Bridging the Differences

Analyses of Five Issues of the WTO Agenda

- Investment
- Competition
- Antidumping
- Mobility of Labour
- Textiles & Clothing

Edited by L. Alan Winters and Pradeep S. Mehta

European Institute for Asian Studies

UNIVERSITY OF SUSSEX AT BRIGHTON

कट्स CUTS
Twenty Years of Social Change
1984 to 2003

#0317

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Published by:

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CUTS Centre for International Trade, Economics & Environment
D-217, Bhaskar Marg, Bani park
Jaipur 302016, India
Email: citee@cuts.org
Website: www.cuts.org

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Layout by:

Sumit Kumawat
CUTS, Jaipur

Printed by:

Jaipur Printers P. Ltd.
Jaipur 302001

ISBN: 81-87222-92-1

First Print: September 2003
Reprint: October 2003

This document has been produced with the financial assistance of the European Community. The views expressed herein are those of the authors and editors and can therefore in no way be taken to reflect the official opinion of the European Commission.

#0317 SUGGESTED CONTRIBUTION Rs.350/US$50

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Foreword

A rule-based global trading system, enshrined in the member-driven World Trade Organisation (WTO), is at a critical juncture. The Fifth Ministerial Conference (FMC) of the WTO is to take place in Cancun, Mexico, in September. It is to review the progress in the multilateral trade negotiations launched at the Fourth MC in Doha, Qatar, in November 2001.

Unfortunately, as of mid-July, 2003, with less than two months to go for the Cancun meeting, some of the crucial deadlines set in the Doha Ministerial Declaration (DMC)—such as those relating to the provisions (in particular, compulsory licensing) of the Uruguay agreement on Trade-Related Aspects of Intellectual Property Right (TRIPs), as they affected public health, Special and Differential Treatment for developing countries and modalities for market access negotiations on agricultural and non-agricultural products—have not been met. Not much progress has been made since the expired deadline, except for the hopeful sign that the EU is seriously considering decoupling agricultural subsidies from production and exports.

Nor is there any agreed draft of their declaration for the ministers to discuss at Cancun. With several other items set in the DMC for the ministers to review, unless the ministers show much greater willingness to cooperate than they have evinced since Doha and are ready to put in whatever effort it takes in Cancun, the spectre of a possible collapse of the Fifth MC at Cancun, as happened at the Fourth MC in Seattle, looms large.

A contributory cause for the impasse in negotiations is the difference in the perspectives of developing countries (DCs), on the one hand, and the mature countries (MCs) on the other, both on the negotiating agenda, and on their positions on the items on the agenda. This is not to say, of course, that all DCs (and MCs) agreed on everything among themselves. On agriculture, for example, the US and the EU (in particular, France, an EU Member-state) differ on the pace of elimination of export subsidies and reductions in domestic support measures.

Among the developing countries also, importers of food and other agricultural commodities see the export subsidies of the EU as benefiting them while exporters of the same commodities see them as damaging them. Nonetheless, on certain issues (*e.g.*, the so-called Singapore issues of trade and investment, trade and competition policy, trade facilitation and transparency in government procurement), the DCs are united. They failed to keep these issues out of the negotiating agenda: it was agreed at Doha that the modalities for negotiations on these (as well as the issues of trade and environment) are to be determined by explicit consensus at Cancun. Thus far, the issue of labour standards has been kept off the negotiating agenda, despite pressure from the EU. As the Director-General of the WTO, Dr. Supachai Panichpakdi, commenting on the failure to meet deadlines on several issues, succinctly puts it, “If greater flexibility is not found and understandings not reached on at least some of these issues, the ministers may be faced with an unmanageable task at Cancun.”

India, a leading developing country, was a reluctant supporter of the launch of the Doha Round. It had been a champion of the (now lost) cause for keeping Singapore issues off the negotiation agenda altogether and for settling the issues of implementation of the Uruguay Round prior to the start of a new round. The EU was, on the other hand, a staunch supporter of including not only the Singapore issues but also labour standards on the agenda.

Given the critical roles of India and the EU, not only in the Doha Round negotiations but more generally in the global trading system, it is particularly appropriate that an EU-India Network on Trade and Development (EINTAD) was set up in May 2002, in Brussels with a leading NGO—*Consumer Unity & Trust Society* (CUTS)—taking the initiative. The network has the long-term objective to involve research, policy and civil society organisations in analysing national and international policies and building capacities for policy-oriented research.

EINTAD brought together as partners several researchers from India, University of Sussex in the UK and the European Institute of Asian Studies in Brussels. This volume is the first publication from their research collaboration. It reports on research findings on five key issues: anti-dumping, textiles and clothing, competition policy, investment, and mobility of labour. It is timely, and its findings will undoubtedly be of immense value, not only for the negotiations of the EU and India, but also for the ministers at Cancun. Let me briefly summarise the volume.

The proponents of a multilateral investment agreement (MIA) are mostly mature capital-exporting countries, which claim that such an agreement would increase flow of foreign direct investment (FDI) into DCs by reducing uncertainty and risk associated with such investment. However, since capital-importing countries have unilaterally liberalised regulations on FDI and they are signatories to the multilateral investment guarantee agreement—administered by the World Bank—thereby ensuring, in particular, against the political risk of expropriation, and have also entered into bilateral and plurilateral investment treaties, the need for an MIA is not compelling. The authors of the investment chapter point out that, given many pre-existing treaties and agreements, unless the proposed agreement is plurilateral, consists of the smallest "common denominator" among the prior bilateral and other agreements, allows WTO members to enter into more substantive agreements with limited membership, it is unlikely to reduce the transaction costs of FDI significantly.

In any case, they do not find any compelling empirical evidence suggesting that an MIA in the WTO would augment FDI flows to DCs—in fact, until prior to the global economic slowdown since 2000, there was a boom in FDI, even in the absence of MIA. Besides, with DCs' insistence that Special and Differential Treatment with respect to their obligations should be part of any proposed MIA, it is more likely that FDI flows will fall, rather than rise, with the conclusion of an MIA. The authors find it unlikely that the DCs would be able to block an MIA if MCs press for it. Given this reality, the authors suggest that the DCs, instead of trying to block an MIA, would benefit by committing themselves to a rule-based FDI regime that included national treatment for foreign investors and a ban on performance requirements. Such a commitment on their part would also put pressure on MCs to reciprocate with concessions on issues like labour mobility and standards.

The chapter on competition policy surveys the submissions by India and the EU to the WTO working group on trade and competition. Although India has expressed strong reservations about the proposals of the EU, the authors feel that surprisingly, India's own proposals are not that far removed from the EU's. The latter, in fact, involved only limited additional obligations for signatories to a multilateral agreement by confining national treatment obligations only to de *jure* discriminations. The authors agree that free trade alone does not guarantee the elimination of private international cartels. They conclude that although EU proposals do not infringe India's sovereignty, they do not deliver what India seeks either.

Among the items on which agreement could not be reached as part of the General Agreement on Trade in Services (GATS) during the Uruguay Round was Mode 4 of the trade in services, called in WTO terminology, "Temporary Movement of National Persons (TMNP)." The word "temporary" distinguishes such movement of individuals from longer-term migration. The potential for mutually gainful temporary movement of labour from developing to mature countries is substantial. Besides, being temporary in the sense of the workers having to return to their home countries at the end of their contractual work abroad, such movement, in principle, should be less prone to the concerns in MCs over the differences in religious, social, political and economic backgrounds of immigrant labour from poor countries. Further, given their shrinking labour force as a proportion of their aging population, developed countries would benefit from the contribution of temporary workers to payroll and other taxes that support pension payments to their retired workers. Still, there has been no movement towards an agreement on TMNP.

The authors of the chapter on mobility of labour suggest that possible reasons for the failure to conclude an agreement on TMNP include a lack of flexibility of GATS and Most Favoured Nation (MFN) requirements. They argue that countries prefer to turn to their regional neighbours for supply of specific services and therefore are, reluctant to offer MFN treatment to all providers, regional and extra-regional. Further, there is the fear that temporary foreign workers would eventually seek permanent residence. Thus, rules for permanent immigration, which allow for flexibility and discretion, would conflict with the more rigid and non-discretionary rules of GATS that would apply to TMNP.

The authors note that health workers from India and the Philippines have been working in Europe and North America under regulations rooted in immigration laws. They suggest incorporating the relevant features of these regulations into commitments for TMNP under GATS. This would benefit countries of origin of workers by providing a predictable, transparent and non-discriminatory framework for their workers contemplating temporary work abroad as well as their employers there. Such a framework for temporary movement also overcomes the bias in immigration laws in favour of skilled workers, thus alleviating the concern of poorer countries of origin that a large proportion of their skilled workers would permanently emigrate. They propose a special "GATS visa" for easing TMNP.

A detailed study of Philippine nurses cited by the authors suggests that unregulated movement of Philippine nurses to foreign countries adversely affected domestic healthcare services. From a study of the Indian doctors working in the UK, the authors infer that India's comparative advantage might lie in educating students for their first and basic degree in medicine. On the other hand, the comparative advantage of the UK might be in providing advanced and specialised training as well as experience with the use of modern technology to doctors, who have been trained abroad for their basic degree.

Economists have long argued that the only rationale for dumping, properly defined, is predation, and that the predatory purpose of dumping is most unlikely to succeed, since it is virtually impossible to keep future entrants out of the market, even if dumping forces out incumbents. Nonetheless, by alleging dumping by foreign exporters causing injury to domestic producers, countries can access anti-dumping measures (ADMs) allowed by GATT/WTO to penalise exporters, not only on a discriminatory basis (in fact, even individual enterprises in the exporting country could be targeted) but also without compensation to exporters. Not surprisingly, ADMs have long been the favourite of protectionists and accounted for an overwhelming majority of contingent protection measures used. Until recently, the US and the EU were the leading users of ADMs. Unfortunately, India has taken this dubious leadership in the last two years, and other developing countries, such as South Africa and Brazil, are also using ADMs. Even more importantly, developing countries are initiating ADMs against other developing countries (*e.g.*, India against China).

It is unrealistic to expect that if an agreement is reached at by the conclusion of the Doha Round, it will include a provision to outlaw ADMs altogether. This being the case, several suggestions of the authors in the chapter on ADM to tighten the use of ADMs are worth the negotiators' attention. In particular, the suggestions to allow consumer interests to be heard in the process of decision-making on the use of ADMs, to expand the definition of domestic industry for the purpose of determination of injury caused by alleged dumping and mandatory use of all allowable injury parameters are noteworthy.

The Multifibre Arrangement (MFA), an agreement under which quotas on trade in textiles and apparel are bilaterally negotiated, is to expire on January 1, 2005. This arrangement evolved from a short-term agreement in the early 1960s on trade of cotton textiles that was primarily intended to restrict exports of such textiles from Japan, to cover trade in textiles and apparel made from almost all natural fibres known to man god! By allowing bilaterally negotiated quotas, MFA egregiously violates the principles of non-discrimination enshrined in Article I of GATT on MFN treatment and the prohibition of the use of quotas for restricting trade.

Yet, because the quotas were "voluntarily" (analogous to "voluntary export restraints" agreed to by Japanese exporters of automobiles to Europe and the US**)** agreed to by the exporter rather than imposed by the importer, technically it did not violate any explicit GATT rule. The fact that quota rents accrued to the exporters also helped in making them agree. Since the exporters were mostly developing countries and MFA restricted their exports, the abolition of MFA was deemed a benefit that DCs obtained in exchange for agreeing to TRIPs in the Uruguay Round. In fact, the benefits from the abolition of MFA would largely accrue to consumers in importing countries, in effect transferring quota rents from exporters to consumers. As such, the benefits did not outweigh the cost to DCs of TRIPs. Besides, there is also a legitimate fear that the importers would replace MFA quotas by other measures (ADM is one such measure) to restrict exports of developing countries.

Even if no new restrictive measures are imposed by the importers after the abolition of MFA, the entry of an efficient and low-cost exporter, namely China, into the WTO could mean that other less competitive DCs may lose their quota-based market shares to China. India would not be among such DCs, according to the empirical analysis of the chapter on textiles and clothing. The authors show that Indian exports of clothing and textiles would potentially increase after the abolition of MFA.

Much would depend on India becoming more competitive by improving its transportation and communications infrastructure by encouraging the entry of private firms, improving the efficiency and flexibility of labour markets by amending its rigid labour laws, accelerating the reforms in the financial sector and above all, by further reducing tariff and non-tariff barriers. The policy of creating special economic zones, within which all barriers to the efficient functioning of factor and goods markets are eliminated ahead of the rest of the economy, could contribute to improving India's competitiveness. The authors recommend that India reduce its tariff and non-tariff barriers unilaterally (without waiting to trade such reductions for reductions of trade barriers in other countries as part of an agreement concluding the Doha Round). They suggest that doing so would be to India's advantage.

The above summary is much too brief to be anything more than suggestive of the richness and depth of the analyses in the individual chapters. Hopefully, it is enough to whet the appetite for reading the book in its entirety.

Stanford
July, 2003

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Acknowledgements

This volume owes much to the efforts of several people. Many during the implementation of the Project made significant contributions. Thanks are due to researchers, partner organisations, members of the Project Steering Committee, Project Conference Participants, CUTS Staff and last, but by no means least, to the funders- European Commission, New Delhi, whose financial support made the entire venture possible. A special thanks is due to Pascal Lamy, EU Trade Commissioner, who inaugurated the launch meeting of the project, which was held at Brussels. It may be difficult to list all the names but some others too need special mention.

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Abbreviations and Acronyms

ABHI	Association of British Healthcare Industries
ADA	Anti-dumping Agreement
ADD	Anti-dumping Duty
AIA	ASEAN Investment Area
ATC	Agreement on Textiles and Clothing
ASCM	Agreement on Subsidies and Countervailing Measures
BMA	British Medical Association
BMJ	British Medical Journal
BOP	Balance of Payments
BPM	Balance of Payments Manual
BUPA	British United Provident Association
BITs	Bilateral Investment Treaties
CVDs	Countervailing Duties
CCST	Certificate of Completion of Specialist Training
CFI	Court of First Instance
CIS	Commonwealth of Independent States
CMIT	Committee on Capital Movements and Invisible Transactions
CMEA	Council for Mutual Economic Assistance
CMIE	Committee on International Investment and Multinational Enterprises
DFID	Department for International Development
DSB	Dispute Settlement Body
DDA	Doha Development Agenda
DTI	Department of Trade & Industry
EC	European Commission
EEA	European Economic Area
EU	European Union
FTAA	Free Trade Area of the Americas
FATS	Foreign Affiliate Trade in Services
FTTA	Fixed-Term Training Attachment
FTAIA	Foreign Trade Anti-trust Improvements Acts
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GMC	General Medical Council
GTAP	Global Trade Analysis Project
GNP	Global Nurses Programme
GP	General Practitioner
GOI	Government of India
HSMP	Highly Skilled Migrant Programme
IELTS	International English Language Testing System
ICU	Intensive Care Unit
IMA	Indian Medical Association

MAI	Multilateral Agreement on Investment
IMC	Indian Medical Council
IMF	International Monetary Fund
ICSID	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
INUKNA	Indo-UK Nurses Association
IPS	International Passenger Survey
IT	Information Technology
ICC	International Chamber of Commerce
ISD	International Subscriber Dialling
LTFV	Less Than Fair Value
MFN	Most Favoured Nation
MFA	Multifiber Arrangement
M&As	Mergers and Acquisitions
MCI	Medical Council of India
MRA	Mutual Recognition Agreement
MSITS	Manual of Statistics for Trade in Services
NCAER	National Council of Applied Economic Research
NHS	National Health Services
NT	National Treatment
OECD	Organisation for Economic Co-operation and Development
OSCE	Observed Structural Clinical Examination
ODTS	Overseas Doctors Training Scheme
OPT	Outward Processing Transition
PIO	Person of Indian Origin
PLAB	Professional and Linguistic Assessment Board
POEA	Philippine Overseas Employment Administration
PPP	Purchasing Power Parity
PRHO	Pre-Registration House Officer
PRC	People's Republic of China
RTAs	Regional Trade Agreements
RBP	Restrictive Business Practice
SHO	Senior House Officer
SOPEMI	Continuous Reporting System on Migration (Systeme d' Observation Permanent des Migrations)
SpR	Specialist Registrar
STD	Subscribers Trunk Dialling
TE	Triennium Ending
TBT	Technical Barriers to Trade
TCI	Textile and Clothing Industry
TMNP	Temporary Movement of Natural Persons
TWES	Training and Work Experience Scheme
TRIMs	Trade Related Investment Measures
UKCC	United Kingdom Central Council for Nurses
UNICE	Union of Industrial and Employers Confederations in Europe
WTO	World Trade Organisation
WGTCP	Working Group on the Interaction between Trade and Competition Policy

Introduction

This book is a product of the programme known as the EU-India Network on Trade and Development or EINTAD, launched by CUTS Centre for Trade, Economics & Environment in May 2002 in Brussels. The University of Sussex, UK and the European Institute for Asian Studies, Brussels, agreed to be partners in the project, and their representatives, along with other researchers from the two regions, participated in the launch meeting. This publication contains research papers undertaken jointly by Indian and European economists and lawyers under this initiative. It has, thus, established a platform for doing collaborative policy-oriented research on the relationship between trade and development, which, it is intended, will become an important forum for exchange of ideas, knowledge and information on emerging trade issues in the multilateral context and on the political relationship between the EU and India.[1]

The project was designed for both analysing some of the contentious issues of the Doha Development Agenda (DDA) and increasing the mutual understanding and trust between the developing and the developed countries. While there are obvious and real differences of interest among countries on many of the issues on the DDA, these have been magnified and appear less tractable, because the parties often do not understand their partners' positions or trust their motives. The EINTAD project sought to address this impasse by analysing some of the contentious issues in teams of European and Indian economists and legal scholars. In part, it is hoped that new approaches to old problems will provide inspiration to negotiators and technical solutions to their problems and fears. The EINTAD hopes that by pairing Indian and European researchers, it will both show that co-operation is feasible (albeit at a lower level than that of the negotiators) and furnish a stock of experts on each side of the debate, who have some experience of the other.

The context for this co-operation could hardly be more critical. The DDA is struggling to reach even provisional commitment on various critical issues that were accepted as necessary precursors to full negotiation — essential medicines, publication of offers on agricultural reform and the special and differential treatment of developing countries. These issues have highlighted a whole series of rifts between participants and led to a diminution, if not a complete breakdown, of mutual trust. Prominent among these rifts is that between the EU and the developing countries, which is the one that we hope to bridge.

The Cancun meeting was always going to be important, but in the last few months, it has assumed a broader and more critical significance. The souring of relations between the

[1] The University of Sussex expresses no institutional position on the issues discussed in this volume. The views expressed are the sole responsibilities of the authors and editors.

US and Europe and between the developed and developing countries is beginning to threaten the notion of multilateralism more deeply than had been imagined even a few years ago. In fact, determining relatively small changes in trade policy instruments and minor changes in the rules of the international trading game should be among the easiest of subjects for multilateral action. Thus, if Cancun does not push the DDA forward significantly, it will send an unmistakable signal of erosion of the post-war multilateral ideal and cast a deep-shadow on many other aspects of the global system, including issues of war and peace.

For minimum, Cancun must demonstrate clear progress on the precursor issues, like medicines and Special and Differential Treatment (S & DT); on agriculture, which has (rightly) become the touchstone of developed countries' willingness to use trade policy as a tool for reducing global poverty; on services, which offer the greatest scope for mutual gains from trade liberalisation; on barriers to manufacturing trade, where the issue is developing countries' own trade barriers that penalise their consumers and prevent the emergence of profitable trade amongst the developing countries; and on the Singapore issues-investment, competition policy, trade facilitation and government procurement, which have become a focus of intense developed-developing country debate. Among the other areas, on which one might hope to see progress, are anti-dumping duties and dispute settlement, which are major concerns in parts of the developing world.

The EINTAD project has considered five of these areas—directly or indirectly—to identify similarities and differences in the developed (EU) and the developing (India) countries' interests, and to help bridge the differences by providing a sound analytical basis for thinking about them. While we have not attempted to solve all of the outstanding issues, the project has focussed on several of the most important among them. This chapter briefly introduces the five studies.

Multilateral Agreement on Investment

Chapter 1, by Peter Nunnenkamp and Manoj Pant, starts by observing that the demand by industrialised countries for a multilateral agreement on investment, to be negotiated under the WTO, has aroused considerable resistance on the part of most developing countries and the groups, such as the western NGOs, which claim to speak for them. The proponents of such a multilateral agreement argue that binding disciplines on capital-importing countries would help reduce uncertainty and, hence, result in more foreign direct investment (FDI) in developing countries. By contrast, the opponents argue that such an agreement will be biased in favour of business interests and against the development objectives of developing economies.

Although appealing to more empirical and pragmatic arguments than the NGOs and expressing them in much more measured tones, Nunnenkamp and Pant conclude that the case for a multilateral agreement on investment is not compelling:

- Investment regulations have been progressively liberalised via unilateral measures in the complete absence of multilateral obligations to do so. Moreover, the protection of foreign investors against political risk is frequently achieved via the large number of bilateral and plurilateral investment treaties.

- A multilateral agreement could reduce FDI-related transaction costs significantly only in the unlikely event that it replaced the complex net of 2000-plus existing bilateral arrangements. A "WTO-plus" framework appears to be the more realistic outcome of negotiations, with a multilateral agreement defining the lowest common denominator and WTO members continuing to maintain more substantive agreements with limited membership.
- The empirical evidence suggests that WTO negotiations on investment are neither sufficient nor necessary to induce higher FDI flows to developing countries. Transaction cost-related impediments to FDI have played a minor role in driving FDI, and the absence of a multilateral agreement has not prevented the recent boom of FDI in developing countries.

