VIEW

Multilateral investment and competition rules in the World Trade Organization: an assessment

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Introduction

In spite of an outcry by a number of developing countries doubting the appropriateness of opening new negotiating fronts at a time when the Uruguay Round Agreements have not yet been fully digested by the majority of developing countries, the first Ministerial Conference of the World Trade Organization (WTO), held in December 1996 in Singapore, established three additional working groups to introduce new issues in the WTO. The outcry of developing countries has again fallen on deaf ears. On the pretext that it is desired to achieve genuine trade liberalization and to share the so-called benefits of globalization,[1] the interface between trade and investment and between trade and competition now form the mandate of two newly established study groups (box 1). (The third group is to negotiate multilateral rules on the transparency aspects of government procurement.)

No one disputes that investment and competition policies, the focus of this article, are an integral part of the globalization phenomenon and occupy a central place in the growth strategy of economic opening to the outside

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[1] The reference to "so-called benefits of globalization" is to denote the fact that "globalization" means different things for different countries. Recently, at the OECD Ministerial Meeting held in Paris from 26 to 27 June 1997, the benefits of globalization meant halving European unemployment in 20 years and increasing the wealth and welfare of the industrialized countries by 80 per cent in the period 1995-2000. One cannot but wonder in the light of such an understanding, what the totality of globalization would yield for developing countries.

Box 1. Excerpt from the Singapore Ministerial Declaration

Having regard to the existing WTO provisions on matters related to investment and competition policy and the built-in agenda in these areas, including under the TRIMs Agreement, and on the understanding that the work undertaken shall not prejudge whether negotiations will be initiated in the future, we also agree to:

- establish a working group to examine the relationship between trade and investment; and

- establish a working group to study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework.

These groups shall draw upon each other's work if necessary and also draw upon and be without prejudice to the work in UNCTAD and other appropriate intergovernmental fora. As regards UNCTAD, we welcome the work under way as provided for in the Midrand Declaration and the contribution it can make to the understanding of issues. In the conduct of the work of the working groups, we encourage cooperation with the above organizations to make the best use of available resources and to ensure that the development dimension is taken fully into account. The General Council will keep the work of each body under review, and will determine after two years how the work of each body should proceed. It is clearly understood that future negotiations, if any, regarding multilateral disciplines in these areas, will take place only after an explicit consensus decision is taken among WTO Members regarding such negotiations.

Source: Ministerial Conference Singapore, 9-13 December 1996. WT/MIN (96)/December.

world, which developing countries have, in fact, for long embraced. The question needs to be asked, however, whether the timing is right for this initiative, whether the WTO is the right forum and whether the disciplines sought are right for developing countries, especially at a time when these are still grappling with implementing their obligations emanating from the Uruguay Round and when they are still formulating new laws at the domestic level to deal with competition and investment. Developed countries, on the other hand, had well-established laws in these areas since—or even before—the Second World War.

Work in the two working groups is beginning gradually.[2] Though it is too early yet to recognize any kind of shape or agreed framework for the work to be undertaken by them, one thing certain is that the two next years will be a learning exercise—an "educational process" in the WTO jargon. Developing countries will have to start their preparations, be it in the WTO itself or in the various other forums and groupings at their disposal, beginning with the Group of 77 and continuing with the Group of 15, UNCTAD, the South Centre and the Non-Aligned-Movement. They still have time to identify their interests and formulate their positions before the actual take-off of either of the two working groups. "Active participation" and "positive agenda"—concepts launched by the Secretary-General of UNCTAD—have become their new motto. Developing countries want—and need—to be involved in the shaping of the agenda, instead of continuously remaining on the sidelines as mere spectators and commentators. But that is easier said than done. In spite of their resistance, they suddenly realize that they are slowly but surely being pulled into the unknown.

I do not want to undermine the sincerity of such resistance or claim that it is more apparent than real, as I myself have been part of it many times. What I want to underline is the feeble argumentation and weak structure on which developing countries build their resistance strategy, and mostly their lack of solidarity today, in stark contrast with their solidarity during the 1960s, 1970s and 1980s, which was a source of their strength. Developing countries have to realize that their stakes in the WTO are high and that they need to pursue their concerns and interest in a much more vigorous manner.

It is with this in mind that I venture to address the two main topics: the relationship between trade and investment, on the one hand, and trade and competition, on the other hand. The aim is not to build a strategy—that would be too ambitious a goal. Rather, it is to reflect on what we, as developing countries, could possibly want—or not want—out of these two working groups. They are important enough to rank high on our agenda, and deserve our full attention in the coming years. But are we up to the challenge? Are we ready to strike a serious and sensitive balance in these two groups and between them? Is the WTO the right forum to tackle a multilateral framework on investment (MFI) and a set of rules on competition

[2] The Working Group on the Relationship between Trade and Investment met from 2 to 3 June 1997 for the first time, and is scheduled to have two additional sessions this year—in October and December. The Working Group on the Relationship between Trade and Competition Policy met in July, and is scheduled to meet again in September and November 1997.

policy which, at the same time, address the developmental needs and objectives of developing countries? How to infuse the WTO with the much-needed development dimension, when its parameters are reciprocity and balance of rights and obligations between developed and developing countries? Should developing countries content themselves with longer implementation periods, reflecting so-called special and preferential treatment accorded them in the framework of the new and highly complex issues? How far can we adapt Part IV of GATT, which deals with special and preferential treatment—yet is confined to trade in goods—to the newly emerging issues of investment and competition policies linked to trade?

In a preliminary attempt to answer some of these questions, one thing needs to be stressed at the outset: if the WTO is to address the issues of an MFI and competition rules, and disciplines at the international and national levels in these areas, it has to do so by incorporating, from the beginning, the development dimension as an integral part of any framework considered; and any agreements reached in this respect would need to be on a par with the various other rights and obligations that would be negotiated, and need to be equally binding. The development dimension should thus not be kept on the margins of any negotiation, or simply left to UNCTAD or even the World Bank on the ground that it does not constitute part of the WTO's mandate.

Brief background

One can easily make the case that the Uruguay Round was but a prelude to a broader move from the traditional concerns of the multilateral trading system (focusing on regulating trade at the border through the elimination of customs duties, as well as direct quantitative and other restrictions) towards a more sophisticated approach to trade liberalization through more domestically oriented policies. In GATT, such policies were strictly limited and directly related to trade (e.g., subsidies and non-tariff barriers). The Uruguay Round opened the door for measures that concern trade in a more indirect manner, e.g., performance requirements in the Agreement on Trade-Related Investment Measures (TRIMs), and various provisions in the General Agreement on Trade in Services (GATS) and in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). Attention is shifting now slowly but surely to obstacles to trade created by domestic laws. It is not hard to see that the issues of investment and competition will

be the backbone of this approach, with a view to disciplining domestic policies.

Developing countries had their reasons for resisting the establishment of the two working groups on investment and competition throughout the preparatory phase of the Singapore Ministerial Conference. Whether because of the negotiation-fatigue syndrome they were still suffering from two years after the conclusion of the Uruguay Round, or for more substantive reasons, their concerns were legitimate. In fact, the courageous stance taken by a number of them helped participants reach a balanced compromise in Singapore—in confining the two groups to studying the issues in question and reconsidering the situation at the next ministerial meeting in terms of the extent to which those issues are ready for negotiations. Although I will briefly address the fears and concerns of developing countries in this respect, this is not, however, the focus of this article. Rather, on a more positive note, we need to prepare ourselves to come forward with our demands and put our main points of interest on the table, and to be ready to engage in negotiations when the time is ripe. This is the path we should take.

The role of UNCTAD

UNCTAD has pledged its full support to help developing countries to participate as effectively as possible in international investment discussions, and its Secretary-General has promised that it will work as a catalyst with other intergovernmental organizations and institutions to assist developing countries in the next round of trade negotiations. However, UNCTAD's mandate with regard to investment and competition (box 2), as agreed during UNCTAD IX in Midrand in 1995, differs substantially from that of the two WTO working groups. While the WTO's mandate focuses on the interrelationship between investment and trade (and not investment *per se*)—and issues should be addressed within such a framework—UNCTAD's mandate concerns investment *per se*, which, of course, includes the relationship between investment and trade, but above all requires a development focus. Having inherited the responsibilities of the former United Nations Centre on Transnational Corporations (UNCTC), UNCTAD already has a long tradition of work in this area, which includes intergovernmental work. Most recently, this included in particular the October 1996 high-level segment of the Trade and Development Board (TDB), which dealt with foreign-direct-

Box 2. UNCTAD's Midrand mandate in the area of investment

(a) Improving general understanding of trends and changes in FDI flows and related policies, the interrelationships between FDI, trade, technology and development, and issues related to transnational corporations of all sizes and their contribution to development, with the results to be published in UNCTAD's report on world investment;

(b) Identifying and analysing implications for development of issues relevant to a possible multilateral framework on investment, beginning with an examination and review of existing agreements, taking into account the interests of developing countries and bearing in mind the work undertaken by other organizations. In this regard, the role of OECD and the activities of its outreach programme in explaining recent developments in that organization should be noted;

(c) Continuing investment policy reviews with member countries that so desire in order to familiarize other Governments and the international private sector with an individual country's investment environments and policies;

(d) Enhancing the capacity of developing countries and countries with economies in transition to improve their overall investment climate, to obtain relevant information and to formulate policies to attract, and benefit from, FDI. Attention should also be given to assistance in the area of accounting standards and accounting education and related activities;

(e) Promoting opportunities for FDI in host countries by facilitating the exchange of experiences on investment promotion and the benefits from FDI;

(f) Promoting investment among developing countries;

(g) Facilitating, consistent with available resources, the holding of a pilot seminar, co-sponsored with other relevant international organizations, on the mobilization of the private sector in order to encourage foreign investment flows towards the least developed countries. The results of this seminar should be evaluated by the Trade and Development Board in order to determine further action in this regard.

