but there appears to be a sticking point in that even if the EC's proposals were to emerge in the form of plurilateral or GATS type code, the result would be that those countries who had signed up in full would have to incur the full costs of operating a basic domestic competition regime, for which of course they would get the domestic benefits, but the obligation on the part of developed country CA's to assist in the policing of export cartels would be voluntary.

One can well argue that even this state of affairs would be an advance from the present situation, but critics will argue that most of what is proposed for the WTO could be achieved voluntarily. That is to say jurisdictions that want anti-cartel laws can introduce them anyway and the EC, if it is sincere, could supply information on cartels it has found.

1.3 Brief history of positions

EC: in creation of Common market, began in early 1990s using competition policy as market opening device within the EC, competition policy being a major tool in the market integration process. In the light of this success it included sections on competition policy in all its bilateral trade agreements. Its early (mid 1990s) proposals for multilateral agreements focused on market access issues, seeing private barriers to entry as something that could be combated by multilateral disciplines.

These were gradually scaled back and moved from market access to anti-trust co-operation with development dimension in the light of criticisms including those from developing countries. Now the EC has proposed that subject to the possibility of exclusions and development related progressivity, there should be a fairly modest agreement on competition policy core principles and a legal framework for voluntary co-operation, with an emphasis on tackling cartels.

India was originally very supportive of international measures on restrictive business practices and especially the work of UNCTAD, but it has taken a position against WTO involvement – though official statements suggest that some form of multilateral agreement based on UNCTAD Set of Multilaterally Agreed Equitable Principles and Rules for the control of restrictive business practices. In this part of our report we

will analyse the public declarations of the two sides. The third section will return in more detail to the question of how the priority given to cartels could be approached in practice.

1.4 The main position papers

India has submitted far fewer papers than the EC in this debate but its detailed texts are often constructive and thoughtful.

The most recent Indian paper can be read almost as a statement of conditions under which it would subscribe to a global competition agreement. (WT/WGTCP/W/216 26 September 2002)

"Until such time as developed countries are willing to consider the impact of mergers on consumers in foreign countries, to rescind the exemption of export cartels in their competition laws, to give serious consideration to enforcing the UNCTAD Set of measures to control RBPs, and to extend the benefits of "positive comity" in competition law enforcement to developing countries, the latter will have to retain the right to challenge foreign mergers and RBPs that have an effect on domestic consumers."¹⁰

How different is this from EC position?

Let us consider the various elements of the Indian position in turn.

India's statements call for developed countries to:

1. to consider the impact of mergers on consumers in foreign countries,
2. to rescind the exemption of export cartels in their competition laws,
3. to give serious consideration to enforcing the UNCTAD Set of measures to control RBPs,
4. and to extend the benefits of "positive comity" in competition law enforcement to developing countries.

Points 1,2 and 4 go in the same direction: the Indians are asking for the EC and the US to take account of foreign consumers in decisions on cartels and mergers. The wording of the first two points is subtly different.

Point two asks for an end to the exemption of export cartels. What does this mean? It could be argued that this has to be interpreted as going beyond what it states: to the extent that domestic competition laws only cover measures with effect in the territory of the jurisdiction, repeal of explicit exemptions would not do anything unless there was a positive decision to take some sort of action against them, or at least to allow action to be taken. It would be difficult but not perhaps wholly impossible to see how the EC could take legal action itself against firms that were not operating a cartel with effects inside the EC. However one could imagine the EC authorities informing their counterparts in other countries of evidence discovered of illegal activities elsewhere. It is not impossible to imagine something which went further, eg in demanding that firms found guilty of abuses in the EC give formal undertakings to the EC to reveal details of their worldwide actions, or even to cease and desist world-wide. We might

want to raise this question: suppose the EC goes all the way to modify its rules to allow prosecution in or by the EC of cartels operated out of the EC whose effects only give rise to abuses illegal elsewhere, would this be unjustifiable extraterritoriality? Similar considerations might arise if the US or the EC or have laws forbidding the payment of bribes elsewhere.

Point one asks developed countries to consider the impact of mergers, a softer demand: but once again we should ask what we mean by “consider”. Gathering information on the world-wide implications for competition, is not the same as asking for mergers which do no harm at home to be stopped because they do harm elsewhere.

Point 4, positive comity requires countries to take account of others’ interests, but only to the extent of your own law. So if points one and two are thought of as to be applied in the form of positive comity, we would not in fact be asking the EC to prosecute firms for doing things not currently illegal in the EC.

The EC proposals focus on controlling hard core cartels but also on co-operation for all aspects of competition policy. The EC paper in 2000 said:

WT/WGTCP/W/152 25 September 2000

"WTO Members should be ready to enter into consultations in order to develop mutually satisfactory and beneficial measures to deal with anti-competitive practices of an international dimension. In order to facilitate such consultations, a WTO Member should inform other Members whose important interests may be affected by an ongoing investigation and proceeding under its or investment and seek information about any possible competition investigation on such practices. In the context of consultations, a WTO Member may also seek assistance from the home country of a foreign MNE in relation to an ongoing competition investigation or seek information which may be of value for enforcement activities in relation to international, import or export cartels. Consultations would also provide an opportunity to exchange views about market analysis or possible remedies. When an anti-competitive practice has an impact on several markets and is subject to parallel competition investigations, WTO Members should endeavour to co-ordinate their actions. In order to avoid the potential for jurisdictional conflicts, a WTO agreement could also include principles of negative comity (i.e. a WTO Member should take into account the important and clearly stated interest of other Members concerned before action is taken)."

The more recent EC paper **WT/WGTCP/W/184**, dated 22 April 2002 says:

“Under a WTO agreement, WTO Members should be ready to enter into consultations in order to develop mutually satisfactory and beneficial measures to deal with anti-competitive practices having an impact on international trade. To better facilitate such consultations, a WTO Member should inform other Members whose important trade interests may be affected by ongoing investigations and proceedings under its competition laws. Similarly, a WTO Member may bring to the attention of another WTO Member evidence of an anti-competitive practice with an impact on its trade or investment and seek information about any possible competition investigation relating to such practices. In the context of consultations, a WTO Member should also be able to seek assistance from the home country of a foreign multinational in relation to an ongoing competition investigation and/or seek information which may be

of value for enforcement activities in relation to international, import or export cartels.”

We must ask: how far apart are these positions? India is implicitly asking for a ban on export cartels; this is not inconsistent with the EC position, and is more likely to be opposed by the US. Though the EC seems at the moment to focus on domestic cartels and on supplying non confidential information: “a WTO Member should inform other Members whose important trade interests may be affected by ongoing investigations and proceedings under its competition laws.”

A key point of controversy is that of the treatment of export cartels. The EC paper specifically calls for voluntary co-operation for all kinds of international cartels

(WT/WGTCP/W/193 1 July 2002)

“A competition agreement should include provisions to facilitate voluntary case-specific cooperation in relation to anti-competitive practices having an impact on international trade. Such provisions should apply to three main types of anti-competitive practices:

practices that affect international trade (e.g. international cartels);

practices that affect market access (e.g. import cartels, exclusionary abuses of a dominant position), and,

practices with an impact on the trade flows to and from a different geographical market than that in which the practices have been conceived (e.g. export cartels, abuse of a dominant position by a foreign corporation).”

But the emphasis is on the voluntary nature of this co-operation. How far does this fall short of the Indian “demand”? One could argue that there is indeed common ground. The EC wording could be consistent with positive comity. It falls short of obliging the EC to act on complaints from developing countries even in terms of providing information, but then we know that there is no mechanism to force the EC to act on complaints brought by domestic consumers. The 1994 SMMT-JAMA case is instructive here. European consumers filed a complaint against the industry to industry VER affecting the UK market. Privately EC competition officials acknowledged that this was a violation of article 85 (81), but made it clear that political considerations made it impossible to act. Among these considerations were the fact that the resulting import cartel allowed Japanese firms a guaranteed market share and high prices. The CFI ruled that the letter from DG Competition refusing to investigate to be unlawful, but the result was merely a new letter not an investigation¹¹. The EC in its press statement agreeing the EC-Japan “Consensus” on trade in cars gave an undertaking to Japan that competition law would not be used to undermine the subsequent VER negotiated between MITI and the EC for the period 1993-2000, a VER for which special authorisation had to be sought at the WTO.¹²

It is hard to see any international agreement on hard core cartels removing altogether the right of a CA not to investigate domestic complaints. Thus the terms of the EC proposal could hardly be expected to require action in the case of *every* aggrieved

¹¹ See T. Frazer and P.Holmes "Self-Restraint: Cars Complaints and the Commission", *European Public Law*, 1995, Vol.1 No.1 pp.85-95

¹² See P.Holmes and A.Smith, "The Automobile Industry" pp. 125-159 in *European Policies on Competition Trade and Industry*, edited by P.Buigues, A.Jacquemin and A.Sapir, Edward Elgar 1995

“Kodak” that claims a “Fuji” is operating a cartel that keeps it out, merely a procedure allowing complaints to be brought. On the other hand, it would open the door to private challenges to import cartels which would in the nature of things add more to market access possibilities for “northern” firms in the “south” than vice versa; not an inherently bad thing for southern consumers, but the asymmetry is not easy to justify.

On the UNCTAD “Set” the next task will be to look more closely at the Set in order to see what “enforcing the UNCTAD Set of measures to control RBPs” might mean¹³.

If we look at the aims of the UNCTAD Set it is clear that there is a difference of rhetoric but no obvious inconsistency with traditional aims of competition policy. The fourth point highlights multi-national firms, but does not address them exclusively.:

“1.To ensure that restrictive business practices do not impede or negate the realization of benefits that should arise from the liberalization of tariff and non-tariff barriers affecting world trade, particularly those affecting the trade and development of developing countries;

2.To attain greater efficiency in international trade and development, particularly that of developing countries, in accordance with national aims of economic and social development and existing economic structures, such as through:

- a. The creation, encouragement and protection of competition;
- b. Control of the concentration of capital and/or economic power;
- c. Encouragement of innovation;

3.To protect and promote social welfare in general and, in particular, the interests of consumers in both developed and developing countries;

4.To eliminate the disadvantages to trade and development which may result from the restrictive business practices of transnational corporations or other enterprises, and thus help to maximize benefits to international trade and particularly the trade and development of developing countries

5.To provide a Set of Multilaterally Agreed Equitable Principles and Rules for the control of restrictive business practices for adoption at the international level and thereby to facilitate the adoption and strengthening of laws and policies in this area at the national and regional levels”

These are classic competition rather than development goals. The “development bias” and equivalent of the S&D provision is quite modest:

“In order to ensure the equitable application of the Set of Principles and Rules, States,

- particularly developed countries, should take into account in their control of restrictive business practices the development, financial and trade needs of developing countries, in particular of the least developed countries, for the purposes especially of developing countries in: Promoting the establishment of development of domestic industries and the economic development of other sectors of the economy, and

¹³ Extract from the Set are taken from <http://r0.unctad.org/en/subsites/cpolicy/docs/CPSet/cpsetp4.htm>

- Encouraging their economic development through regional or global arrangements among developing countries.”

The Set calls for everyone to have a competition law of some sort. Part E states:

“States should, at the national level or through regional groupings, adopt, improve and effectively enforce appropriate legislation and implementing judicial and administrative procedures for the control of restrictive business practices, including those of transnational corporations.”

In the next paragraph the only point that seems like to be significantly offensive to those who worry that a trade and competition agreement might be too oriented to market access is the suggestion that legislation should “primarily” address acts which “limit access to markets”:

“States should base their legislation primarily on the principle of eliminating or effectively dealing with acts or behavior of enterprises which, through an abuse or acquisition and abuse of a dominant position of market power, limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on their trade or economic development, or which through formal, informal, written or unwritten agreements or arrangements among enterprises have the same impact”

The Set then calls for what could be seen as transparency and National treatment:

“States, in their control of restrictive business practices, should ensure treatment of enterprises which is fair, equitable, on the same basis to all enterprises, and in accordance with established procedures of law. The laws and regulations should be publicly and readily available.”

The call for information exchange is not unlike what is proposed by the EC:

“States should establish appropriate mechanisms at the regional and subregional levels to promote exchange of information on restrictive business practices and on the application of national laws and policies in this area, and to assist each other to their mutual advantage regarding control of restrictive business practices at the regional and subregional levels”

And

“States should, on request, or at their own initiative when the need comes to their attention, supply to other States, particularly developing countries, publicly available information, and, to the extent consistent with their laws and established public policy, other information necessary to the receiving interested State for its effective control of restrictive business practices”

It does *not* call for exchange of all confidential information:

“Where, for the purpose of the control of restrictive business practices, a State obtains information from enterprises containing legitimate business secrets, it should accord such information reasonable safeguards normally applicable in this field, particularly to protect its confidentiality.”

The provisions for dealing with disputes echo the old ITO formula rather than provide for binding dispute settlement; even so, they resemble the EC’s plan for a competition Committee:

“Consultations:

- a. Where a State, particularly of a developing country, believes that a consultation with another State or States is appropriate in regard to an issue concerning control of restrictive business practices, it may request a consultation with those States with a view to finding a mutually acceptable solution. When a consultation is to be held, the States involved may request the Secretary-General of UNCTAD to provide mutually agreed conference facilities for such a consultation;
- b. States should accord full consideration to requests for consultations and, upon agreement as to the subject of and the procedures for such a consultation, the consultation should take place at an appropriate time;
- c. If the States involved so agree, a joint report on the consultations and their results should be prepared by the States involved and, if they so wish, with the assistance of the UNCTAD secretariat, and be made available to the Secretary-General of UNCTAD for inclusion in the annual report on restrictive business practices.”