The authors then note that wishful thinking also pervades the position of the developing countries. The latter want to insist on preferential treatment with regard to their own obligations as host countries but on binding obligations on foreign investors and their home countries. It is highly questionable whether developing countries could derive more benefits from FDI if a multilateral agreement were to include a "development clause" allowing for flexible and selective approval procedures and performance requirements, such as local-content rules. The call for binding rules on the behavior of foreign investors may very well discourage multinational enterprises from investing in developing countries altogether, instead of fostering transfers of technology and improving the quality of FDI. By insisting on preferential treatment with regard to FDI incentives, developing countries tend to ignore the fact that incentives-based competition for FDI is mainly among themselves. Nunnenkamp and Pant argue that an agreement to limit investment incentives by developing country governments would be very desirable, but equally, very unlikely in the present climate.

Unless developing countries are prepared to tie their own hands, they cannot reasonably expect significant concessions from industrialised countries. Developing countries will become relevant negotiation partners in the WTO only by offering something of their own. Rather than engaging in a futile attempt to block multilateral negotiations on investment altogether, therefore, Nunnenkamp and Pant argue, developing countries should commit themselves to rule-based FDI policies as a negotiating chip. Besides, they say, the pressure on industrialised countries to engage in negotiations on labour mobility would mount if developing countries refrain from performance requirements and grant national treatment to foreign investors.

Competition Policy

If investment is the most sensitive of the Singapore issues, competition policy is the second. In Chapter 2, T. C. Anant, Simon Everett, Peter Holmes and James Mathis analyse several of the issues at stake in the discussions surrounding the creation of a competition policy agreement at the WTO.

They begin by surveying the formal submissions of India and the EC to the WTO Working Group on Trade and Competition and try to identify the exact location and nature of the differences between them. Despite the very strong reservations expressed by India about the EC's proposals, they nevertheless find that the Indian position is actually not particularly far removed from them. India has expressed support for the UNCTAD "Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices", and, once one gets below the rhetoric and legalese, the EC's current proposals differ little from the Set.

The authors next look in more depth at the EC's proposals, asking just what new rights and obligations are implied by and what a WTO agreement inspired by them would mean for a developing country like India. They suggest that the EC's current proposals involve surprisingly limited additional obligations for signatories to a multilateral agreement. Indeed, in some important respects, the EC's proposal would actually reduce the extent of WTO obligations in competition policy, by confining GATT Article III, on National Treatment obligations in competition law, to *de jure* discrimination (*i.e.* implicitly permitting *de facto* discrimination, which is currently disciplined if it disadvantages imports) and by making further provision for special exceptions.

However, if there were no *further exclusions*, an agreement along the lines of the EC's proposals would extend the scope of the *de jure* national treatment requirement beyond its present application to include non-traded goods and to non-scheduled services. The chapter explores a variety of different means, by which exclusions could be articulated, including the possibilities of codifying existing obligations, and of adopting a "GATS" model, whereby members schedule, when they are ready, specific sectors and specific violations of competition as actionable under the agreement.

The final part of the chapter looks in depth at the costs and benefits of the EC's proposed provisions on *hardcore cartels*. The authors argue that recent evidence makes it hard to sustain the view that free trade alone guarantees contestable markets. In particular, private international cartels have been active in both industrial and developing countries. Moreover, recent evidence suggests that the deterrent effect of effective anti-cartel enforcement measures is considerable. They also cast doubts on the often-heard claim that the enforcement of competition law is an unjustifiably expensive activity. The authors explore a number of specific issues on cartel enforcement, including the Indian concern about the withholding of "confidential" information and related concerns about the viability of amnesty provisions. They believe that developing economies' interests would be best served by exploring arrangements, where the amnesty provisions in industrialised countries' competition laws could be used to provide incentives for cartel conspirators to willingly reveal the extent of their activity to enforcement officials in developing as well as developed countries.

Overall, Chapter 2 concludes that from India's point of view, the weakness of the EC proposals at the time of writing is not so much that they would be invasive of India's sovereignty, as they would deliver relatively little of what India seeks.

Temporary Movement of Workers – GATS Mode 4

Even before the General Agreement on Trade in Services (GATS) can flap its nascent wings, the literature is already overflowing with its likely hap. A group of developing countries has concluded that, *"The fundamental objective of the GATS Preamble – to achieve an overall balance of rights and obligations for all the WTO Members – has not been attained"*.

Christine Breining, Rajesh Chadha and L. Alan Winters start Chapter 3 by observing that arguably, the least liberal and most inequitable areas of the GATS is the Temporary Movement of Natural Persons (TMNP - Mode 4). Developing countries are replete with labour willing to move temporarily to work, and yet TMNP accounts for less than 2 percent of services trade and even less of GATS concessions. This neglect of TMNP as a route to market liberalisation almost certainly stems from the extreme political sensitivity of migration within developed countries coupled with the current tendency to equate temporary mobility with migration in both popular perception and bureaucratic treatment.

Breining, Chadha and Winters argue, however, that the issue will become unavoidable in the developed countries as economic pressures build up. The need for inflows of labour is already high and is certainly growing, as developed countries' work forces age and their relative skill level and job aspirations rise above those needed for many important services. TMNP offers a way out of this impasse: while the direct economic consequences of TMNP are similar to those of migration, TMNP is not the same as international migration, for it does not entail commitments to social welfare or shifts in residence of the workers concerned.

It might, thus, appear surprising that so little enthusiasm has been evinced for the GATS Mode 4. The authors of Chapter 3 suggest a number of possible reasons, including the lack of flexibility of GATS bindings and the MFN requirement. Their behaviour suggests that developed Member government prefer restricted or regional arrangements for recruiting specific service providers. This tendency is further strengthened by fears that labour mobility under the GATS could serve as a tool to establish permanent residence and, thus, conflict with the existing immigration policies. From this point of view, existing immigration rules allow for more flexibility by granting more room for discretion. This flexibility contrasts with the need for transparency and predictability, which is required by the GATS. The authors suggest that the introduction of a GATS visa should be further examined as a way of generating additional mobility without having to change immigration policies fundamentally.

The Chapter offers a detailed discussion of the movement of doctors from India to the UK based on new data. This is a major flow and a critical one for the UK's national health service (NHS); it takes place outside any GATS provisions. The flows are ostensibly temporary, but in fact, rates of staying are quite significant, and the data raise at least the possibility of brain-drain losses to India. One interpretation of the situation is that the movement of doctors reflect comparative advantage in the production of fully qualified doctors. India's comparative advantage might lie in providing basic education and first degrees in medicine, while the UK's might lie in high-level practical training with modern technology.

Obviously, the movement of health workers from Asia to Europe takes place at present despite the absence of commitments under GATS. Three arguments are made in the chapter for extending the commitments under Mode 4 of the GATS: first, such commitments would benefit the sending countries by providing a more predictable and transparent framework that is based on non-discrimination. This would encourage the flow to developed countries, which are coming to depend more heavily on them. Second, by making the inflow more secure, a GATS commitment will allow employers more confidence in its continuation and, thus, allow greater adjustment in the direction of comparative advantage. And third, expanding Mode - 4 commitments could be used as a tool to overcome the bias in favour of highly qualified labour. Since the evidence suggests that the brain drain may be a problem for countries with extensive export of health workers, a GATS framework could serve as a safeguard because it encourages explicitly *temporary* movement of persons rather than pseudo-permanent moves. A study on Filipino nurses reported in the chapter shows that domestic health service delivery may seriously suffer if the movement of nurses to foreign destinations is left unregulated.

Anti-dumping

Chapter 4, by Krista Lucenti and Sharad Bhansali, considers anti-dumping duties (ADD). It documents their recent evolution – especially the growth in their use by large developing countries – makes a case for their existence and offers some suggestions for their reform at the DDA. While ADDs are very sensitive, there appears to be a little willingness to consider their administration, even by the USA. The authors draw a number of strong conclusions from their study. They argue, and uncontroversially, that despite the widespread agreement about the welfare-reducing effects of ADDs, governments will continue to view them as a politically-easier alternative for promoting efficient and competitive domestic industries. That is, the DDA will not abolish ADDs.

Over 1987-2001, anti-dumping cases accounted for 86 percent of all types of contingent protection measures (anti-dumping, countervailing duty, safeguards, etc.) used by WTO members. At the same time, developing economies surpassed the traditional users (the US, the EC, Canada and Australia), accounting for over half of the AD complaints, measured by the number of cases filed. The major new users are the large developing countries, such as South Africa, Brazil and India. Small economies are mostly still small users. Within this growth, there has been an increase in "South-South" anti-dumping cases: India has levied over 50 percent of its measures against other developing countries; Argentina levied 50 percent of its measures against Brazil and China; and South Africa, though its targets were more dispersed, still levied 25 percent of its measures against China and Korea.

Turning to the other side of the ledger, developing countries are significantly more vulnerable to anti-dumping measures than they were 10 years ago. Their increasing production of the industrialised products, mostly subject to ADDs, has not surprisingly, made them more vulnerable to anti-dumping actions. Least-developed countries, on the other hand, have not experienced such a significant increase due to their low and static share of exports in the sectors most hit by anti-dumping measures.

With this in mind, the authors suggest several ways, in which the Anti-Dumping Agreement (ADA) may be tightened. While no one expects a revolution in the ADDs, policymakers in Cancun should aim to amend and improve some provisions of the agreement to reduce existing distortions and to prevent its gross misuse. From a legal perspective, this would help tighten the agreement and reduce the ambiguities, from which it currently suffers. Among the critical issues the authors identify are: changes in the calculation of the dumping margin and the determination of normal value, *e.g.* procedural improvements involving transactions between related parties and the prohibition of zeroing; using a broader definition of 'domestic industry' in the determination of injury; the mandatory analysis of all 15 of the WTO's recommended injury parameters; calculating injury margins for the most efficient producer not the least; the mandatory use of the 'lesser-duty rule'; taking the public interest criterion seriously; and provisions for relief to small enterprises in the agreement.

Textiles and Clothing

Implicit in much of the development debate is concern about the future of the textile and clothing (T&C) market in the face of Chinese accession to the WTO and the imminent abolition of the MFA. Dean Spinanger and Samar Verma take up this subject in Chapter 5. They start from the growing concern that the impact of China's WTO membership will massively impact global T&C exports and, in the context of EINTAD, specific concerns that India will suffer. They argue that there is currently no consensus on what the impact of the elimination of T&C quotas in 2005 might be.

Spinanger and Verma argue that examining the additional impact of China's accession to the WTO, there is little doubt that the elimination of ATC quotas and any liberalisation of tariffs in the DDA will imply a massive shift of resources. The accession of China to the WTO will certainly give China's exports an additional boost, but based on calculations presented in this chapter, it is suggested that India will actually be one of the few countries that has the potential to profit from the net effects of this and the abolition of T&C quotas. This applies not just to clothing exports but to exports as a whole.

On the other hand, surveys carried out for this paper in Hong Kong with major T&C companies reveal the key factors that are essential to attract investments and generate demand in T&C; in other words, what is necessary to become more competitive in the sector. In the critical areas, like transportation and communications infrastructure and labour market flexibility, India has long failed to perform adequately. Should India want to profit from the potential created by the quota liberalisation and at least retain its market share *vis-à-vis* China, upgrading will be essential. If the analysis carried out in this paper is correct, taking such issues seriously is truly a win-win path that India should venture down as quickly as possible.

In view of the observation that lack of efficient physical and bureaucratic infrastructure causes India to be less competitive, the policy message is just to open up these sectors to private companies that can quickly design and construct state-of-the-art facilities to cut down the delays. Then, the authors argue, back this up with sweeping reform of labour markets as well as of the financial sector, coupled with a major elimination of tariff and non-tariff measures. The recent attempts to jump-start industrial and service sector developments by setting up special zones should also be intensified. Spinanger and Verma suggest that India should not wait for the next WTO round to bargain through the suggested tariff and non-tariff changes. China is in the WTO now and T&C quotas are being eliminated in less than 600 days. There is no time to wait. India has already waited too long.

Through this book, an attempt is made to feed the results of research on the *five issues* summarised above into the Cancun Ministerial Conference in September 2003. It highlights the role that research and policy institutions and civil society organisations can play in informing and influencing policymakers in the field of trade and investment issues, and in working towards bridging the gap between the development of knowledge and policy-making. In future, the network proposes to expand further to cover other policy-oriented issues emerging in the multilateral trading system and to better understand the development dimensions of the international trading system.

Chapter 1

Why the Economic Case for a Multilateral Agreement on Investment is Weak

by

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Introduction[1]

According to the terms of reference for the Investment Group of the CUTS-Sussex project, we focus on the pros and cons of a multilateral framework for cross-border investment activity. The rise of bilateral investment treaties as well as previous attempts to reach international agreements on investment issues provide the starting points of this discussion. The major aim is to assess what a multilateral framework may offer in addition to bilateral and plurilateral rules. More specifically, the terms of reference consider the following issues to be of major relevance:

- the extent to which a multilateral framework would increase transparency and reduce transaction costs;
- the opportunity costs and trade-offs to which a multilateral framework may give rise;
- the possible effects on the quantity of FDI flows to participating countries;
- the request of developing countries for a balanced agreement, including corporate obligations and allowing for flexibility and privileged status of developing host countries, in order to improve the "quality" of FDI; and
- the economic justification of performance requirements which may turn out to be a particularly contentious issue in negotiations on a framework for investment; and the prospects for a multilateral framework to prevent the widely feared "race to the top" with regard to FDI incentives.

Even though this list covers a fairly broad spectrum of questions, two major limitations of our analysis should be mentioned at the outset. First, we discuss the pros and cons of a multilateral investment agreement, rather than the effects of capital flows in recipient countries. In particular, it is beyond the scope of this paper to carefully assess the benefits developing countries may derive from inflows of FDI. We do note, however, that the relevant literature suggests that favourable growth effects of FDI in developing countries cannot be taken for granted (which is in some contrast to the currently prevailing euphoria about FDI among policymakers).

Second, the main body of the paper is confined to negotiation issues that are strictly related to cross-border investment, notably FDI. This discussion leads us to conclude that the economic case for a multilateral agreement is weaker than its proponents suggest. We are well aware that the political case for such an agreement may be stronger once linkages between narrowly defined investment issues and various trade and labor issues are taken into account. As a matter of fact, in the concluding section, we suggest that developing countries should consider cross-issue linkages in WTO negotiations and the option to enter into a "grand bargain". The position we take has been criticised from opposite angles by several referees:

- On the one hand, the suggestion for a grand bargain is dismissed as irrelevant, not worth considering, or inconsistent with the economic arguments against a multilateral investment agreement.

- On the other hand, a broader discussion of the merits of cross-issue linkages is called for as the fragmentation of production makes trade and investment closely intertwined.

We principally accept the second critique, which logically implies that the first critique is misplaced. Nevertheless, we decided not to enter more deeply into the merits and possible drawbacks of cross-issue linkages. As economists who are [not] involved in WTO negotiations, we lack the comparative advantage to analyse the specific effects that investment-related concessions by developing countries may have on the negotiation stance of industrialised countries in areas such as agriculture, barriers against imports from poor countries and anti-dumping rules. If at all, the reaction patterns may be identified in the process of WTO negotiations. We would like to emphasise, however, that our economic analysis suggests that developing countries could make investment-related concessions from which they have little to lose, while industrialised countries, which seem to care for an investment agreement, may be more inclined to offer quid pro quo-concessions.

1. Why Foreign Direct Investment is on the Agenda of Policymakers

Especially since recent financial crises in Asia and Latin America, developing and newly industrialising countries have been strongly advised to rely primarily on foreign direct investment (FDI), in order to supplement national savings by capital inflows and promote economic development. Even harsh critics of rash and comprehensive capital account liberalisation argue in favor of opening up towards FDI (e.g., Stiglitz 2000). It is for several reasons that developing countries may benefit from FDI inflows:

- Foreign direct investors typically have a longer-term perspective when engaging in a host country. As a consequence, FDI is less volatile and less prone to crisis than other private capital flows (Nunnenkamp 2001a: Figure 9).
- In contrast to debt inflows constituting contractually fixed debt-service obligations, FDI constitutes a residual claim on the host country's resources. In other words, FDI has risk-sharing properties.
- While debt-related capital inflows may be used for consumption, FDI is more likely to add to domestic investment. Yet, overall investment may remain unaffected by FDI inflows, especially if they come in the form of mergers and acquisitions (M&As).
- FDI is more than just capital; it also offers access to internationally available technologies and management know-how. Firms and workers in the host country may benefit from economic spill-overs so that productivity increases are not restricted to foreign-dominated operations.

For all these reasons, it is widely expected that FDI provides a stronger stimulus to economic growth in the host countries than other types of capital inflows. Recent empirical studies on the FDI-growth link do provide some support to this proposition (e.g., Soto 2000). However, the available evidence also suggests a major qualification when it comes to the productivity-increasing effects of FDI in developing countries.[2] In one way or another, recent studies echo an earlier finding of Blomström et al. (1994), namely that the positive impact of FDI on economic growth is confined to higher-income developing countries. As it seems, developing countries must have reached a minimum level of economic and institutional development before they can capture the growth-enhancing effects of FDI.

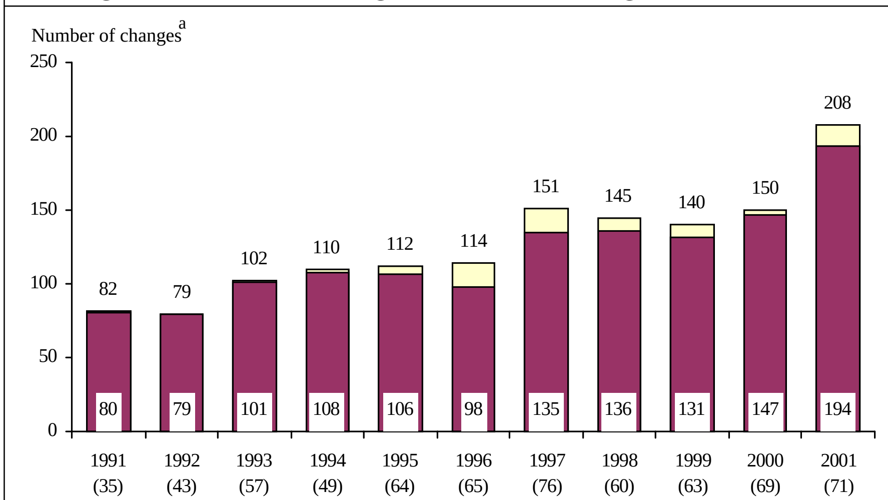
Nevertheless, more and more developing countries have entered the worldwide competition for FDI. This trend is clearly reflected in an almost universal move to liberalise national FDI regulations (Figure 1). In 1991–2001, about 95 percent of all changes in national FDI regimes, reported by UNCTAD (2002: 7), were meant to treat FDI more favourably. Liberalisation measures or measures aimed at strengthening the functioning of markets as well as increased FDI incentives are included in this category.[3] By contrast, just 78 out of almost 1400 measures taken in 1991–2001 intensified control over FDI or reduced FDI incentives.

The World Bank (2003: 118) reckons: "As with trade reforms, unilateral reforms to liberalise foreign direct investment (FDI) are likely to have the greatest and most direct benefit for the reforming country." Apart from unilateral liberalisation measures, various countries have concluded bilateral investment treaties (BITs) for the protection and promotion of FDI. The number of BITs increased significantly to 2099 at the end of 2001. As it seems, both the liberalisation of FDI regulations and the protection of foreign investors against political risk is fairly advanced. Hence, the obvious question arises why a multilateral agreement on investment may be needed.

According to the Doha WTO Ministerial Declaration, the purpose of a new multilateral framework on investment is "to secure transparent, stable, and predictable conditions for long-term cross-border investment" (WTO 2001: Paragraph 20). From this statement, one may conclude that the basic WTO rationale of the benefits of rule-making in international economic relations does not only apply to trade but also to cross-border investment. However, trade and capital flows differ in several respects. Stanley Fischer, even though a prominent supporter of free international capital flows, acknowledges that "the difference between the analytical understanding of capital versus current-account restrictions is striking. The economics profession knows a great deal about current-account liberalisation, its desirability, and effective ways of liberalising. It knows far less about capital-account liberalisation" (Fischer 1998: 8).

Empirical research, too, suggests that the case for multilateral rule-making is stronger for trade than for investment. While "openness to trade has unambiguously helped the representative Third World economy" (Lindert and Williamson as quoted in World Bank 2002: 5), empirical studies reveal ambiguous effects of capital inflows in developing countries, even in the case of FDI. Furthermore, an investment agreement is inherently

Figure 1: Number of Changes in National FDI Regulations 1991–2001



[a]Shaded area: changes considered more favourable to FDI; figures in brackets below years refer to the number of countries that introduced changes in their FDI regime.

Source: UNCTAD (2002: 7).

different from a trade agreement in that developing countries are, almost invariably, net receivers of FDI, whereas industrialised countries are both important receivers and senders of FDI.[4] Consequently, conflicts of interest and bargaining asymmetries tend to be more pronounced when it comes to an investment agreement.

In the remainder of this introductory section, we present the major arguments of the proponents and opponents of a multilateral agreement on investment. These arguments will be taken up and analysed in more detail in the subsequent sections. In doing so, we will not apply a strict definition of “investment”. The existing regulatory environment, including BITs and investment-related agreements on a plurilateral level, covers different types of foreign investment, with some agreements extending far beyond FDI. However, our discussion will focus on FDI, since it is mainly the rise of FDI that is widely expected to help developing countries foster their economic development.