Source: UNCTAD, *Proceedings of the United Nations Conference on Trade and Development: Ninth Session, Midrand, Republic of South Africa, 27 April - 11 May 1996, Report and Annexes*. Sales No. E.97.II.D.4, p. 17.

investment (FDI) issues; the Africa symposium on "International investment arrangements: the development dimension" (Fez, 19-20 June 1997); and the 1996 and 1997 editions of the *World Investment Report*. In addition, UNCTAD has held its first expert meeting (May 1997), reviewing existing agreements on investment with a view to identifying implications for development. That meeting suggested that another expert meeting, in 1998, deal with regional and multilateral agreements to examine what, from a development perspective, can be learnt from them for a possible MFI. Expert meetings will also be held on investment promotion, to suggest measures that promote development objectives (September 1997), and on competition law and policy (November 1997).

The differences between the two mandates—and hence the distinctly different starting points—need to be kept firmly in mind. In this context, it should also be recalled that developing countries had difficulty in UNCTAD's Intergovernmental Expert Meeting on Competition Law and Policy (formerly the Intergovernmental Group of Experts on Restrictive Business Practices) in introducing the relationship between competition policy and international trade, which should be one of the priority topics to be studied by the WTO working group.

In my view, UNCTAD's role in the two highly important WTO working groups should be to help developing countries infuse the development dimension into the work of the groups. UNCTAD should work in close cooperation with the developing countries and in parallel to the WTO process, either formally or informally. It needs to help developing countries to understand the issues in an in-depth manner, and it needs to help them to assess the impact of the ongoing process in the WTO on their development process, while stressing their interest as a group and as individual countries at different levels of development. Lastly, UNCTAD—at a later stage—could also provide developing countries with enough input to increase their negotiating capacity and their leverage, if and once negotiations start on a possible MFI and international competition rules and disciplines.

The discussion of the two issues prior to the Singapore Ministerial Conference

Before the two WTO working groups were established, three main questions had to be addressed. These remain at the core of any further action in these areas:

- Is the issue trade-related?
- Is the WTO the best forum to address the issue?
- Is the issue ready for negotiations within the WTO?

There was tacit agreement in Singapore to study the issues carefully, and to obtain answers to these questions, without prejudging whether negotiations could be initiated in the future, as well as the specific areas that might merit further consideration in the WTO framework, if any (see box 1).

In my view, all three questions remain still wide open, though with different nuances. I shall attempt to look at the issues, bearing in mind these three basic questions. It is worth noting that developing countries have a vested interest in keeping the WTO a purely "trade organization", in spite of different attempts to the contrary. A case in point is dealing with environmental issues in the WTO as a result of the Marrakesh Ministerial Conference (December 1994). Had not developing countries throughout the preparatory phase of the Committee on Trade and Environment prior to the Singapore Ministerial Conference continued to maintain that only trade-related environmental aspects be looked at, WTO would have risked being turned into an environmental organization. Confining WTO strictly to the trade-related aspects of any issue and a clear definition of the issue being discussed, which they should not tamper with, especially in view of the increasing tendency to link trade to all kinds of issues, notably labour standards, should constitute a safeguard for developing countries.

The relationship between trade and investment

It is well known that GATT was the distorted embryo of a broader international treaty—the Havana Charter—which was supposed to address, among other things, foreign direct investment, i.e., the treatment of transnational corporations (TNCs) operating in the contracting parties. GATT, a provisional agreement, was then confined to trade in goods. The first step in the GATT system towards dealing with questions of TNCs was the 1979 Agreement on Government Procurement, to which only a limited number of countries acceded. The real change came with the results of the Uruguay Round negotiations, as embodied in the WTO, which included the treatment of TNCs in a number of its agreements, though with different nuances and emphasis.

This section is not about the merits or de-merits of FDI. Rather, it focuses on the educational process in WTO and attempts to lay out the main arguments as regards the pros and cons of a possible MFI in the WTO. To that end, I shall endeavour to answer three major questions:

- How and where has investment been treated so far in the WTO agreements?
- Why have an MFI in the WTO?
- Why not have an MFI in the WTO?

How and where has investment been treated so far in the WTO agreements?

This is a good starting point because—at some point in time—developing countries have to take the decision whether the existing tools and instruments available in the WTO are adequate and sufficient, or whether they need to be complemented, changed or even replaced.

Investment is not a new issue in the WTO. Apart from its being addressed within the framework of the Havana Charter, a substantive discussion on investment began with the initiation of talks on a new round in 1982. However, in spite of the pressure already exerted by a number of developed countries, investment *per se* was not formally placed on the negotiating agenda of the Uruguay Round: the Punta del Este Declaration (which launched the Round) provided for a significantly narrower set of negotiations, centring on government measures in the area of investment deemed to have restrictive and distortive effects on trade, i.e., trade-related investment measures (TRIMs).

In spite of that, the Final Act contains a number of provisions dealing with issues relating to investment liberalization and even protection. The bulk of these provisions are in two Agreements: TRIMs and GATS. A number of other agreements of the Final Act, namely the Agreement on Subsidies and Countervailing Measures (ASCM) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), as well as the Understanding on Rules and Procedures Governing the Settlement of Disputes, also contain certain provisions relevant to assessing the treatment of investment in general.

The TRIMs Agreement was concluded in spite of strong resistance by a group of developing countries to what had been an attempt by OECD countries, in particular the United States at that time, to create a multilateral agreement for the protection of investment within the framework of the Uruguay Round. The TRIMs Agreement deals primarily with a set of measures usually employed to compel or induce TNCs to meet certain performance requirements. It acknowledges that such measures can have restrictive or distortive effects on trade. It reaffirms existing GATT disciplines relating to national treatment as set forth in article III of GATT and the prohibition of quantitative restrictions (article XI). Though the TRIMs Agreement does not contain a definition of what constitutes an investment measure that violates GATT/WTO principles, it provides an illustrative list that identifies local content and trade-balancing requirements as being inconsistent with article III. At the same time, it states that trade- and foreign exchange-balancing restrictions and domestic sales requirements constitute quantitative restrictions, thus conflicting with article XI. This fell short of what the United States (the country pursuing this issue most vigorously) wanted at the time of the Punta del Este Declaration, namely a very broad coverage for the TRIMs negotiations, including investment issues *per se*, such as right of establishment, national treatment and investment incentives and protection. At the same time, article IX of the TRIMs Agreement calls for future negotiations as part of the built-in agenda of the WTO and acknowledges that stronger policy interrelations in the fields of trade, investment and competition will be likely to warrant the inter-linkages between these issues in the future being addressed in a more comprehensive manner within the multilateral trading system. This mandate was reconfirmed by the ministers in Singapore, and it should be respected and followed up.

It may also have been because of the strong resistance at the time of the Uruguay Round by developing countries—which wished to preserve their sovereignty over investment policies and rejected the tendency to have recourse to trade sanctions to protect property rights—that the United States adopted such a reluctant and skeptical position *vis-à-vis* the attempts led by the European Union, Canada and Japan to put negotiations on an MFI on the WTO agenda at the Singapore Ministerial Conference. The European Union, Canada and Japan succeeded, however, in rallying a number of developing countries behind their endeavour, principally because the latter feared that they would be confronted with a *fait accompli* at the end of the OECD negotiations on a Multilateral Agreement on Investment (MAI).