We have not dealt at length here with the issue of exemptions from National Treatment for the purpose of development policy, but as Stewart (2002) argues it is not clear that the issue of national treatment would go beyond the application and enforcement of the anti-trust law, to allow increased market access or negate the benefits for local firms of industrial policy.¹⁴

The recent India- Brazil paper on TRIMS (**G/C/W/428, G/TRIMS/W/25** 9 October 2002) seems to argue that competition policy should be part of proactive industrial policy:

“Developing countries should be allowed to use TRIMs in order to:

- a) promote domestic manufacturing capabilities in high value-added sectors or technology-intensive sectors;
- b) stimulate the transfer or indigenous development of technology;
- c) promote domestic competition and/or correct restrictive business practices”

While this implies discrimination against foreign firms: point c would not necessarily need to be discriminatory but points a and b might so. Here we have to ask ourselves how far this would imply discrimination within competition policy as such, and how far this would in fact go beyond the technology policy goals that the EC has set itself. Some member states of the EC would be ready to commit to opening all technology policy instruments to all foreign investors: but would all member states want to do so? The EC’s position is however that what it is proposing in a competition agreement should strictly be confined to competition issues as such, and that other development policies should be treated separately. India however sees there as being a link but the implications of such a linkage are as yet unclear.¹⁵

¹⁴ Taimoon Stewart (2002). "Some Comments on the Meaning of the Core WTO Principles when included in a National Competition Law." Geneva: South Centre, (September)

¹⁵ Indian officials note that Article 9 of TRIMS provided for the possibility of negotiations on competition issues

A provisional conclusion from this review of the texts is that while the EC is still not offering as much on export cartels as India appears to be asking, the Indian request still loosely formulated and the EC might be able to offer much of what is meant by “positive comity” and what is implied by the UNCTAD Set within the terms of what the EC has so far set out, by clarifying the degree of discretion under the heading of voluntary co-operation.

So where are the fundamental differences? The EC has certainly stepped back from being interested in market access. Having said that, there are other interests at stake; the EC (like the US) has a broader political interest in projecting its approach to the governance of trade related issues. This includes some form of multilateralisation of the approach to competition it adopts in its bilateral agreements. India has a pragmatic interest in mechanisms which discipline restrictive business practices that might affect it, and has long advocated some global framework. Ultimately, India is seeking to ensure that there are rules in place which discipline firms engaging in restrictive business practices, while the EU has in the past been mainly concerned with ensuring that countries have appropriate competition policies. These aims are not however contradictory in that in the absence of an supranational competition authority with the ability to act directly against restrictive business practices, the only way to ensure that there are adequate and appropriate rules in place in each of the relevant national and regional jurisdictions is for a WTO agreement on standards for competition policy to be applied by all members¹⁶. The UNCTAD Set can be seen as a set on non-binding standards, and as the citations above show the consistent wording “*States should...*” shows that the Set defines standards for national rules.

Hence philosophically the positions are not diametrically opposed. But there are clear differences. And even if they were even closer, the Indian side has understandable fears that negotiations at the WTO now might have unpredictable consequences. A key issue is that the EC proposals have rather specific content and agreement *at the WTO* has quite specific implications and the second part of the study addresses this in more depth.

It should be added at this point that we are well aware that differences between India and the EC are not confined to this issue and any final WTO deals at Cancun and after will be based on complex trade offs including all the other issues covered by the EINTAD research.

¹⁶ For an explanation of the difference between a rule (more precise) and a standard (setting a more general aim) see “Rules and Standards in International Law” by Daniel Bodansky, NYU Law School March 31, 2003

http://www.law.nyu.edu/kingsburyb/spring03/globalization/BodanskyRules_v_StandardsPaper.pdf

" "The distinction between rules and standards is, in essence, that between ex ante and ex post decision-making. Rules attempt to define in advance what conduct is permissible. They generally consist of two parts: a set of triggering facts and a legal result. If the triggering facts are present, then the rule specifies the legal outcome in a determinate manner. In contrast, a standard is less precise about what facts lead to what legal results."

2. Relation of General Principles to National Laws; Modifications Raised by Framework Proposals; Possible Alternative Approaches*

2.1 Introduction

The first section considered the effects of international cartels upon developing countries and identified the primary points of divergence between the EC and India on the question of an international competition policy framework in the WTO. It then placed these positions into a common context by comparing the parties' viewpoints on the UN Set as expressed in the Working Group on Trade and Competition (WGTCP). That section concluded that the Set incorporated objectives that were mutually shared by both the EC and India. A divergence between these jurisdictions was noted on two closely related points. The EC proposes that Members agree to have certain domestic competition laws that would incorporate a prohibition on hard core cartels. These laws would then serve as the primary enforcement mechanism, territory by territory, to give actual legal effect to the ban on international cartels. However, the provisions offered thus far for international co-operation, whereby developing country competition authorities could receive information on cartel practices or assistance with the investigation and prosecution of export-oriented cartels, would remain a voluntary mechanism.¹⁷ The heart of the critique from India's viewpoint was noted as,

“Since prosecuting RBPs perpetrated by firms based abroad is going to be extremely difficult for countries with limited resources, domestic producers will in practice bear the brunt of a competition law that enshrines the NT principle, while allowing foreign producers to get away with similar infractions.”¹⁸

This difficulty is presented as a matter of resource enforcement capacity in light of increased demands by domestic complaints. Within the domestic law, national treatment would not allow domestic authorities to favour either their local firms in bringing prosecutions or to provide for any greater enforcement focus upon foreign practices.¹⁹ Foreign actors can and will bring complaints charging domestic agreements restricting imports. Likewise, domestic actors (and the state) also have the legal capacity to file domestic prosecutions against foreign-based practices that are restraining exports that affect purchasers in the domestic market. However, these prosecutions are acknowledged as more difficult where actors and their agreements are located abroad, the suggested mechanism to facilitate such prosecutions will

¹⁷ WT/WGTCP/W/184, most recently summarised in WT/SGTCP/W/222, 19.11.02, para. 17. Bilateral co-operation agreements wherein authorities assume a positive comity obligation to respond to requests to deal with domestic cartels having effects upon the territory of the requesting party would not be covered by MFN according to the EC submissions. The argument has been made that MFN does not apply to such agreements as a general matter of GATT law. Mathis, J., (2002), WTO Core Principles, UNCTAD Series on Issues in Competition Law and Policy, Geneva, pp.49-50.

¹⁸ WT/WGTCP/W/216, 26.09.02. NT refers to national treatment.

¹⁹ National treatment in the EC submissions would however be limited only to the terms of the written law. WT/WGTCP/W/222, para. 14.

remain voluntary, and the authority's resources are consumed by responding to actions on domestic practices.

Thus, for India and other developing countries, there results a

“... fear that a multilateral agreement would impose too many constraints on developing country competition rules whilst confining assistance on international cartels to a purely voluntary process.”²⁰

A second point of divergence is noted relating to India's characterisation of the application of national treatment principle as it applies to competition laws. As both quotes above indicate, there appears to be a possibility that India views the adoption of a framework as raising a new national treatment obligation that does not now otherwise apply to domestic competition laws. This is correct only in part to the extent that the EC submission proposes a broadening of the existing national treatment obligation so as to prevent discrimination between *firms* on the basis of their nationality. However, it should be made clear that the general GATT national treatment obligation already applies to a national competition law to the extent that the provisions of such a law might affect the sale or distribution of imported products in relation to like domestic products. Since India's understanding of the existing NT obligation is rather central to any position it might put forward regarding the framework, this aspect of GATT/WTO core principles in their application to competition laws is taken up as a first area of consideration.

2.2 GATT law as to national competition rules

The application of national treatment to a competition law does not “open” a market in the sense of establishing a right of market access. Market access is controlled by tariff commitments (goods), specific commitments (services) or by investment agreement undertakings. A territory maintaining a totally closed market can as well maintain a competition policy regime that would insure rivalry between domestic firms. To the extent that such a market is opened for imports or participation by foreign firms, then a national competition law will provide effectively identical rights of rivalry as to them in relation to domestic goods or firms. This follows from the law of the GATT that provides Members a means of lawful domestic protection by the use of tariff duties rather than by discriminatory domestic laws and regulations, including competition laws.

To insure that domestic economic protection is not afforded to domestic production by internal laws, GATT national treatment is a general obligation as to all domestic laws, regulations or requirements that affect the internal sale, offering for sale, distribution, etc of imported goods. Since the application (or stated and selective non-application) of a domestic competition law can certainly affect the internal sale, distribution or purchase of imported goods, national treatment applies. An example would be where imported products were subject to different competition policy requirements than like or directly competitive domestic products. Thus, *in the absence*

²⁰ Some national officials do suggest that the voluntary provision provided in a framework is a meaningful enhancement over current practice where there is no administrative “legal cover” to provide non-confidential information upon request.

of any CP framework, the following points should be noted regarding WTO law as to national competition laws.

1. Any country with a competition law is already providing a basis to challenge domestic (private) anti-competitive agreements, either by investigations and prosecutions undertaken by the state itself, or by permitting private actions upon complaint by firms, or both.
2. Where a state provides for a right of complaint on behalf of private firms, this right can not be limited to those brought only by domestic firms. Such a provision in the law would violate GATT Article III to the extent that the law related to controlling agreements affecting the sale or distribution of goods.
3. Where a law only provided for a right of state action, these actions can not lawfully be confined to addressing only the practices of foreign firms on the domestic market. This would violate national treatment to the extent that enforcement remedies affected the sale and distribution of imported goods.
4. Domestic competition laws are jurisdictional as to effects upon the domestic territory, i.e., the principle of territory jurisdiction. As such, they act to address both foreign and domestic practices, but only as these practices affect competition upon the domestic market. Since national competition laws are not drawn to treat the external (other country markets) effects of domestic practices, territories stating explicit “exclusions” from treating the external effects of domestic practices (export cartels) are really no different from territories that do not state such an explicit exclusion.²¹

Different approaches to jurisdiction are possible, but have not been raised for consideration in the competition law and policy context. For one example, The OECD Anti-bribery Convention requires signatories to assume nationality jurisdiction over its domestic firms as they conduct unlawful practices upon other markets.²²

5. National competition laws commonly exclude an application for sectors or non-sectoral activities, but not in a manner that facially provides for less favourable treatment to like imported products. As long as like imported products are also excluded from the application of the domestic law, no violation of national treatment results *de jure*. A *de facto* claim for NT could be made where a domestic product was the beneficiary of an exclusion to the detriment of a directly competitive imported product, or where the exclusion had the effect of legalising a domestic monopoly or cartel that entirely foreclosed the sale of like imported products.²³

²¹ Further, this jurisdictional territorial characteristic of domestic competition laws does not violate the national treatment principle. GATT Article III is limited in its scope domestic laws that affect the *internal* sale or distribution of imported goods. This means that national treatment imposes no obligation upon a Member to consider the manner in which domestic laws affect the external sale of domestic products. See Mathis, WTO Core Principles, pp.47-48, cited above.

²² OECD Convention on Combating Bribery ..., 37 ILM 1997, at. p.10. U.S domestic law reflects both forms of jurisdiction in providing domestic penalties for U.S. firms as they violate the anti-bribery law in other jurisdiction. U.S., 112 Stat. 3202, 1998.

²³ For GATS a similar *de facto* result would occur for imported services or providers, but only after a market access commitment had been made, and assuming no stated modifications to national treatment. GATS Articles, XVI and XVII.

6. If an exclusion would be found to provide for less favourable treatment, its only “validation” would be by a reference to a stated GATT exception. There are no currently stated exceptions provided for granting more favourable treatment to domestic goods for the purpose of achieving development-related objectives.²⁴
7. Co-operation agreements between two countries whereby one agrees to investigate, provide information, or take action as to domestic practices having effects upon the other’s market, are not governed by GATT Article I, most-favoured nation. Although GATT Article I does apply to those matters covered in paragraph 4 of Article III, these matters, as according to that paragraph, only relate to laws, regulations or requirements affecting the *internal* sale of goods.²⁵

2.3 CP Framework considerations in light of EC proposals

Having considered the above, it is possible to determine some of the implications of EC positions forwarded for a CP framework, and in light of the India positions outlined from the first paper. To consolidate the discussion the following questions are taken in turn. 1) How does a framework agreement modify the existing WTO provisions as applied to national laws? 2) How are objectives other than “pure efficiency” reflected in the proposals? What additional undertakings can be considered in a CP framework to enhance the treatment of restrictive business practices having external effects?

2.3.1 *How does a framework agreement modify the existing WTO provisions as applied to national laws?*

EC proposals suggest modifying national treatment in two ways. The first is a narrowing of the existing GATT and GATS national treatment law to only *de jure* treatment, as contrasted to a *de facto* violation that would be evident only by after examining the application of the law for its disparate effects upon imported like products or services. Although WTO dispute panels is still in the course of developing this second theory of action, it is clear from the existing cases that a facially neutral law, regulation or requirement can be assessed on the basis of its discriminatory effects upon imported goods or services.²⁶

The EC configuration has a significant implication for administrative action as to the handling of particular cases ruled under otherwise neutral criteria, and for the GATT law treatment of the *de facto* effects of stated exclusions and exemptions provided within the law. For the first, the NT principle would now exclude any evaluation of case decisions or outcomes reflected by patterns of case decisions or investigations.²⁷ Similarly, where a facially neutral exclusion in the law had disparate effects upon

²⁴ A domestic “public policy” exception provided within the domestic law would also have to be drawn to one of the stated GATT Article XX (General Exception). GATT does have exceptional provisions for “Governmental Assistance to Economic Development” in GATT Article XVIII, but this Article relates to the use tariffs (border measures) rather than to discriminatory internal laws.