Contentious issues related to a multilateral agreement on investment center around four questions: Is there any need for such an agreement? What should it contain? Should we aim for binding rules or flexible guidelines? What would be the likely effects on the quantity and quality of FDI? Many developing countries are opposed to a multilateral agreement on investment, while its proponents are mainly to be found in industrialised countries. Likewise, disagreement is mainly between developing and industrialised countries when it comes to the contents and character of a multilateral framework. However, interests differ also within these groups, and independent experts provide different answers to these questions.

As concerns the need for a multilateral agreement, opponents point out that the liberalisation of FDI regulations has progressed rapidly through unilateral, bilateral and plurilateral initiatives. The accompanying boom of FDI is said to reveal the irrelevance of a multilateral framework. By contrast, proponents conjecture multilateral negotiations on investment to be instrumental to greater openness of investment regimes than can be achieved unilaterally. They also argue that it is precisely because of the proliferation of BITs and plurilateral rules that a multilateral agreement is required. This proliferation is deemed unwarranted, since the complexity and non-transparency of FDI regulations is increased, rather than reduced in this way.

If a multilateral agreement were to become “a ‘one-stop’ substitute for the complex and legally divergent web of existing BITs” (World Bank 2003: 127), this would not only improve transparency but also according to the proponents of a multilateral agreement, it could help counterbalance the bargaining asymmetries built into BITs and regional agreements. For example, it might become easier for developing countries to prevent non-investment matters such as labour and environmental standards from being included in agreements on investment. However, many developing countries appear to be reluctant to buy the argument that their bargaining power would be stronger in a multilateral context than in their bilateral dealings with major industrialised countries.

The proponents in industrialised countries suggest that the contents of a multilateral agreement should be similar to what was discussed during the failed attempt at the Multilateral Agreement on Investment (MAI) among OECD countries in the 1990s (for details, see Section 4 below). This implies that the focus would be on guarantees for foreign investors related to entry and post-entry conditions. Developing countries are opposed to this approach which they regard as biased towards the interests of foreign investors. If a multilateral agreement is not plainly rejected, developing countries ask for a balanced agreement which, according to their view, should include obligations of foreign investors.

Whether rules should be binding or flexible is debated on different levels. Most fundamentally, skeptics doubt whether it is, theoretically and empirically, feasible to apply to investment the principle of free movement as applied to goods and services. Unlike goods and services, investment is considered an ill defined entity and a reflection of imperfect international markets for technology. It is pointed out that the activities of foreign investors are highly diverse, involving operation, maintenance, use, sale or liquidation of an investment. More practically, it is disputed what exactly should be bound. Developing countries are pressing for binding rules on corporate behavior, but are reluctant to tie their own hands. Not surprisingly, the business community in industrialised countries favours exactly the opposite: Binding commitments by host countries are considered necessary in order to lock in unilateral reforms and provide additional protection of investors' rights.

As concerns possible effects of a multilateral agreement, developing countries are mainly concerned about the quality of FDI. In other words, they want to ensure, e.g. through corporate obligations, that FDI fosters economic development in the host country. On the other hand, the business sector in industrialised countries is striving for an agreement which would expand investment opportunities in potential host countries. As will be argued below, the effects of a multilateral agreement on both the quality and quantity of FDI may easily be exaggerated.

Against this backdrop, we proceed by presenting the basic characteristics of BITs and discussing possible shortcomings in Section 2. Subsequently, we review plurilateral arrangements related to the treatment of FDI in regional trade agreements (RTAs) (Section 3). This leads to the question of what a multilateral agreement on investment may offer in addition to existing agreements. The failure in the late 1990s to conclude the MAI among OECD countries provides the starting point for addressing this question (Section 4). Next, we discuss whether and why another attempt to agree on a multilateral framework should be undertaken (Section 5). Major issues related to such an agreement such as performance requirements (Section 6) and incentives competition (Section 7) are analysed in more detail. Section 8 summarises and discusses strategic options of developing countries of how to proceed in investment-related multilateral negotiations.

2. *Bilateral Investment Treaties*

Apart from unilateral regulatory changes, the desire of governments to facilitate FDI flows is also reflected in a dramatic increase in the number of BITs for the protection and promotion of FDI during the 1990s (UNCTAD 1997: 19). Less than 400 BITs were reported at the beginning of the 1990s, more than 80 percent of which involved at least one developed country as a partner. The number of BITs soared to 2099 at the end of 2001.

The proliferation of BITs can at least partly be attributed to the absence of a multilateral framework on investment. Yet, it is open to question whether this trend can be reversed by including investment in the Doha agenda (see also Section 5 below). Many developing countries are opposed to binding multilateral investment rules, despite the argument that their bargaining position would become stronger in a multilateral context. As a matter of fact, the proliferation of BITs is largely because developing countries were eager to conclude BITs, either with developed countries or among themselves. In 2001, 86 percent of the 158 BITs concluded, involved at least one developing partner country (Figure 2). Moreover, the largest share of BITs concluded in 2001 were an intra-developing country affair. It should also be noted that BIT activity was not restricted to relatively advanced developing countries, but involved various least developed countries as well. In 2001, a number of 23 least developed countries concluded 51 BITs, 13 of which least developed countries signed among themselves.

As mentioned before, BITs are considered a means to facilitate FDI flows and to provide foreign investors with a clear legal framework, in order to reduce uncertainty related to the treatment of FDI in potential host countries before and after entry. However, reducing legal uncertainty by concluding a large number of BITs may come at a cost for foreign investors. An ever increasing number of BITs tends to reduce transparency and may render it difficult for foreign investors, notably relatively small enterprises engaging in FDI, to collect and evaluate the relevant information. Transaction costs related to FDI can, thus, be expected to rise with the number of BITs.

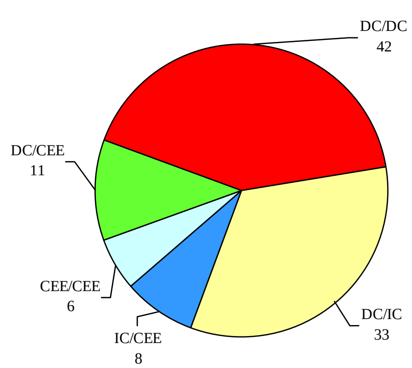
Consider the case of a German investor who wants to outsource relatively labour-intensive parts of his production to a developing country. Apart from evaluating economic fundamentals in potential developing host countries, the investor will have to study various BITs and compare the legal framework laid out there. As of January 2000, Germany had signed 124 BITs, more than any other country at that time (UNCTAD 2000b: 9); 102 BITs had been concluded with developing countries. Even if the investor had shortlisted some developing countries on the basis of economic fundamentals, information costs might still be substantial when it comes to evaluating the relevant BITs.

Information costs and transparency do not only depend on the number of BITs. Actually, lack of transparency would be a minor problem, if legal and administrative procedures and regulations were the same in all BITs signed by one particular country. This is not the case, however, even though most BITs do have common features (see Box 1). There is considerable uniformity in various principles, but specific formulations vary. Furthermore, some BITs go beyond the principles noted in Box 1. This is particularly in two respects. First, most BITs do not grant the right of establishment to foreign investors, whereas some BITs provide a guarantee of national and MFN treatment on entry and establishment. Second, some BITs prohibit performance requirements with regard to local content, exports and employment, as conditions for the entry or operation of foreign investors.

From the perspective of foreign investors, the limitations of BITs are primarily related to transaction costs. In addition to the sheer number of BITs with different regulations and procedures, the reduction in non-economic risk through BITs is sometimes considered insufficient. Major shortcomings of most BITs are seen in lacking protection against violations of intellectual property rights, and in discretionary interventions by sub-national authorities of host countries that are not prevented by BITs.

Developing host countries, too, are concerned about shortcomings of BITs. This may be surprising since, as mentioned before, developing countries were signatories of most of the recently concluded BITs. As it seems, developing countries faced a dilemma: They entered into BITs in order to improve their chances to attract FDI, even though the bargaining position of an individual host country, especially if it was small, vis-à-vis foreign investors and their home countries was too weak to have a say on the exact terms of BITs.[5] Hence, developing countries frequently complain that BITs are biased in that host countries (have to) agree to binding obligations in various respects, whereas foreign investors benefit from rights without assuming any duties. For example, BITs typically do not include provisions against restrictive business practices; they do not define basic labour standards to which foreign investors shall adhere; and they do not address the issue of binding obligations of foreign investors with regard to social responsibilities and transfers of technology.

Figure 2: BITs Concluded in 2001 by Country Group[a] (percent)



[a]DC= developing countries; IC = developed countries; CEE = Central and Eastern European countries.

Source: UNCTAD (2002: 8).

Coordination among developing countries may offer a way to strengthen their bargaining position in dealing with foreign investors and their governments. However, as shown below, the widely perceived bias of rights and duties in favour of foreign investors is also underlying the reservation of many developing countries to enter into negotiations on a multilateral framework on cross-border investment issues (Kumar 2001; Singh 2001). Moreover, it is open to question whether FDI would offer more benefits to developing host countries, if investment agreements were to include binding commitments by foreign investors. On the one hand, the "quality" of realised FDI projects may improve, if agreements ensure that FDI helps achieve development objectives of host countries. On the other hand, strict requirements imposed on foreign investors, may have as a consequence that the amount of FDI flowing to developing countries declines. Foreign investors always have the option not to undertake FDI projects under conditions they consider unprofitable. The severity of this trade-off depends on whether or not investment agreements can reasonably be expected to induce more FDI.

The experience with BITs suggests that the amount of FDI flowing to developing countries is largely determined by factors other than investment agreements. UNCTAD (1998a: 117) argues that "it would be unreasonable to expect that any improvements in the investment climate brought about by BITs, which relate only to parts of the FDI policy framework, could exert a significant impact on FDI flows." Several empirical analyses confirm the relative insignificance of BITs in determining FDI:

- UNCTAD (1998b) analysed time-series data on bilateral FDI flows between the signatory countries of a BIT. It was shown that the host country's share in the outward FDI of the home country increased only marginally after the signing of a BIT. This suggests that BITs do not cause significant diversion of FDI from host countries not being part of the agreement to host countries being signatories of BITs.
- Hallward and Driemeier, the results of whom are summarised in World Bank (2003: Box 4.4), compared FDI flows in the three years after a BIT was signed to those in the three years before. No significant increase in FDI was found.
- When analysing FDI determinants across 133 countries, UNCTAD (1998b) found that the number of BITs signed by a host country played only a minor role for both, FDI flows and stocks in 1995.

Box 1: Important Similarities Between BITs[a]

- Broad and open-ended definition of foreign investment.
- Entry and establishment subject to national laws and regulations.
- Fair and equitable treatment of foreign investors.
- Principle of national treatment of foreign investors, but often subject to qualifications and exceptions.
- MFN treatment, subject to some standardised exceptions.
- Right of the host country to expropriate foreign investors, subject to the condition that expropriation is non-discriminatory and accompanied by compensation.
- Guarantee of free transfer of payments related to a foreign investment, often qualified by exceptions in case of balance-of-payments problems.
- State-to-state dispute-settlement provisions; investor-to-state dispute settlement becoming standard practice.

[a] *For a more detailed presentation, see UNCTAD (1998a: 100) and CUTS (2001: 8 f.).*

- The cross-country evaluation of Hallward and Driemeier made use of 20 years of data on bilateral FDI flows from OECD countries to 31 developing countries. Controlling for a time trend, there was little independent role for BITs in accounting for the increase in FDI.

Each approach may have its particular data problems and econometric shortcomings. For example, the reliability of causal inferences drawn from cross-country studies depends on the quality of controlling variables. In a time-series context, foreign investors cannot reasonably be expected to invest where economic fundamentals remain weak after the conclusion of BITs. Yet, it is striking that all available evidence comes to the same conclusion, namely that policymakers are well advised not to put their faith in BITs as a major stimulus to higher FDI inflows. Variables such as market size and growth, exchange rates and country risk turned out to be more important than BITs as FDI determinants in cross-country studies. Time-series studies could only be dismissed if they were dominated by countries lacking locational attractiveness except being signatories of BITs, which is unlikely to be the case.

The proliferation of BITs since the 1990s may have eroded the effectiveness of BITs in attracting FDI. The conclusion of BITs is no longer a distinctive factor signalling host countries' readiness to offer favorable investment conditions by reducing non-economic risk. Rather, foreign investors tend to regard BITs as a standard feature of the institutional structure prevailing worldwide. In other words, the proliferation of BITs may be characterised by diminishing returns. Nevertheless, BITs should still turn out to be relevant in empirical analyses, if the few developing countries not taking part were considered relatively risky locations by foreign investors for this reason and, therefore, suffered negative effects on FDI inflows. However, weak economic fundamentals and markets, rather than the absence of BITs, appear to be the major factors working against FDI flows into these countries. BITs per se do little more than enabling multinational enterprises to invest in a partner country. It is a completely different question whether FDI will actually be undertaken as a result of BITs. This is rather unlikely, at least until economic fundamentals are conducive to FDI.

3. Plurilateral Investment Agreements

In the previous section, we argued that there has been a tremendous proliferation of BITs particularly in the 1990s. We also noted that BITs are not a sufficient condition to induce FDI. In essence, the role of the BITs seems to be to ensure some certainty in FDI transactions. From another point of view, it allows countries to pre-commit to certain investment rules which can then be immunised from local interest group interference (Low and Subramaniam 1995). In this section, we will see how the principles underlying bilateral treaties tend to be modified in plurilateral investment treaties (PITs).

Most of the PITs have been of recent origin and immediately preceded or followed the conclusion of the Uruguay Round Agreement in 1995. The signing of PITs also coincided with the tremendous growth in regional trading arrangements (RTAs) (UNCTAD 2001). While not as large in number as the BITs, the PITs (like RTAs) have proliferated mainly in the 1990s with most countries being member of more than one PIT (e.g., UNCTAD 1999a: Chapter IV). Here we will address major issues related to PITs by looking at the treatment of investment in five specific RTAs: the Energy Charter, Free Trade Agreement of the Americas (FTAA), MERCOSUR, NAFTA, and ASEAN. While the first is largely an area-specific RTA involving developed and developing countries, MERCOSUR and ASEAN consist of only developing countries and the remaining two involve both developing and developed countries. Even for RTAs such as FTAA that have not yet come into force, the treaties' intentions and expected features may offer valuable insights. Moreover, a closer look at RTAs may help us understand the factors that led to the failure of the OECD's attempt at an MAI which straddled a large number of developed and developing countries.

There are almost no multilateral agreements which are investment specific. Rather, PITs have largely evolved as chapters or clauses in RTAs. Even the **Energy Charter** focuses on trade, transit and efficiency issues apart from investment. The 52 countries (as of Sept. 2002) which are signatories are drawn from both developing and developed countries of Europe. A number of African countries as well as the United States and Canada have an observer status. In Asia, Japan is a recent signatory. The charter came into force in April 1998, four years after the signing in 1994.

The charter relates only to energy. Being highly focused, the agreement guarantees post-entry non-discriminatory treatment to member country investments. In addition, it guarantees the better of MFN and national treatment in operation (UNCTAD 1996: 555). As concerns pre-entry establishment, however, the charter only admits a "best endeavour" clause. Furthermore, the charter "grandfathers" existing exceptions and restrictions, and it allows for the reservation of privatised assets for local firms. Finally, the charter includes a comprehensive dispute settlement procedure for both state-state and investor-state disputes. The extremely limited product coverage of the charter has probably allowed countries to come to an agreement rather quickly. Countries may accede to the charter over time as and when they are ready, thus providing the flexibility required by countries at different stages of development.

The initiative for the **Free Trade Agreement of the Americas (FTAA**) envisages a far more general RTA.[6] The negotiations were launched in 1998 and the agreement was scheduled to come into force by 2005 (UNCTAD 1998a: 59). In making an inventory of the national rules on investment already prevalent in prospective member countries, it turned out that there was a high degree of similarity in respect of national and MFN treatment, equality between foreigners and nationals, principles of private property and agreements on dispute settlement. As concerns the last issue, many negotiation partners were already members of the World Bank's International Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID; see UNCTAD 1998a: 62–63). The exceptions to MFN were also the same in most of the countries, namely economic integration agreements, tax treaties and bilateral concessionary finance schemes. In international finance, the countries were committed to mobility of capital subject to a balance of payments exception. Finally, there was also convergence in expropriation decrees and compensation criteria. The divergence came in the definition and scope of investment, processes of authorisation and registration of foreign investment, treatment of sub-national authorities and industry exceptions. In addition, countries differed on pre-entry and post-entry establishment commitments.

A somewhat different treatment of investment obtains in the **ASEAN** agreement. Concluded in October 1998, the Framework Agreement on the ASEAN Investment Area derives its value from the perceived need to promote the Asian Free Trade Area (AFTA). The agreement includes a waiver of the 30 percent national equity requirement under the ASEAN Industrial Cooperation Scheme, and it extends to all services and modes of supply (UNCTAD 1999a). However, the agreement relies on voluntary cooperation with no legal bindings or dispute settlement mechanisms (UNCTAD 1998a). There is no provision for investor-state dispute resolution in the Protocol on Dispute Settlement Mechanism. Furthermore, the agreement specifies a negative list of industry exceptions and balance of payments safeguards in case of external financial difficulties (ASEAN 1998). The national treatment (including right to entry) is presently limited only to ASEAN investors and contains a large number of sectoral exceptions that are due to be eliminated only by 2010 (UNCTAD 2002). In general, the ASEAN agreement on investment reflects the unwillingness of East and South East Asian countries to be tied down to legal specifics in international agreements (Pant 2002).

The ASEAN RTA has evolved in a series of steps. The 1987 Agreement for the Promotion and Protection of Investments was followed by the Framework Agreement on Economic Cooperation in 1992, the setting up of the ASEAN Investment Area (AIA) at the fifth ASEAN summit and the protocol of 1996 to enhance investor confidence. As a PIT, the ASEAN initiative was much like the MERCOSUR agreement (to be discussed below), i.e. largely meant to promote trade among partner countries. Thus, national treatment was to be extended to non-ASEAN investors only by 2020. The AIA specifically refers only to FDI, which has traditionally contributed a great deal to exports of South East Asian countries in particular. Finally, the agreements do not prevent any of the constituent countries from joining other sub-regional initiatives or growth triangles involving adjacent countries.[7]

By contrast, **NAFTA** provides for a very comprehensive treatment of investment (NAFTA Treaty 1994). The free trade area of Canada, Mexico and the United States comes into full operation by 2005, ten years after NAFTA was agreed upon.[8] Chapter 11 of the NAFTA Treaty deals specifically with investment. The dominance of the United States in framing the treaty is reflected in the definition of investment, which is extremely broad and includes, apart from both direct investment and portfolio investment, intellectual property and loans. The scope of the agreement extends MFN and national treatment (NT) to both investors and investment. The application of the non-discrimination principles is extended by the addition of the clause on "fair and equitable treatment (FET)" to foreign investors. The treaty specifically states that no formal and substantive rule can be made which would give advantage to local investors. In addition, it is specified that "in like circumstances" there cannot be any discrimination with respect to any sphere of operation of an investment instrument.

The NAFTA Treaty also contains an elaborate dispute settlement mechanism. A regional Dispute Settlement Body (DSB) allows for international arbitration of disputes. No appeal to the host country is available for decisions of the DSB, and the treaty requires that there be some international element involved in any investment dispute. In other words, the DSB is only available where the investor and/or the investment belong to two different country's jurisdictions. Unlike most RTAs, there is provision of investor-state dispute settlement (except for pure Canadian companies in Canada) and the private party has the right to nominate one of the three members of the DSB (NAFTA Treaty 1994).[9] The treaty applies also to sub-national authorities. In a controversial clause, investors are entitled to dispute any governmental action that harms their investment ("regulatory takings"). This has been a bone of contention in the widely publicised Ethyl case in Canada (UNCTAD 1998a).

MERCOSUR is an RTA consisting of Argentina, Brazil, Paraguay and Uruguay with Chile and Bolivia as associate members since 1996. Created under what is known as the Treaty of Asuncion, MERCOSUR was initially to be a common market. Internal struggles and several crises notwithstanding, considerable trade liberalisation has been achieved since 1991. This is true especially for internal tariffs. In addition, the common external tariff applied to 85 percent of all products by June 1995 (Machado 1995: 19; Schirm 2002: chapter 4). Somewhat like the EU, MERCOSUR also aimed at a coordinated policy in regional economic fora.

Yet, MERCOSUR has little to offer as a PIT. The only instrument is the 1994 Protocol on Promotion and Protection of Investments from States not Parties to MERCOSUR. Even this instrument only undertakes, not to treat foreign investors more favorably than set out in the protocol. Furthermore, the parties signatory to the protocol enjoy the discretion to give or not to give MFN and national treatment to foreign investments. The protocol does not contain any provisions to bar performance requirements or incentives.

In a recent survey, Gestrain (2002) noted that the extent to which signatories to an RTA attempt to establish wide ranging and ambitious rules on foreign investment is largely a function of their previous experience with liberal investment regimes. Thus, for example, provisions very similar to those of NAFTA can be found in the FTAA agenda.[10] Similarly, the OECD's attempt at the MAI (discussed in the next section) came after many years of experience with liberal investment regimes in the OECD countries.

Yet, one has to take into account various additional factors to see whether or not RTAs include a comprehensive treatment of investment issues. First of all, it is mainly through BITs, rather than RTAs that negotiations on investment are pursued (Gestrain 2002). Out of the 172 RTAs (as of 2000), only a few deal with investment issues. In contrast to many BITs, investment is narrowly defined as FDI in most RTAs, with NAFTA and possibly also FTAA representing major exceptions. A comprehensive treatment of investment in RTAs may be difficult to achieve if a large and heterogenous (in terms of development criteria like per capita income) set of countries is involved. However, our short account of major RTAs also suggests that RTAs among developing countries have a limited coverage of issues like dispute settlement and national treatment of foreign investors. Developing countries appear to be more oriented towards promoting trade and supporting national companies, rather than foreign investment, when it comes to provisions in RTAs. For example, this applies to both MERCOSUR and ASEAN.