With regard to GATS, it addresses explicitly the issue of investment—"commercial presence"—in services as one of the four modes of supply of

services to foreign markets, and as part of progressive liberalization in the services sector. In fact, the GATS contains the single largest number of investment-related provisions to be found in the Final Act of the Uruguay Round, as a substantial number of services can be effectively delivered through commercial presence. These provisions relate to matters of investment liberalization. There is no need to discuss them here; suffice it to say that, in many respects, the GATS is the WTO's real investment agreement. However, its structure, and the positive list approach and the various limitations applied in the schedules, continue to be a cause of concern for OECD countries. But as far as developing countries are concerned, they allow countries to choose the industries which they wish to open up to FDI, as well as the degree of that opening up. The GATS—like the TRIMs Agreement—contains its own built-in agenda where one can expect reciprocity in return for further liberalization. This agenda ought to be respected and pursued.

The fact, however, that the GATS applies solely to service providers and not to goods producers or other non-service industry firms is considered by the proponents of multilateral rules on investment as a shortcoming that has to be remedied by an overall agreement on investment. In my view, wanting to extend the arguments for investment in services to investment in goods is as inconsistent as applying the principles of trade in goods to trade in services. Whereas investment is part of the definition of trade in services—because it is a mode of supply—this is not the case for trade in goods. While it was feasible to include investment (under the name "commercial presence") in the GATS (as this was the first timely that "services" had been dealt with in GATT), the same would not be timely as far as goods are concerned: a broadening of the definition of trade in goods to include FDI in goods would require a reinterpretation—and renegotiation—of virtually all GATT/WTO agreements. This would clearly not be a viable proposition.

One could further argue that liberalization of investment in services is incidental, as trade in services is defined to encompass movement of factors of production. That definition was necessary for the services agreement to have a meaningful coverage. Thus, the objective of the services agreement is not to cover investment *per se*, but only to serve as a means of delivering services; in other words, recourse to investment through "commercial presence" was introduced into the GATS because it is a necessary tool for liberalizing trade in services. This approach is not needed for trade in goods. Indeed, the process of liberalizing trade in goods has gone a long way,

beginning with liberalizing measures at the border in GATT and continuing in the WTO framework. Furthermore, it should also be kept in mind that there is a certain "substitutive" relationship between investment and trade in goods; an investment regime for goods could therefore add restrictions rather than work in favour of the liberalization of trade in goods. For example, a firm from country A exports product X to country B, and then decides to invest in product X in country B; the result would be that such production would supply the market of country B with its needs for product X, thereby substituting trade in that product between the two countries. In such a case, product X would, according to the rules of origin, be considered a product of country B, and no longer of country A. What I would like to demonstrate is that, unlike trade in most services, investment geared to providing goods in a particular market would not necessarily lead to the liberalization of their trade. Investment is not as necessary a component for trade in goods as it is for trade in services.

In addition, rules on investment in the area of goods (and services) have been agreed upon in the framework of a great number of bilateral investment treaties (BITs) and various regional agreements. The new positive attitude towards FDI, and the fact that so far most of the liberalization of investment regimes has occurred *without* an international framework of rules, work to the advantage of the existing BITs and regional agreements.

As for the TRIPs Agreement, it contains no provisions directly addressing the treatment of investment, though many like to believe that it will create an environment conducive to investment by enhancing the protection of intellectual property rights. Its real effects on FDI inflows, however, remain unknown, as developing countries have barely entered the implementation phase of the Agreement, and in any event, intellectual property rights protection does not rank high among FDI determinants in most industries.

There may be a linkage between ASCM and FDI flows, and it would be worth looking into the consistency of the ASCM provisions with policies to attract investment. Many developing countries have been confronted recently with the inconsistencies of their investment incentives with the ASCM, in the sense that some financial or fiscal incentives may nullify objectives. A distinction between subsidies and investment incentives on the basis of their differentiated objectives should be studied carefully.

Why have an MFI in the WTO?

Views of countries and groups of countries

The idea of having an MFI in the WTO was advanced primarily by the European Commission, Canada and Japan. The reasons for this remain unclear, particularly in the light of the ongoing negotiations in the OECD on an MAI. It may be that the three pushed for a parallel process in the WTO for the very simple reason that they have a special interest in the markets of the developing countries. Or perhaps the European Commission was the driving force behind bringing the issue to the WTO, because it speaks on behalf of the individual member States in this forum, as compared with the OECD, where negotiations are conducted by the member States as represented by the six-month rotating chairmanship. As for Canada, it may be that that country needs the support of developing countries to have a better balanced investment agreement and a more coherent set of global rules.

The United States remains, however, reluctant to bring the OECD negotiations into the WTO, as it aims for the highest investment standards; moving negotiations to the WTO entails the risk of having to negotiate lower standards.

It is worth noting in this context that negotiations in the OECD began in September 1995. Preparations for them started before then; in addition, the OECD countries have more than thirty years of experience in dealing with capital-flow matters, beginning in 1961 with the adoption of the capital liberalization codes and continuing with the adoption of the investment declaration in 1976, which was followed by a regular review. The OECD had aimed to conclude the MAI by May 1997, a deadline that was extended to May 1998. Many issues, notably the hard-core ones (including the dispute over application of the Helms-Burton law), remain unresolved among OECD members. Whether or not they will be resolved, and an agreement signed, remains to be seen.

Before discussing further the question of why there should be an MFI in the WTO, a brief mention should be made as to why some developing countries were reluctant when the proposal to negotiate an MFI was first made in the WTO before the Singapore Ministerial Conference, and why others welcomed it and felt the need to initiate negotiations in the framework of the WTO. In fact, many of the reasons for the reluctance of some and the openness of others were quite similar, if not identical. Both groups

were apprehensive about the fact that negotiations were taking place in the OECD. For the first time, the developed countries did not content themselves with preparatory work in the OECD before bringing an issue to a larger multilateral forum, as was the case for the Uruguay Round negotiations and also for previous rounds, but went into negotiating a full-fledged agreement in the OECD. What is more, it was made clear from the beginning that the aim was a free-standing agreement open to non-OECD members, which, however, were not allowed to participate in the negotiations. The OECD process follows therefore an entirely different logic from the one that is customary in multilateral negotiations, whereby all countries for which a treaty is intended are invited to the negotiating table, instead of one group of countries claiming to negotiate for all countries. Skeptics questioned the sudden move by a number of developed countries to begin a process in the WTO, as they hardly thought it possible that OECD members would be ready or willing to negotiate another set of rules in the WTO. Rather, they feared that the purpose of a parallel process was to open up the WTO so that the OECD agreement could be transferred *in toto* to the WTO, once it had been finalized. Developing countries that welcomed the WTO members' engaging in discussions and eventual negotiations on an MFI argued that they would not like to see themselves, at a later stage, being invited to sign an agreement in the negotiating of which they had not participated.

Arguments in favour of an MFI

Interest in an MFI stems from a number of considerations, the most important of which, in my opinion, are the following:

- The TRIMs Agreements and the GATS were largely criticized by the OECD countries and their investors. Critics of the former believed that it reflects more skepticism about FDI than is warranted in the new era of competition for FDI. For them, it remains very limited in scope. As for critics of the GATS, they tend to see its shortcomings rather than the importance it accords to investment and the liberalization it has generated by way of commercial-presence commitments. Critics stress that it provides weak and insufficient protection to investors, and its liberalization process is very much hampered by the various limitations in its provisions as well as the positive list approach to commitments. These critics believe that an overall agreement on investment would be a natural complement to existing WTO rules.

- Those developed countries that are proponents of an MFI in the WTO point to the numerous advantages of FDI (employment, transfer of technology, growth opportunities, etc.) and the need for TNCs to operate smoothly and securely in foreign markets, with the fewest possible restrictions and maximum protection. The fact that the international system lacks an agreed set of investment principles to shape and guide the evolution of FDI in a globalizing world economy and that all countries compete for FDI works against the developing countries, as they are perceived to have a less secure investment environment than developed countries.

- The proliferation of BITs (more than 1,300 such treaties existed at the beginning of 1997) and the proliferation of regional and multilateral agreements on FDI issues make it all the more important to establish an MFI, since companies making cross-border investments are currently faced with a vast array of different legal frameworks.[3] Investors would like to be assured of non-discriminatory treatment and be given the highest level of protection.

Why not have an MFI in the WTO?

Countries throughout the world now actively compete for the productive growth opportunities that can accompany FDI. In particular, developing countries are dismantling restrictive measures that discourage or discriminate against foreign investors, creating a more open and conducive investment climate. This is, however, not the point at issue here. Studying MFI issues in the WTO should be confined to answering whether it is a trade-related issue and whether the WTO is the best forum in which to negotiate an agreement on trade and investment, should this be found to be necessary. To that end, it was agreed that the relationship between trade and investment should be examined. Such an examination, therefore, should not deal with the topic of investment policy *per se*, and in particular should exclude investors' rights as the central issues. One point which developing countries need to recognize, however, is that the work undertaken in the OECD regarding the establishment of an MAI is not confined to trade-related FDI issues, but deals with a wider range of FDI issues, from protection to further liberalization.