²⁵ What is not considered here is whether a government “measure” terminating a domestic private restriction upon exports falls within the scope of GATT Article XIII. This Article requires the non-discriminatory application of quantitative restrictions when permitted.

²⁶ The two WTO Appellate Body cases to consider on this point are, Chile - Taxes on Alcohol Beverages, WT/DS110/AB/R; and EC – Measures Affecting Asbestos, WT/DS135/AB/R.

²⁷ Although transparency and due process requirements would not be affected or otherwise diminished.

imported goods or firms, the proposal would also appear to eliminate the possibility of making a challenge on this basis. Depending upon how strongly one characterises the WTO case developments on *de facto* analysis, the modification as proposed by the EC could be viewed as a significant limitation of Article III's capacity to reach "applications" of national competition law.

In light of the India viewpoint as summarised above, this modification to NT would be a favourable provision to incorporate to the extent that if India chose to focus its resources on investigation of foreign practices as affecting the local market, then this "pattern" of treatment resulting from an administrative decision would appear to be beyond challenge by the CP framework NT provision.²⁸

The second modification is a broadening of existing national treatment provisions in both GATT and GATS, as the EC proposal would apply the obligation to firms (economic actors) on the basis of their nationality. This affects GATT and GATS national treatment in different ways. For GATT, a law providing for less favourable treatment of foreign firms can result in a violation, but the additional step of showing affects upon imported goods must be made. GATT Article III relates to the treatment accorded to imported goods, not to firms. The second link of proof would be eliminated in a CP provision where the object of the obligation is directed to treatment of firms at the outset. Although this change might not make much of a difference in cases where imported goods were affected anyway, it does broaden the scope of the NT to the extent that the provision would be no longer purely "trade-related". As to firms, the treatment accorded would not require a showing that imported goods were affected by the provisions of the law.

This change has more complex implications as to the GATS. GATS national treatment (GATS Article XVII) applies to the services and providers of "other Members". Since providers are economic actors (firms), GATS national treatment in this sense is not modified by the EC proposal. Except however, GATS national treatment is not a general but rather a specific obligation undertaken only as a result of a market access commitment. Further, when undertaken, a party may also modify it according to its own schedule. Thus, if a country has made no market access commitment, then GATS national treatment does not apply to foreign service providers. It is suggested therefore that a CP national treatment obligation as to firms would impose a general obligation to provide no less favourable treatment to firms, at least in respect to the facial characteristics of national competition laws. This would effectively result in new undertaking for India in any sectors where no GATS market access commitments for service providers (or commercial presence mode) have been made. Likewise, where India has made a market access commitment without scheduling any reservations for national treatment, then it would also appear that little additional obligation is being undertaken as to the CP framework provision suggested by the EC.

As contrasted to GATT and GATS, the CP national treatment provision for firms is a "horizontal" provision that both "cuts across" these annexed agreements, as well as de-linking the existing national treatment rules from their "trade-related" scope of application. This "trade-related" aspect may be important to India as it has tended to

²⁸ A caveat applies, that administrative directives and other official acts would not be covered by GATT Article III national treatment, i.e., that while *de jure* treatment is said to only apply to the text of the actual competition law itself, these secondary acts must either be covered by general national treatment, or not be covered by any national treatment obligation.

confirm the application of the UN Set, which is decidedly oriented to treatment of RBPs in the context of trade. Likewise, regional practice, including the EC Treaty and EC external trade agreements all provide for action on the basis of whether trade is affected between the parties. The original Havana Charter provisions of the ITO for RBPs were also limited to dealing with private restrictive practices as they affected the trade of the Members.

It is likely that India would be more comfortable with a national treatment provision that also operated within the scope of the existing annexed agreements and clearly limited to dealing with practices that affected trade in goods or services between the Members. If so, then working group submissions on this aspect can be made accordingly.²⁹ On the other hand, to the extent that the CP provision is only attached to *de jure* aspects of the national law, the modification as to firms may not attach meaningful new obligations in India's actual practice under its new law. This is an analysis that India itself would have to undertake.

2.3.2 How are objectives other than "pure efficiency" reflected in the proposals?

The part of the EC proposal most related to the achievement on non-efficiency objectives deals with the treatment of exclusions. The EC proposal does not appear to seek to eliminate the use of the various exclusions and exemptions that are found in existing national competition laws. Nor does it appear to propose any burdensome restrictive or qualifying criteria for the use of exclusions, other than the need to "narrowly define sectoral exclusions and exemptions in a transparent and predictable manner."³⁰ This treatment appears to be evolutionary to the extent that the EC also suggests the possibility of review over time and possibly in light of experience of other WTO Members who have phased out exclusions over time.

To the extent that a territory chose to form exclusions or grant exemptions for economic development, infant industry, or any other purposes, one would conclude that these would not be subject to challenge under the proposed CP framework. Thus, it would appear that national competition laws are not being required to pursue any particular set of objectives defined by economic efficiency, consumer welfare, or otherwise.

In combination with the *de jure* limitation for national treatment, it would seem that the conclusion above would hold even for exclusions that were origin based on their face, at least to the extent that they would not be a part of the actual competition law. As discussed above, while GATT claims seeking to charge exclusions have not yet been made to date, the EC proposal for permitting exclusions would in any case appear to terminate any possibility for making such a claim, *de jure* or otherwise.

This would seem to provide a broadest avenue for India to develop its own criteria for granting exemptions from the application of its law, only with the caveat that some "narrowing" process may also be built in to the longer-term agenda within a framework. At this stage, there is little detail that can be added to inform the context as to what aspects "narrowing" would be applied over time. It can also be suggested that India could consider submitting information to also influence the parameters for that discussion as it develops, particularly since declared developed and other

²⁹ A submission by Thailand has also criticised the national treatment proposal as it relates to firms rather than trade. WT/WGTCP/W/213/Rev.1, 26.09.02

³⁰ WT/WGTCP/W/222, para 3 and 24.

developing country declared exclusions may also impact India's external trade and investment as well. Alternative approaches considering scheduling of exclusions and considering a negotiated exemption criteria are considered below.

2.3.3 What additional undertakings can be considered in a CP framework to enhance the treatment of restrictive business practices having external effects?

If the CP framework remains limited to Members applying national competition laws, without offering something more binding on co-operation aspects, then the answer has to be that little, if anything, can be drawn from a CP framework to enhance India's capacity to treat domestic effects of external domestic practices. No matter the value of India's critique that the burden of addressing external effects falls upon the target market, the territorial limitation of the national competition laws of the other Members remains the limiting factor. It is also the case for the area of international co-operation, that a CP framework is not likely to evolve beyond a voluntary (and therefore non-binding) system, albeit with the possibility of some reference to multilateral participation at this lower committed level.³¹ It is clear that India cannot compel MFN treatment to receive the benefits now being extended as between particular bilateral co-operation parties. Over time, as India also derives experience with its own law and develops ongoing relationships with other authorities, potential for its own bilateral agreements will be enhanced. However, this longer term prospect does not resolve the conflict raised on the issue of capacity to achieve a meaningful level of domestic enforcement over foreign practices.

A recent Thailand submission has also focused upon this lack of balance in the framework provisions to provide for a more meaningful means to address to external effects of domestic practices. Here however, while the focus of that submission appropriately placed upon trade, imports and exports, there appears to also be a continuing point of reference to draw the solution to the problem as to competition authorities. In this case, Thailand notes that its own law does not discriminate between exporting and importing firms, and that no exemption is made for export or international cartels.³²

The opinion here is that focus upon trade is appropriate and also reflected in the proposed EC prohibition on international cartels affecting trade. However, it is not likely that competition authorities of Members can take account of other markets, since market definitions are also based upon experience specific to the authorities' territory itself. What could show more promise is Thailand's characterisation that export cartels, essentially output restrictions, should be characterised as unfair trade barriers. This opens an avenue to consider that the proposed prohibition, while having both an import and export dimension, would fall upon Members to implement by domestic competition authorities (imports) and by domestic trade or commerce

³¹ The recent EC submission on this topic, stating, "(P)rovisions on non-discrimination would not be extended to cover existing or future co-operation arrangements in the competition area, including bilateral co-operation agreements on competition ..." WT/WGTCP/W/122, para 17. According to earlier submission, the EC did provide a listing of case aspects that could be transmitted on a multilateral basis and perhaps as obligatory. These include for a pending case, the nature and scope of the practice concerned, the market involved and key players, the procedural steps already undertaken by the authority and expected subsequent steps, and any public document. WT/WGTCP/W/207, 15.08.02, para. 28.

³² See generally, WG/WGTCP/W/213/Rev.1, paras. 2.1.

authorities for exports problems. By point of reference, GATT Article XI already prohibits output restrictions when imposed by governments. Giving an equivalent legal effect to the export side of the prohibition would therefore require governments to be responsive to complaints made by other Members as to export restrictions being made effective by their domestic firms.

A softer version containing a consultation component is now provided in GATS Article IX regarding anti-competitive business practices that affect trade in services. While GATT has no comparable article, it could be provided either by an understanding relating to GATT Article XI, or by delineating such a component in the framework itself. Since India is active in the working group, these avenues should be pursued by submission and further discussion relating to the question of given more operative legal effect to the proposed prohibition as it affects exports in goods and services. In this firmer legal context, the existing proposals for voluntary co-operation could be complementary and useful.

2.4 Possible alternative approaches

The divergence is not as wide as one had thought at the commencement of the analysis. This flows primarily from the fact that national treatment already applies to competition laws, and that these laws already tend to reflect national treatment, together with the limits on national treatment as proposed by the EC. The most invasive aspect of the EC proposal might concern the extension of national treatment to the nationality of firms rather than limited to traded goods or services. To the extent that this aspect might cross-cut GATS commitments that have not been made, and even investment considerations, there may be a case for limiting a framework agreement at first to those aspects dealing with *trade in goods*. This would result in a GATT-annexed framework rather than a WTO horizontal one. GATS considerations could be taken up as a separate matter in order to resolve the peculiarities of that regime with respect to national treatment.

Outside the context of the EC proposal there are other possibilities for a framework agreement. Two possibilities are considered here, a scheduling approach and a code of conduct approach, both relating to fact that many countries do not yet have any competition laws, and many, like India, are only commencing the implementation of new laws. Most of the countries in this situation do not desire to assume international commitments until they have a greater degree of experience with the operation of competition laws in their own markets. These reservations are either due to resource problems, or simply a need to derive a better understanding of their own development needs in relation to competition laws prior to assuming framework obligations.

2.5 Scheduling approach

The principle element of GATS is the positive list approach where countries identify specific areas where there are willing to offer commitments. The approach has a core identified through the core principles that act as a uniform basis but allows countries to schedule participation based on their developmental and national goals. The advantage of the framework is a element of irreversibility in the scheduling and the possibility of postponing contentious issues to a later date. Applying this approach would require decomposing a competition law into key constituent elements. The

advantage will be that it may enable a Member to participate at its chosen level and in a manner consistent with its development agenda.

The key elements of a GATS approach are twofold as the GATS is partitioned in its “Fundamental Principles” into two groups of General Obligations and Specific Commitments, and then the identification of a matrix of elements in which these commitments are to be offered.³³ While an advantage of an all or nothing approach to a competition policy framework may be to end up having no agreement at all, a scheduled approach would seek to build an agreement on the basis of common points. Further it will not limit the character of the national competition law.

The core obligations that are being considered from the EC proposal include the following.

1. *Existence of a domestic competition law.* This is a non-issue as far as India, the EU and other OECD countries are concerned. Given the work program, most countries are in some stage or another of evolving a domestic law.
2. *Transparency.* This is also not really an issue since the focus is primarily upon *de jure* transparency in the structure of rules, laws and procedures.³⁴
3. *Non-discrimination.* As discussed earlier, this involves two key elements - MFN and National treatment. From the Indian perspective, as made out in various submissions and the terms of the national law, MFN per se is not a problem. Since MFN only talks about equal treatment as between foreign nationals and can be adjusted to grandfather regional and existing bilateral agreements, it has not been a major area of discussion. The critical element has been in extending National Treatment to competition law and its implications.
4. *Co-operation.* This is one of the most contentious issues in the area with different countries having very different perspectives. While the developed countries are seeing co-operation in a manner that would be bilateral and voluntary, developing countries rather see this as the heart of any viable interest in a multilateral agreement from their perspective.

Thus, the two issues seeming most contentious are national treatment and co-operation and these should therefore be considered as ideal candidates for inclusion into the category of specific commitments.

2.5.1 Specific Commitments

2.5.1.1 National Treatment

The positive list approach would require making specific commitments on the contentious areas based on a matrix of sectors and the nature of the anti-competitive

³³ Thus for instance in GATS the core principles involve MFN, Transparency (with qualifications) while specific commitments are in market access, national treatment and so on. The matrix is based on modes of supply and sectors. Thus we get a positive list where country may make commitments on its nationals going abroad for health care but not on opening its market for foreign health care companies.

³⁴ Though we may need to worry if at some stage the concept of transparency is expanded from its current *de jure* status to a *de facto* one. A *de facto* principle on transparency would require us to ensure freedom of information and an absence of other imperfections in governance.

activity involved. A possible scheduling framework is considered with these factors in mind.