The limitations of many RTAs are particularly striking with regard to dispute settlement. The importance of a dispute settlement mechanism cannot be doubted given the increase in the number of disputes over the last decade. As noted in Gestrain (2002), between 1972 and 1999, 69 disputes were registered with ICSID or about two and a half per year. Between January 2000 and February 2002, 29 disputes were registered, i.e. about 14 per year. Dispute settlement mechanisms are common in BITs, but included in just a few comprehensive RTAs like NAFTA.[11] As we will see in the next section, dispute settlement was also among the contentious issues in the OECD's attempt at the MAI, which was the first truly multilateral investment initiative. Some of the points raised here come out in stark relief when looking at the factors that led to the failure of the MAI.

4. Multilateral Initiatives on Investment

4.1 The OECD's MAI

It has been argued that the objective to launch talks on the MAI in the OECD reflected the logical culmination of the process of liberalisation in the constituent countries as far back as 1961 (Henderson 1999). The aim was to broaden the liberalisation process via an investment specific instrument. To put it another way, it was deemed necessary to extend to investment the same liberal treatment that already existed for commodity trade. The MAI essentially attempted to implement the report to the OECD submitted by the Committee on International Investment and Multinational Enterprises (CMIE) and the Committee on Capital Movements and Invisible Transactions (CMIT) in 1995 (OECD 1995). Restrictions on outflows of capital had been almost completely eliminated by 1995. Hence, it seemed logical to extend the liberalisation to inflows of capital and to codify these rules in the context of both international movements of investment and services (Henderson 1999). The MAI was supposed to reduce transaction costs, to which the plethora of BITs tended to add. As noted in Section 2, most countries have signed a large number of bilateral treaties, resulting in increasing costs of understanding the regulations governing FDI in any country. Transaction costs can be entry barriers especially for small foreign investors (Gara 2002).

The starting conditions appeared to be favorable at the beginning of MAI negotiations. Exchange controls had gone in all OECD countries along with restrictions on the outward movement of capital. Even though restrictions on inflows of capital remained, inflows of FDI had been deregulated in the context of major liberalisations of domestic financial markets in the 1990s and RTAs like NAFTA, EU and MERCOSUR. A similar liberalisation took place in other countries like Australia and New Zealand (Caves and Krause 1984; OECD 1996). The 1980s had witnessed extensive liberalisation of inflows of capital in Latin American countries like Brazil and Chile. In the same vein, Asian countries like China, India and those of the ASEAN as well as countries of Eastern Europe had opened up to inflows particularly of FDI (UNCTAD 2000a).

In general, it could be argued that, both for suppliers and demanders of capital, the mood was extremely optimistic in the mid-1990s (Pant 1995). According to Henderson (1999), conditions for an MAI could not have been better than in 1995, in terms of the enabling environment and technical preparedness. Consequently, the MAI represented the most ambitious initiative so far, involving the 29 countries of the OECD and eight developing countries including China, Brazil and Argentina. However, the developing countries had only an observer status and, thus, had little influence on the agenda. In addition, the WTO, World Bank and IMF were represented in MAI negotiations.

As argued in Witherell (1995), the MAI had to be fairly comprehensive to be an improvement over other multilateral instruments and the two existing codes of the OECD which related to the liberalisation of capital movements and the liberalisation of invisible transactions. Box 2 summarises the main features of the planned MAI (for details, see Ley 1997; Witherell 1995; UNCTAD 2001).

Despite the favorable environment, however, the MAI discussions broke down in 1998. There were several issues on which substantial disagreement remained. For one, on the 'scope' of the agreement, the United States supported extra territorial application of national laws which was opposed by EU countries (UNCTAD 1999b: 20; Henderson 1999). Second, exceptions for regional integration organisations (the REIO clause that is common in other agreements) were opposed by the United States, in particular on the grounds that such an exception was contrary to the basic objective of market access (UNCTAD 1999b). Third, in the context of 'cultural exceptions', barring the United States, Japan and New Zealand none of the other countries was willing to accept the 'standstill' clause in the audio-visual industry. Fourth, there was considerable disagreement on the introduction of the clause on labour and environmental standards. The MAI was abandoned by the time any agreement on the issue of standards was reached (Henderson 1999). Fifth, the 'pre-entry establishment' clause was supported by the United States, whereas it was opposed by EU countries like France. Finally, there was disagreement on including the 'investor to state' clause in dispute settlement particularly in the context of 'regulatory takings' (Graham 1998). All this resulted in a plethora of reservations which went into a large number of chapters which are still not available as public documents. Coupled with the exclusion of taxation from the ambit of the MAI, the treaty would at best have been a political liability (Henderson 1999; UNCTAD 1999b).

With hindsight, the MAI failed because of a multiplicity of factors (see also Dymond 1999). Some of these were treaty specific. On clauses like cultural exceptions, extra territorial application and dispute settlement there seemed to be no meeting ground even within the set of OECD countries. In addition, many countries were unwilling to commit to the broad definition of investment. It may thus be argued that the initial agenda was over ambitious. Subsequently, a treaty was rendered rather meaningless by the special interests of many countries as well as the number of reservations and exemptions sought (UNCTAD 1999b).

More generally, the political economy of multilateral negotiations changed substantially in the 1990s (Pant 2002; UNCTAD 1999a). The business groups, for example, had considerable interest in the MAI when negotiations started (ICC 1996). Yet, they lost interest with taxation off the agenda, the possibility of minimum labour and environmental standards coming on the agenda, and the dispute settlement mechanism being watered down. At the same time, NGOs emerged as an important force opposing the MAI agenda. The impact of the NGOs (from both developed and developing countries) was aided substantially by the developments in instant electronic communication via the internet (Rothkopf 1998; Mathews 1997). The NGOs projected some aspects of the MAI as impinging on the sovereignty of consumers and individual countries by giving foreign investors rights without obligations. In their view, this was particularly true of investor-state dispute settlement with third party intermediation, regulatory takings, and labour and environmental issues (UNCTAD 1999b).

The broad sweep of the MAI also alienated many countries which saw the prospective treaty as placing private interests above state interests (Henderson 1999; France, le Premier Ministre 1998). It must be remembered that, in the 1990s, the electorate in many countries had returned Left/Centre governments which were more responsive to the concerns of NGOs. In addition, the developing countries were effectively excluded from the negotiations and were offered only the choice to take it or leave it. With developing countries being increasingly opposed to the process, the MAI came to symbolise all that was perceived to be wrong with globalisation (Sauve 1998). In the light of all these developments, it would have been political suicide to persist with the MAI.

What are the lessons to be learnt? First of all, the existence of a large number of BITs does not indicate that countries are ready for a comprehensive multilateral treaty on investment. The specific trade-offs that can be negotiated in BITs are not easy to pursue in a multilateral context. Furthermore, an ambitious multilateral negotiation agenda is unlikely to succeed unless it offers scope for quid pro quo-deals between participating countries pursuing different objectives. The potential for such deals was fairly limited in the case of the MAI, as negotiations in the OECD were restricted to investment-related issues. Under such conditions, it might have been more promising if a modest and incremental approach had been taken in MAI negotiations. Considering that even the relatively small and homogeneous group of OECD countries could not agree on the ambitious agenda, it was all the more unlikely that a larger number of heterogeneous countries, including developing countries, were prepared to join.

The situation is different if investment issues are negotiated under the roof of the WTO, where considerable scope exists for quid pro quo-concessions in different areas of negotiations. The Uruguay Round is a reminder to this effect. Therefore, we consider different strategic options open to developing countries in Section 8 below. Yet, the MAI experience suggests an important caveat: If multilateral treaties go beyond trade

Box 2: Principal Features of the Planned MAI

- Unlike the previous OECD codes, the MAI was to be a full fledged treaty ratified by legislatures.
- A formal dispute settlement mechanism was planned, including provisions for investor-state and state-state disputes.
- Investment was broadly defined as in the NAFTA agreement.
- All phases of investment, including pre-entry establishment, were to be covered by the principles of non-discrimination (MFN and national treatment).
- Reservations (country-specific exceptions) were subject to 'standstill', 'rollback' and 'ratchet' clauses. In other words, there could be no new reservations and existing ones were time bound.
- The negative list approach was used with regard to general and specific exceptions.
- Performance requirements were to be prohibited or limited, while incentives were to be subjected to well defined rules.
- Right of access to key foreign personnel was to be guaranteed.
- As in GATT, the disciplines of the treaty were to apply to sub-national authorities.

promotion (the basic objective of GATT) to attempting to homogenise the pace of liberalisation in contracting parties, the process of negotiation and the final settlements may be difficult to sell politically. After the conclusion of the Uruguay Round, policymakers in OECD countries pushed ahead with liberalisation in areas such as investment without anticipating the resistance emerging among developing countries, NGOs as well as their own electorates. Recently, the wariness about new multilateral initiatives has mounted, especially in developing countries which are dissatisfied with the implementation of the results of the Uruguay Round.

4.2 Multilateral Initiatives in the WTO

The WTO initiatives that impact on foreign investment are largely contained in four agreements: Trade Related Investment Measures (TRIMs), General Agreement on Trade in Services (GATS), Trade Related Intellectual Properties (TRIPs) and Dispute Settlement Undertaking (DSU). While TRIPs and DSU provide minimal standards of protection for investment (Sauve 1998), the main provisions affecting investment are contained in TRIMs and GATS.

The TRIMs measures are reasonably comprehensive in that they ban the imposition of performance requirements on foreign investors. This is not normally a part of BITs, with the notable exception of those involving the United States (Vandevelde 1998; Read 1999)[12]. In addition, TRIMs includes "standstill" and "rollback" provisions. Countries are required to notify all non-conforming measures to the Council for Trade in Goods, and there is a commitment to roll back these measures in five years for developing countries and seven years for least developed countries. Article III of the agreement imposes national treatment on signatories, while Article XI forbids quantitative restrictions on exports and imports. It has been argued that TRIMs offers a natural base for consideration of a multilateral agreement on investment (Low and Subramaniam 1995; Hoekman and Saggi 2001). However, the principal problem with TRIMs is that it is restricted to trade in goods and does not cover services. Moreover, TRIMs rules have remained highly contentious and various WTO members appear to have violated them.

Important measures for investor protection under the WTO are contained in GATS. To the extent that GATS covers FDI as a mode of supply ("commercial presence") as well as the movement of related skilled personnel ("temporary movement of natural persons"), its provisions have a direct bearing on investment. Sauve (1998) argued that GATS contains "provisions relating both to matters of investment liberalisation and investment protection, albeit with different degrees of comprehensiveness". While Article II(1) imposes MFN treatment (a measure of liberalisation), transparency (indicating investment protection) across all sectors is required by Article III. However, GATS Article II(v) allows for exceptions to MFN. These exceptions relate mainly to regional trade arrangements (RTAs), bilateral tax treaties (DTs) and reasons of public health or morality. This is in conformity with most BITs.

Likewise, national treatment is subject to limitations in GATS (Read 1999). National treatment is guaranteed only in service sectors listed in a member country's schedule (Article XVII(1)). The number of sectors where national treatment is granted is expected to increase over time in line with the 'positive list' approach of GATS. In another clause, Article III(3) imposes 'transparency' on members who are required to publish and notify the Council for Trade in Services all laws, regulations and administrative measures relevant to the agreement in the case of committed service sectors (Read 1999).

According to Article XXIII, all disputes relating to GATS are to be governed by the Dispute Settlement Undertaking (DSU). The DSU contains the usual provisions for negotiations, consultations, arbitration and compensation (Sciarra 1998). However, unlike the NAFTA agreement, there is no provision for investor-state dispute settlement.

Even though TRIMs and GATS offer a number of provisions relating to investment, the main lacunae are in the context of expropriation, compensation and subrogation (Read 1999). In addition, provisions for investor-state dispute settlement are missing. A multilateral agreement on investment might help fill these gaps. However, following this route involves several critical issues. First, in the case of commodity trade, it is easy to associate traded goods with particular countries. This is not always possible in the context of FDI, as the principal feature of transnational corporations is that their base of operations spans several countries.

Second, multilateral attempts to constrain a country's sovereignty through redefinition of jurisdiction (as investor-state dispute settlement would do) would be as hotly contested by developed as developing countries. The concern is that this would confer advantages to foreign companies not available to local companies, which could be considered "reverse discrimination". As we have seen earlier, this issue contributed to the breakdown of OECD talks on the MAI. Subsequently, we will discuss whether there are better prospects for a multilateral framework for investment in the context of WTO negotiations.

5. *Why a Multilateral Framework?*

5.1 Conflicting Interests

The earlier failure of OECD countries to conclude the MAI notwithstanding, industrialised countries, including the EU, are pressing for a multilateral agreement on investment to be integrated into the WTO framework. The negotiating stance of industrialised countries largely reflects the business perspective in these countries. For instance, according to UNCTAD (1999a: 140), the Union of Industrial and Employers Confederations in Europe (UNICE) "attached high priority to the establishment of a global regime for FDI that is non-discriminatory, transparent, stable and liberal". UNICE claimed that appropriate provisions on FDI would be in the interest of WTO members at all levels of development. Likewise, the International Chamber of Commerce (ICC) argues that a single set of legally binding multilateral rules and disciplines to govern international investment is needed for two reasons: firstly to protect the great volume of existing FDI in a better way and to facilitate further expansion; secondly to replace the large and rapidly growing number of overlapping legal instruments and initiatives in the investment area (DSE Forum 2002: 40 f.).

A multilateral framework replacing the intricate net of bilateral and plurilateral rules would improve transparency and reduce FDI-related transaction costs. This could indeed be in the mutual interest of foreign investors and host countries. By rendering FDI more profitable, lower transaction costs may induce higher FDI flows from which host countries may derive benefits. In addition, foreign investors and host countries alike may gain from a less distorted allocation of FDI.[13] While conclusive evidence on FDI diversion resulting from BITs is lacking (see Section 2), the complexity of the currently prevailing regulatory environment makes discriminatory practices more likely. Discrimination, which frequently invites bureaucratic interference and corruption, may hinder investors to enter superior locations and host countries to attract superior investments.

Nevertheless, various developing countries remain skeptical that they would benefit from a multilateral investment agreement. The fear is that the bargaining position of developing host countries would weaken further. As pointed out by Kokko (2002), the TRIMs agreement has already tilted the playing ground in favour of multinational enterprises (MNEs). While this agreement prohibits measures (e.g., performance requirements) traditionally applied to promote so-called development friendly FDI, it does not limit the scope for subsidy-based competition for FDI. A multilateral investment agreement aiming primarily at protecting existing FDI and encouraging additional FDI may shift the balance of power even more in favour of MNEs.

Policymakers from developing countries emphasise the need to take due account of national development goals and policies in a multilateral investment agreement.[14] This position is supported by many NGOs. UNCTAD (1999a: 140) summarises their view as follows:

> "The main priority for international negotiations is not liberalisation, but setting a framework to ensure that international investment promotes sustainable development and real economic efficiency. Specific priority areas for rules include investor behavior and transparency, competition and restrictive business practices, regulation of investment incentives, and support for least developed countries to enable them to attract high quality investment."

As it seems, conflicting interests are mainly between industrialised and developing countries. It fits into this picture that, for instance, the Minister of Small and Medium Enterprises and Commerce of Senegal argued for a "compromise between the investor and the receiving country in question" (DSE Forum 2002: 39). However, recent research on where the economic benefits of FDI go suggests that interests tend to diverge also among developing countries. This is not only because some developing countries, notably those offering neither promising markets nor relevant cost advantages, may not have reasonable chances to attract FDI, no matter what investment agreement they sign.

In addition, the bottom line of various empirical investigations appears to be that developing countries must have reached a minimum level of economic development before they can capture positive effects of inward FDI on economic growth.[15] Higher-income developing countries have better prospects than low-income countries to benefit from economic spillovers of FDI by absorbing superior technology and knowledge. Hence, more advanced developing countries may find it easier to accept, as a quid pro quo, the demands of MNEs and industrialised countries for clearly defined multilateral rules. By contrast, the cost-benefit calculus of poorer countries for which FDI has less to offer may lead them to reject such demands.

The finding that beneficial effects of FDI in developing host countries cannot be taken for granted has further implications, which will be discussed in the remainder of Section 5. It is far from obvious that FDI would have more favorable effects in poor countries, if a "development clause" were to be included into a multilateral investment agreement. Similarly, it is open to question whether a "balanced" agreement, containing corporate obligations in addition to rules binding host countries, would foster transfers of technology and know-how. Strict obligations may rather discourage MNEs from investing in poor developing countries altogether.

However, as argued in the following, wishful thinking also prevails on the part of those pushing for the liberalisation of FDI regulations through a multilateral agreement. Cost savings are likely to be limited as a multilateral agreement would not replace, but rather complement bilateral and plurilateral agreements. Moreover, the importance of transaction costs, relative to other determinants of FDI in developing countries, tends to be overstated. As a consequence, it is unlikely that a multilateral agreement would induce significantly more FDI in developing countries.

5.2 The Relevance of Transaction Costs

A multilateral investment agreement could potentially reduce transaction costs related to FDI by providing for a transparent regime of rules and regulations. As argued in OECD (2002: 176 ff.), a lack of transparency may deter FDI in several ways:

- It adds to operational risks for MNEs and imposes higher information costs on them.
- It gives rise to information asymmetries which tend to benefit market incumbents and discourage FDI by new entrants.
- It may lead to adverse selection among foreign investors, by favoring those who possess privileged information and are politically well connected in the host country.

An illustrative list of transaction costs caused by a lack of transparency in rules and regulations governing FDI has been presented by UNCTAD (1999a: 179 f.); this list, which largely applies to domestic investment as well, is shown in Table 1. The cost effects of lacking transparency in these respects are impossible to quantify. Yet, UNCTAD reckons that unclear rules and regulations "can increase the transaction costs of investment and operations significantly" (ibid.). In a similar vein, OECD (2002: 176) stresses that "a lack of transparency will almost certainly discourage foreign investors", even though transparency per se will not induce FDI if other deterrents remain. To support this argument, OECD refers to a recent study by the Asian Development Bank Institute on various aspects of transparency in 55 (industrialised and developing) countries. It turns out that inward FDI is relatively low where transparency is poor.

Nevertheless, the relevance of a multilateral agreement on investment for enhancing transparency and reducing transaction costs is questionable on several grounds. For a start, even if all transaction costs listed in Table 1 were addressed by such an agreement, other FDI-related transaction costs would remain unaffected. Hoekman and Saggi (2000: 643) argue in this context that "the major proportion of the transaction costs associated with FDI is likely to arise from differences in language, culture, politics, and the general business climate of a host country [rather than from the costs imposed by the multitude of BITs on multinational firms]".

Even for cost elements to be addressed in a multilateral agreement, reductions in transaction costs will be less than hoped for by the business community. A far-reaching multilateral agreement might render various less comprehensive BITs redundant. However, the Doha Round will at best mark the starting point of a long-term process towards substantive and binding multilateral investment rules. Most, if not all, bilateral and plurilateral investment agreements will remain in place for the time being. Investment agreements of different sorts with narrow or broad membership will coexist, as is the case in international trade.[16] A multilateral agreement would define the smallest common denominator of WTO members, while regional groupings or bilateral partners would still be free to go beyond commonly agreed rules. In other words, the realistic scenario with regard to investment rules is what trade negotiators labelled a "GATT plus"-framework.

The expected pattern of a "GATT plus" (or, rather, "WTO plus") type framework for international investment is easy to explain in collective action terms. The degree of common interests and perspectives is typically higher among a smaller homogenous group of countries; coordination problems mount with the number of contracting parties.

It follows that more and stricter investment rules can be fixed in BITs and regional agreements. As Sauvant (2000: 9) put it, "what would be acceptable at the bilateral or even at the regional level may not necessarily be acceptable at the multilateral level." The unpleasant consequence for foreign investors is that they will continue to encounter considerable information needs and transaction costs resulting from a lack of transparency, when planning to invest in a country which is WTO member and, at the same time, contracting party of more far-reaching investment agreements. The remaining complexity of trade regulations at different levels is a clear reminder to this effect.

It may actually be the foreign investors themselves who will contribute to the emergence of a "WTO plus" framework. This could happen if, as widely assumed, multilateral negotiations on investment strengthened the bargaining position of developing countries. As a consequence, the business community may lose interest in a multilateral agreement, and instead prefer the stronger protection of investors' rights in BITs (World Bank 2003: 127).

Table 1: Transaction Costs Related to the Legal and Regulatory Environment for FDI

	Transaction	Enterprise exposure	Effects on
Business entry	Registration, Licensing Property rights Rules, Clarity, Predictability Enforcement, Conflict resolution	Monetary costs for firm,Time costs (including compliance and delays), Facilitation costs, Expert evaluations of rules and their functioning, Number of rules and formalities	Rate of new business entry, Distribution of firms by size, age, activity, Size of shadow economy, Rate of domestic investment, FDI inflows, quantity and quality Investment in R&D
Business opera-tion	Taxation Trade-related regulation, Labour hiring/ firing,Contracting, Logistics Rules, Clarity Predictabil-ity, Enforcement Conflict resolution	Cost of compliance, Higher costs of operation, Costs of conflicts and conflict resolution, Search costs and delays Insufficient managerial control "Nuisance" value Problems in making contracts, Problems in delivery	Business productivity, Export growth, Size of shadow economy, Growth of industries with specific assets or long-term contracting, Rate of innovation and R&D Rate of business expansion, Rate of investment in new equipment, Subcon-tracting
Business exit	Bankruptcy, Liquidation, Severance/layoffs, Rules, Clarity, Predictability, Enforcement, Conflict resolution	Rate of change of rules, Changes in costs and number of rules, Availability of rules and documents to firms, Rates of compliance and/or evasion, Use of alternatives to formal institutions	Rate of exit (and entry), Prevalence of credit, Distribution of profitability of corporations

Source: UNCTAD (1999a: 179 f.) on the basis of World Bank information.