[3] Even if and when an MFI is concluded, it is difficult to believe that differences in FDI laws and the treatment of TNCs are likely to disappear. Countries may find themselves compelled to provide even more ambitious incentives to attract FDI.

This is not the place to refute each of the arguments put forward by the proponents of an MFI. There are, however, a number of points that ought to be taken into consideration:

- Developing countries are now confronted with a new myth—similar to the myth of a relationship between the TRIPs Agreement, FDI and transfer of technology—of accepting additional disciplines to protect investment in order to encourage and promote FDI inflows. They had been persuaded to accept the higher global norms and protection for intellectual property rights and some disciplines on investment, on the ground that this would promote FDI and transfer of technology and put an end to unilateralism. None of these have so far materialized. Similarly, it is improbable that additional disciplines will affect FDI trends, at the very least, this remains to be demonstrated. On the other hand, new standards on intellectual property rights and increased disciplines on TRIMs constrain the ability of host countries, particularly developing countries, to benefit from FDI in accordance with their needs and development strategies.

- On the one hand, developing countries are now confronted with the call for a multilateral set of rules to control the actions of governments *vis-à-vis* TNCs, while, on the other hand, efforts to finalize a code of conduct for TNCs were formally abandoned in 1993. That meant the end of a major international initiative to draft non-binding guidelines for the behaviour of TNCs to complement the rights TNCs are acquiring—and hence to formulate a balanced set of rights and responsibilities for both TNCs and governments. Instead, we are faced with a strong trend towards reducing and removing more and more regulations that governments have in respect to corporations, towards granting them increased rights and powers, and towards removing or reducing the authority of States to govern their behaviour and operations. There are strong pressures from governments of developed countries in the WTO to grant TNCs the rights of establishment and national treatment, thus widening their rights, whilst blocking or diluting principles that promote development. In the WTO, governments of developing countries, individually or as a group, are not yet adequately prepared for negotiations, compared with governments of developed countries. This situation is all the more problematic as negotiations in the WTO involve legally binding agreements.

- After studying the relevant aspects and various dimensions of the relationship between trade and investment, governments could strive to answer the question of whether we need an MFI, as the study to be undertaken in the Working Group on the Relationship between Trade and Investment is without prejudice to any position and without prejudice as to whether negotiations will be initiated in the future. On the latter, a consensus among WTO members then needs to be reached.

- Many questions arise in this context. For example, are BITs not sufficient? Are the open investment regimes in the developing countries not welcoming enough to FDI? How would multilateral binding rules in the WTO be more attractive to foreign investors? What would be the corresponding rules for TNCs? What would be the rights and obligations of host countries *vis-à-vis* the rights and obligations of investors? Host countries should not lose their right to frame national laws regulating the operations of foreign affiliates through wanting to be more attractive to FDI.

- If the aim of an MFI is to protect and promote FDI, why should it be negotiated in the WTO, which seems to be to many developing countries not the right forum? Why not in the World Bank? Why not a free-standing agreement under the auspices of the United Nations, like the various multilateral environmental agreements? How far will attempts to negotiate an MFI in the WTO distract attention from further market-access negotiations and in whose interest would that be? Are the developing countries really interested in subjecting their national investment policies to the dispute-settlement mechanism of the WTO? So far, this seems to be the only valid argument for the sudden interest in having an MFI negotiated in WTO, at a time when the OECD countries are negotiating among themselves a state-of-the-art agreement. Indeed, it has been argued that subjecting conflicts arising from FDI to an effective dispute-settlement process in the context of a rule-based—and not a power-based—framework works for and not against a comprehensive multilateral framework,especially for smaller countries. In my view, an MFI will basically consist of rules and disciplines on governments in favour of FDI, i.e., it will put governments into a straitjacket. Conflicts will mainly arise because of the insufficient implementation of such rules and disciplines by governments. Hence, a dispute-settlement process would favour TNCs at the expense of government policies and laws, and therefore protect TNCs *vis-à-vis* the smaller, rule-loving countries, and not the contrary.

- In many cases, the autonomous investment liberalization measures taken by countries go even further than any MFI is likely to go. However, no matter how much governments liberalize autonomously, they still keep their full rights to regulate and channel FDI in the light of their objectives and development needs, whereas an MFI would certainly affect the sovereignty of countries in that respect. Developing countries should not lose their right to set performance requirements for foreign investors, with a view to ensuring that they contribute to the country's socio-economic development objectives.

- It has also been argued that a liberalized multilateral investment system will lead to additional FDI flows. No one can dispute that developing countries are doing their utmost to establish an open and conducive environment to attract investment. In addition, it is important to emphasize that FDI flows are attracted, first and foremost, by the size of a country's market, its growth prospects and the quality of infrastructure (including skills), rather than by regulatory frameworks (once these are enabling).

- Also, countries may wish to attract in particular those types of FDI that suit them best in terms of their own development objectives. The composition of the FDI package is not of equal interest to all countries. Governments competing to attract FDI should seek to maximize the benefits they derive in accordance with their priorities, taking into account the new parameters established by a liberalizing and globalizing world economy, which make it all the more difficult to attract FDI and level the playing field in this regard between developed and developing countries.

All this suggests that we—in the WTO—are still far from the stage of arguing for or against an MFI. It was agreed in principle that our point of departure should not be the OECD process. Rather, work should be conducted completely independently from that going on elsewhere. Developing countries should have a fair chance to learn and to educate themselves before any decision is taken regarding the future course of action. Therefore, suggestions for work made by developed and developing countries alike were focused on factual, legal and economic basic studies. More specifically, the Working Group on the Relationship between Trade and Investment has decided that the main topics that should be studied in the coming two years are the following (box 3):

Box 3. Checklist of issues suggested for study in the working group on the relationship between trade and investment

It was widely recognized that the Working Group's work programme should be open, non-prejudicial and capable of evolution as the work proceeds. It was also emphasized that all elements, not only category I, should be permeated by the development dimension. Particular attention should be paid to the situation of least-developed countries. In pursuing the items of its work programme, the Working Group should avoid unnecessary duplication of work done in UNCTAD and other organizations.

I. Implications of the relationship between trade and investment for development and economic growth, including:

- economic parameters relating to macroeconomic stability, such as domestic savings, fiscal position and the balance of payments;
- industrialization, privatization, employment, income and wealth distribution, competitiveness, transfer of technology and managerial skills;
- domestic conditions of competition and market structures.

In this work, the Working Group should seek to benefit from the experience of Members at different stages of development and take account of recent trends in foreign investment flows and of the relationship between different kinds of foreign investment.

II. The economic relationship between trade and investment:

- the degree of correlation between trade and investment flows;
- the determinants of the relationship between trade and investment;
- the impact of business strategies, practices and decision-making on trade and investment, including through case studies;
- the relationship between the mobility of capital and the mobility of labour;
- the impact of trade policy and measures on investment flows, including the effect of the growing number of bilateral and regional arrangements;
- the impact of investment policies and measures on trade;
- country experiences regarding national investment policies, including investment incentives and disincentives;
- the relationship between foreign investment and competition policy.

III. Stocktaking and analysis of existing international instruments and activities regarding trade and investment:

- existing WTO provisions;
- bilateral, regional, plurilateral and multilateral agreements and initiatives;
- implications for trade and investment flows of existing international instruments.

IV. On the basis of the work above:

- identification of common features and differences, including overlaps and possible conflicts, as well as possible gaps in existing international instruments;
- advantages and disadvantages of entering into bilateral, regional and multilateral rules on investment, including from a development perspective;
- the rights and obligations of home and host countries and of investors and host countries;
- the relationship between existing and possible future international cooperation on investment policy and existing and possible future international cooperation on competition policy.

Source: WTO Working Group on the Relationship between Trade and Investment.

- The impact of investment flows on trade, the balance of payments, domestic savings, employment, income and wealth distribution, and macroeconomic management, as voices drawing attention to the incoherence and conflicts between structural adjustment programmes and macro stabilization policies in developing countries, on the one hand, and the globalization of capital flows and freer investment, on the other hand, are becoming louder and more emphatic.

- The impact of trade-investment linkages on the policy options of host countries and on their growth and development policies in general, including the linkages between investment and the local economy, so that TNCs do not operate as an enclave economy.

- The legal and institutional aspects, in terms of examining the trade-investment linkages within the context of specific WTO agreements, which contain investment-related provisions, as indicated above.

- The impact of investment policies on the operation of the WTO agreements. Examination of this topic would identify specific provisions in WTO agreements where investment measures could frustrate their objectives.

- The interrelationship between trade, investment and competition policy. This issue should be linked and studied in conjunction with the second working group, established to examine the interaction between trade and competition policy.