For items that fall under GATT, the discussion in the previous section regarding Article III of GATT, as well as the example of the *Kodak Fuji* Case, suggests that any domestic law will have to be inherently non-discriminatory. Further, in a recent paper Hoekman and Mavroidis argue that even in the case of cartels there may be a point to look at article XI:

“Under the “effects” doctrine (or subjective territoriality), countries may take action against foreign practices that have negative effects in their markets. Cartels are an example. The WTO may be relevant in this connection through GATT Art. XI, which states: “no prohibition or restriction ... shall be instituted or maintained ... on the exportation or sale for export”. Export cartels are a restriction on exportation. As with national treatment, the threshold issue is whether the export cartel can be attributed to government behavior.”³⁵

The point is that for these classes of goods, the existing provisions provide considerable scope for a ‘non-discriminatory’ national competition law. The 1997 *Kodak – Fuji* case made it clear that competition laws are covered by the national treatment obligation, explicitly by subjecting Japanese competition law to the national treatment obligation (§§10.376-7 of the panel report), and implicitly by accepting that the term “affecting” extends to national competition laws. In fact, the case raises the possibility that in the absence a explicit agreement on competition the evolution of the law will take the form of some sort of common law of dispute settlement.

The point is, that for these classes of goods the existing provisions provide considerable scope for a ‘non-discriminatory’ national competition law. However the impact is limited only to the extent they apply to traded goods. In the previous section we noted that the application to competition policy will expand this domain, but the emphasis on *de jure* applicability will also act as a limit to this broader application, and more, clarify the ambiguity inherent in leaving the definition to a common law of dispute settlement.

2.5.1.2 Co-operation

Co-operation has a variety of forms and meanings. The literature identifies four basic elements:

1. Information sharing (Public Domain) and Technical Assistance (weak)
2. Based on Positive Comity (Semi strong)
3. Positive Comity + (Confidential) Information sharing (Strong)
4. Mutual recognition and enforcement of Laws (Virtual integration: US Canada)

These are ranked in terms of the level of implied participation by countries. The discussion so far has tended to work on uniform principles which creates dissonance based on different perceptions. Allowing a scheduling approach, one could seek to fine tune offers at different level of co-operation in different types of antitrust efforts

³⁵ Hoekman and Mavroidis 2002. Thus it is worth speculating that explicit legal support under Webb-Pomerene in the US may in fact qualify for disapproval under this interpretation.

(an issue to which we turn to later). Thus countries could commit to 2 on cartels but 1 on mergers (say).

There is a second issue in co-operation, which relates to co-operation between whom. In the area of competition policy we have two sets of authorities, Judicial and Executive. The nature of co-operation between agencies differs. Co-operation between judicial agencies is well established and has long precedents. In terms of our classification this would be a form of 1. Co-operation between executive agencies falls into 3. As between all other agencies would be akin to 4.

Note that a distinction between the types of agencies is relevant in the following sense. The US competition authority operates an amnesty provision in its law wherein the first applicant gets leniency or a full amnesty in return for co-operation in securing convictions of other cartel co-conspirators. The second and subsequent applicants for leniency could receive a reduction in cartel-related punishments. Information sharing without similar amnesty benefits could jeopardize the whole program. If a firm is convicted then the conviction is in public domain. It is an interesting point if countries could base their domestic legal strategy on the public fact of conviction rather than on the evidence that led to it. This still leaves open what they could do in the case of consent decrees that do not lead to conviction, but some behaviour modifications.

2.5.2 Structure of Matrix of Commitments

The positive list approach would require making specific commitments on the contentious areas based on a matrix of sectors and nature of anticompetitive activity. Thus we look at possible frameworks for this approach:

2.5.2.1 Classification of Sectors

The above discussion brings out the sectoral classification as well. In this connection we can in any case broadly separate them into three broad categories goods covered under the definitions in GATT, Services as defined in GATS and finally residual non-tradable or other activities. The focus of the application of law in these three areas is very different.

As we have noted in our discussion the provisions of GATT provide for NT in the application of competition law. Further Government support for policies that restrict markets are also restricted. The only scope for further commitment lies in the area of co-operation, where the provisions of GATT are limited

The application of competition law for services classified under the GATS is already there in terms of provisions relating to regulation and standards. But these are subject to these being scheduled for commitment. It is worth noting most existing regulatory exceptions to competition law in National Laws fall under this head. Further concerns on national treatment would have greatest bite in this class of activities. Thus for instance India already has a regime that distinguishes banks on basis of national origin. Further treatment of mergers based on national origin in financial services is not unusual. In such a case scheduling commitments to competition law would naturally dovetail with the process under GATS where we seek an additional set of commitments relating to the application of competition law.

Finally the residual category of non-traded and miscellaneous goods and services are really a concern for domestic competition law with virtually no trade implications and can be scheduled into an agreement based on developments in the agreement on Investment which is the only real source for cross border issues here.

Thus, a scheduling approach separating out these three categories has the advantage that it can be dovetailed into existing commitments; structured to permit countries to limit their initial application of competition law to traded goods only, as in the spirit of the UNCTAD set and the Havana Charter, and yet formulate agreements in an area that is at present being defined through a common law process of dispute settlement.

2.5.2.2 Classification of Anti-competitive activities

Here the discussion typically focuses on cartels, as in: international (hardcore?), export, import; other restrictive business practices; abuse of dominance (e.g. Microsoft); and mergers and acquisitions. The economic impacts of these different anticompetitive practises tend to be different and are listed in an increasing order of conceptual difficulty. In general the economic efficiency argument for them tends also to be increasingly more complex. Thus while there is virtually no efficiency case for encouraging cartels (Clarke and Evenett 2003³⁶), the picture is very different for mergers.

A paper by G. Oliveira (CUTS 2002³⁷) argues that one can make a case for a phased domestic framework for competition based on level of development that a country is at. This would imply that we try to seek agreement on these in a phased manner with a minimal agreement on just international cartels being adequate to start with. This is in fact the EC position. What this implies is that participation would require a commitment on international cartels. All higher levels of anti-competitive practice are subject to domestic scheduling and later negotiations.

Further, it is possible to consider scheduling separate S&D provisions for developing countries in case of specific domestic import and export cartels not already covered under sectoral exclusions discussed earlier. While it is difficult to define these in detail at the moment, they could provide for special provisions for SME's in goods. For services they would in any case be provided for by the positive listing character of the scheduling required.

Finally we come to the nature of specific commitments. Based on our earlier discussion these include two broad areas. National Treatment, which has already been commented on earlier and will primarily apply to the GATS components of the agreements, since under GATT, Art. III is in effect once a country establishes a domestic competition law. The second being co-operation. The Scheduling approach permits us to classify co-operation differently in different sectors and for types of anti-competitive activity. It may be worth exploring whether we can find a stronger level of commitment than purely technical assistance and information sharing for international cartels. It is true, as we note in the previous section of this section, that these will have to be dovetailed carefully with the incentive programs being adopted

³⁶Clarke, Julian L., and Simon J. Evenett. (2003). "The Deterrent Effects of National Anti-Cartel Laws: Evidence from the International Vitamins Cartel." Forthcoming in the *Antitrust Bulletin*.

³⁷ Oliveira, G, "International Cooperation and Competition Policy" draft issue paper prepared for CUTS IWOOGDA conference, November 2002.

in the EU and the USA. In this context, an agreement to participate may itself generate greater effectiveness than the current situation.

There is one major issue that is still left out, that being dispute settlement. This will need some specific ideas. It is true that the minimalist agenda outlined above does not call for much in the way of DS, but we will still require elimination of domestic laws sanctioning cartels with non-domestic effects. In view of the positive list approach this will imply a participation constraint. At later levels there is possibly a case for a formal dispute settlement, except that we need to evaluate the nature of relief: retaliatory punishments as of now are problematic, Tariffs and duties, in the case of cartels, would perversely make the problem worse. We may be limited to just simple injunctions for now. An independent agreement on competition can in principle provide for a different route to dispute settlement and may be worth exploring in greater detail. This would imply that competition issues would be outside of the purview of existing dispute settlement bodies. If competition policy in the WTO context is taken up for non trade-related aspects, perhaps there is also an argument for differentiating dispute settlement on this basis. However, it is also noted that there are non trade-related aspects addressed by the domestic enforcement regimes introduced by the TRIPS. The issue of whether these domestic laws are satisfactorily implementing the requirements of that annexed agreement remain a matter of dispute resolution in the DSU.

2.5.3 Scheduling approach: conclusion

The point of this exercise has been to outline a framework that provides scope for different country concerns and yet address the key economic issues involved. The minimal agreement will not involve a substantial change from the current position except for a recognition of hard core cartels and a minimalist information sharing regime relating to them, The advantage of agreeing to the structure is, that like GATS, it gives us something to build upon. It also allows countries to add without effectively compromising their national agenda.

2.6 Code of conduct and graduation approach

It may be that India and others determine that they do not wish to be subject to any WTO rule that could possibly compel the establishment of a domestic law with any particular designated characteristics, whether or not subject to longer implementation periods. In this case, an alternative that would still allow for engagement on the issue would be that of a “code of conduct” approach dealing with the substance and application of national laws if and when a Member decides to have one. Such a code could establish the overall ground rules emphasising transparency and due process, and with other negotiated aspects would be of interest to developed and developing countries alike. This approach need not be a “plurilateral” exercise whereby only a select group of countries would negotiate a framework which would be joined later on a “take it or leave it basis” by those who had no active participation in its negotiation. Rather, such a code could as well be a part of a single undertaking that was a subject of negotiation and exchange by all Members, but then only lawfully applicable if and when a Member determines to have a law. The analogy for this approach is that of the WTO Technical Barriers to Trade Agreement (TBT), which does not compel Members to have technical regulations, but rather governs their preparation, adoption

and application to the extent that they affect the trade of other Members. Likewise, the TBT has provisions dealing with co-operation (mutual recognition of conformity assessment) and provides Members with guidelines regarding a code of good practice. In all, the issue of timing as to when countries choose to adopt technical regulations is not a matter that is addressed at all by the TBT, other than an obligation to apply international standards as a basis for technical regulations.

An even less intrusive approach can also be raised in this context. This would act as a voluntary expression by the Members to harmonise their competition laws around a common set of enunciated principles. At a later point in time when WTO Members had obtained more sufficient experience with operating national laws, then a future non-committed negotiation could expand the code to take account of the legal developments and practice experience obtained.

A noted drawback overall however is that while countries do not make commitments to have laws and do not agree to have them within any particular period of time, it may not be realistic to assume that any prohibition on international cartels could or would be a component of this approach.

2.7 Legitimate objectives approach

Since developed Members also use exclusions, a somewhat more ambitious treatment of the use of exclusions could be considered either as an enhancement to the existing EC submissions, or also as an aspect of a code of conduct approach. This would identify by the process of negotiated text, the agreed-upon legitimate objectives that are sought to be accommodated by competition laws, and then go on to provide a meaningful stated criteria for the granting of exclusions and exemptions. The advantage to this more structured approach to exclusions for India would be to separate developed-territory protectionist exclusions from those employed by developing territories that are fulfilling some legitimate development objectives. This would provide a stated criteria for national authorities to apply when assessing requests for exemptions and exclusions, and would also relate responsibility for vetting these aspects as between agencies and parties responsible for investment and industrial policy.

The EC proposal essentially eliminates the capacity to challenge any exclusion. In comparison, the GATT and GATS law as it stands, and as it appears to be developing, may not be so forgiving. If exclusions can be reached by a national treatment claim, then it must be acknowledged that there are also no existing development exceptions provided in GATT law that can be relied upon to re-validate more favourable treatment to domestic production as granted by an exemption or exclusion.³⁸ Moreover, when a party is found to violate a GATT Article, the burden of proof decidedly shifts to the respondent to demonstrate the conditions required for the GATT law exception. A legitimate objectives framework that would recite the permitted criteria for granting exclusions for economic development would have the effect of eliminating this burden-shifting by designating the “safe harbour” criteria that authorities could rely upon in assessing their agreements. For an example, this approach has been employed by the EC Treaty in Article 81(3), which provides the criteria for granting pro-competitive exemptions which nevertheless fall within the

³⁸ This refers to the permitted exceptions found as listed in GATT Article XX and GATS Article XIV, the general exceptions Articles for each annexed agreement.

terms of the general stated prohibition. A CP framework that adopted this exemption approach could also specifically state that the burden of proof in challenging an exclusion would remain upon a complainant to demonstrate that the listed criteria was not considered, or that it was applied in arbitrary manner. If such an exemption criteria were being considered within the context of code of conduct approach, India might consider that the successful formulation of an exemption criteria could serve as one condition prior to the framework becoming “binding” in the sense that Members would then incur the obligations to respect the core principles.

2.8 Conclusion: Competition and Development

A final point is considered. Although competition law does not create market access, a market that is in the process of liberalisation runs a certain risk in the absence of an implemented and functional competition law. Upon opening for cross border investment or importation of goods or services, foreign firms can and do attain dominant positions. As such, a competition policy can do more to insure continuing domestic participation in the market than does its absence. Where a country chooses to remain closed to cross-border movements, a competition law that is capable of insuring rivalry between domestic firms is also cited as a means to generate more competitive domestic firms as they develop trade and investment abroad.

However difficult it may be for a developing territory to address foreign practices affecting its domestic market, any chance of domestic enforcement as to these practices remains an impossibility in the absence of a domestic competition law.