5.3 Transaction Costs and Inward FDI

There is another reason for not expecting too much from a multilateral investment agreement in terms of transaction cost reductions. Survey results on investment conditions in 28 developing countries, presented by the European Round Table of Industrialists (ERT 2000) in cooperation with the United Nations and the International Chamber of Commerce, suggest that impediments to FDI that give rise to transaction costs have already been relaxed substantially, largely on a unilateral basis, throughout the 1990s.[17] It is, thus, debatable whether a multilateral agreement is needed as urgently as suggested by statements on the significance of transaction costs made by the business community.[18]

ERT (2000) lists country-wise impediments to FDI on a scale ranging from 0 (most liberal) to 6 (most restrictive). In this section, we consider impediments that give rise to transaction costs (see Box 3 for details). These impediments are grouped into five indices: administrative bottlenecks, entry restrictions, post-entry restrictions, risk factors and technology-related regulations. Table 2 indicates that transaction costs have come down considerably in all five dimensions, if ERT's assessment of the severity of FDI impediments provides a reasonable yardstick:

- In the early 1990s already, the average score of all sample countries was below 2 (i.e., fairly liberal) in all dimensions except for entry restrictions.
- As concerns changes between 1992 and 1999, just eight out of 140 country-specific entries in Table 2 point to higher transaction costs at the end of the observation period.
- For only two countries (Guatemala and Sri Lanka), FDI impediments were rated more restrictive in 1999 in more than one dimension.
- The average score of all sample countries declined to about half the score in 1992 for each of the five indices.

All this suggests that foreign investors do not have not to wait for a multilateral agreement on investment in order to benefit from transaction cost reductions. This applies especially to some specific factors that figured prominently among investors' concerns in the more distant past. Relevant examples are the risk of nationalisation or expropriation (subsumed under risk factors in Table 2) and exit restrictions, including restrictions on the repatriation of capital (subsumed under post-entry restrictions in Table 2). According to the survey results of ERT, the threat of nationalisations or expropriations has diminished tremendously. The number of sample countries where it was considered relevant at all declined from 13 in 1992 to 5 in 1999 (among them India and China, though their score of 0.5 indicated a fairly low risk of expropriation). A similar move towards liberalisation is reported for exit restrictions; in this regard, India's score improved from 2 in 1992 to 1 in 1999 (China: 2 in 1992 versus 0.5 in 1999). A multilateral agreement may help lock in previous liberalisation measures undertaken unilaterally, and render such measures more difficult to reverse. However, there appears to be little a multilateral agreement can offer in terms of further reducing the risk of expropriation and liberalising exit restrictions.

Correlation and regression analyses that we performed on the link between the indicator values presented in Table 2 and inward FDI in the sample countries support the view that transaction cost-related impediments to FDI were of minor importance in the past

Box 3: Survey Results by the European Round Table of Industrialists on Impediments to FDI Giving Rise to Transaction Costs

Comparable survey results are available from ERT (2000) for 28 developing countries and the years 1992, 1996 and 1999. We draw on ERT findings for the first and the final year. The checklist of ERT covers 33 items, ranging from restrictions on overall management control and freedom of decision of private investors to criminality and civil disturbances in the sample countries. We focus on those impediments that give rise to transaction costs.

We consider the following ERT items and aggregate them into five indices, by averaging survey results on specific items:

1. *Administrative bottlenecks*
   - inefficient administration and red tape
2. *Entry restrictions*
   - ownership restrictions: mandatory state or local partnership; limitations related to industrial property and land;
   - access to sectors and activities: industries reserved for the state or local enterprises; restrictions related to acquisition of existing enterprises; minimum investment requirements;
   - approval procedures: discrimination against private business or FDI; complex procedures; rapidly expiring licenses; red tape.
3. *Post-entry restrictions*
   - management control/freedom of decision: political pressure on management; discretionary state intervention;
   - performance requirements: requirements with regard to exports, local content and manufacturing; foreign exchange neutrality; import and local sales licenses depending on export performance;
   - foreign exchange transactions: restrictions with regard to profit remittances, import financing and payment of fees; delays imposed on transfers; additional taxation of remittances;
   - exit restrictions: restrictions on repatriation of capital;
   - price controls: freezing prices and/or wages;
   - marketing and distribution: interference in the structure of sales organisations and product distribution.
4. *Risk factors*
   - inconsistent, unclear and/or erratic regulations;
   - risk of nationalisation or expropriation;
   - shortcomings in legal and regulatory systems;
   - political instability;
   - environmental risks (e.g., contingent liabilities for previous environmental damage);
   - high rates of criminality;
   - civil disturbances and violence.
5. *Technology-related regulations*
   - intellectual property protection: insufficient protection for patents, copyrights, trademarks etc.; no, insufficient or highly taxed remuneration for brand use, technical assistance and technology transferred;
   - technology targeting: interventions into corporate technology transfers; pressure to dissipate a company's R&D efforts; insistence on local R&D.

Some of the specific items will be considered separately in Section 6 on performance requirements. It should also be noted that the assessment of FDI impediments, especially the weighting done by ERT, may be rather subjective. This drawback which is common to surveys, has to be accepted in the absence of hard (quantitative) data. Moreover, it is foreign investors who take locational decisions so that ERT is probably best qualified to assess the restrictiveness of FDI impediments in potential host countries.

Source: ERT (2000); Nunnenkamp and Spatz (2002).

already.[19] For a start, we calculated bivariate (Spearman rank) correlation coefficients between the indices in Table 2 on the one hand, and FDI stocks in 1999 and FDI inflows in 1997–2000 on the other hand.[20]

The first two columns of Table 3 suggest that more serious administrative bottlenecks and higher risks discouraged inward FDI in a significant way. However, inward FDI was not correlated significantly with either entry restrictions, post-entry restrictions, or technology-related regulations.[21] This provides a first indication that the distribution of FDI among developing countries was shaped by locational factors other than

Table 2: Transaction Cost-Related Impediments to FDI in 28 Developing Countries[a] for 1992 and 1999

	Administrative bottlenecks		Entry restrictions		Post-entry restrictions		Risk factors		Technology-related regulations	
	1992	1999	1992	1999	1992	1999	1992	1999	1992	1999
Argentina	0.5	0.5	0.7	0	0.6	0.3	0.1	0	1.0	0.5
Bangladesh	2.0	1.5	1.0	0.7	0.7	0.3	0.6	0.4	2.0	1.0
Brazil	1.0	0	1.3	0.7	1.2	0.3	0.7	0.2	2.5	0.5
China	3.0	2.0	3.7	2.7	3.3	2.4	1.6	0.9	2.5	1.3
Colombia	2.0	0	2.5	1.0	0.8	0.8	0.7	0.3	2.0	2.0
Ecuador	1.0	1.5	2.0	0.8	0.7	0.4	0.4	0.1	1.0	0.8
Egypt	2.0	2.0	3.0	1.8	1.1	0.5	0.6	0.1	2.0	1.3
Ghana	2.0	0	3.0	1.0	0.5	0.2	0.4	0.1	1.0	0.3
Guatemala	0	0	0.8	1.0	0.7	0.3	0.1	0.6	1.5	0.8
India	3.0	1.0	2.3	1.3	1.5	0.9	1.4	0.4	2.5	2.3
Indonesia	2.0	0	3.3	1.2	1.5	0.3	1.1	0.4	2.0	0.8
Iran	3.0	1.0	3.8	2.7	2.4	1.8	1.3	0.3	2.5	2.0
Kenya	2.0	1.0	2.3	1.3	1.7	0.2	0.7	0.7	1.5	0.8
Korea, Rep.	1.0	0	3.3	1.2	1.3	0.5	0.6	0.3	2.5	1.3
Malaysia	0	0	2.8	2.0	1.8	1.0	0.4	0	2.5	3.0
Mexico	1.0	1.0	3.0	0.5	1.3	0.2	0.4	0.3	1.0	0.5
Nigeria	3.0	2.5	3.3	1.0	2.2	0.5	1.9	0.8	2.5	1.5
Pakistan	2.0	1.0	1.3	0	1.3	1.3	0.8	0.6	1.5	1.3
Philippines	1.0	2.0	2.2	1.2	1.7	0.8	1.1	0.3	2.5	1.0
Saudi Arabia	0	0	3.2	3.3	0.8	0.7	0.4	0.1	1.8	1.0
Sri Lanka	1.0	1.0	1.7	1.3	1.0	0.3	0	0.6	0	1.0
Syrian Arab. Rep	3.0	2.0	3.0	1.7	2.8	1.5	1.7	0.9	1.5	0.3
Taiwan	0	0	2.0	1.3	1.3	0.8	0.4	0.1	2.5	1.8
Thailand	0	0	4.0	1.5	1.0	0.6	2.3	0.3	1.5	0.3
Tunisia	1.0	0	0.5	0.5	0.8	0.8	0.6	0.1	2.5	1.0
Turkey	3.0	2.0	2.3	0.8	0.8	0.5	0.4	0.3	2.5	1.5
Vietnam	3.0	1.0	3.8	1.8	2.3	0.9	1.6	0.4	3.0	2.5
Zimbabwe	3.0	2.0	3.0	1.5	1.8	0.3	1.7	1.1	1.5	0.3
Average 28 DCs	1.6	0.9	2.5	1.3	1.4	0.7	0.9	0.4	1.9	1.1

[a]Survey results ranging from 0 (most liberal) to 6 (most restrictive); see Box 3 for a more detailed description of survey items and aggregation into indices.

Source: ERT (2000).

transaction costs captured by these three FDI impediments. For instance, per-capita FDI stocks in 1999 were highest in Malaysia among all sample countries, even though this country was rated relatively restrictive with regard to entry conditions and technology-related regulations.

The minor importance of transaction costs, as reflected in the indices on FDI impediments, is borne out more clearly once we control for market-related determinants of FDI in developing countries. In a simple multivariate regression analysis, we examined whether transaction cost-related impediments provide explanatory power for the distribution of FDI over and above the host countries' population and GDP per capita. We ran a regression of log FDI (flows and stocks, respectively, in million US-Dollar) on log population, log GDP per capita and each of the five indices on FDI impediments.[22] The two market-related determinants of FDI turned out to be highly significant in all regressions.[23] The coefficients of these regressions were then used to calculate the partial correlation coefficients of each index on transaction cost-related FDI impediments with both, FDI stocks and FDI flows. All partial correlation coefficients are insignificant (see the third and fourth column of Table 3). This implies that even the role of administrative bottlenecks and risk factors in explaining the distribution of FDI among developing countries is small at best, if market-related variables are controlled for.

Our findings underscore the view of Hoekman and Saggi (2000: 642 f.) and Singh (2001), who consider transaction costs to be a weak argument for a multilateral agreement on investment. Furthermore, as argued before, it is far from clear that transaction costs would be substantially lower than under current conditions in the counterfactual situation

Table 3: Transaction Cost-Related FDI Impediments and Inward FDI: Correlation and Regression Results

FDI impediments[a]	Bivariate correlations[b]		Partial correlation coefficients[c]	
	FDI stocks in 1999	FDI flows in 1997–2000	FDI stocks in 1999	FDI flows in 1997–2000
Administrative bottlenecks	–0.53***	–0.39**	–0.23	–0.17
Entry restrictions	–0.09	–0.01	–0.10	–0.17
Post-entry restrictions	–0.01	–0.04	–0.11	–0.18
Risk factors	–0.62***	–0.54***	–0.24	–0.03
Technology-related regulations	–0.01	–0.02	–0.07	–0.12

*, **, *** significant at 10 percent, 5 percent and 1 percent level, respectively (two-tailed).

[a]As of 1999 for correlations with FDI stocks; as of 1996 for correlations with FDI flows. – [b]Spearman rank correlation coefficients; inward FDI in US-Dollar per capita of the sample countries' population. – [c]See text for underlying regression and calculation procedure; inward FDI in million US-Dollar.

Source: Nunnenkamp and Spatz (2002).

of a multilateral investment agreement. Of course, it cannot be ruled out that FDI in developing countries would have been still higher if multilateral rules had existed. Yet it should be noted that the boom of FDI in developing countries occurred without a multilateral investment agreement (Singh 2001), and some countries, notably China and Malaysia, attracted enormous amounts of FDI despite their relatively restrictive investment regimes.

5.4 Developing Countries' Demands for Flexible Rules and Corporate Obligations

According to Singh (2001), the attractiveness to FDI of countries such as China and Malaysia also proves the case for flexible investment rules, which would allow for selectivity of developing host countries in targeting and regulating inward FDI. A strict application of WTO principles such as national treatment and MFN to FDI is deemed harmful by these authors to economic development in the Third World. It is for several reasons that developing countries are urged to monitor and regulate the amount, structure and timing of FDI: (i) to avoid financial fragility, (ii) to prevent crowding-out of domestic investment, and (iii) to promote economic development by technology transfers and economic spillovers.

Likewise, the request for a balanced multilateral agreement to include corporate obligations is meant to improve the developmental impact of FDI in the Third World. Corporate obligations are considered a vital element of a multilateral agreement, as MNEs "often only aimed at maximising their own profits" (DSE Forum 2002: 39). The profit motive of MNEs may conflict with development needs of the host countries of FDI and, thus, provides a rationale for restrictive FDI policies if market failure is prevalent: "Since multinational firms typically arise in oligopolistic industries, the presence of imperfect competition in the host country is an obvious candidate" (Hoekman and Saggi 2000: 632).

It is mainly with regard to corporate obligations that developing countries may achieve a better deal by negotiating multilaterally on investment. As noted in Section 2, BITs typically do not include provisions against restrictive business practices. Bargaining asymmetries will be easier to overcome if the request for corporate obligations is coordinated among developing countries. The wish-list of multilateral rules on corporate behavior includes the following (for details, see CUTS 2001; 2002):

- observance of human rights, labour rights and environmental protection ("Global Compact");
- corporate disclosure and accountability;
- respect for national laws;
- social responsibility, e.g., with regard to illicit payments and product safety;
- transparency in transfer pricing;
- precautions against restrictive, abusive and unfair business practices (e.g., market segmentation, discriminatory pricing, collusion, exclusive dealing); and
- promotion of technological dissemination, local entrepreneurship and local workers.

Even though it was for good reasons that developing countries have resisted linking trade with labour and environmental standards and human rights, they would now like to have binding rules on corporate behavior in these respects. Previously established guidelines and codes of conduct are dismissed as insufficient. Similar to restricting incentives-based competition for FDI (see Section 7 below), however, the real challenge is enforceability. The critique leveled against non-binding guidelines, that they have little impact on corporate behavior, may apply to binding rules, too, unless they can be enforced effectively.

In essence, developing countries demand more flexible rules with regard to their own behaviour and more binding rules with regard to corporate behaviour in order to improve the developmental impact of FDI. Developing countries may be tempted to dismiss the opposition of industrialised countries and MNEs against these demands by pointing to the selfishness of opponents in the political bargaining process. Yet, developing countries should take into account that their demands also give rise to some economic questions. In the subsequent paragraphs, we address possible trade-offs and opportunity costs, and discuss the effectiveness of "development clauses" in a multilateral investment agreement.

Possible trade-offs are twofold. First, the required flexibility of rules on FDI policies by host countries comes at the cost of transparency and predictability. According to Sauvant (2000: 10), a balance has to be achieved: "On the one hand, it is unavoidable that any international agreement – almost by definition – establishes certain obligations that reduce the freedom of action for any signatory and that, on the other hand, the distinct and specific needs of any particular country to promote its own development objectives in light of its own situation need to be taken into account." In striking this balance, negotiators should be aware that the transaction-cost argument, discussed in the previous section, might become irrelevant altogether if rules were to become rather flexible. Put differently, reductions in transaction costs will be the less, the more flexible rules become.

Second, while corporate obligations can only have an impact on the quality of inward FDI if they are binding and enforceable,[24] strict obligations may reduce the quantity of inward FDI. Foreign investors are always free not to invest if profit opportunities are considered poor in the light of obligations to be fulfilled. This might not be a problem for recipient countries if only "development-unfriendly" FDI projects were discouraged in this way. It cannot be ruled out, however, that foreign investors would generally become more reluctant. Almost by definition, the profits of MNEs and, thus, their incentive to undertake FDI will decline to the extent that developing countries succeed in shifting rents from MNEs to host countries by imposing binding obligations on the former.

Likewise, the effectiveness of flexible rules and "development clauses" cannot be taken for granted. The special treatment developing countries were granted in trade is a clear reminder in this regard.[25] Trade preferences traditionally rule the way many developing countries perceive the GATT/WTO, even though they "did little for the poor countries" (Bhagwati 2002: 27).[26] The economic results from special treatment in trade have been "disenchanting" (Langhammer 1999: 21) according to several studies. Well-intended as they were, trade preferences did the poorest WTO members no good in promoting their world-market integration. Rather, the special treatment appears to have discouraged African countries, for example, from actively participating in trade negotiations by committing themselves to binding trade liberalisation (ibid.). As a result, African markets are still heavily protected. Another consequence was that developing countries insisting on preferential treatment were not relevant negotiation partners for industrialised countries in various trade rounds: "The rich countries, denied reciprocal concessions from the poor countries, wound up concentrating on liberalising trade in products of interest largely to themselves" (Bhagwati 2002: 26). The implication for multilateral negotiations on investment is fairly obvious: It is rather unlikely that developing countries can achieve much, e.g. with regard to binding corporate obligations, if they are not prepared to constrain flexibility on their own part.

Besides quid pro quo-considerations in the political bargaining process, it should be taken into account that market failure provides a necessary, but not a sufficient condition for flexible rules to be effective in promoting development-friendly FDI in developing countries. Hoekman and Saggi (2000: 636), though acknowledging the relevance of market failure, emphasise that "in practice it is rather difficult to design strategic FDI policies that are effective. The informational requirements for formulating a successful policy are substantial and such policies invite lobbying and other socially-wasteful activities. ... The best rule of thumb for policy-makers is to refrain from pursuing strategic policies."

The general skepticism of these authors on whether flexibility and selectivity will help promote development-friendly FDI may be specified in several respects.[27] For instance, developing countries in Asia (e.g., Korea and Taiwan) chose to restrict FDI and instead to rely on domestic investors in technologically advanced industries, in order to strengthen local technological capabilities. According to UNCTAD (1999a: 173), selective FDI policies paid off in some of these countries; "in many cases, however, the emergence of successful domestic producers in a new, technologically-advanced industry is unlikely or might take a long time with uncertain results. An example of a costly intervention in favour of domestic firms in high-technology industries is the Brazilian informatics policy of the early 1980s, which involved restrictions on FDI."

In other words, it cannot be simply assumed, as in Singh (2001), that some success stories of flexible and selective FDI policies could be easily copied by all developing countries. Poor developing countries in particular, may lack administrative capabilities to effectively screen FDI and channel foreign investors into activities which foster national economic development. Government failure may then hamper economic development even more seriously than market failure.

Finally, in the course of time, selective FDI policies may turn out to be less successful than first-round effects suggest. The empirical results of Agosin and Mayer (2000) on FDI-induced crowding-out and crowding-in of domestic investment provide an example. According to Singh (2001), the findings of these authors strengthen the case for selective FDI policies, as crowding-in was observed in Asian countries with less liberal FDI policies, whereas crowding-out prevailed in more liberal Latin America. This misses a point made in a recent OECD study: "Crowding out of domestic investment through FDI may not necessarily be a problem, and can even be a healthy sign" (OECD 2002: 64). The host economy may benefit if local enterprises lacking competitiveness are replaced by foreign firms, provided that released domestic resources are used for more productive purposes. With hindsight, it might have been not so bad after all if Asian governments had allowed MNEs to outcompete local firms; this might have helped prevent over-investment in unproductive activities.

6. *Performance Requirements: Making a Fuss about a Minor Problem?*

Conflicts of interest between developing and developed countries appear to be particularly pronounced with regard to performance requirements. Developed countries are widely expected to intensify pressure on developing countries to abolish performance requirements when it comes to multilateral negotiations on investment.

Taking further into account that many BITs do not prohibit performance requirements, it is less likely than noted before in the context of corporate obligations that developing countries will achieve a better deal on performance requirements in multilateral negotiations. In other words, multilateral negotiations may improve the bargaining position of developing countries in some respects, but not necessarily in all respects. As a matter of fact, the resistance of developing countries to enter into multilateral negotiations under the WTO umbrella seems to be largely because they regard performance requirements as an essential means to improve the "quality" of FDI inflows.

The opposing objectives of developing and industrialised countries and the ensuing controversy suggest that performance requirements are widely used and considered a major bottleneck to FDI by multinational enterprises. All the more surprisingly, OECD (2002: 185) notes: "Little concrete evidence is available to shed light on the pervasiveness of performance requirements." Under the TRIMs agreement which prohibits certain types of performance requirements (e.g. export restrictions, trade-balancing requirements and local content obligations), only 26 countries had notified performance requirements that did not conform with this agreement, and many of these requirements have since been repealed (OECD 2002). On the other hand, notifications may seriously underreport the actual use of TRIMs, which is now one of the implementation issues in the Doha agenda.[28]

Survey data on investment conditions in 28 developing countries, presented in ERT (2000), indicate that both the proponents and the critics of performance requirements miss an important point: The implicit assumption made on both sides of the debate, namely that performance requirements are highly relevant, seems to be in conflict with the available evidence.

The ERT-survey covers various aspects of investment conditions in the 28 sample countries. The following three items, included in the checklist, are of particular interest in the present context:[29]

- performance requirements related to exports, local content, manufacturing and foreign exchange neutrality (including requirements that are not codified);
- requirements related to employment conditions (discrimination of foreign investors against comparable local employers) and work-permits for international staff; and

- technology targeting, i.e., interventions into the corporate transfer of technology and insistence on R&D efforts in the host country and R&D dissipation.