Trade-offs

Studying the relationship between trade and investment in all its aspects, and in a comprehensive manner, does still not answer a number of nagging "what if" questions. What if, at the end of the road, developing countries acquiesce in negotiating an MFI in WTO? What and where should be the trade-offs? Can giving up one's sovereign right to direct FDI towards development objectives and needs be traded-off in the first place? Is an MFI by and in itself good for developing countries? The way the Uruguay Round was negotiated demonstrates clearly how important it is to think about trade-offs, as these may be put on the negotiating table at the eleventh hour, be it by developed or developing countries. The WTO, as an offspring of the Uruguay Round Agreements, provides ample possibilities for trade-offs. Where are these to take place? Within the MFI itself, by integrating the development dimension in an agreement and by aiming at balancing the rights and obligations of investors with the rights and obligations of host countries? Between investment and competition rules, by linking an MFI to a multilateral agreement on competition rules? Or should one even think of a linkage between an investment framework and other goods sectors or rules areas, such as textiles, agriculture or anti-dumping?

These are all options that, at one point or another, developing countries need to consider seriously as part of an overall strategy and as part of their preparation process, so that they do not risk being taken by surprise. One only needs to recall the TRIPs Agreement and the circumstances in which the negotiations took place, when it was presented at the last minute as an

integral part of a "take-it-or-leave-it" package. Also, one should bear in mind that the approach of a industry-by-industry liberalization process in the context of the unfinished business in the GATS has proved to be very protracted and not necessarily to the advantage of the developing countries.

Assessing the situation together

At any rate, developing countries should make the best use of the parallel process taking place in UNCTAD. Indeed, the differences in mandates outlined earlier suggest that one may view the work being undertaken there as being one step ahead of that in the WTO. But the question of whether there is really a need for an MFI remains valid, and should be answered by both processes.

In the end, however, it remains for governments to assess the situation in an objective and comprehensive manner. Expediting work in the WTO with a view to negotiating a framework should be weighed against the often-repeated argument that developing countries will opt to sign up for the OECD MAI.

This, however, is not likely to be a realistic option, particularly in the light of what the OECD agreement is likely to be: a state-of-the-art agreement consolidating the progress achieved so far in bilateral and regional agreements, containing the highest standards of liberalization and protection of investment in such areas as the right of establishment, most-favoured-nation treatment, expropriation and repatriation of earnings, and subject to a multilateral dispute-settlement mechanism, with all the possible implications such a mechanism has. In addition, it aims at having a very broad definition of investment, covering all tangible and intangible assets of enterprises, including intellectual property rights and portfolio investment. Explicit and implicit discrimination against foreign investors will not be allowed. Contrary to the positive list approach used in the GATS (i.e., selecting and scheduling the industries which a country thinks appropriate to liberalize), the OECD approach is to use a negative list (i.e., all industries are included, unless a country explicitly enters a reservation). A negative list approach is followed in NAFTA, and has already proved to be complex and impractical in this three-country agreement. One might only wonder how operational such an approach could be for an OECD agreement, not to mention a multilateral agreement. Moreover, it would be surprising if any developing country saw fit to accede to an agreement that does not foresee differential or preferential treatment to take into account the situation of developing

countries. Once a country accedes to the agreement, it will have to live up to the highest standards and highest obligations agreed upon among the OECD countries, even if it will be able to negotiate a list of exceptions.

However, if a number of developing countries, particularly the most developed among them, accede to the MAI if and when it is concluded, what will be the reaction of other developing countries? Trying to answer such a question cannot only be based on pure speculation. Several scenarios could be envisaged, in which the number of acceding countries and their level of development could be determining factors for the reaction of others:

- If only a handful of developing countries with high levels of development accede, that would hardly trigger a dramatic move on the part of the rest of the developing countries.

- If a larger number of countries accede, the risk of a domino effect could arise, i.e., other developing countries would seek to accede rapidly. But it is conceivable that countries would adopt a "wait-and-see" attitude. The latter option is a possibility, since countries that do not accede to the MAI could very well continue to control the situation, including by engaging in a "beggar-thy-neighbour" policy within the framework of which they would offer even better investment conditions as foreseen in an MFI, including more openness, fewer exceptions, more incentives and tax holidays, stronger guarantees and more protection at bilateral and regional levels.

At any rate, the situation is difficult to predict, as much will depend on the shape and content of the MAI and the derogations it might embody.

Whatever the outcome, it is important not to confuse an MFI with additional flows of investment. It is not difficult to imagine that investment-starved governments in developing countries are made to believe that a multilateral framework which replaces bilateral investment treaties or regional arrangements would lead to additional investment in the country or region. However, this can simply not be proven.

One final point needs to be made: the tendency to regard development as a by-product in an MFI is troublesome. Development is considered more and more to result from a trickle-down effect of globalization and liberalization. In the new thinking, "development" is becoming but a limitation which is often more notional and theoretical than real, and in any case should follow logically from the benefits accruing from the process of globalization, of which freer FDI is only one facet. Developing countries

should resist such thinking. Development is not a by-product. It is not even an objective on a par with the liberalization of trade and FDI, but rather a higher objective which should be served by liberalization, and should not be assimilated to the process of globalization or subordinated to it. Development is neither a notional nor a theoretical problem: it is a real problem—and should be the ultimate objective of our efforts.

In my opinion, there is no rational economic basis for an MFI. The only justification for such an agreement is that it will benefit TNCs. If developing countries start panicking after the conclusion of an OECD agreement and believe that the quicker they accede to it, the more investment they will get, they will be mistaken and will only contribute to a further erosion of the cause of developing countries. Developing countries should first make the best use of the instruments available to them, be it in the WTO (such as the TRIMs Agreement and the GATS) or in the World Bank (such as the Multilateral Investment Guarantee Agency), before believing that they need to be bound by a new investment agreement. No one can deny, for instance, that the GATS has generated positive liberalization dynamics for investment/commercial presence, as it has led to a large number of specific commitments, including by those developing countries. The GATS even allows for compensation through recourse to arbitration aimed at determining compensatory adjustments with equal commercial effect, in instances where members may choose to modify or withdraw a concession made under the GATS. This is analogous to the issue of expropriation, nationalization and fair market-value compensation as addressed in bilateral investment treaties.

The relationship between trade and competition

Brief background

Many efforts have been made to include competition policy (including the treatment of restrictive business practices (RBPs)) in the trade field, including in the framework of the Havana Charter. All of them met with failure. In the late 1950s, a group of experts in GATT prepared a decision (which was subsequently adopted by the Contracting Parties in November 1960), namely the Decision on Arrangements for Consultations on Restrictive Business Practices (box 4).[4]

[4] This Decision was recently invoked by the United States against Japan in the Kodak-Fuji photo-film dispute.

Parallel endeavours were made within the framework of the United Nations by ECOSOC and later by UNCTAD. These culminated in the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (the Set).[5]

The treatment of RBPs restraining competition in international trade in the framework of a binding instrument in the Havana Charter had failed because of strong objections by the United States, which felt that the principle of "reciprocity" in such an instrument had been neglected, if not ignored. Already at that time, when other countries did not have strong and effectively enforceable competition laws, the United States argued against any attempt to impose obligations on its TNCs. Such a criticism at that time was mainly directed towards other developed countries. Today, it applies equally to developing countries. Such a problem, however, did not arise in the negotiations on the Set, as it constitutes a non-binding instrument and was in fact negotiated in a framework of non-reciprocity.

But signs of the long-standing resistance by the United States started to reemerge in the first discussions of the Working Group on the Relationship between Trade and Competition Policy in the WTO, especially as regards the international dimensions of competition rules on RBPs as well as on other topics related to the interrelationship between trade and competition in the context of governmental measures. It is hardly conceivable that the home countries of TNCs, in particular the United States, will agree to any multilateral rules or disciplines to be applied directly to their TNCs, at least not in the foreseeable future. What the scope and objectives of this working group and its underlying principles will be in the light of the different and varied perceptions regarding competition policy and its interaction with trade remain wide open. The extent to which the working group can confine itself to practicalities in its deliberations and not digress into an abstract discussion will very much depend on the goodwill of its members. The group is bound to encounter major problems throughout its life, which (like that of the Working Group on the Relationship between Trade and Investment) is envisaged to be two years. In this part I will try—in a preliminary manner—to address major concerns and basic views on this complex interrelationship, with yet another attempt to ascertain where developing countries stand. This is certainly not an easy task, as we are still in the very first phases of familiarizing ourselves with the issue.

[5] Combined in UNCTAD, *International Investment Instruments: A Compendium* (Geneva: UNCTAD, 1996), Sales No. E.96.II.A.9.