Thus for both open and closed markets, there appears to be a development dimension that is complemented by a national competition law. While the EC proposals have called upon countries to have competition laws, it is becoming increasingly difficult to argue that a developing country should not have one anyway. In this sense, the “requirement” to have a law as suggested by the EC, will likely become more redundant over time. Considerations of the international context will certainly also evolve to take those developments into account. What does appear to be serving as a limiting factor at this juncture is that many countries do not have much practice experience with their own laws, or have not fully implemented them into their own domestic regimes.

In the meantime, the consideration that is paramount for India is to determine whether the EC submissions that have been made to date in the working group can form the basis for any rejoinder submissions that would seek to modify those provisions in its own interests. Similarly, India must assess whether any of the alternatives noted here may serve as a better initial platform for any submission being considered. However, both of these points presuppose that India would choose to engage the process by drawing submissions at this time. On this, India has already made submissions that are in strong endorsement of the application of the UN Set. As the first section noted, the divergences between the Set and the EC proposal, while significant on certain key points, may not be so significant that the EC proposal itself could not be modified to more clearly accommodate the elements of the Set. On points dealing with the trade-related formulation of the Set, the responsibility to give meaningful effect to a prohibition for restrictive effects upon other markets, and incorporation of the development dimension as a core principle, these are all points that can be raised to modify or enhance the EC proposal without dismissing it outright.

That the EC proposal has called for a prohibition on hard core cartels that affect trade is a significant element that must be considered in further detail by all Members. There is a certain interplay between provisions suggested for domestic enforcement regimes that will be called upon to address import restrictions and regimes that might be raised to deal with the issue of export restraints. The overall regime should establish a balanced exchange between these two elements. Thus, where the domestic enforcement requirements are exacting and provide a great degree of legal certainty for complainants, a “quid pro quo” offered by only a voluntary co-operation regarding the external effects of domestic practices could be characterised as insufficient. However, a certain “reading between the lines” exercise makes this conclusion somewhat tentative. An international law prohibition may give offer the legal cover for developed countries to take action against prosecuted cartels as to the other markets affected. This aspect has not been explicit in the submissions, but it may be a component that is in play within the context of the EC submission itself. Whatever the implications of the stated prohibition, it is somewhat clear that if the bar is set low on domestic enforcement requirements, then there is also little that could or should be expected in the way of demanding more of the export side of the equation, no matter the argument that can be made in favour of affirmative action on behalf of import sensitive developing countries. Where domestic enforcement obligations are undertaken, then there is some greater leverage to demand more of co-operation. In this respect, most developing countries would see reason to have a prohibition and its accompanying implementing provisions broadened to treat not only cartels, but also abuses of dominant positions.

To the extent that the EC proposal has been characterised here as rather minimally invasive, the fact that there is little on offer as to co-operation perhaps already reflects a low level, but not necessarily an unbalanced, exchange. The only obvious point that detracts from this conclusion is the extent to which the proposal has been understood to require WTO Members to actually create domestic competition laws and put them into effect. For any territory that already has such functioning laws, this is also not a new requirement. The primary point of contention for a framework’s application to these existing laws is that of national treatment on the basis of nationality of firms. The process of engaging submissions on this point should seek to clarify this aspect in relation to the development dimension, or preferably, limit it to trade effects on imported products and services.

3. Potential multilateral disciplines on hard core cartels

There is some divergence between the positions of the Government of India (GOI) and the European Communities and its Member States (EC) over the efficacy of multilateral provisions on so-called hard core cartels. As will become clear below, these authorities regard international hard core cartels as having detrimental effects on both global commerce and on developing economies, in particular. However, only the EC has come forward with explicit proposals to tackle these cartels in an agreement at the World Trade Organization (WTO). This section begins by defining the different types of international cartels and then discusses the substantial increase in the prosecution of international cartels since 1993. Quantitative estimates of the adverse effects of such cartels are presented in section 3.2 and the potential sources of international spillovers from national cartel enforcement (and non-enforcement) are also identified. The implications of these findings for the debate over the efficacy of potential multilateral disciplines on hard core cartels are then discussed, especially as they shed light on the merits of the GOI and EC's formal contributions to this debate. Due attention is given to the assertion—made by some—that such disciplines will result in considerable implementation costs for WTO members, particularly for developing economies.

3.1 Defining terms: private international cartels

The purpose of this section is to offer definitions of certain types of cartels. There is no implication that any of the cartels discussed below are more important than any other, nor is it claimed that every type of cartel is elucidated upon. The focus on private international cartels and on hard core cartels reflects the attention given to these types of cartels in discussions on potential multilateral disciplines on competition policy-related matters. As the goal of this section is to analyse the positions of the GOI and the EC on the subject of potential multilateral disciplines on hard core cartels, there is little point defining and discussing the types of cartels that are not central to current discussions at the WTO.

A private cartel is said to exist when two or more firms, that are not *de facto* or *de jure* controlled by a government, enter into an explicit agreement to fix prices, to allocate market shares or sales quotas, or to engage in bid-rigging in one or more markets. A private international cartel is said to exist when not all of the firms in a private cartel are headquartered in the same economy or when the private cartel's agreement affects the markets of more than one economy.

This definition, therefore, rules out cartels that involve state enterprises (as in the case of OPEC). Furthermore, the definition requires an explicit agreement between firms which distinguishes this form of cartelisation from collusion.³⁹ Another aspect of this definition is that it includes governments and the private sector as victims of private international cartels, as recent cases involving bid rigging in American aid projects in Egypt can attest.

³⁹ In economic analyses of collusion firms enter into implicit agreements. Such agreements can arise after repeated interaction between the firms.

It is worth differentiating between private international cartels and export cartels. The latter are a special type of private international cartel in which the conspiracy does not involve commerce in the economies where the cartel members are headquartered. Often discussions of export cartels implicitly assume that such a cartel is made up of firms from one nation and that the agreement is to cartelise markets abroad. (This assumption is not surprising as many nation's laws give specific exemptions from national antitrust laws to those cartels that only affect commerce abroad.⁴⁰) However, in principle, an export cartel could include firms headquartered in more than one economy.

Another term is prominent in the discussions of private cartels; that of, "hard core cartels." This term has acquired a special significance since Organisation for Economic Cooperation and Development (OECD) members agreed to a non-binding "Recommendation" on such cartels. According to the OECD, a hard core cartel is

"an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating consumers, suppliers, territories, or lines of commerce."⁴¹

Perhaps the most important distinction between the definition of private cartels elaborated earlier and that of hard core cartels is the repeated use of the phrase "anticompetitive" in the latter.⁴² This raises the issue as to whether a cartel could be pro-competitive, that is, whether a cartel's formation could result in lower prices for purchasers. As some Chicago-school scholars have pointed out, as a theoretical matter it is possible for a cartel—under certain specific circumstances—to result in large enough cost reductions that prices paid by purchasers actually fall.⁴³ The relevance of this theoretical observation for policy discourse has not been established in the available empirical evidence on private international cartels.

Having defined the objects of the analysis, we now turn to the evidence on the growing number of prosecutions of private international cartels since the early 1990s.

3.2 The surge in private international cartel enforcement since 1993

In this section the key findings on recent international cartel enforcement are described. As will become clear, the findings are disturbing for a number of reasons—not least because they call into question the general applicability of one of the maxims dear to the hearts of many international trade economists. To provide the appropriate context for the factual overview that follows, a brief digression on that maxim is called for.

Imagine you were a well-trained international trade economist who rarely ventures outside the narrow confines of his or her own sub-discipline. Such an economist would have been taught about Bhagwati's path-breaking analysis of the way in which open borders can undermine the ability of domestic firm's to exercise market power.⁴⁴ Furthermore, the empirical findings of James Levinsohn and Ann Harrison in the

⁴⁰ Of course, such export cartel exemptions are different from export cartels. The latter can arise without the former; and the former may not induce the creation of the latter.

⁴¹ Organisation for Economic Cooperation and Development, 2002

⁴² Notice that a hard core cartel may well have an international component to it, but need not do so.

⁴³ See Landes (1983) for such a claim.

⁴⁴ Bhagwati (1968).

early 1990s supported the general thrust of Bhagwati's argument; namely, that the ability to exercise market power in a domestic market for an internationally tradable good is constrained by the level of tariffs on imports of that good.⁴⁵ Given this line of research, that our international economist would be highly doubtful that a *private* international cartel could both exercise considerable market power and sustain itself over a large number of years. Surely, imports from non-cartel members would "discipline" cartel members? If so, arguments like Bhagwati's would reinforce Stigler's long articulated contention that cartels were likely to collapse under the weight of their own internal incentive problems.⁴⁶

Such an international trade economist—if he or she followed actual cartel enforcement measures in the certain industrialised economies—would have received a rude awakening after 1993. In that year, the United States introduced a far more generous leniency programme for cartel members that approached it with credible information about the conspiracy in which they were engaged. The scheme was deliberately designed to maximise the incentive for firms to defect from a cartel agreement. As a reward for coming forward with information and, if necessary, assisting in securing the conviction of other conspirators, a firm and its executives could receive full amnesty from criminal penalties in the United States.⁴⁷ Furthermore, the U.S. authorities often agreed not to share any information received in this fashion with foreign antitrust authorities (more on this matter much later.) The beauty of this scheme lies in its efficiency; much of the evidence required by the authorities is brought to it by the conspirators themselves in return for amnesty.

What would our parochial international trade economist predict about the number of firms seeking amnesty after this revised leniency scheme was introduced in the United States? At most, our friend would predict that some members of cartels with short duration might come forward to the American antitrust authorities. In reality, the results have been quite different. Evidence collected from applied amnesty programmes in the United States and the European Union has been instrumental in the prosecution of most of the forty or more private international cartels uncovered since 1993.^{48 49} The fines imposed on the remaining cartel members are so sizeable that since 1993 the United States has collected more revenues in fines on private international cartels than it has collected on all other fines for all other crimes committed in the United States since the formation of the Republic in 1776.⁵⁰ The European Commission is now also levying substantial fines—as the 855 million euro fine on the vitamins cartel members in 2001 demonstrates.

Table 1 lists the headquarters of the firms who participated in forty private international cartels prosecuted by the United States and the EC since 1990. As can be

⁴⁵ Levinsohn (1993) and Harrison (1994).

⁴⁶ Stigler (1964).

⁴⁷ The U.S. corporate leniency programme for cartels is structured in such a way as to give the first applicant for leniency a full amnesty in return for cooperation in securing convictions of other cartel co-conspirators. The second and subsequent applicants for leniency could receive a reduction in cartel-related punishments.

⁴⁸ The European Union has now amended its corporate amnesty programme so as to generate the same strong incentives for current cartel members as the American scheme.

⁴⁹ US officials claim that before 1993 they received approximately one application for leniency a year. After 1993, they claim they received on average one application for leniency per month. It is worth bearing in mind that these numbers undoubtedly include leniency applications by firms in cartels that affect only U.S. commerce, and so would fall outside the definition of a private international cartel.

⁵⁰ These fines typically bear some relation to the amount of overcharges in the cartelised jurisdictions

seen, these cartels affected a wide range of products and were not confined to a small number of economic sectors. Moreover, the cartel members were spread all over the world having their headquarters in 31 economies, eight of which were developing economies.⁵¹ These findings, and others, suggest that it is difficult to sustain the argument that private international cartels are a geographically localised problem or one that is concentrated in a small number of industries. Furthermore, 24 of these 40 cartels lasted for at least four years, casting doubt on the claim that private international cartels quickly collapse under the weight of their own incentive problems or under pressure from imports from non-cartel members (Evenett, Levenstein, and Suslow, 2001).

Turning now to the effects of these private international cartels, the findings of detailed qualitative research are disquieting (see Levenstein and Suslow, 2001, Evenett, Levenstein, and Suslow, 2001, and Connor, 2001.) In addition to the purchasers of cartelised products paying more, there is evidence that cartel members took steps to shut out non-members from markets through the use of antidumping investigations, often co-opted new entrants to their industry, and in some cases restricted access to the latest technological developments to cartel members. These latter effects imply that private international cartels also affect non-cartel members access to, and ability to compete in, international markets.

Attempts to quantify the effects of private international cartels have grown in sophistication in recent years.⁵² Initially, studies focused on the price reductions observed after a cartel collapsed and most estimates pointed to a 20 to 40 percent fall in prices (OECD, 2000, and Levenstein and Suslow, 2001). In addition, various estimates have been made of the value of international trade flows that have been affected by cartelisation. Figure 1 reproduces calculations of the total value of developing economy imports of twelve cartelised products throughout the 1990s.⁵³ (In this Figure if, for example, a cartel were operating from 1993 to 1995 then only for those years are developing country imports of the cartel's goods included in the reported totals.) By 1995, annual imports of these twelve cartelised products by developing economies routinely exceeded \$8 billion. Moreover, since 1990, estimates of the total amount of international trade affected by these twelve cartels exceed \$80 billion. Assuming a 20-40 percent price overcharge, this implies that developing economies paid \$12.5-25 billion dollars more than they should have done for these twelve products alone. This range of overcharges is likely to be a substantial underestimate of the true overcharges paid by developing economies since 1990 as it

⁵¹ This finding suggests that private international cartels cannot be accurately be characterized as a North-South phenomenon, with Northern firms exploiting—to use the deliberately emotive language of recent debates over international trade reform—Southern purchasers. Indeed, such a characterization would beg the question as to why the EC and the US prosecuted these cartels in the first place!

⁵² For a discussion of the strengths and weaknesses of existing studies in this regard, see Evenett (2003).