For each of these items, ERT (2000) lists country-wise impediments to FDI on a scale ranging from 0 (most liberal) to 6 (most restrictive). As mentioned in Section 5.3, the scoring may be criticised for the subjectivity involved and the limited number of host countries under consideration. Moreover, restrictive performance requirements tend to be concentrated in some industries such as automobile production.

Nevertheless, Table 4, which presents the results for 1992 and 1999, i.e., the first and the final year for which comparable surveys are available, reveals some interesting insights. Even in the early 1990s, the restrictiveness of performance requirements was considered rather low for the average of all sample countries; the average score was below 2 in 1992 already. Moreover, the average score declined significantly during the 1990s, indicating a relaxation of performance requirements in all three dimensions. Performance requirements became less restrictive in almost all sample countries.[30] Specific exceptions are: employment requirements in Nigeria and Zimbabwe, and technology targeting in China.

More surprisingly perhaps, a (Spearman rank) correlation analysis does not support the proposition that more restrictive performance requirements tend to discourage FDI in a significant way. For lack of sectorally disaggregated data on performance requirements and FDI in the sample countries, we correlate performance requirements as given in Table 4 with overall (inward) FDI stocks per capita of the host countries' population.[31] The correlation coefficients shown in Table 5 are statistically insignificant, which is in conflict with the proposition underlying the negotiating stance of developed countries in the WTO. For technology targeting, the coefficients even reveal a positive correlation with FDI stocks.[32] Although the evidence is admittedly weak, the most heavily disputed performance requirements related to exports, local content, manufacturing production and foreign exchange neutrality may have become less relevant as a hindrance to FDI during the 1990s.

These findings seem to strengthen the case of developing countries attempting to improve the "quality" of FDI inflows by insisting on performance requirements. As it seems, the costs of doing so, in terms of a lower quantity of inward FDI, are marginal at most. Before drawing such a conclusion, however, two issues have to be taken into account. First, it is open to debate if (and which) performance requirements actually help improve the "quality" of FDI. Second, there may be other costs involved, notably special incentives granted to foreign investors, which compensate for restrictive performance requirements and, therefore, prevent FDI from falling. These issues are discussed in the remainder of this section.

Performance requirements are designed by host countries to enhance the benefits and minimise the costs of FDI (OECD 2002: 185). For example, local content requirements are regarded as an important means to strengthen economic links between foreign and local producers and, thereby, create local employment opportunities as well as technological spillovers (Kumar 2001). Requirements related to local content, exports and foreign exchange neutrality are intended to reduce the risk that FDI leads to a deterioration of the current account. And mandatory technology transfers may help promote the development of an indigenous industry that is competitive internationally.

Some proponents of performance requirements tend to take it for granted that reasonable development objectives will be achieved in this way (e.g., Kumar 2001; Singh 2001). The detailed account by Moran (1998) of host-country policies to shape foreign investor activities portrays a differentiated picture. In a summary paper, these authors draws the following conclusions (Moran 1999): Export performance requirements have encouraged the integration of foreign affiliates into the global operations of their parent companies

Table 4: FDI Impediments Related to Performance Requirements in 28 Developing Countries[a] for 1992 and 1999

	Export, local content and manufacturing requirements		Employment requirements		Technology targeting	
Argentina	1	0.5	0.5	0.5	0	0
Bangladesh	1	0	3	3	1	0.5
Brazil	0.5	0	1	1	2	0
China	4	3.5	2.5	2	0	0.5
Colombia	1	1	1	0.5	1	1
Ecuador	1	1	0	0	0	0
Egypt, Arab Rep.	2	1	3	2	0	0
Ghana	1	0	2	1.5	1	0
Guatemala	1	0	2	1	0	0
India	1.5	1	3	2	0	0
Indonesia	3	0	2	1	0	0
Iran, Islamic Rep.	3	3	3	1	0	0
Kenya	2	0	0	0	0	0
Korea, Rep.	0	0	1	0	2	0
Malaysia	3	2.5	2	2	2	2
Mexico	2	0	2	1	0	0
Nigeria	3	0.5	2	2.5	0	0
Pakistan	3	3	2	0	0	0
Philippines	2	1	2	0	2	0
Saudi Arabia	0	0	2	1	0	0
Sri Lanka	2	1	0	0	0	0
Syrian Arab Rep.	2	2	3	2	3	0
Taiwan	1	1	1	0	1	1
Thailand	2	1	2	0	0	0
Tunisia	0	0	3	1.5	3	0
Turkey	0	0	1	0	0	0
Viet Nam	0	0	2	1.5	1	1
Zimbabwe	3	0	0	1	0	0
Average 28 DCs	1.6	0.8	1.7	1.0	0.7	0.2
Coefficient of variation[b]	0.7	1.2	0.6	0.9	1.4	2.2

[a]Survey results ranging from 0 (most liberal) to 6 (most restrictive); see text for a more detailed description of survey items. – [b]Standard deviation divided by mean.

Source: ERT (2000).

and have, thus, helped economic development of host countries. By contrast, FDI is found harmful to the growth and welfare of developing host countries when foreign investors are sheltered from competition in the host-country market and burdened with high domestic content, mandatory joint venture and technology-sharing requirements. Likewise, a recent OECD study provides little comfort to those supposing that performance requirements are generally in the interest of developing countries (OECD 2002: 185 ff.). The relevant literature, summarised in this study, rather suggests that the development impact of performance requirements varies across countries, sectors and motives for FDI. Similar to Moran (1998), the case for export requirements is considered stronger than the case for local content requirements. The former can play a crucial role in pushing multinational enterprises to integrate their affiliates in developing countries more closely into corporate sourcing networks,[33] and may counteract the "high incidence of restrictive clauses imposed by MNEs on the export activities of their local affiliates" (Kumar 2001: 3153, with regard to India).

By contrast, local content requirements tend to protect inefficient local producers. Foreign investors who are forced to use inputs that are not up to world-market standards suffer cost increases and impaired international competitiveness. As a consequence, local content requirements may backfire on export objectives. OECD (2002: 192) concludes that the record for performance requirements in achieving development objectives is "less than encouraging". In an earlier survey on the diffusion of technological know-how of foreign investors, Blomström and Kokko (1997) found that local competence and a competitive environment tend to be more important than technology transfer requirements for achieving productivity benefits from FDI.

As concerns the economic costs of performance requirements, incentives granted to foreign investors by host country governments have to be taken into account. If multinational enterprises undertake FDI in spite of performance requirements, this may be because they perceive such requirements as a quid pro quo for compensatory advantages offered by the host country (OECD 2002: 187).[34] Compensatory incentives may have prevented adverse consequences of performance requirements on the quantity of inward FDI, but tend to involve economic costs in terms of allocative distortions and/

Table 5: Performance Requirements[a] and Inward FDI Stocks[b]: Spearman Rank Correlation Results across 28 Developing Countries for 1992 and 1999

	Export, local content and manufacturing requirements	Employment requirements	Technology targeting
		1992	
FDI stocks, 1992	–0.23	0.12	0.12
		1999	
FDI stocks, 1999	–0.10	0.15	0.18

[a]According to Table 4. – [b]US-Dollar per capita of the host countries' population.

Source: Own calculations based on Table 4 and UNCTAD online data base.

or budgetary strains. Allocative distortions are likely, if foreign investors are granted privileged access to protected host-country markets and local resources (e.g., raw materials). For example, FDI in various Latin American countries was traditionally concentrated in sophisticated manufacturing industries in which host countries lacked comparative advantage (Nunnenkamp 1997). Import protection supported high rates of return so that the efficiency and international competitiveness of market-seeking FDI was not a major concern of foreign investors (UNCTAD 1998a: 253).

More apparent costs arise when fiscal and financial incentives are granted to foreign investors as a quid pro quo for performance requirements. FDI in the automobile industry of various countries provides a case in point. As noted in OECD (2002: 186 f.), local content requirements are widely used in this industry. At the same time, host country governments incurred huge fiscal or financial costs to attract FDI in the automobile industry. Oman (2001: 69) presents data, gathered from unofficial sources, according to which "the direct cost of financial and fiscal subsidies paid by governments (predominantly sub-national governments) to attract FDI in major automobile factories rose substantially over the course of the 1980s and 1990s, and amounted to hundreds of thousands of dollars per job-to-be-created in countries as diverse as Brazil, Germany, India, Portugal and the United States."

In conclusion, the issue of performance requirements must not be considered in isolation. Performance requirements are not to be recommended, unless they help achieve development objectives and the direct and indirect costs involved do not exceed the benefits. Incentives-based competition for FDI, an issue to which we turn next, may be particularly perilous for developing countries lacking the financial means to compete successfully with developed countries. All this is underlying the suggestion, e.g. by Moran (1999), that developing countries might offer to refrain from performance requirements in exchange for a commitment of developed countries to refrain from incentives-based competition for FDI.[35]

7. Incentives-based Competition for FDI

Comprehensive statistics on the use and significance of FDI incentives do not exist. That is why the World Bank (2003: 118) considers it of high priority for international collaboration to systematically compile information on FDI incentives. For obvious reasons, however, neither the governments that offer incentives nor the investors who receive them are willing to disclose the amount of incentives (Oman 2001). Most of the relevant literature on FDI incentives refers to the limited evidence presented by UNCTAD (e.g., Moran 1998; Kumar 2001; Kokko 2002). This evidence allows the following conclusions:

- Major FDI projects involved subsidies amounting to hundreds of thousands of dollars per job-to-be created.
- Both developed and developing countries engaged in incentives-based competition; "bidding wars" frequently involved local and provincial authorities.
- Incentives-based competition has increased considerably since the mid-1980s. More than 100 countries provided various FDI incentives in the mid-1990s. In recent years, few countries appear to have competed for FDI without any form of subsidies.
- Financial incentives are common in developed countries, while incentive schemes in developing countries are often based on tax holidays and other fiscal measures that do not require direct payments of scarce public funds.
- FDI incentives appear to be concentrated in some technologically advanced industries such as automobiles, petrochemicals and electronics.
- Incentive packages are offered particularly for large, "high-visibility" projects.

The economic justification of FDI incentives depends on whether they are (i) effective in increasing the amount of FDI inflows and (ii) efficient in that the costs of providing incentives do not exceed the benefits to the host country.[36] The effectiveness of FDI incentives was considered highly questionable by most economists in the past (Oman 2001; Nunnenkamp 2001a). However, Kokko (2002) argues that globalisation has made incentives a more important determinant of international investment decisions; this author refers to recent surveys and econometric studies supporting this view.[37]

The strongest efficiency argument in favour of FDI incentives is based on prospects for economic spillovers. Foreign firms often command over superior technology and knowledge. Local firms may benefit from productivity-enhancing externalities or spillovers, e.g., through forward or backward linkages with foreign firms. Such spillovers do not enter the private cost-benefit calculus of foreign firms. Hence, FDI tends to be less than is optimal from the host country's perspective. FDI incentives can bridge the gap between private and social returns. It follows that the efficiency of FDI incentives depends on the significance of spillovers.

The empirical evidence on spillovers is mixed. Kokko (2002: 5) summarises as follows: "There is strong evidence pointing to the potential for significant spillover benefits from FDI, but also ample evidence indicating that spillovers do not occur automatically." Hence, the efficiency of FDI incentives is not obvious, and systematic differences between countries are to be expected. Hoekman and Saggi (2000: 638) conclude that "the elusive nature of spillovers makes it difficult to justify the use of investment incentives on the scale they are being used today".

From a developing country perspective, the efficiency of FDI incentives deserves particular attention, when defining their negotiation stance on multilateral investment rules. Even though the potential for FDI-induced catching-up processes should, in principle, be inversely related to the per-capita income of host countries, it would be wrong to conclude that the efficiency of FDI incentives is highest in low-income countries. The available evidence rather suggests that productivity-enhancing spillovers materialise only if the host country has reached a threshold of sufficient local capabilities to absorb superior technologies and knowledge of foreign investors.[38] This implies that FDI incentives amount to a waste of scarce public resources in many poor developing countries.

Especially where FDI incentives are difficult to justify economically, the pervasiveness of incentives is probably largely due to political considerations. FDI incentives are politically attractive: Host country governments can point to visible results of their promotional efforts when an FDI project is attracted by granting incentives, whereas the costs of incentives are typically widely spread and hardly visible. There is, thus, a built-in bias towards offering overly generous incentives. In other words, politically motivated competition for FDI tends to raise incentive levels and shifts benefits from host countries to foreign investors (Haaland and Wooton 1999). It is precisely the lack of transparency which renders incentives-based competition for FDI problematic. Secrecy creates "significant possibilities for graft, corruption and many other types of rent-seeking behaviour" (Oman 2001: 79).

The "race to the top" in offering FDI incentives is difficult to stop, even though the economic case for not taking part in incentives-based competition may be strong. Politically, it may not be feasible to withdraw incentives unilaterally. Even if economic fundamentals of host countries remain a more important pull factor of FDI inflows, incentives can make a difference in an investor's final locational choice among short-listed countries with similarly favorable fundamentals (Oman 2001: 68). Host country authorities, including sub-national governments, find themselves in a prisoner's dilemma when multinational enterprises start playing the authorities off against each another to bid up the value of incentives. Incentives offered by one particular country may have negative external effects on another country, in terms of either countervailing incentives or forgone FDI inflows.

Policy coordination seems key to escape this dilemma. The scarcity of serious attempts to overcome coordination problems and limit competition for FDI is all the more surprising. As noted by Oman (2001), there is one major exception, namely the European Union, which offers some lessons of how to limit incentives-based competition (Box 4). Developing countries may find the EU approach fairly attractive, as "development areas" are granted preferential treatment. If this principle was applied in multilateral negotiations on incentives-based competition for FDI, developing countries would have more leeway than developed countries to attract FDI by offering incentives.

However, a multilateral agreement that seeks to discipline incentives designed to attract FDI "will be difficult to achieve and difficult to enforce, given that governments have multiple instruments at their disposal to attract FDI or to retain investment" (Hoekman and Saggi 2000: 640). The hope of developing countries for an agreement that effectively restrains industrialised countries in providing subsidies to foreign investors may prove illusory. The failure of the MAI among OECD countries is quite telling in this regard (see Section 4).

Furthermore, it is open to question whether developing countries could attract substantially more FDI, without putting too much strain on their financial resources, if only developed countries were restrained in subsidising FDI. For most FDI projects, developing countries compete with each other, rather than with highly developed countries. Oman (2001: 65) observes that "much of the competition for FDI is effectively among governments in the same geographic region, i.e. among relative neighbours." Hence, preferential treatment of developing countries with regard to FDI incentives would hardly be instrumental to strengthen the bargaining position of developing host countries in resisting the demand for incentives by multinational enterprises.

Its political attractiveness notwithstanding, preferential treatment along the lines of the EU system would solve only the minor part of the problem. From an economic perspective, developing countries would be well advised to go beyond requests directed at developed countries to reduce their FDI incentives and, thereby, offer developing countries better chances in incentives-based competition. Self-restraint appears to be indispensable, in order to strengthen the bargaining position of developing countries vis-à-vis multinational enterprises. A unilateral withdrawal of incentives is rendered difficult by the prisoner's dilemma. Unless this dilemma is tackled effectively by a binding multilateral framework, policy coordination at the regional level could be helpful in preventing an incentives race to the top.

Box 4: Limiting Incentives-Based Competition for FDI: The Example of the EU[a]

Since the creation of the European Economic Community in 1957, the European Commission has been empowered to limit the ability of member countries to offer subsidies to firms and investors. The underlying reason was that uncontrolled subsidies could undermine the objective of the Treaty of Rome to achieve a common market and a convergence in living standards across member countries. As a result, a system of "bounded competition" has emerged, in which subsidies are confined by the European Commission to geographically defined lower-income regions ("development areas"). The system may be far from perfect, but it offers:

- a functional regulatory framework,
- an autonomous supervisory body,
- procedures for enforcement, and
- sanctions backed by provisions for judicial review.

The EU model may not be easily copied by other countries, or a larger group of less integrated countries. Nevertheless, it seems worthwhile to study its features in more detail, in order to tackle the prisoner's dilemma in multilateral negotiations.

[a]*Based on Oman (2001: 66).*

8. Conclusions and Strategic Options

Several arguments suggest that multilateral negotiations on an investment agreement should not figure high on the WTO agenda. Investment rules do exist already in BITs, RTAs and even at the multilateral level in TRIMs and GATS. Existing rules may be far from perfect, but it is difficult to conceive that a clearly superior set of rules could be agreed upon under the roof of a WTO agreement on investment.

The most likely outcome of multilateral negotiations on investment will be a "WTO-plus" framework. Any WTO member could move beyond the multilaterally defined smallest common denominator, by concluding more far-reaching agreements either bilaterally or among regional partners. This has an important implication for one of the widely perceived strong-points of a multilateral agreement, the reduction of transaction costs. Whatever the relevance of FDI-related transaction costs might be under current conditions (the available evidence suggests that they are frequently overstated), the complexity of different investment rules and regulations would persist, unless BITs and investment rules in RTAs were replaced by a multilateral agreement.

This cannot reasonably be expected from the Doha Round, which may at most mark the starting point of WTO negotiations on investment. Our reasoning is supported by the World Bank (2003: 127–128), which notes that the Doha Ministerial Declaration reflects a rather limited approach that does not view a multilateral framework as a substitute for BITs and RTAs. It is also mentioned in this context that recent negotiating briefs in the WTO indicate that some countries have withdrawn support for investor-state dispute settlement, which would lessen investor protection compared to various bi- and plurilateral agreements. The transaction-cost argument would become close to irrelevant, if developing countries succeeded in preventing strict and generally enforceable rules and insisted on flexibility and "development clauses".

This is not to ignore that Doha could initiate a long-term process towards more substantive and binding multilateral investment rules. Even so, the experience with trade rules suggests that the potential of reductions in transaction costs is easily overstated. Substantial trade liberalisation at the multilateral level has not prevented the "spaghetti bowl" of bilateral and plurilateral trade preferences. It is thus hardly compelling to argue that in the course of time, progress with respect to multilateral investment rules will render more and more BITs and RTAs redundant.

The chances to effectively constrain incentives-based competition for FDI do not appear promising either. Even though some economists have questioned the public good character of a multilateral agreement to stop "bidding wars" (e.g., Langhammer 1999; Kumar 2001), policy coordination seems key to escape the prisoner's dilemma. It would be an important first step to develop an inventory of the extent and costs of FDI incentives granted by all WTO members (World Bank 2003).

However, due to strong opposition, especially from sub-national authorities, the critical issue of incentives-based competition for FDI had been removed from the agenda of OECD countries even before the attempt to agree on the MAI among themselves failed completely. It seems highly unlikely that developing countries unwilling to tie their own hands can achieve binding concessions from industrialised countries to cut FDI subsidies. Apart from quid pro quo-considerations, the practical consequences of a multilateral agreement would remain limited at best, unless negotiations "enter deeply into the taxation regulations of host countries" (Langhammer 1999: 352) and developing countries were prepared to constrain incentives-based competition among themselves.

Furthermore, our analysis underscores the skeptical view expressed in World Bank (2003: 118) that "new international agreements that focus on establishing protections to investors cannot be predicted to expand markedly the flow of investment to new signatory countries". It is, obviously, difficult to determine, not to speak of predicting, changes in the volume and allocation of FDI resulting from changes in the regulatory environment. Yet, there are several reasons why the effects of a multilateral agreement on FDI flows to developing countries are likely to fall short of high expectations:

- The absence of such an agreement has not prevented the recent boom of FDI in developing countries.
- Likewise, substantial unilateral liberalisation of FDI regulations was undertaken in the past even though multilateral obligations to do so did not exist.
- The coverage of protections to investors in various BITs (and RTAs) goes beyond what can be expected from the Doha Round. Nevertheless, BITs do not appear to have had a significant impact on FDI flows to signatory countries. This can be concluded from several studies applying different methodologies and, thereby, reducing the risk of seriously biased results.
- As shown elsewhere, it is also questionable whether RTAs such as NAFTA and MERCOSUR had a strong and lasting effect on FDI flows to developing member countries (Nunnenkamp 2001b).

It is against this backdrop that developing countries have to decide on their negotiation strategy when it comes to investment-related issues in the current WTO round. Harsh critics of a multilateral agreement on investment, e.g., Kumar (2001) and Singh (2001), urge developing countries to take a firmly defensive stance. Accordingly, resisting the efforts of industrialised countries to go beyond TRIMs is considered the first-best option for developing countries. As a fall-back position, Kumar (2001) suggests to minimise developing countries' own commitments (e.g., by excluding pre-entry rules, and by insisting on development clauses and exceptions from national treatment even in the post-entry phase) and, at the same time, to stick to demands for binding corporate obligations and restraints on FDI subsidies granted by industrialised countries.

The rationale underlying this defensive strategy appears to be that essentially nothing will change if a large enough number of developing countries follows this route. Developing countries and industrialised countries would block each other. To the extent possible under current conditions, the former could still pursue flexible FDI policies deemed necessary to achieve developmental objectives. The latter could take this as an "excuse" for not offering concessions as to the demands of developing countries.

Whether a defensive stance is the appropriate strategy for developing countries depends on two factors: (i) the costs of giving up flexible FDI policies, and (ii) the benefits to be derived from possible concessions by industrialised countries. As concerns the former, the proponents of a defensive strategy tend to ignore that the record of governments in developing countries to promote economic development by flexible and selective FDI policies is mixed at best (see Sections 5 and 6). Moreover, as argued by Hoekman and Saggi (2000: 637), "if a country pursues free trade, a restrictive FDI policy will not transfer any rents as foreign firms will not engage in FDI. Instead, they will contest the market through exports." Hence, the costs of giving up discretion are frequently overstated.