Box 4. Arrangements for Consultations Decision on Restrictive Business Practices

Having considered the report submitted by the Group of Experts, which was appointed under the Resolution of 5 November 1958, and related documents,

Recognizing that business practices which restrict competition in international trade may hamper the expansion of world trade and the economic development in individual countries and thereby frustrate the benefits of tariff reduction and removal of quantitative restrictions or may otherwise interfere with the objectives of the General Agreement on Tariffs and Trade,

Recognizing, further, that international cooperation is needed to deal effectively with harmful restrictive practices in international trade,

Desiring that consultations between governments on these matters should be encouraged,

Considering, however, that in present circumstances it would not be practicable for the CONTRACTING PARTIES to undertake any form of control of such practices nor to provide for investigations,

The CONTRACTING PARTIES,

Recommend that at the request of any contracting party a contracting party should enter into consultations on such practices on a bilateral or a multilateral basis as appropriate. The party addressed should accord sympathetic consideration to and should afford adequate opportunity for consultations with the requesting party, with a view to reaching mutually satisfactory conclusions, and if it agrees that such harmful effects are present it should take such measures as it deems appropriate to eliminate these effects, and

Decide that:

a) If the requesting party and the party addressed are able to reach a mutually satisfactory conclusion, they should jointly advise the secretariat of the nature of the complaint and the conclusions reached;

b) If the requesting party and the party addressed are unable to reach a mutually satisfactory conclusion, they should advise the secretariat of the nature of the complaint and the fact that a mutually satisfactory conclusion cannot be reached;

c) The secretariat shall convey the information referred to under (a) and (b) to the CONTRACTING PARTIES.

Source: GATT, Decision of 18 November 1960.

In spite of the fact that the European Commission proposed the establishment of a working group to address the issues of trade and competition in the WTO prior to the Singapore Ministerial Conference, the issue of competition policy had long been perceived as an issue of interest to developing countries in particular. Unlike in the case of the substantive difficulties and the clear objections made by developing countries to the initiation of work on an MFI, the establishment of a working group on the relationship between trade and competition proceeded relatively smoothly. The main objection was basically that no new issue should be taken up within two years of the conclusion of the Uruguay Round, when developing countries were not yet ready for another round of negotiations. It was then agreed at the WTO Singapore Ministerial Conference to establish a working group to study "issues raised by Members on the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework" (see box 1).

It is worth noting that, unlike in the case of investment, the request to negotiate competition policy and RBPs in the Uruguay Round came initially from the developing countries at the Punta del Este meeting. Though specific negotiations on the issue did not take place in the Uruguay Round, a large number of competition rules are reflected, either directly or indirectly, in various WTO agreements, including those on anti-dumping and subsidies and countervailing measures, the GATS, the TRIPs Agreement, and the agreement on state trading enterprises. The adoption of the Uruguay Round Agreements at Marrakesh witnessed yet another attempt by some of the developing countries to include trade and competition policy on the list of the new or emerging issues to be negotiated in the WTO.

Mandate of the working group

It is obvious that the working group's mandate was drafted flexibly enough, so as to take into account the different positions that had arisen on the complex relationship between trade and competition policies during the initial phase of the discussions. It was clear that no issue, however controversial it might seem, should be left out. The inter-linkages between market competition and industrial structure at the national level as well as at the international level, where levelling the playing field globally becomes the main argument, are interpreted as part of the group's mandate given by the Singapore Ministerial Conference. In addition, the mandate spells out ex-

plicitly that the group is entitled to study issues *raised by members* relating to the interaction between trade and competition policy, including anti-competitive practices. The fact that the mandate has not limited the issues to be raised by members for study, except that they need to be related to the interaction between trade and competition policy, gives the group a whole range of possibilities.

Such an understanding, however, continues to be strongly resisted by the United States, which wants to confine the work of the group to the national perspective and the establishment of national antitrust laws and their enforcement. The main points of contention in the framework of this working group—recognizing the underlying trend towards globalization—are basically two: *first*, whether there is a need for an international agreement on competition policies and a harmonized structure of rules on competition in the light of differences in competition policies; and *second*, to what extent the existing rules of the multilateral trading system take into account the impact of globalization on competition and trade.

Experts in this area consider that competition policy is difficult to define in a precise manner because it aims at influencing a wide range of government policies with a view to encouraging greater liberalization at the international and national levels. Any policy that promotes the contestability of markets could be called a competition policy. Thus, trade liberalization, more open government procurement arrangements, control of the protectionist abuse of technical standards, the reduction of subsidies and, of course, control of RBPs could all be related to competition policies. The overwhelming trend within the working group was to recognize the complexities of views regarding the definition of competition, as it was felt that it would be counterproductive to aim at a consensual definition in the initial phase of its work. This flexibility allowed the group to embark on a rich educational work programme that entails a wide range of studies covering a variety of views. These views can be distinguished according to regions, levels of development and industrial structure, as well as power politics.

Views of countries and groups of countries

The principal positions on competition policy and its interface with trade are set out below:

- The United States, as already indicated, confines competition to nationally pursued competition policies, in the sense of enforcing anti-

trust laws through national authorities, even if that necessitates their extraterritorial enforcement in some cases. (Naturally, extraterritorial enforcement is only a theoretical possibility for most countries.) The United States might consider that international standards on competition policy could theoretically be needed, but the time is not yet ripe for such standards to be implemented in practice. For the United States, the main trade distortions are not caused by private companies, but rather by government practices that do not enforce correct competition laws and policies, thus allowing cartels and distortions in their markets. The United States even views the pursuit of international rules to fight cartels as being fraught with enormous risks, as they may end up becoming meaningless because of the list of exceptions and restraints that they usually contain.

- Japan and the Asian countries consider that the existing rules in the GATT/WTO framework linking trade and competition were developed with a rather narrow perspective and focus. Furthermore, some of the GATT/WTO rules for remedying trade problems were adopted almost half a century ago and have encountered growing skepticism concerning their ability to deal with anti-competitive effects. For this group of countries, the work programme should examine whether current WTO rules are appropriate for remedying market distortions and promoting competition, and how such rules can be adapted to an integrated system of trade and competition in a globalizing world economy, where economies are becoming increasingly interdependent. In fact, this group of countries believes that globalization has rendered conventional trade rules adopted to protect markets at the borders obsolete. They argue that impediments to market access, or distortion of trade, could by and in themselves be distortive as regards competition. The main concern in the Japanese and Asian approach relates to the abuse of domestic regulations for competition-related trade practices, such as anti-dumping and safeguard measures, which in their view restrain competition in domestic markets; their excessive use denotes their purely protectionist purposes. This is a legitimate concern. However, it meets with strong objections by the United States. The European Commission supports the Asian position, in principle; however, it does not want to see the group faltering because of United States objections. Therefore, as a way out, it proposes a step-by-step approach, whereby addressing trade remedies and the impact of trade policy on competition would come at a later stage.

- Furthermore, the European Commission (unlike the United States) acknowledges explicitly the international dimensions of competition policy as a result of liberalization and the globalization process. It has opted for an apparently balanced approach, in the sense that it stresses that the WTO should address the international dimensions of competition policies as well as competition laws and their enforcement mechanisms at the national level. It rightly argues that countries, at all levels of development, are interested in reaping the benefits of liberalization and not in seeing these nullified by barriers erected by firms. Such a position coincides with the understanding of the majority of the developing countries, as they too consider that competition policy should focus on enterprise behaviour. Accordingly, a multilateral agreement should be sought to deal with trade barriers erected by enterprises to trade. The European Commission further argues that national competition laws are not fully equipped to address anti-competitive practices with an international dimension. The main point, however—contested by the developing countries—is the attempt by the European Commission to link national competition-law enforcement procedures with the WTO dispute-settlement mechanism, with a view to ensuring compliance with the WTO provisions.

- Whereas the United States has the capacity to extend its competition policies extraterritorially, other countries, particularly developing countries, lack such power. Their leverage at the national level in enforcing their antitrust laws *vis-à-vis* TNCs is even challenged, in the sense that they can be easily threatened with TNCs' relocation. (De-industrialization, de-nationalization and de-capitalization are new phenomena accompanying the opening up of markets with freer investment and freer competition, if safeguards are not adopted.) As a result, countries are becoming increasingly aware of the need to adopt national competition laws and to establish an appropriate enforcement mechanism, and that for two main reasons:

  - to counter anti-competitive practices of foreign and national firms (including dominant firms and/or state enterprises), i.e., to ensure that foreign firms, in the same way as domestic ones, do not apply RBPs or do not dominate the market;

  - to help attract FDI, i.e., so that foreign investors are assured that they will not encounter anti-competitive practices in the host country market.