⁵³ The source of the data for this Figure is the Statistics Canada *World Trade Analyzer* database. Considerable effort went into matching the products sold by each of the twelve cartels to the relevant four-digit (SITC) product category in that database. All reported values are converted into year 2000 U.S. dollars. It should be noted that, to the extent that the cartelised products are “narrower” in definition than the four digit product categories employed in the *World Trade Analyzer*, then the reported calculations will overstate the amount of cartel-distorted international trade. One attempt to use even more disaggregated international trade data—which is not routinely available to academics—found that disaggregation does not necessarily lower the calculated totals of the amount of cartel-affected international trade. This is because not every four digit trade total has been correctly calculated from more disaggregated underlying trade data.

omits the overcharges on the products supplied by the other twenty eight private international cartels listed in Table 1 and the overcharges on the undetected private international cartels.

The effects of certain individual private international cartels have been analysed with econometric techniques (Connor, 2001; White, 2001; and Clarke and Evenett, 2003). A recent analysis of the international vitamins cartel, which divided up the world markets for various types of vitamins from 1989 until 1999, was able to recover estimates of the overcharges paid by 90 vitamins importing nations throughout the 1990s.⁵⁴ One of the key findings was that the vitamins cartel appears to have generated more overcharges in those jurisdictions with weak cartel enforcement regimes. Table 2 presents the estimated overcharges on vitamins imports by 90 economies (see Clarke and Evenett, 2003, for further details.) The total overcharges in India amounted to \$25.71 million US dollars (in year 2000 US dollars). The total overcharges for the ten European Union members reported in Table 2 were estimated to be \$660.19 million US dollars; that is, two thirds of a billion dollars.⁵⁵ The total overcharges by these 90 importers amounted to \$2709.87 million US dollars throughout the 1990s; just under two and three quarter billion dollars for this one cartel alone. Furthermore, as Connor (2001) has shown and as various OECD reports can attest, the international vitamins cartel is not alone in creating over a billion dollars of overcharges. In sum, the 1990s saw many private international cartels exploit the very open markets that the multilateral trade reforms seek to encourage so as to raise prices and transfer billions of dollars of rents from purchasers to cartel members. Such cartels are indeed a cancer on international commerce.

3.3 The rationales for an international accord on cartel enforcement

Findings such as those in Figure 1 and Table 2 may provide a rationale for robust national cartel enforcement regimes—but do they also provide a rationale for international initiatives on cartel enforcement? In the terminology used by economists, for this question to be answered in the affirmative it is enough to show that national cartel enforcement efforts—or the absence of such efforts—create (economic) ‘spillovers’ in other jurisdictions (which, in turn, an international agreement may be able to ‘internalise.’) At least one such spillover can be identified from recent enforcement experience while empirical evidence on the behaviour of firms in concentrated global industries provides the basis for a second spillover.

The first spillover arises from public announcements in one nation about cartel enforcement actions tend to trigger investigations by trading partners. For example, Korean officials began investigating the graphite electrodes cartel after reading about American enforcement actions against this cartel. Likewise, Brazil initiated investigations into the lysine and vitamins cartels after US investigations were concluded.⁵⁶ Trading partners therefore benefit from active enforcement abroad—and

⁵⁴ A full welfare analysis of this cartel would examine the effects on consumer and producer surpluses of the international vitamins cartel. In the study reported upon here (Clarke and Evenett 2003), the estimated overcharges bound from below the consumer welfare losses of each importing country.

⁵⁵ No doubt differences in the size of India’s and the EU economy account for much of the difference in the amount of overcharges.

⁵⁶ This is not to suggest that, at present, there is much inter-agency cooperation on cartel enforcement, with the potential exception of cooperation between US and Canadian agencies (see Waller 2000 for an account of the latter.) This dearth of cooperation is probably a reflection of the fact that confidential

these benefits are likely to be reinforced over time as formal and informal cooperation between competition authorities deepens.

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

Much has been made by the critics of a potential WTO agreement on competition policy of the need to identify spillovers as the rationale for international collective action (see Hoekman and Mavroidis, 2002). The purpose of this section has been to show the difficulties in obtaining evidence and cartel-related information underlie two such spillovers.

3.4 Towards multilateral disciplines on private international cartels? Perspectives from India and the European Commission

The previous parts of section 3 have pointed out the harm caused by private international cartels and to the causes of sub-optimal levels of anti-cartel enforcement; thereby providing the backdrop to our discussion of what appears to be the current positions of the GOI and the EC on the desirability of multilateral disciplines on cartel enforcement.

The Government of India has made no separate formal submission on “hard core cartels” to the WTO's Working Group on the Interaction Between Trade and Competition Policy. Nevertheless, other submissions to this body reveal something of its attitude towards private international cartels. In submission WT/WGTCP/W/149 on September 18 2000, India argued that:

‘The very rationale of talking about competition policy in the context of the WTO has in fact been the apprehension that once the (government) policy-induced restrictions are removed through the implementation of the Uruguay Round commitments by Members, the vacated space might be occupied by private enterprise practices of an anti-competitive nature.’ (India, 2000, page 3.)

This view appears to be part of a broader argument about the distribution of the gains from international trade in general (and not just the gains from trade reform), as the following quotation makes clear:

‘International trade in itself is not a “zero sum” game. Trade could benefit both the players. However, anti-competitive behaviour by either of the two trading

information on cartel cases typically cannot be shared with foreign enforcement agencies and that, until recently, few agencies beyond Brussels, Ottawa, and Washington, D.C., were enforcing their jurisdiction's cartel laws in the first place. The constraints on sharing confidential information are discussed at greater length in the next section. More generally, see Jenny (2002) for a discussion of the extent of cooperation on competition enforcement.

entities could help it corner the gains from trade. Much of the benefits of international trade over the last century have been made possible through the very same “beggar-thy-neighbour” policies by countries in the absence of any binding rules restraining such practices.’ (India, 2000, page 2)

India goes onto make similar claims about the effect of foreign direct investments and draws the conclusion that

‘...the pursuit of a market access agenda may result in outcomes that are detrimental from a welfare point of view. This is a key reason why some competition authorities are leery of putting anti-trust on the WTO agenda and why doubts have been expressed about the ability of a WTO-based process to play as constructive a role in the area of competition law as it has in the area of trade law.’ (India, 2000, page 3)

Although these positions cannot be construed as a whole-hearted endorsement of putting disciplines on private international cartels into the WTO, it should be noted that India has not explicitly stated its opposition to such disciplines—at least in formal submissions to the WTO. Nor has India stated precisely what form of credible international collective action it would prefer nations to undertake. India’s position seems to be best characterised as doubtful, yet very much engaged in the discussions. The latter, at least, is consistent with India’s professed concerns about the impact of private international cartels on the distribution of the gains from international trade; concerns which the empirical record has amplified.

The European Community and its Member States have put forward a comprehensive proposal on potential disciplines on private international cartels in a submission on July 1 2002 (submission number WT/WGTCP/W/193). This submission characterises hard core cartels as

‘...cases where would-be competitors conspire to engage in collusive practices, notably bid-rigging, price-fixing, market and consumer allocation schemes, and output restrictions. These practices can appear in a number of shapes and combinations.’ (EC 2002, page 1).

The submission goes on to describe EC enforcement actions against private international cartels as well as reviews of the recent research findings on the effects of such cartels on the world economy, noting in particular research undertaken at the OECD and for the World Bank.

On the basis of this submission, the Commission envisages that a potential WTO agreement on hard core cartels could include the following provisions:

1. ‘a clear statement that [hard core cartels] are prohibited’ (EC 2002, page 5). This presumably includes domestic hard core cartels as well as private international cartels.
2. ‘a definition of “what types of anti-competitive practices could be qualified as “hard core cartels” and would be covered by the multilateral ban’ (EC 2002, page 5). (The EC notes, in this respect, that such a definition might include a description of the permitted exceptions and exemptions to such a multilateral ban, although she did not take a stand on what those exemptions and exceptions might be, see EC 2002, page 6).

3. a commitment by WTO members ‘to provide for deterrent sanctions in their domestic regimes’ (EC 2002, page 6); while noting that a variety of sanctions are available.
4. on ‘appropriate procedures in the field of voluntary cooperation and exchange of information. Indeed, transparency is an essential element of a framework of competition. Provisions have therefore to be developed on notification, information exchange and cooperation between competition authorities. These would include provisions regarding the exchange of information and more generally, cooperation procedures, e.g. when authorities are launching parallel investigations into the same practice. Negative and positive comity instruments could also be addressed’ (EC 2002, page 7).

It would appear, therefore, that the Commission envisages a cartel enforcement architecture that includes strong national pillars (enforcement authorities) and a chapeau that links the pillars (information exchange and notification.) Although the EC’s submission leaves the reader in no doubt that there are many subtle parameters to be negotiated, the construction of such an architectural edifice would, in their view, constitute:

‘a major step towards effectively curbing such cartel activity and eliminating their adverse impact’ (EC 2002, page 7).

In light of the evidence presented above, the EC proposal has correctly identified the importance of private international cartels as a distortion to the world trading system and has rightly located two of the policy-related causes of sub-optimal levels of enforcement: ineffective or non-existent national cartel enforcement regimes and inadequate information exchange. In assessing the Commission’s proposal a number of points should be borne in mind. First, the EC is not advocating that WTO members adopt the full set of antitrust or competition laws. She is only advocating the enactment and effective implementation of cartel legislation, which is important as fighting cartels is widely regarded as the “high ground” of competition policy.⁵⁷ Nor is the EC proposing that each nation—irrespective of their level of development—adopt exactly the same type of cartel law. Rather, the EC is advocating that a cartel law, however implemented, should meet certain fundamental criteria. Consequently, it cannot be asserted that the EC is seeking to impose a “one size fits all” solution to the cartel problem; to use that oft-repeated and tired cliché.

Second, nothing in the EC’s submission appears to rule out developing countries creating a regional competition authority with powers to undertake cartel enforcement. To the extent that such regional bodies are feasible and can economise on the resource costs of cartel enforcement, this may go some way to allay concerns on this score. (A fuller discussion of implementation costs is undertaken later.)

Third, the EC’s submission does not propose the mandatory sharing of all cartel investigation-related information; which some experts and developing country officials have called for. Often, the argument given in defence of not sharing all such information is that some of it is confidential and is protected by statute. This particular argument is not very persuasive as the information needed for cartel

⁵⁷ That is, the practical and conceptual arguments for attacking cartels are widely regarded as stronger than the arguments in favour of intervention in other areas of antitrust or competition policy (such as vertical restraints and mergers.)

prosecutions is often retrospective (and therefore need not concern future business plans) and typically relates to information as to when corporate executives met, where, and what illicit agreements they signed. It is not clear that national statutes should be protecting this type of information. Moreover, even if national statutes currently prevent such information being exchanged, nothing prevents a WTO member from proposing a provision that such statutes be amended to explicitly exclude protections for documents relating to cartel activities.

There is, however, a more compelling and distinct rationale for not requiring the mandatory exchange of all information obtained in a cartel investigation. The points to bear in mind are that most of the private international cartels prosecuted in the 1990s by the EC and the U.S. authorities resulted from information supplied through corporate amnesty programmes. The incentive for a firm that is participating in a private international cartel to furnish such information to a national competition authority is severely diminished if that information was to be automatically passed on to other nations' competition authorities where the firm could face sanctions for its illicit conduct. Put bluntly, the mandatory sharing of information acquired during cartel investigations will result in a substantial reduction in the amount of information supplied through leniency programmes; which—on the basis of the experience since 1993—amounts to compromising one of the most effective weapons in the fight against private international cartels.

There are a number of responses to this conundrum. The first response is, as the EC proposes, to require some form of notification by authorities to other nations whose interests may be affected by a private international cartel or by an investigation into such a cartel; a requirement that may not actually result in much investigation-specific information being shared. The second response, which the EC submission in no way precludes, is to encourage the formation and operation of joint corporate leniency programmes. Such joint programmes could offer cartel members the prospect of some (or even full) leniency in a number of jurisdictions in return, of course, for information on the cartel's activities within those jurisdictions. This may strengthen the incentive of firms to defect from a cartel agreement but has little to offer countries that are not members of such joint programmes.

A third response, again which the EC submission does not rule out, is for a nation to automatically offer a firm that receives amnesty from another WTO member's competition authority no worse treatment (in terms of reductions in fines and non-incarceration of executives) if the firm comes forward with the same information it supplied the first competition authority, or if it supplies any additional information and assistance needed to secure a prosecution in the relevant jurisdiction.⁵⁸ This response has the advantage that a nation can implement such a provision unilaterally and does not rely on a nation finding willing partners for a regional competition body or joint leniency programme. Furthermore, a no-worse-treatment provision could be used as evidence in support of a nation's claim that it is serious about enforcing its cartel law. Finally, such provisions would strengthen the incentive of firms to defect from their cartel agreement in the knowledge that a successful amnesty application to

⁵⁸ This proposal could be modified in certain ways. So as to avoid the problem of any one nation's antitrust authority "giving away the store" (so-to-speak) to leniency applicants; there could be commonly agreed rules on what constitutes sufficient cooperation by a leniency applicant with an antitrust authority. Alternatively, the promise of automatic leniency might only follow if a jurisdiction with a known track record of enforcement offers leniency to an applicant.

a WTO member would result in comparable treatment from other WTO members.⁵⁹ In sum, there are creative ways to enhance the investigation-related information while remaining consistent with the EC's proposals.

The fourth observation on the EC's proposal is that it is not inconsistent with certain notions of Special and Differential Treatment (as that term is commonly discussed in the literature on trade and competition policy, see OECD 2001). Even though it is unclear why any government that wanted to eliminate distortions to market forces would want to do so, the EC's proposal accepts that WTO members may wish to negotiate exceptions and exemptions from the multilateral ban on hard core cartels. Furthermore, the Commission's proposals do not rule out longer transitional periods for developing economies and technical assistance is often mentioned by EC officials as a necessary complement to any WTO rules that require stronger cartel enforcement regimes.