This leads us to suggest an offensive strategy, even though we consider the economic case for a multilateral investment agreement to be weak. Developing countries may offer in multilateral negotiations not to impose any new performance requirements and phase out existing ones. The available evidence on the effectiveness of performance requirements (see Section 6) reveals that developing countries have little to lose if they offered to refrain from joint-venture and technology-sharing requirements, which are not included in the illustrative list of the TRIMs agreement. Financially, they may even gain as compensatory incentives, granted to foreign investors in conjunction with performance requirements, could be abolished.

The WTO may be used as a scapegoat for such a move and may, thus, help overcome the opposition of rent-seeking constituencies within developing countries. By offering something on their own, developing countries will become more relevant negotiation partners for industrialised countries. Only then could developing countries reasonably expect industrialised countries to make concessions as a quid pro quo. Concessions by industrialised countries may comprise: the relaxation of rules of origin applied by the EU and NAFTA, which create similar distortions as local-content requirements of developing countries; the inclusion of corporate obligations into a multilateral agreement; and restraints on the use of FDI incentives.

The proposal for developing countries to enter into a "grand bargain" (Moran 1998; 1999) with industrialised countries has been criticised for two reasons by Hoekman and Saggi (2000):

- Given the limited use of existing agreements (notably TRIMs), these authors question the marginal value of yet another multilateral agreement. However, TRIMs is widely considered to be biased against the interests of developing countries. Hence, it may be politically more attractive to developing countries to strive for a more balanced agreement by making a fresh start in negotiating on investment.
- Devising a grand bargain may prove a two-edged sword for developing countries. The potential downside can be seen in cross-issue linkage in areas such as labour standards and the environment, pushed by industrialised countries and civil-society organisations. Yet, Hoekman and Saggi (2000) agree that the grand-bargain argument is one of the raisons d'être of the WTO. Hence, the question for developing countries is not whether to offer anything, but what to offer and what to demand as a quid pro quo.

The offensive strategy outlined so far is rather narrowly defined, as cross-issue linkages are confined to FDI-related policies. Developing countries may be well advised to look beyond negotiations on investment, especially when it comes to concessions demanded from industrialised countries. Concessions from industrialised countries would be easier to achieve, if developing countries made additional offers related to trade under existing agreements, i.e. GATT and GATS (Hoekman and Saggi 2000). Yet, rules-based FDI policies are an important negotiating chip for developing countries. Far-reaching offers related to FDI policies would render it increasingly difficult for industrialised countries to block negotiations in other areas that are of vital interest to developing countries.

Linking national treatment of foreign investors in the pre-entry stage with cross-border movements of workers is an obvious case in point. At present, the request of industrialised countries for an agreement on investment is frequently rejected as it would result in an asymmetry, unless free capital movement is matched by free labour mobility (e.g., Kumar 2001 and Panagariya 2000, quoted in Kumar). However, developing countries should consider the option to transform this defensive stance into an offensive strategy by presenting national treatment in the pre-entry stage as a carrot for industrialised countries to engage in negotiations on labour mobility. Economically speaking, the arguments for labour mobility are no weaker than those for capital mobility (Hoekman and Saggi 2000). The political resistance by industrialised countries to treat labour and capital symmetrically may weaken in the longer run at least, when demographic problems mount in various industrialised countries.

Finally, it is for political-economy reasons that we prefer a broadly defined offensive strategy of developing countries over the currently prevailing defensive stance. As argued in Section 5.1, the cost-benefit calculus with respect to a multilateral investment agreement differs across developing countries, e.g., depending on what FDI has to offer under different host-country conditions. This implies that a united front of developing countries against such an agreement is rather unlikely.

Furthermore, various developing countries may have little choice but to join a multilateral agreement on investment eventually. Some developing countries with large markets and strong economic fundamentals could possibly afford to remain outsiders. But small and less attractive countries probably cannot, even though a multilateral agreement may not induce more or higher-quality FDI inflows. The reason is similar to what UNCTAD (1998a) observed with regard to national FDI regulations: Not taking part in the trend towards more liberal FDI policies can effectively close the door to FDI, whereas liberal FDI policies (or agreeing to a multilateral agreement on investment, for that matter) are just a necessary condition for FDI to help achieve national development objectives.

Conflicting interests among developing countries strengthen the bargaining position of industrialised countries. A purely defensive strategy, as suggested by Kumar (2001) and Singh (2001), is thus likely to fail. Rather than engaging in a futile attempt to block multilateral negotiations on investment altogether, it appears more promising to us to actively take part in negotiations, by making own offers and demanding quid pro quo-concessions from industrialised countries.

Annex

Transaction Cost-Related FDI Impediments and Inward FDI: Robustness of Correlation Results

The robustness of correlation results presented in Table 3 in Section 5.3 may be questioned on two grounds:[39]

- Transaction costs might become an issue only if, in their absence, investors wished to invest in a developing country. In other words, our correlation results for the overall sample may understate the relevance of transaction costs due to the inclusion of developing countries in which reasonable profit opportunities do not exist so that FDI will not take place even if transaction costs are low.
- The relevance of transaction costs may differ between different types of FDI. Most notably, transaction cost-related variables may have varying effects on greenfield investments on the one hand, and mergers and acquisitions (M&As) on the other hand.

The first argument suggests to re-run the correlations for a reduced sample. We excluded six (out of 28) countries, namely Bangladesh, Ghana, Iran, Kenya, Syria and Zimbabwe. The assumption that, due to more fundamental bottlenecks to FDI, transaction costs are more or less irrelevant there is based on two criteria, met by these six sample countries: Per-capita FDI stocks in 1999 were extremely small (below US-Dollar 100)[40] and their share in FDI stocks in all developing countries was below 0.2 percent.

Spearman rank correlations did turn out to be somewhat stronger for the reduced sample (Annex Table 1). Yet, the results deviate surprisingly little between the full and the reduced sample. None of the correlations lacking significance at conventional levels for the full sample becomes significant when the above mentioned countries are excluded. This applies to correlations with both, FDI stocks in 1999 and FDI flows in 1997–2000. This corroborates the finding that transaction costs were a minor factor shaping the distribution of FDI among developing countries. This conclusion holds even for those developing countries for which transaction costs could be expected to play a more important role.

The second argument calls for a disaggregation of overall FDI inflows. We separated greenfield investment from M&As by subtracting M&A sales, as given in UNCTAD (2002: Annex Table B.7), from total FDI inflows.[41] Spearman rank correlations are reported in Annex Table 2. As before with regard to sample selection, the disaggregation of FDI inflows has some impact on the correlation results, but all major conclusions drawn in Section 5.3 remain valid. Entry restrictions appear to have discouraged M&As more than greenfield investment, even though the correlation coefficient turns out to be insignificant for both types of FDI inflows. In all other respects, the correlation exercise reveals only minor differences between M&As and greenfield investment. The two transaction cost-related factors that were negatively correlated with total FDI inflows in a significant way (administrative bottlenecks and risk factors) affected M&As and greenfield investment to the same extent.

Annex Table 1: Transaction Cost-Related FDI Impediments and Inward FDI: Correlation Results for Full and Reduced Sample[a]

FDI impediments[b]	FDI stocks in 1999		FDI flows in 1997–2000	
	full sample	reduced sample	full sample	reduced sample
Administrative bottlenecks	–0.53***	–0.64***	–0.39**	–0.49**
Entry restrictions	–0.09	–0.05	–0.01	–0.05
Post-entry restrictions	–0.01	–0.21	0.04	–0.11
Risk factors	–0.62***	–0.76***	-0.54***	–0.64***
Technology-related regulations	–0.01	–0.27	0.02	–0.11

*, **, *** significant at 10 percent, 5 percent and 1 percent level, respectively (two tailed).

[a] For reasons given in text, we excluded Bangladesh, Ghana, Iran, Kenya, Syria and Zimbabwe. Spearman rank correlation coefficients; inward FDI in US-Dollar per capita of the sample countries' population. – [b] As of 1999 for correlations with FDI stocks; as of 1996 for correlations with FDI flows.

Source: Own calculations on the basis of UNCTAD online data base and ERT (2000).

Annex Table 2: Greenfield Investment vs. M&As: Spearman Rank Correlations with Transaction Cost-Related FDI Impediments

FDI impediments[a]	FDI flows in 1997–2000[b]		
	total	M&As[c]	greenfield[c,d]
Administrative bottlenecks	–0.39**	–0.43**	–0.41**
Entry restrictions	–0.01	–0.29	0.16
Post-entry restriction	0.04	–0.07	0.14
Risk factors	–0.54***	–0.48**	–0.48**
Technology-related regulations	0.02	–0.01	0.15

*, **, *** significant at 10 percent, 5 percent and 1 percent level, respectively (two tailed).

[a] As of 1996. – [b] US-Dollar per capita of the sample countries' population. – [c] Excluding Iran due to missing data. – [d] Approximated by the difference between total FDI inflows and M&A sales.

Source:Own calculations on the basis of UNCTAD (2002 and online FDI data base) and ERT (2000).

Endnotes

1 We would like to thank the participants of the Programme's Midterm Review Meeting in Jaipur on December 20–21, 2002 for constructive criticism. We are particularly indebted to our discussant T. N. Srinivasan and to Alan Winters for many helpful suggestions. Thanks are also due to Rolf J. Langhammer and several anonymous referees for comments on the second draft of this paper. Manoranjan Pattanayak provided research assistance.

2 For a summary of the relevant literature, see Nunnenkamp (2002: Section 9).

3 In 2001, all regulatory changes which favoured FDI (total of 208) were grouped as follows (UNCTAD 2002: 8): more guarantees (24 percent), more liberal entry and operational conditions (28 percent), sectoral liberalisation (23 percent), and more promotion including incentives (26 percent).

4 We owe this argument to an anonymous referee.

5 The World Bank (2003: 127) notes: "The negotiating asymmetries that are common to bilateral agreements have led to treaties in which developing countries have taken on substantive obligations without any reciprocity other than the promise of increases in future private investment."

6 FTAA negotiations involve 34 developing countries of Latin America and the West Indies. The United States and Canada are the only developed countries taking part.

7 India and China are also now attempting to enter into a free trade agreement with ASEAN.

8 The accession to NAFTA by Mexico was due to the expected significant investment and trade benefits which would accrue (Krueger 2000). It has been argued that Mexico was able to overcome one decade of opposition to NAFTA due to the debt crisis of the 1980s, its extreme trade dependence on the United States and its semi-authoritarian regime prior to 1991 (Schirm 2002). In addition, the formation of NAFTA was arguably propelled by Mexico's GATT membership since 1986 and fears of a "Fortress Europe".

9 The framework for a binational judicial review of tribunal decisions is laid down in Chapter 19 of the NAFTA Treaty.

10 However, as mentioned before, pressure by the United States played a role in NAFTA and may also shape investment rules in FTAA.

11 According to Rugman and Anderson (1997), however, the NAFTA dispute settlement mechanism was running into problems.

12 Performance requirements are also covered in some BITs involving Canada, Japan and Mexico.

13 We owe this argument to an anonymous referee.

14 See, for example, the summary of discussions with regard to trade and investment in DSE Forum (2002: 39 ff.).

15 For a summary of relevant studies, see Nunnenkamp (2002).

16 The so-called spaghetti bowl of trade preferences (Bhagwati) clearly suggests that such an outcome would be sub-optimal from an economic point of view. Yet, for political-economy reasons, we consider it unlikely that a multilateral agreement on investment will achieve what proved impossible so far in trade negotiations.

17 The small sample of 28 countries may compromise the representativeness of survey results for the developing world. Note, however, that the sample accounted for 62 percent of FDI flows to all developing countries in 1997–2000 (UNCTAD online data base).

18 The business community may have had incomplete information on unilateral liberalisation in the past. Improved information could then contribute to a fading interest of the private sector in a multilateral agreement. On the other hand, the business community may still consider a multilateral agreement to be the best means to lock in previous unilateral liberalisation measures, i.e. render them irreversible.

19 The remainder of this section draws on Nunnenkamp and Spatz (2002).

20 Both, FDI stocks and flows are considered in US-Dollar per capita of the sample countries' population in the correlation analysis. In this way, we avoid the large-country bias that characterises the distribution of FDI in absolute terms.

21 The robustness of results was checked in two respects; see Annex for details.

22 The reason that we ran separate regressions for each index with the same controlling variables is that the indices on FDI impediments reveal a fairly high degree of multicollinearity.

23 These results are not shown here in order to save space.

24 For an evaluation of mandatory technology transfers and other performance requirements, see Section 6.

25 Special treatment of developing countries was codified in GATT through the so-called Part IV Extension in 1965 and the Enabling Clause on "Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries" in 1979.
26 See also Langhammer (1999) and the literature given there.
27 See also Section 6 on performance requirements.
28 We owe this point to Alan Winters.
29 Note that performance requirements related to exports etc. constituted one element of post-entry restrictions considered in Section 5.3; technology targeting constituted one element of technology-related regulations (see Box 3 for details).
30 The score improved (i.e., declined) in 43 out of 84 entries in Table 4; it remained constant in 38 cases.
31 FDI stocks are considered in per-capita terms, in order to control for country size; further details can be found in Nunnenkamp and Spatz (2002).
32 This unexpected result is mainly because Malaysia reported the highest inward FDI stock per capita in 1999 (US-Dollar 2234) among all sample countries, even though it was rated most unfavorably in Table 4 with regard to technology targeting in 1999.
33 This remains unlikely, however, if the host country pursues trade policies giving rise to a strong anti-export bias.
34 According to Hoekman and Saggi (2000: 630), "the schizophrenic nature of the overall policy environment" is reflected in that FDI incentives are granted in conjunction with performance requirements.
35 See Section 8 for a discussion of strategic options of developing countries.
36 The subsequent discussion draws on Kokko (2002) and the literature given there.
37 As noted earlier in the context of BITs (Section 2) and transaction costs (Section 5.3), it is difficult to determine what the allocation of FDI would have been in the absence of one particular element of the regulatory framework governing FDI. This is particularly so when it comes to FDI incentives for which there is a serious lack of data.
38 For an overview of the relevant literature in this regard, see Nunnenkamp (2002).
39 We owe the following arguments to T. N. Srinivasan and Simon Evenett.
40 The average for all 28 sample countries amounted to almost US-Dollar 500.
41 Note that this results in an imperfect proxy of greenfield investment since the data sets on total FDI flows and M&As are not consistent with each other.

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Chapter 2

The EU and India on Competition Policy at the WTO: Is There a Common Ground?

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The authors are very grateful to everyone who provided advice and assistance for this report, in particular to L. Alan Winters, Pradeep S. Mehta, Stefan Amarasinha and Julian Clarke as well as participants in the mid-term review meeting in Jaipur, India, in December 2002. The study is a collective one and the order of names on this page specifies who took principal responsibility for the each of the sections of the paper.

Introduction

This research report consists of four sections. It goes without saying that the opinions expressed in our report are those of the authors and not necessarily those of the Consumer Unity & Trust Society of India (CUTS) or the European Commission (EC) that funded this project. The goal of this report is to analyse several issues at stake in the discussions on trade and competition at the World Trade Organisation (WTO). In the view of the European Community and its member states, these discussions should lead to negotiations—which, India argues, will take place only when full agreement on "modalities" is reached[1] at—on a possible multilateral framework on competition policy under the auspices of the WTO. While we do not enter into the question of the appropriate modalities for negotiations, our report may be of interest in the pre-negotiation stage, as it analyses the stated positions of the EC and India and explores the common ground between them.

We start by surveying the formal submissions of India and the EC to the WTO Working Group on the Interaction Between Trade and Competition Policy (WGTCP) and then identify the crux of the differences between them. Despite strong reservations by India about the EC's proposals, the Indian position is in fact not as far from the EC's current proposals as one might expect. Nonetheless, we focus on the aspects, on which India does explicitly or implicitly state what it would seek from any multilateral approach to the competition policy.

We go on to note that India has expressed support for the United Nations Conference on Trade and Development (UNCTAD's) "Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices" (known as the "Set"[2]). Close examination reveals that in many regards, the EC's current proposals differ little from the Set. The Set was prepared by a group of experts working for the UNCTAD in 1980 and subsequently adopted by the United Nations' General Assembly. The Set, however, has no binding force, and this is significant, as the EC is arguing for some binding commitments on selected elements of domestic competition law. The first section concludes by noting that whatever the content of any multilateral disciplines on competition policy, the heart of the disagreement lies in the basic legal distinctiveness of agreements under the auspices of the WTO.

The second section of our report takes a deeper look into the EC's proposals. This section deals with the new rights and obligations implied by the EC's proposals as also with what a WTO agreement inspired by them would mean for a country like India. The analysis reveals that the EC's current proposals involve surprisingly limited additional obligations for the signatories to a multilateral agreement. In some respects, the EC's proposal would actually reduce the extent of WTO obligations in the competition policy by confining Article III of the National Treatment obligations in competition law to the *de jure* discrimination (*i.e.* exempting *de facto* discrimination from WTO disciplines in this field) and by making further provisions for special exceptions.[3] However, *without further exclusions*, any agreement would extend the scope of the *de jure* national treatment requirement beyond its present application — beyond imported goods and scheduled services to non-traded goods and non-scheduled services. Merger review policies would be an issue in this regard.

But as noted in the first section of this report, the EC has framed its proposals in a way that do not affect national industrial or development policy options. We go on to explore a variety of different means, by which exclusions could be spelled out, with a discussion on the "GATS[4]" model and the possibility of simply codifying the existing obligations.

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

As far as discussions on potential multilateral disciplines on hardcore cartels are concerned, we dwell at length upon the implications for the developing countries, including India, of the EC's proposals regarding the cartels. This section identifies two rationales for adopting binding minimum standards in national cartel law and enforcement. We also describe how a number of cooperative mechanisms would enhance the capacity of developing countries to tackle hardcore cartels.

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

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

1. A Comparison of EC and India's Submissions to WTO on Interaction between Trade and Competition Policy

1.1 Historical Background

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

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

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

The revival of interest in international competition issues was associated with a wave of suspicion about the possible abuses of dominance by multinational firms during the 1970s, even though more countries began to see the benefits of direct foreign investment. Work continued at the GATT and the OECD in parallel, but the trade and competition debate did not really revive until the 1990s, when for separate reasons, both the EC and the US began to take a major interest. The result was the decision at Singapore to set up a working group with a mandate to study the linkages between trade and competition policy and the decision at Doha conditionally to initiate negotiations.

The motive that initially drove both big players was slightly different from the one, which had provoked the revival of interest in the 1970s: it was about market access. The

EC had discovered the effectiveness of competition policy as a lever to ensure market openness and included provisions on competition policy in all its bilateral trade agreements, notably the Europe agreements, and bi-laterals with Mexico and South Africa. Interestingly, none of these laid down detailed conditions for domestic competition rules, but rather provisions that called for the prevention of anti-competitive practices that affected trade. The success of these initiatives in the eyes of the Commission has been one of their motives for the desire to "multilateralise" them.

The EC has also pursued bilateral co-operation with the US, though ironically its initial agreement with the US was challenged by member states, which insisted on their competence in this area, and individual member states still have their own bilateral arrangements. For example, the UK has a "Mutual Legal Assistance Treaty" with the US, and the UK DTI web site notes:

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

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

> "The Foreign Trade Anti-trust Improvements Act of 1982 (FTAIA) applies to foreign conduct that has a direct, substantial and reasonably foreseeable effect on the U.S. commerce."[8]

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

The Indian position on "Trade and Competition" has, as is well-known, been deeply sceptical of anything that could lead to substantive negotiations in the Doha Round. But, as we shall see, the Indian position, as evidenced in its submissions to the WTO working group, has been more nuanced than outright opposition.

1.2 Comparison of EC and Indian Positions on Trade and Competition

Here we will ask whether

a) the positions of interests to the EC and India are fundamentally different and irreconcilable; or

b) the two sides have in fact truly common interests, so that a compromise could be easy.

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

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

1.3 Brief History of Positions

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

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

India was originally very supportive of international measures on restrictive business practices, especially the work of the UNCTAD; but it has taken a position against WTO involvement — though official statements suggest the acceptability of some form of multilateral agreement based on UNCTAD Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices. In this part of the report, we will analyse the public declarations of the two sides. The third section will return in more detail to the question how the priority given to cartels can be approached in practice.

1.4 The Main Position Papers

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

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

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

How different is this from the EC position?

Let us consider the various elements of the Indian position, point-wise.
India's statements want the developed countries

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

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

Point 2 asks for an end to the exemption of export cartels. What does this mean? It can be argued that this has to be interpreted as going beyond what it states, "to the extent that domestic competition laws only cover measures with effect in the territory of the jurisdiction", repeal of explicit exemptions would not do anything unless there is a positive decision to take some sort of action against them, or at least to allow action to be taken. It would be difficult but not, perhaps, wholly impossible to see how the EC can take legal action itself against firms not operating a cartel with effects inside the EC.

However, one could imagine the EC authorities informing their counterparts in other countries of evidence discovered of illegal activities elsewhere. It is not impossible to imagine something, which went further, *e.g.* demanding that firms found guilty of abuses in the EC give formal undertakings to it to reveal details of their worldwide actions, or even to cease and desist worldwide. We may raise a question: suppose the EC goes all the way to modify its rules to allow prosecution in or by the EC of cartels operating out of the EC, whose effects only give rise to abuses elsewhere, would this be unjustifiable extra-territoriality? Similar considerations might arise if the US or the EC have laws forbidding the payment of bribes elsewhere.

Point 1 asks the developed countries to consider the impact of mergers, a rather softer demand. But once again we should ask what we mean by the term "consider". Gathering information on the worldwide implications for competition is not the same as asking for mergers, which do no harm at home but still be stopped because they do harm elsewhere.