There is, however, one important consideration: by adopting national competition laws and opening their markets to more competition by foreign firms while at the same time abolishing their national monopolies, developing countries are certainly taking an immense risk. When they liberalize, they need to ensure that national companies find a niche in order to have an opportunity to develop instead of being forced out of the market. Special and differential treatment for certain industries of developing countries, particularly their small and medium-sized enterprises, would seem essential in this respect. It certainly needs to involve more than longer implementation periods. Countries need to enact enabling regulations once a multilateral agreement is reached. The provisions addressed in the Set could be their point of departure for negotiation purposes. Preferential treatment for developing countries is addressed in the section entitled "Preferential or differential treatment for developing countries."[6] Developing countries have to be conscious of the dangers and risks. They should ensure an optimal transition for firms previously protected from competition, so as to ensure that they can compete successfully as markets are opened to the free forces of competition. They should therefore endeavour to develop proposals about how to level the playing field between foreign and domestic firms in their own markets, while keeping in mind the gap in capabilities between these two groups of firms. It is precisely because of such weaknesses (and others) that developing countries need multilateral rules, to deal with foreign anti-competitive practices at the national or at the international levels.

Basic questions raised prior to the Singapore Ministerial Conference

It might still be worth having a quick look at the three questions that were at the heart of the debate prior to the Singapore Ministerial Conference and at how they still influence work in this area:

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[6] "C(iii) *Preferential or differential treatment for developing countries*:

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:

(*a*) promoting the establishment or development of domestic industries and the economic development of other sectors of the economy, and

(*b*) encouraging their economic development through regional or global arrangements among developing countries."

- *Is the issue of competition trade-related, and does it affect trade in such a substantial manner that it deserves consideration at the multilateral level*? The answer in my view is a straightforward "yes". With growing globalization and liberalization, trade and competition can no longer remain divorced, as has been vigorously stated by developed countries' experts in recent years in UNCTAD's expert group on competition. Recognition of this fact led to the group's name being changed from "Intergovernmental Group of Experts on Restrictive Business Practices" to "Intergovernmental Group of Experts on Competition", thus depriving the group of the possibility of working on the interrelationship between trade policy and competition policy. Today, monopolies and dominant firms should be dealt with at the national and international levels, to allow for trade liberalization and to open markets for developing countries' exports. On the other hand, developed countries' governments should not obstruct fair competition through the excessive use of anti-competitive trade practices. The keen interest shown by Japan and the Asian countries in challenging trade rules that restrict competition—such as anti-dumping, safeguards, subsidies and countervailing measure—is relevant here. Trade distortion is in essence a distortion of competition; and, conversely anti-competitive practices are an obstacle to free, equitable and fair trade.

  One additional point, however, should be kept in mind: for developing countries, the situation is not so self-evident, particularly for those undergoing stringent structural adjustment programmes. To replace state monopolies with competitive small and medium-sized enterprises or joint ventures, while ensuring that the socio-economic aspects are fully taken into account, requires financial resources and, above all, a gradualistic, well-structured and planned approach. Developing countries will have to inject such considerations into the study phase and later into the negotiations, if any. Reciprocity should not be the name of the game, as developing countries have a long way to go to levelling the playing field in this respect. The process of liberalization and the process of enacting adequate national competition laws and regulations should be synchronized. For that reason, a gradual approach is best for developing countries.

- *Is the existing comprehensive multilateral framework sufficient to let competition and trade issues evolve under WTO agreements, and in bilateral and regional competition cooperation agreements, or is there a need for an international agreement on competition rules and disci-*

plines? Though this is perhaps the most complex question (and discussions and studies by the working group at the international level, as well as at the national level, are necessary), I believe developing countries have a vested interest in actively pursuing an international agreement on competition rules and disciplines. Such an agreement would need to deal with anti-competitive practices of firms at the national and international levels, as well as with competition-distorting effects of government measures. Although the promulgation of national competition laws is desirable, developing countries should be cautious about agreeing to a step-by-step approach which would begin at the national level, while nevertheless linking it with the WTO dispute-settlement mechanism, as this could lead to sanctions and cross-sanctions if enforcement is considered inappropriate by a dispute-settlement panel. The onus would fall on the weaker partner in such an agreement. National implementation seems—at the present time— to be the limit the United States and (to a large extent) the European Commission have set for the working group.

The second step would comprise rules and regulations aimed at making firms avoid restrictive business practices that have an effect at the international level (e.g., a ban on export cartels, and control of monopoly-creating mergers). Agreement on this type of international framework on competition could be harder to achieve. In particular, it is difficult to see how such rules and regulations would be enforced directly *vis-à-vis* TNCs. Such an agreement can be adequately implemented only if sincere and sound international cooperation exists, with home country authorities being well disposed to active cooperation with host country governments. Altough it would be difficult—at this stage—to discern any direct rule applicable to TNCs, one could very well think of horizontal rules, in the sense that they are negotiated among governments and implemented by them, which would then directly affect TNCs. Such a step could be taken upfront and constitute a pragmatic and an attainable goal.

The third step could be the establishment of rules to tackle the competition-distorting effects of governmental measures, such as anti-dumping, countervailing and safeguard measures. But the United States and the European Commission oppose such a step at the present time. In the light of this, it is a positive development that the United States and the European Commission have agreed that the working group study this issue without, of course, prejudicing the outcome or

any further work that may be embarked on in this regard in the future. Developing countries should not shy away from insisting on a balanced and integrated approach for the studies to be conducted by the group.

- *Is the WTO the best forum to address the issue of competition and trade? Does the issue need to mature in other, more experienced forums in this field, such as the OECD and UNCTAD?* The status of the WTO is no longer contested. Developing countries are gradually learning how to adapt and make the best use of the system. The question is no longer whether the WTO is the best forum, but how to get the best out of it as a forum. Developing countries have to understand the system and know how to play the game. This is becoming the challenge, not the WTO in and by itself. The issue should be mature in the WTO framework itself. On the one hand, developing countries should not be sidestepped by any process in the OECD. On the other hand, UNCTAD remains a valid organization to assist developing countries. But things have to evolve and mature in the WTO itself, so that developing countries get to know the arena in which they will later conduct the real negotiations. If they want to include the development dimension in this new issue, it is in the WTO itself that they have to make proposals and ascertain the possibilities for their implementation—not in UNCTAD first and then returning to the WTO. UNCTAD can help develop proposals, but these have to be studied and then later negotiated in the WTO. If the latter is to become an adequate forum, it cannot remain aloof from the needs of the developing countries and the asymmetries between developed and developing countries. Otherwise, it is the multilateral trading system as a whole that bear the risks.

The scope of work in the working group

It is worth noting—as recognized by a number of experts in the field—that, with the increased trend towards globalization and the evolving trading environment, TNCs increasingly shape the conditions for competitiveness and competition in markets in which expanded intra-firm trade is becoming the norm. As a result, countries have become more and more interdependent, and markets—indeed, production systems—have become more and more interrelated. Trade policy and competition policy are becoming increasingly complementary to one another and can no longer be dealt with separately. Though developing countries recognize the need to adopt

adequate competition laws at the national level, they also are well aware of the fact that such laws are deficient in addressing anti-competitive practices at the international level. Thus, there is a growing need to look at the linkages between trade and competition from a global perspective, with a view to coming to grips with an international agreement on competition rules and disciplines.

The Working Group on the Relationship between Trade and Competition Policy should address the trade and competition issue in a comprehensive manner and adopt a holistic approach, without prejudice to the results of the work or the issues to be eventually identified that would merit further consideration (box 5). Though developing countries are particularly interested in the international dimensions of competition policy, the group should not shy away from studying—as this is an educative process—the interface of trade and competition involving antidumping and safeguard measures.

In order to increase knowledge of the subject, the working group should embark on a rich educational work programme, a programme that would entail national submissions and studies by the WTO secretariat, in cooperation, where appropriate, with other international organizations, particularly UNCTAD, as mandated by the ministers, with a view to ensuring that the development dimension is fully taken into account. This work should draw upon UNCTAD's Set, whose basic objective is to ensure that RBPs 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. It is important to draw upon the comprehensive nature of the Set. Drawing on it is particularly important, since it incorporates the development dimensions. The Set is therefore a relevant starting point for our work. In fact, developing countriesat some point in time requested that the Set be made obligatory. The possible merits and demerits of eventually bringing the Set into the WTO, as a binding instrument, need to be assessed. This may be an attractive option, but it also entails risks. Developing countries should not forget that the Set itself is a consensus text, resulting from long and tedious negotiations. Therefore, they should not be reluctant to make new proposals, going beyond the Set, in order to clarify what a development orientation requires. New and imaginative measures promoting development should be sought in the framework of our studies.