Fifth, the role of transitional periods and technical assistance is likely to assume greater importance as discussions intensify over the developmental consequences of a credible multilateral national cartel enforcement regime. Ever since the TRIPs debacle developing economies—often with India in the lead—have raised concerns about the implementation costs of existing and potential new WTO disciplines. These assertions have been echoed by certain trade policy experts (see, for example, Winters 2002). What light can research shed on these claims?

The first point to make in this regard is that careful studies of the challenges faced by developing countries as they implement competition laws highlight the importance of initial political and economic conditions; see Kovacic (2001) for one of a number of excellent papers on the experience in the transition economies. Furthermore, the importance of supporting institutions which support the value of freer (if not necessarily free) markets is a common theme of such studies. These institutions include universities (to train competition officials and to educate future business people about the rule of law), the body politic (which must not be too adverse to attacking entrenched economic interests that abuse market power and that do not see the competition authority as a means of corruption) and, where necessary, less than dysfunctional courts. These arguments suggest that, yes, instituting effective cartel laws will take time and that any WTO agreement that creates such an obligation to do so should reflect this fact.

The second point to bear in mind is that many developing countries have established cartel enforcement regimes and have begun to use them. Table 3 summarises the recent enforcement actions taken by ten developing economies that differ markedly in terms of their stage of development and in their legal traditions. This suggests that active cartel enforcement is not the preserve of a small number of wealthy nations and that developing countries can learn from one another in this regard.

But what can existing research say about the magnitude of implementation costs of competition policy?⁶⁰ For all of the bluster about implementation costs, few have ever bothered to collect data on the costs of running national competition policy regimes, let alone those national cartel enforcement regimes which are at the core of the EC's proposal. Even fewer have compared these costs with some estimate of the benefits of

⁵⁹ It should also be said that nothing prevents a nation from adopting such a provision now, in the absence of a WTO agreement.

⁶⁰ See Evenett (2003) for an extensive account of the resource implications of adopting a multilateral framework on competition policy.

running such an enforcement regime; but more on that later. As far as the costs of running a cartel enforcement regime is concerned, the costs should in principle include the government outlays on cartel enforcement, private expenditures on legal services to defend firms and individuals against accusations of cartelisation, the costs of court time (if court trials for cartel offences are required in national law) and, where relevant, the cost of incarcerating individuals involved in cartels.

The sad truth is that researchers have only assembled data on government outlays on competition policy enforcement and even the evidence marshalled here is rather meagre. For example, the World Bank's *Global Economic Prospects* Report for 2003 invokes implementation costs—amongst other reasons—for casting doubt on the efficacy of multilateral rules on competition policy without reporting a single country's government outlays on competition enforcement (World Bank, 2003)!⁶¹ Winters' (2002) discussion of implementation costs is based on just three pieces of expenditure data—two for British enforcement agencies and one from the United States.⁶² CUTS (2002) assembled such data for seven developing economies. Clarke and Evenett (2003) reported such data for nine economies and Hahn and Layne-Farrar (2002) used OECD sources and assembled data on the budgets of 24 competition agencies (including the EC's agency.) This seems rather a flimsy amount of data upon which to launch an implementation costs-based attack on a multilateral ban of hard core cartels.

Matters are worse for critics now that some recent research has begun to quantify the benefits of active cartel enforcement bodies. Effective cartel enforcement regimes can have benefits other than those which flow from deterring the formation of hard core cartels in the first place. If the punishment (fines etc) that cartel members can expect should they be successfully prosecuted is linked to the overcharges made by the cartel, then one might hypothesise that the size of those overcharges is lower in economies where either the probability of successful prosecution is higher or the expected fines are higher (especially, as is the case in some jurisdictions, if the fines are a multiple of the harm done.) Such a cartel may well raise prices less in a jurisdiction where cartel enforcement is more robust. A recent empirical analysis of the vitamins cartel has found support for this hypothesis (Clarke and Evenett, 2003). Indeed, so substantial was the estimated reduction in overcharges on vitamins imports that resulted from robust EC anti-cartel enforcement, that the price reduction in ten EU members equalled 96 percent of the total cost of these ten countries' state outlays on their competition authorities plus the cost of the Brussels-based EC enforcement efforts (see Table 4). Moreover, in Latin America the average annual reduction in overcharges on vitamins imports equalled seven percent, 46 percent, and 65 percent respectively of the Chilean, Mexican, and Brazilian state outlays on competition enforcement. In interpreting these results it is important not to repeat the mistakes alluded to earlier—namely, drawing too strong a policy recommendation on the basis of a small amount of evidence. Even so, the evidence from the international vitamins cartel does suggest that the benefits of active cartel enforcement may well go a long way (and in some cases even all the way) to meeting the greater governmental outlays brought about by WTO disciplines on hard core cartels. Much more research is

⁶¹ In the interests of transparency, I co-wrote a background paper for this Report.

⁶² Winters does, in passing, footnote the CUTS (2002) study mentioned in this paragraph. Winters' contention is that outlays by developing countries on competition enforcement are likely to rise if a multilateral framework on competition policy is adopted. Evenett (2003) explores this issue in considerable detail and is less certain of the effects on resource outlays than Winters.

needed here to gauge the net benefits of multilateral disciplines on hard core cartels. Such research is intrinsically empirical in nature and policymakers should be on their guard against economic advice that is deduced solely from first principles.

3.5 Conclusion

Section 3 of our report has discussed the merits of introducing multilateral disciplines on hard core cartels. Such disciplines would go beyond existing multilateral rules and would constitute a cross-sectoral commitment to enforce (and in some jurisdictions, also to enact) a national anti-cartel law. Evidence was presented here to suggest that there is a strong independent incentive for nations to enact and enforce such laws; especially as it appears that some international cartels have deliberately targeted those jurisdictions without active anti-cartel enforcement regimes.

The case for international collective action, however, is different and rests on the fact that a nation's decision not to enact and enforce such a law adversely affects the interests of trading partners' consumers and exporters. Specifically, non-enforcing jurisdictions can act—probably unwittingly—as safe havens in which international cartels can organise their conspiracies. An agreement on minimum standards of national cartel enforcement would, if properly designed and implemented, go a long way to undermining these conspiracies. It is worth bearing in mind that these conspiracies essentially exploit the very improvements in market access, that multilateral trading system has secured in the past, to generate rents and in so doing erode the benefits that trade reforms generate for customers, be they consumers, other firms, or governments.

Turning to the current discussions on potential multilateral disciplines on hard core cartels, we described and analysed in detail the European Commission's proposals in this regard. For the moment, the Government of India has not offered a comparable proposal. Should it choose to do so the Indian government may find the flexibility inherent in the EC's proposals can be tailored to the interests of developing countries—but no doubt options are possible. Furthermore, trade negotiators and policymakers might be well advised to hold its fire on the question of implementation costs, especially in light of the hollow empirical basis of the claims advanced to date.

Table 1:
COUNTRIES WITH FIRMS CONVICTED OF PRICE FIXING BY THE
UNITED STATES AND THE EUROPEAN COMMISSION DURING THE 1990s

Country	Cartel
Angola	Shipping
Austria	Cartonboard, citric acid, newsprint, steel heating pipes
Belgium	Ship construction, stainless steel, steel beams
Brazil	Aluminum phosphide
Canada	Cartonboard, pigments, plastic dinnerware, vitamins
Denmark	Shipping, steel heating pipes, sugar
Finland	Cartonboard, newsprint, steel heating pipes
France	<i>Aircraft</i> , cable-stayed bridges, cartonboard, citric acid, ferry operators, <i>methionine</i> , newsprint, <i>plasterboard</i> , shipping, sodium gluconate, stainless steel, steel beams, seamless steel tubes
Germany	<i>Aircraft</i> , graphite electrodes onboard, citric acid, aluminum phosphide, lysine, <i>methionine</i> , newsprint, pigments, <i>plasterboard</i> , steel heating pipes, seamless steel tubes, vitamins
Greece	Ferry operators
India	Aluminum phosphide
Ireland	Shipping, sugar
Israel	Bromine
Italy	Cartonboard, ferry operators, newsprint, stainless steel, steel heating pipes, seamless steel tubes
Japan	Graphite electrodes, lysine, <i>methionine</i> , ship transportation, shipping, sodium gluconate, sorbates, seamless steel tubes, thermal fax paper, vitamins
Luxembourg	Steel beams
Malaysia	Shipping
Mexico	Tampico fiber
Netherlands	Cartonboard, citric acid, ferry operators, Ship construction, sodium gluconate, Tampico fiber
Norway	Cartonboard, explosives, ferrosilicon
Singapore	Shipping
South Africa	Diamonds, newsprint
South Korea	Lysine, <i>methionine</i> , ship transportation, shipping
Spain	<i>Aircraft</i> , Cartonboard, stainless steel, steel beams
Sweden	Cartonboard, ferry operators, newsprint, stainless steel
Switzerland	Citric acid, laminated plastic tubes, steel heating pipes, vitamins
Taiwan	Shipping
UK	<i>Aircraft</i> , cartonboard, explosives, ferry operators, newsprint, pigments, <i>plasterboard</i> , shipping, stainless steel, seamless steel tubes, steel beams, sugar
US	<i>Aircraft</i> , aluminum phosphide, bromine, cable-stayed bridges, cartonboard, , citric acid, diamonds, ferrosilicon, Graphite electrodes, isostatic graphite, laminated plastic tubes, lysine, maltol, <i>methionine</i> , pigments, plastic dinnerware, Ship construction, ship transportation, sorbates, Tampico fiber, thermal fax paper, vitamins
Zaire	Shipping

Source: Levenstein and Suslow 2001, Table 1. Note: Products in italics are currently under investigation.

Figure 1:
Total imports of twelve cartelised products by developing countries, 1981-2000

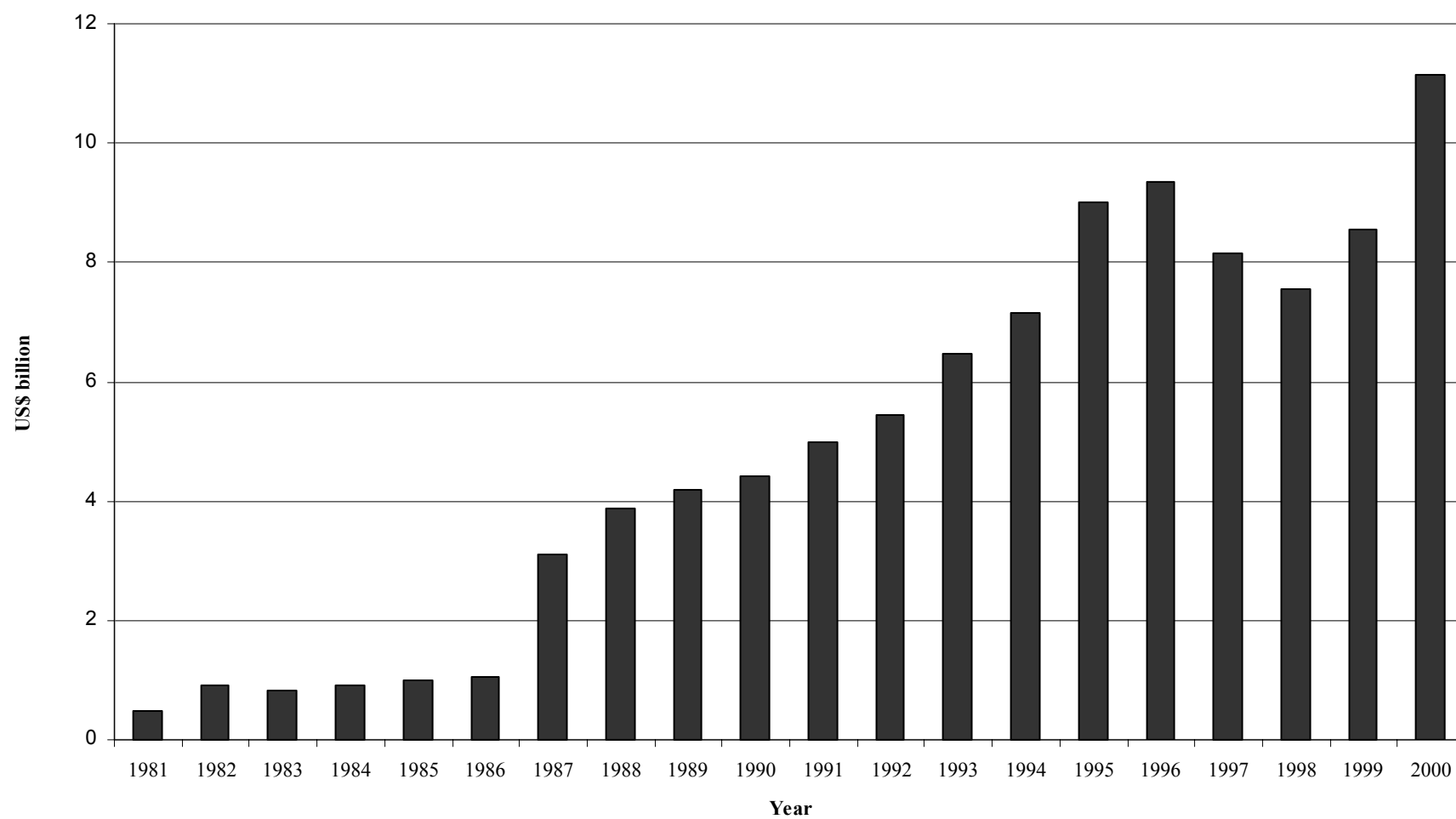


Table 4: Estimating the average savings-per-dollar spent on competition enforcement

Economy	Additional overcharges in the absence of a cartel law (millions of US dollars)		Annual cost of competition authority (1999-2000)	Savings on each dollar spent: ratio of last two columns	Overcharges actually paid (millions of US dollars)
	Total throughout the conspiracy	Annual average during 1990-9			
Austria	27.96	2.80			44.22
Brazil	72.09	7.21	10.96	0.658	183.37
Chile	15.11	1.51			38.43
Denmark	278.11	27.81	8.70	3.20	138.49
Finland	13.68	1.37	3.40	0.40	16.44
Greece	27.56	2.76			13.73
Ireland	35.66	3.57	1.60	2.23	17.76
Italy	308.83	30.88			153.78
Mexico	44.59	4.46	9.70	0.46	151.98
Norway	14.69	1.47	7.70	0.19	19.27
Peru	6.98	0.70	10.05	0.07	18.91
Portugal	25.65	2.57			12.77
Spain	184.53	18.45			91.89
Sweden	22.28	2.23	7.30	0.31	23.47
UK	296.51	29.65	46.60	0.64	147.64
<i>Memorandum:</i>					
Sum of entries for EU members above	1220.78	122.08	127.50	0.96	660.19

Note:

The cost of the European Commission's competition enforcement authority was added to the line "EU members above."

Table 2: Estimated overcharges from the international vitamins cartel, 1990-1999 in year 2000 US dollars, by

Importing economy	Millions of US dollars			Importing economy	Millions of US dollars		
	Overcharges paid on vitamins imports during the conspiracy	Total value of imports during years when importer did not have a cartel law	Total value of imports during years when importer did have a cartel law		Overcharges paid on vitamins imports during the conspiracy	Total value of imports during years when importer did not have a cartel law	Total value of imports during years when importer did have a cartel law
<i>Economies with evidence of cartel prosecutions in OECD documents</i>				<i>Economies with no evidence of cartel prosecutions in OECD documents</i>			
Brazil	183.37	0.00	665.19	(continued)			
Australia	154.70	0.00	333.63	Guatemala	10.41	30.05	0.00
Italy	153.78	0.00	1040.09	Nigeria	7.00	20.14	0.00
Mexico	151.98	111.33	411.38	Bangladesh	6.42	22.26	0.00
UK	147.64	0.00	998.57	Syria	5.79	20.08	0.00
Denmark	138.49	0.00	936.62	Paraguay	4.57	13.18	0.00
South Africa	99.93	173.56	39.57	Tunisia	4.45	12.80	0.00
Spain	91.89	0.00	621.47	Vietnam	4.38	15.19	0.00
China	77.61	72.35	56.73	Costa Rica	3.82	11.03	0.00
Austria	44.22	88.34	94.16	Bolivia	3.45	9.97	0.00
Chile	38.43	0.00	139.41	Zimbabwe	3.41	9.80	0.00
Poland	31.50	0.00	213.07	Lebanon	3.11	10.77	0.00
New Zealand	29.26	0.00	63.11	Dominican Republic	3.07	8.86	0.00
Hungary	24.71	48.73	54.11	El Salvador	2.70	7.80	0.00
Sweden	23.47	36.10	75.03	Jordan	2.54	8.82	0.00
Norway	19.27	34.85	49.47	Jamaica	2.11	6.09	0.00
Romania	18.99	48.36	16.29	Kenya	1.79	5.16	0.00
Peru	18.91	3.32	64.43	Ghana	1.32	3.81	0.00
Ireland	17.76	0.00	120.10	Nepal	1.21	4.21	0.00
Finland	16.44	28.06	46.08	Nicaragua	1.20	3.46	0.00
Greece	13.73	0.00	92.83	Cote D'Ivoire	0.88	2.53	0.00
Portugal	12.77	0.00	86.39	Senegal	0.82	2.36	0.00
Bulgaria	5.04	2.87	27.47	Trinidad Tobago	0.81	2.33	0.00
Zambia	0.06	0.14	0.01	Panama	0.68	1.96	0.00
<i>Economies with no evidence of cartel prosecutions in OECD documents</i>				Madagascar	0.60	1.73	0.00
Singapore	245.22	849.93	0.00	Ethiopia	0.59	1.69	0.00
Hong Kong	178.48	618.61	0.00	Yemen	0.58	2.02	0.00
Turkey	82.89	287.31	0.00	Mali	0.49	1.41	0.00
Thailand	78.45	271.91	0.00	Mauritius	0.46	1.33	0.00
Argentina	73.83	213.08	0.00	Cameroon	0.39	1.12	0.00
Colombia	54.95	158.60	0.00	Cambodia	0.28	0.98	0.00
Indonesia	48.72	168.85	0.00	Benin	0.22	0.63	0.00
Venezuela	45.32	130.81	0.00	Togo	0.19	0.53	0.00
Iran	44.25	153.35	0.00	Tanzania	0.16	0.46	0.00
Egypt	38.49	110.66	0.00	Haiti	0.11	0.33	0.00
Pakistan	36.82	127.62	0.00	Angola	0.11	0.33	0.00
Israel	32.30	111.97	0.00	Gabon	0.09	0.27	0.00
Philippines	29.58	102.53	0.00	Niger	0.07	0.19	0.00
Honduras	25.87	74.65	0.00	Congo	0.06	0.19	0.00
India	25.71	89.12	0.00	Burkina Faso	0.06	0.17	0.00
Malaysia	22.94	79.50	0.00	Malawi	0.05	0.13	0.00
Ecuador	14.82	42.78	0.00	Rwanda	0.04	0.12	0.00
Saudi Arabia	13.11	45.43	0.00	Uganda	0.03	0.10	0.00
Morocco	12.44	35.77	0.00	Guinea	0.03	0.09	0.00
Algeria	11.09	31.88	0.00	Laos	0.03	0.10	0.00
				Chad	0.01	0.04	0.00
				Mozambique	0.00	0.01	0.00

Notes:

1. Total value of overcharges for imports into these 90 economies is 2709.87 million US dollars.
2. This table does not include overcharges for Papua New Guinea or for Korea.

Table 3: Recent cartel enforcement activities in developing economies

Economy	Cartelised market	Duration of cartel	Effects of conspiracy and fines imposed (where available)
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Bulgaria	Transportation on variable routes (intermediate transportation)	2000	Conspirators agreed on a price increase of approximately EUR 0,10 on transportation services. The companies were fined a total of EUR 47,000.
	Phone cards sales	One year (year not specified)	A common shareholder acted as intermediary in price co-ordination between two conspiring companies. Both were imposed a fine of EUR 9,000.
	Gasification	2002	Two companies agreed on a five-years contract imposing non-compete clauses. A fine of EUR 25,500 was imposed on both companies.
China	Brickyard	1999	Bid rigging conspiracy involving five groups of companies affecting the operation of a brickyard plant in Zhejiang Province. They were fined EUR 6,500 each.
	School building	1998	Bid rigging involving ten construction companies. The bid was declared invalid and illegal gains confiscated.
	Engineering construction	1998	Bid rigging involving two construction companies.
Estonia	Milk products	2000	Price-fixing attempt by four leading milk processors and ten wholesalers. A prohibiting order was issued before an agreement came in place.
	Taxi services	1999	Three taxi companies (over 40% of the taxi market) convicted of price fixing, and fined EUR 639 each.
	Road transport	1999	The Association of Estonian International Road Carriers was prosecuted for participating in price fixing involving the provision of international transport services. The Competition Board issued a proscriptive order. No sanctions were applied.
Indonesia	Pipe and pipe processing services	Formed in May 2000	Bid rigging involving four companies. The ensuing contract was dissolved. No fines were imposed.
Latvia	Aviation	1998-1999	International cartel involving one Latvian and one Russian company agreeing to co-cooperate in the organisation of passenger flights between Riga and Moscow. The Latvian company was fined 0,7% of its total turnover of 1998.
	Courier post	1999	Agreement between a Latvian state-owned courier post services and an international courier services operator. No sanctions were applied, as no practical effect on competition was ascertained.
Peru	Building and construction	1997	Three companies involved in bid rigging. Fines of nearly EUR 1,800 were imposed on each of the respondents.
	Taxi Tours	1999	Price fixing agreement between a number of local companies. Only one company, which did not express their commitment to cease the restrictive practices, was fined EUR 900.
	Poultry market	1995-1996	Several associations and 19 firms investigated for alleged "price-fixing, volume control, restraint of trade, and conspiracy to establish entry barriers and development of anti-competitive mechanisms to suppress and eliminate competitors, in the market of live chicken in Metropolitan Lima and Callao". (*)

Romania	Mineral water	1997	Price fixing conspiracy relating to the bottling of mineral water.
	Drugs	1997-2000	Members of Pharmacists Association were convicted of participating in a conspiracy relating to market sharing in pharmaceutical distribution (approx. EUR 430 million per year) and deterring entry by other competitors. Fines were calculated as a percentage of profit of the Pharmacists Association (amount not specified).
Slovenia	Electric energy	2000 (year of conviction)	Price fixing conspiracy relating to the provision of electric energy in Slovenia. The cartel was prohibited by the Office.
	Organisation of cultural events	2000	Two companies agreed to co-operate and prevent entry in the market. The amount of fines imposed is not specified.
South Africa	Citrus fruits	1999	Conspiracy relating to the purchase, packaging and sale of citrus fruits.
Taiwan (China)	Wheat	1997-1998	The Flour Association was convicted of organising a buyers' cartel, instituting quantity control and quota system among 32 flour producers. The association was imposed a fine of EUR 620,000.
	Mobile cranes	1998	Six companies convicted of bid rigging.
	Liquefied Petroleum Gas (LPG)	Not specified	27 companies, controlling most of the market share, convicted of participating in a price fixing conspiracy relating to delivery of LPG in southern Taiwan. Total fines amounted to EUR 4,123,000.
Ukraine	Electronic cash machines	1999	Price fixing conspiracy involving two companies. As an effect of the agreement, prices rose by EUR 1.0 – 2.0.
	Kaolin	2000	Two competing distributors concluded a contract specifying amounts of sales of the product.
Zambia	Poultry	Not specified	Two companies, the dominant producer and the largest buyer in the poultry market made agreements foreclosing competition. The agreement was declared invalid.
	Oil	1997 – not specified	Nine oil-marketing companies convicted of price fixing. The cartel leaders also forced other companies to comply with standard behaviour on prices.
Source: OECD 2001a (*) OECD 2001 b			

4. Overall Conclusions

As one of the Singapore Issues, competition policy-related matters are one for the most intensely debated matters in the world trading system. Some feel that the WTO needs to expand the set of rules on international commerce if the world trading system is to meet the challenges posed by the last wave of global market integration. Others are wary of taking on obligations under the auspices of the WTO.

This Report describes and then analyses a number of the European Union's and India's proposals with respect to potential multilateral disciplines on competition policy. The report examines both existing WTO disciplines that may have some bearing on the conduct for national competition policy and some potential new disciplines, such as those for hard core cartels.

Our first major finding is that many of the existing rules of the WTO do already cover competition policy. GATT Article III currently requires *de facto* non discrimination for all laws that might affect trade in goods. By proposing a mechanism for derogations and by proposing that in competition law *de facto* non-discrimination should be replaced by a less stringent *de jure* obligation, the EU proposals can be seen as actually reducing the scope of current WTO disciplines though simultaneously making them more explicit. (With respect to services, existing GATS obligations are somewhat weaker and apply only to currently scheduled sectors)

This observation leads us to conclude that there may be what might be called a *minimalist* approach to crafting multilateral disciplines on competition policy; namely codification and clarification of existing WTO disciplines explicitly as they relate to the conduct of national competition policy. Such an approach would address the criticism that EU proposals are too intrusive, perhaps because they would not involve any obligation for WTO members to have a competition law.

Our analysis is not just confined to such a minimalist approach. Elements of a broader approach, that includes new horizontal rules, are examined. These new rules could be in the area of hard core cartels, voluntary cooperation, and certain core principles. In the case of cartels, the case for international collective action is identified and its relevance backed up by experience with international cartel enforcement in the 1990s.

In fact the EU's proposals go beyond the minimalist agenda, but not by very much. They advocate

1 an agreement to define the existing competition provisions including national treatment more precisely and in their proposal more narrowly, and allow for derogations

and

2 a comprehensive agreement that would extend such obligations from the their present scope, ie tradeable goods and scheduled services, to all goods and services not covered by an exemption

The second point would constitute a modification of obligations, but be subject to derogations.

At the same time the EU are proposing a general framework for voluntary cooperation, which would give some additional rights to those who accepted the redefined obligations which would actually be, in India's case very little extra.

Our report (section 3.4) argues that a system of voluntary co-operation supporting national enforcement in developing countries above all in the cartel field could bring benefits to developing countries. We note that the EC proposals are consistent with a wide variety of approaches and we do not seek to advocate any detailed options. But we argue that while countries should be enjoined to notify affected WTO members when an international cartel is identified and should not rule out the possibility of exchange of confidential information on cartels, it would be wrong to focus on obligations for the exchange of confidential information in any agreement. Not only would this be resisted, it would also risk compromise certain proven techniques for attacking hard core cartels.

Formal even if initially voluntary co-operation provisions could be a first step towards the rules on international competition that India has called for.

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