Irrespective of the various positions adopted so far by countries and group of countries, one could envisage a range of relevant topics to be

Box 5. Checklist of issues suggested for study in the Working Group on the Relationship between Trade and Competition Policy

It was widely recognized that the Working Group's work programme should be open, non-prejudicial and capable of evolution as the work proceeds. It was also emphasized that all elements should be permeated by the development dimension. Particular attention should be paid to the situation of least-developed countries. In pursuing the items of its work programme, the Working Group should draw upon and avoid unnecessary duplication of the work of other WTO bodies concerned with specific trade measures as well as the work under way in UNCTAD and other organizations.

I. Relationship between the objectives, principles, concepts, scope and instruments of trade and competition policy.

Their relationship to development and economic growth.

II. Stocktaking and analysis of existing instruments, standards and activities regarding the interaction between trade and competition policy, including of experience with their application:

- national competition policies, laws and instruments as they relate to trade;
- existing WTO provisions;
- bilateral, regional, plurilateral and multilateral agreements and initiatives.

III. Interaction between trade and competition policy:

- the impact of anti-competitive practices of enterprises and associations on international trade;
- the impact of state monopolies, exclusive rights and regulatory policies on competition and international trade;
- the relationship between the trade-related aspects of intellectual property rights and competition policy;
- the relationship between investment and competition policy;
- the impact of trade policy on competition.

IV. Identification of any areas that may merit further consideration in the WTO framework.

Source: WTO Working Group on the Relationship between Trade and Competition Policy, 8 July 1997.

studied to allow us to understand this complex issue, including the following ones:

- Arguments in favour of and against developing multilateral competition policy standards, and the differences between competition law and competition policy;

- The pros and cons of accepting international obligations as regards the enforcement of national laws and regulations linked to the WTO dispute-settlement mechanism, while taking into account the amount of experience that has yet to be acquired by the majority of developing countries in this domain;

- The development dimension of competition policy and how to ensure an optimal transition for firms previously protected from competition so that they can compete successfully as markets are opened to the free forces of competition, with a comparison of the various approaches—and their costs and benefits—that can be adopted in this regard;

- Anti-dumping policy and its compatibility with competition policy and the possible replacement of anti-dumping rules by competition rules;

- The relationship between investment and competition policy. The linkages between investment and competition need to be made very clear. A multilateral framework on competition and a multilateral framework on investment are two sides of the same coin. The adoption of the former is simply in order to ensure the benefits of the latter;

- The role of competition policy under conditions of intra-firm trade, i.e., trade not dictated by the rules of the market;

- The extent to which the adoption of a multilateral framework would act as a shield against unilateral extraterritorial trade or competition measures. So far tensions in this area have mainly been among developed countries;[7]

- The relevant provisions of the Uruguay Round agreements related to competition, and the extent to which such provisions are compatible with basic competition principles.

[7] A WTO dispute is currently pending between the United States and Japan (with the European Commission being a third party), relating to a United States complaint about alleged nullification and impairment of benefits through the non-enforcement of the Japanese competition law against RBPs in the Japanese photo film market, known as the Kodak-Fuji case.

Developing countries should be cautious about, and take a stand against, any tendency towards having a plurilateral agreement in the WTO as a first step, which would keep the options open for countries to accede to it at a later stage or reconsider the situation in the future. This is not a procedure alien to the WTO: a case in point is the International Technology Agreement, which was introduced into the WTO by the United States only at the time of the Singapore Ministerial Conference, the final deal being concluded three months later among 30 countries. Nevertheless, such a move should resisted. Since trade and competition attract wide-ranging interest, it should be worth while for developing countries to participate actively from the very beginning, as it would be difficult—if not impossible—to unravel an agreement concluded by the main players in the WTO.

It is clear from the above that the issue in question is not an easy one. In greatly simplified terms, there are two basic views:

- According to the first view, the magnitude of the negative externalities or spillovers of nationally pursued competition policies is still unknown. Since these may be minimal, there is no reason to negotiate a multilateral agreement on competition policy. This view is based on the premise that economic theory does not seem to support the idea of linking trade liberalization and an international agreement on competition policy. It is argued that the existing GATT/WTO agreements can be used to address competition-policy-related concerns, in the event that externalities become more significant, for which the basic condition is that the externalities of national competition policies (or the negative spillovers) will have to be attributable to governments. If an externality cannot be attributed to a government, it cannot be challenged by the current GATT/WTO system. According to this view, the relevant GATT provisions in this context are article III on national treatment, article XI on the prohibition of quantitative restrictions and article XXIII (1*b*) on nullification and impairment of benefits from the GATT agreement.

- According to the second view, in the face of increased globalization and liberalization, competition policy cannot be dealt with in the national context alone, especially when the issue of a level playing field between nationally and globally operating firms becomes the main argument for the whole process of development of developing countries. The proponents of this view argue that the phenomenon of globalization and the changing trading environment have helped TNCs

to define the new conditions for competitiveness and competition in markets through adopting global strategies and integrated international production methods, where expanded intra-firm trade increasingly becomes the norm rather than the exception. The way competition policy was viewed at in the past, delinking it from international trade, may have been sensible then. Today, however, competition policy can no longer be confined to a national framework. We are dealing with a phenomenon whose consequences transcend national borders, thus impacting on countries with different levels of development in a varied and unequal manner. The benefits of this new environment, particularly for developing countries, cannot be taken for granted. To level the playing field at the global level, developed and developing countries should cooperate to establish an enabling framework that should allow them to make the best use of the benefits accruing from free trade and freer investment. Thus, there is an increasing need to look at the linkages between trade and competition and investment and competition from a global perspective—and this suggests that a multilateral agreement on competition policy is a necessity.

Between these two views, lie—as we have seen—a whole range of options with different degrees of probability. Ideally, the working group on trade and competition policy should work on a comprehensive and balanced framework of competition principles and policies, which would address both horizontal and vertical restraints and also deal with anti-dumping rules. There seems to be little controversy as to the negative impact of international horizontal restraints on competition, such as price-fixing, including through collusive tendering, market allocation and bid-rigging, and their detrimental effects on international trade and development. Consequently, it should be possible to reach in principle agreement on a multilateral framework prohibiting such restrictive business practices, although the United States continues to view favourably the sectoral approach adopted so far in the GATS, where (in the scheduling of the different sectors) reference is made to competition law and avoidance of the use of monopolies. In the field of vertical restraints and merger controls, however, positions and basic philosophies differ considerably from country to country, thus making the possibility of reaching an international agreement more difficult. Linking either of the possible sets of agreements to a reform of anti-dumping rules seems difficult in the light of the discussions in the working group so far. Perhaps one could opt for a step-by-step approach. This is, however, not easy, as shown above. Things are still vague in the area of trade and competition, and need to be shaped and studied carefully.

It is against this background that, I believe, developing countries—indeed, all countries—should consider seriously and study carefully a binding international framework for competition policy. They should even consider linking closely the idea of negotiating an MFI with a similar agreement on competition, thus balancing the benefits accruing to investors from a possible MFI with the obligations which investors have to bear in terms of conducting fair competition at the national as well as the international level. It was also with this in mind that the link was made in the Singapore Ministerial Declaration between the two working groups, for each draw on the other's work; even prior to Singapore, the TRIMs Agreement attempted to complement investment with competition policy.

Before concluding, I would like to stress that an international agreement on competition rules and disciplines should aim at being comprehensive and balanced in terms of coverage and application. In other words, an agreement cannot aim solely at setting "procedural standards", securing national treatment, non-discrimination, most-favoured-nation treatment, market access and due process for TNCs, without at the same time providing for transparency and allowing the competition authorities of host countries to have access to the necessary information on firms. At the same time, the home countries of TNCs should not fail to take adequate measures against export cartels and curb anti-competitive excesses of trade policy as now practised in the areas of anti-dumping, countervailing measures and safeguards, with a view to ensuring fair competition and that its benefits accrue to consumers.

Conclusions

This has been an attempt to introduce the reader, mainly in developing countries, to the issues in question. Things are still evolving, and evolving faster than we may think. What I wanted to emphasize in this article—even though this could seem parochial—is the need to familiarize ourselves with the WTO system and to learn how to make use of it. It is different from the United Nations system and even more so from that of UNCTAD. Also, the WTO is different from GATT, a so-called rich man's club. The WTO is an organization in which developing countries are now well represented. *They are there.* Countries such as Brazil, India and the ASEAN countries are slowly integrating into the world trading system, and are becoming active

members of it. It is high time for others to follow suit, so that their voices can also be heard.

So far the two working groups have been focusing on organizational and procedural matters. Delegations from developing and developed countries alike continue to stress that work in the two groups, at this stage, is of an educational and exploratory nature. The next WTO Ministerial Meeting, to be held in Geneva in May 1998, will mainly be for celebration purposes, i.e., to celebrate the fiftieth anniversary of GATT/WTO. As it will not deal with the new issues, this should give developing countries ample time for good preparation with the framework of the working groups ahead of the 1999 Ministerial Conference. ■