As per Point 4, positive comity requires countries to take into account others' interests, but only to the extent of your own law. So, if Point 1 and Point 2 are thought of as ones to be applied in the form of positive comity, we would not, in fact, be asking the EC to prosecute firms for doing things not currently illegal in the EC.

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

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

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

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

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

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

WT/WGTCP/W/193, 1 July 2002):

> "A competition agreement should include provisions to facilitate voluntary case-specific cooperation in relation to anti-competitive practices having an impact on international trade. Such provisions should apply to three main types of anti-competitive practices:
>
> (I) Practices that affect international trade (*e.g*. international cartels);
>
> (II) Practices that affect market access (*e.g*. import cartels, exclusionary abuses of a dominant position); and
>
> (III) Practices with an impact on the trade flows to and from a different geographical market than that in which the practices have been conceived (*e.g*. export cartels, abuse of a dominant position by a foreign corporation)."

But the emphasis is on the voluntary nature of this co-operation. How far does this fall short of the Indian "demand"? One may argue that there is indeed common ground. The EC wording could be consistent with positive comity. It falls short of obliging the EC to act on complaints from developing countries even in terms of providing information. But then we know that there is no mechanism to force the EC to act on complaints brought by domestic consumers.

The 1994 SMMT-JAMA[11] case is instructive here. European consumers filed a complaint against the industry to industry Voluntary Export Restraint (VER) affecting the UK market. Privately EC competition officials acknowledged that this was a violation of Article 85(81), but made it clear that political considerations made it impossible to act. Among these considerations were the fact that the resulting import cartel allowed Japanese firms a guaranteed market share and high prices. The Court of First Instances (CFI) ruled that the letter from the DG Competition's refusal to investigate was unlawful, but the result was merely a new letter against an investigation[12]. The EC, in its press statement, agreeing to the EC-Japan "Consensus" on trade in cars gave an undertaking to Japan that competition law would not be used to undermine the subsequent VER negotiated between MITI and the EC for the period 1993-2000, a VER, for which special authorisation had to be sought at the WTO[13].

It is hard to see any international agreement on hardcore cartels removing altogether the right of a CA not to investigate domestic complaints. Thus, the terms of the EC proposal could hardly be expected to require action in the case of *every* aggrieved "Kodak" that claims a "Fuji" is operating a cartel that keeps it out, merely a procedure allowing complaints to be brought. On the other hand, it would open the door to private challenges to import cartels which would in the nature of things add more to market access possibilities for "northern" firms in the "south" than the *vice versa*; not an inherently bad thing for southern consumers, but the asymmetry is not easy to justify.

On the UNCTAD "Set", the next task will be to look more closely at the Set in order to see what "enforcing the UNCTAD Set of measures to control RBPs" would mean[14].

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

1. "To ensure that restrictive business practices do not impede or negate the realisation of benefits that should arise from the liberalisation of tariff and non-tariff barriers affecting world trade, particularly those affecting the trade and development of developing countries;
2. To attain greater efficiency in international trade and development, particularly that of developing countries, in accordance with national aims of economic and social development and existing economic structures, such as:
   a. Creation, encouragement and protection of competition;
   b. Control of concentration of capital and/or economic power; and
   c. Encouragement of innovation;
3. To protect and promote social welfare in general and, in particular, the interests of consumers in both developed and developing countries;
4. To eliminate the disadvantages to trade and development, which may result from the restrictive business practices of trans-national corporations or other enterprises, and thus help maximise benefits to international trade, particularly trade and development of developing countries;
5. To provide a Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices for adoption at the international level and thereby to facilitate the adoption and strengthening of laws and policies in this area at the national and regional levels".

These are classic competitions rather than development goals. The "development bias" and equivalent of the Special and Differential Treatment (S&DT) provision is quite modest:

> "In order to ensure the equitable application of the Set of Principles and Rules, States, particularly developed ones, should take into account in their control of restrictive business practices the development, financial and trade needs of developing countries, in particular of the least developed countries, for the purposes especially of developing countries in:
>
> * Promoting the establishment of development of domestic industries and the economic development of other sectors of the economy; and
> * Encouraging their economic development through regional or global arrangements among developing countries."

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

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

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

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

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

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

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

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

And that

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

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

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

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

> "Consultations:
>
> a. Where a State, particularly of a developing country, believes that a consultation with another State or States is appropriate in regard to an issue concerning control of restrictive business practices, it may request a consultation with those States with a view to finding a mutually acceptable solution. When a consultation is to be held, the States involved may request the Secretary-General of UNCTAD to provide mutually agreed conference facilities for such a consultation;
> b. States should accord full consideration to requests for consultations and, upon agreement as to the subject of and the procedures for such a consultation, the consultation should take place at an appropriate time; and

c. If the States involved so agree, a joint report on the consultations and their results should be prepared by the States involved and, if they so wish, with the assistance of the UNCTAD secretariat, and be made available to the Secretary-General of UNCTAD for inclusion in the annual report on restrictive business practices."

We have not dealt at length here with the issue of exemptions from National Treatment for the purpose of development policy, but as Stewart (2002) argues it is not clear that the issue of National treatment would go beyond the application and enforcement of the anti-trust law, to allow increased market access or negate the benefits for local firms of industrial policy[15].

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

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

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

While this implies discrimination against foreign firms, Point c may not necessarily need to be discriminatory, but the Points a and b might be so. Here, we have to ask ourselves as to how far this would imply discrimination within the competition policy as such, and how far this would, in fact, go beyond the technology policy goals that the EC has set itself. Some member states of the EC would be ready to commit to opening all technology policy instruments to all foreign investors, but would all member states want to do so? However, the EC's position is that what it is proposing in a competition agreement should strictly be confined to competition issues as such, and that other development policies should be treated separately. India, however, sees them as working as a link but the implications of such a linkage are as yet unclear[16].

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

So, where are the fundamental differences? The EC has certainly stepped back from being solely interested in market access. Having said that, there are other interests at stake: the EC (like the US) has a broader political interest in projecting its approach to the governance of trade-related issues. This includes some form of multilateralisation of the approach to competition it adopts in its bilateral agreements. India has a pragmatic interest in mechanisms which discipline restrictive business practices that might affect it, and has long advocated some global framework. Ultimately, India is seeking to ensure that there are rules in place, which discipline firms engaging in restrictive business practices, while the EC has in the past been mainly concerned with ensuring that countries have appropriate competition policies. These aims are not however contradictory in that in the absence of an supranational competition authority with the ability to act directly against restrictive business practices, the only way to ensure that there are adequate and appropriate rules in place in each of the relevant national and regional jurisdictions is for a WTO agreement on standards for competition policy to be applied by all members[17]. The UNCTAD Set can be seen as a set on non-binding standards, and as the citations above show the consistent wording "*States should…*" shows that the Set defines standards for national rules.

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

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

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

2.1 Introduction

The first section considered the effects of international cartels upon developing countries and identified the primary points of divergence between the EC and India on the question of an international competition policy framework in the WTO. It then placed these positions into a common context by comparing the parties' viewpoints on the UN Set as expressed in the Working Group on Trade and Competition (WGTCP). That section concluded that the Set incorporated objectives that were mutually shared by both the EC and India.

A divergence between these jurisdictions was noted on two closely-related points. The EC proposes that WTO members agree to have certain domestic competition laws that would incorporate a prohibition on hardcore cartels. These laws would then serve as the primary enforcement mechanism, territory by territory, to give actual legal effect to the ban on international cartels. However, the provisions offered thus far for international co-operation—whereby developing country competition authorities could receive information on cartel practices or assistance with the investigation and prosecution of export-oriented cartels—would remain a voluntary mechanism[18]. The heart of the critique from India's viewpoint was noted as:

> "Since prosecuting RBPs perpetrated by firms based abroad is going to be extremely difficult for countries with limited resources, domestic producers will in practice bear the brunt of a competition law that enshrines the NT principle, while allowing foreign producers to get away with similar infractions."[19]

This difficulty is presented as a matter of resource enforcement capacity in the light of increased demands by domestic complaints. Within the domestic law, national treatment would not allow domestic authorities to favour either their local firms in bringing prosecutions or to provide for any greater enforcement focus upon foreign practices[20]. Foreign actors can and will bring complaints charging domestic agreements restricting imports. Likewise, domestic actors (and the state) also have the legal capacity to file domestic prosecutions against foreign-based practices that are restraining exports that affect purchasers in the domestic market. However, these prosecutions are acknowledged as more difficult where actors and their agreements are located abroad, the suggested mechanism to facilitate such prosecutions will remain voluntary, and the authority's resources are consumed by responding to actions on domestic practices.

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

> "…fear that a multilateral agreement would impose too many constraints on developing country competition rules whilst confining assistance on international cartels to a purely voluntary process."[21]

A second point of divergence is noted relating to India's characterisation of the application of national treatment principle as it applies to competition laws. As both quotes above indicate, there appears to be a possibility that India views the adoption of a framework as raising a new national treatment obligation that does not now otherwise apply to domestic competition laws. This is correct only in part to the extent that the EC submission proposes a broadening of the existing national treatment obligation so as to prevent discrimination between *firms* on the basis of their nationality.

However, it should be made clear that the general GATT national treatment obligation already applies to a national competition law to the extent that the provisions of such a law might affect the sale or distribution of imported products in relation to like domestic products. Since India's understanding of the existing NT obligation is central to any position it might put forward regarding the framework, this aspect of GATT/WTO core principles in their application to competition laws is taken up as the first area of consideration.

2.2 GATT Law as to National Competition Rules

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

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

1. Any country with a competition law is already providing a basis to challenge domestic (private) anti-competitive agreements, either by investigations and prosecutions undertaken by the state itself, or by permitting private actions upon complaint by firms, or both.
2. Where a state provides for a right of complaint on behalf of private firms, this right cannot be limited to those brought only by domestic firms. Such a provision in the law would violate GATT's Article III to the extent that the law relates to controlling agreements affecting the sale or distribution of goods.
3. Where a law only provides for a right of state action, these actions cannot lawfully be confined to addressing only the practices of foreign firms on the domestic market.

This would violate national treatment to the extent that enforcement remedies affect the sale and distribution of imported goods.

4. Domestic competition laws are jurisdictional with regard to effects on the domestic territory, *i.e.*, the principle of territory jurisdiction. As such, they act to address both foreign and domestic practices, but only as these practices affect competition upon the domestic market. Since national competition laws are not drawn to treat the external (other country markets) effects of domestic practices, territories stating explicit "exclusions" from treating the external effects of domestic practices (export cartels) are really no different from the territories that do not state such an explicit exclusion[22].

   Different approaches to jurisdiction are possible, but have not been raised for consideration in the competition law and policy context. For one example, The OECD Anti-bribery Convention requires signatories to assume nationality jurisdiction over its domestic firms as they conduct unlawful practices upon other markets[23].
5. National competition laws commonly exclude an application for sectors or non-sectoral activities, but not in a manner that facially provides for less favourable treatment to like imported products. As long as like imported products are also excluded from the application of the domestic law, no violation of national treatment results *de jure*. A *de facto* claim for NT could be made where a domestic product was the beneficiary of an exclusion to the detriment of a directly competitive imported product, or where the exclusion had the effect of legalising a domestic monopoly or cartel that entirely foreclosed the sale of like imported products[24].
6. If an exclusion would be found to provide for less favourable treatment, its only "validation" would be by a reference to a stated GATT exception. There are no currently stated exceptions provided for granting more favourable treatment to domestic goods for the purpose of achieving development-related objectives[25]
7. Co-operation agreements between two countries, whereby one agrees to investigate, provide information, or take action *vis-à-vis* domestic practices having effects on the other's market, are not governed by GATT's Article I, most-favoured nation. Although the Article I does apply to those matters covered in paragraph 4 of Article III, these matters, as according to that paragraph, only relate to laws, regulations or requirements affecting the *internal* sale of goods[26].

2.3 Competition Policy Framework Considerations in the Light of EC Proposals

Having considered the above, it is possible to determine some of the implications of EC positions forwarded for a CP framework, and in light of the India positions outlined from the first paper. To consolidate the discussion, the following questions are taken in turn:

1) How does a framework agreement modify the existing WTO provisions as applied to national laws?
2) How are objectives other than "pure efficiency" reflected in the proposals?
3) What additional undertakings can be considered in a CP framework to enhance the treatment of restrictive business practices having external effects?

2.3.1 How does a Framework Agreement Modify the Existing WTO Provisions as Applied to National Laws?

EC proposals suggest modifying national treatment in two ways. The first is a narrowing of the existing GATT and GATS national treatment law to only *de jure* treatment, as contrasted to a *de facto* violation that would be evident only after examining the application of the law for its disparate effects on import, like products or services. Although WTO dispute panels are still in the course of developing this second theory of action, it is clear from the existing cases that a facially neutral law, regulation or requirement can be assessed on the basis of its discriminatory effects on imported goods or services[27].

The EC configuration has a significant implication for an administrative action as to the handling of particular cases ruled under otherwise neutral criteria, and for the GATT law treatment of the *de facto* effects of stated exclusions and exemptions provided within the law. For the first, the NT principle would now exclude any evaluation of case decisions or outcomes reflected by patterns of case decisions or investigations[28].

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

In the light of the India's viewpoint, as summarised above, this modification to NT would be a favourable provision to incorporate to the extent that if India chose to focus its resources on investigation of foreign practices as affecting the local market, then this "pattern" of treatment resulting from an administrative decision would appear to be beyond challenge by the CP framework NT provision[29].

The second modification is a broadening of the existing national treatment provisions in both GATT and GATS, as the EC proposal would apply the obligation to firms (economic actors) on the basis of their nationality. This affects GATT and GATS national treatment in different ways. For GATT, a law providing for less favourable treatment of foreign firms can result in a violation, but the additional step of showing affects on imported goods must be made. GATT Article III relates to the treatment accorded to imported goods, not firms.

The second link of proof would be eliminated in a CP provision where the object of the obligation is directed to treatment of firms at the outset. Although this change might not make much of a difference in cases where imported goods were affected anyway, it does broaden the scope of the NT to the extent that the provision would be no longer purely "trade-related". As to firms, the treatment accorded would not require a showing that imported goods were affected by the provisions of the law.

This change has more complex implications with regard to the GATS. GATS national treatment (GATS, Article XVII) applies to the services and providers of "other members". Since providers are economic actors (firms), GATS national treatment in this sense is not modified by the EC proposal. Except, however, GATS national treatment is not a general but rather a specific obligation undertaken only as a result of a market access commitment. Further, when undertaken, a party may also modify it according to its own schedule. Thus, if a country has made no market access commitment, then GATS national treatment does not apply to foreign service providers.

It is suggested therefore that a CP national treatment obligation as to firms would impose a general obligation to provide no less favourable treatment to firms, at least in respect to the facial characteristics of national competition laws. This would effectively result in new undertaking for India in any sector, where no GATS market access commitments for service providers (or commercial presence mode) have been made. Likewise, where India has made a market access commitment without scheduling any reservations for national treatment, then it would also appear that little additional obligation is being undertaken as to the CP framework provision suggested by the EC.

As contrasted to GATT and GATS, the CP national treatment provision for firms is a "horizontal" provision that both "cut across" these annexed agreements as well as de-linking the existing national treatment rules from their "trade-related" scope of application. This "trade-related" aspect may be important to India, as it has tended to confirm the application of the UN Set, which is decidedly oriented to treatment of RBPs in the context of trade. Likewise, regional practice, including the EC Treaty and EC's external trade agreements, all provide for action on the basis of whether trade is affected between the parties. The original Havana Charter provisions of the ITO for RBPs were also limited to dealing with private restrictive practices, as they affected the trade of the members.

It is likely that India would be more comfortable with a national treatment provision that also operated within the scope of the existing annexed agreements and clearly limited to dealing with practices that affected trade in goods or services between the members. If so, then working group submissions on this aspect can be made accordingly[30]. On the other hand, to the extent that the CP provision is attached only to *de jure* aspects of the national law, the modification is needed so that firms may not attach meaningful new obligations to India's actual practice under its new law. This is an analysis that India itself would have to undertake.

2.3.2 How are Objectives other than "Pure Efficiency" Reflected in the Proposals?

The part of the EC proposal most related to the achievement on non-efficiency objectives deals with the treatment of exclusions. The EC proposal does not appear to seek to eliminate the use of the various exclusions and exemptions that are found in the existing national competition laws. Nor does it appear to propose any burdensome restrictive or qualifying criteria for the use of exclusions, other than the need to "narrowly define sectoral exclusions and exemptions in a transparent and predictable manner[31]." This treatment appears to be evolutionary to the extent that the EC also suggests the possibility of review over time and possibly in light of experience of other WTO members, who have phased out exclusions over time.

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

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

This would seem to provide a broadest avenue for India to develop its own criteria for granting exemptions from the application of its law, only with the caveat that some "narrowing" process may also be built in to the longer-term agenda within a framework. At this stage, there is little detail that can be added to inform the context as to which aspects "narrowing" would be applied over time. It can also be suggested that India could consider submitting information to influence the parameters for that discussion as it develops, particularly since developed and other developing country-declared exclusions may also impact India's external trade and investment. Alternative approaches, with scheduling of exclusions and a negotiated exemption criteria, in mind are considered below.

2.3.3 What Additional Undertakings can be Considered in a CP Framework to Enhance the Treatment of Restrictive Business Practices having External Effects?

If the CP framework remains limited to the members applying national competition laws, without offering something more binding on co-operation aspects, then the answer has to be that little, if anything, can be drawn from a CP framework to enhance India's capacity to treat domestic effects of external domestic practices. No matter the value of India's critique that the burden of addressing external effects falls on the target market, the territorial limitation of the national competition laws of the other members remains the limiting factor. It is also the case for the area of international co-operation that a CP framework is not likely to evolve beyond a voluntary (and, therefore, non-binding) system, albeit with the possibility of some references to multilateral participation at this lower committed level[32] . It is clear that India cannot compel MFN treatment to receive the benefits now being extended as between particular bilateral co-operation parties. Over time, as India also derives experience with its own law and develops ongoing relationships with other authorities, potential for its own bilateral agreements will be enhanced. However, this longer-term prospect does not resolve the conflict raised on the issue of capacity to achieve a meaningful level of domestic enforcement over foreign practices.

A recent submission by Thailand has also focused on this lack of balance in the framework provisions to provide for a more meaningful means to address external effects of domestic practices. Here, however, while that submission appropriately focuses on trade, imports and exports, there also appears to be a continuing point of reference to draw the solution to the problem with regard to competition authorities. In this case, Thailand notes that its own law does not discriminate between exporting and importing firms, and that no exemption is made for export or international cartels[33].

The opinion here is that focus upon trade is appropriate and also reflected in the proposed EC prohibition on international cartels affecting trade. However, it is not likely that competition authorities of Members can take account of other markets, since market definitions are also based upon experience specific to the authorities' territory itself.

What could show more promise is Thailand's characterisation that export cartels, essentially output restrictions, should be characterised as unfair trade barriers. This opens an avenue to consider that the proposed prohibition, while having both an import and export dimension, would fall upon Members to implement by domestic competition authorities (imports) and by domestic trade or commerce authorities for exports problems. By point of reference, GATT's Article XI already prohibits output restrictions when imposed by governments. Giving an equivalent legal effect to the export side of the prohibition would, therefore, require governments to be responsive to complaints made by other members as to export restrictions being made effective by their domestic firms.

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

2.4 Possible Alternative Approaches

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

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

2.5 Scheduling Approach

The principal element of GATS is the positive list approach, where countries identify specific areas where there are willing to offer commitments. The approach has a core, identified through the core principles that act as a uniform basis, but allows countries to schedule participation based on their developmental and national goals. The advantage of the framework is an element of irreversibility in the scheduling and the possibility of postponing contentious issues to a later date. Applying this approach would require decomposing a competition law into key constituent elements. The advantage will be that it may enable a Member to participate at its chosen level and in a manner consistent with its development agenda.

The key elements of a GATS approach are two-fold as the GATS is partitioned in its "Fundamental Principles" into two groups of General Obligations and Specific Commitments, and then the identification of a matrix of elements, in which these commitments are to be offered[34]. While an advantage of an all or nothing approach to a competition policy framework may be to end up having no agreement at all, a scheduled approach would seek to build an agreement on the basis of common points. Further, it will not limit the character of the national competition law.

The core obligations being considered from the EC proposal include the following:

1. *Existence of a domestic competition law.* This is a non-issue as far as India, the EU and other OECD countries are concerned. Given the work programme, most countries are in some stage or another of evolving a domestic law.
2. *Transparency.* This is also not really an issue since the focus is primarily on *de jure* transparency in the structure of rules, laws and procedures[35].
3. *Non-discrimination.* As discussed earlier, this involves two key elements – MFN and National treatment. From the Indian perspective, as made out in various submissions and the terms of the national law, MFN *per se* is not a problem. Since MFN only talks about equal treatment between foreign nationals and can be adjusted to grandfather regional and existing bilateral agreements, it has not been a major area of discussion. The critical element has been in extending National Treatment to competition law and its implications.
4. *Co-operation.* This is one of the most contentious issues in the area with different countries having very different perspectives. While the developed countries are seeing co-operation in a manner that would be bilateral and voluntary, developing countries rather see this as the heart of any viable interest in a multilateral agreement from their perspective.

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

2.5.1 Specific Commitments

2.5.1.1 National Treatment

The positive list approach would require making specific commitments on the contentious areas based on a matrix of sectors and the nature of the anti-competitive activity involved. A possible scheduling framework is considered with these factors in mind.

For items that fall under GATT, the discussion in the previous section regarding its Article III as well as the example of the *Kodak-Fuji Case* suggests that any domestic law will have to be inherently non-discriminatory. Further, in a recent paper Hoekman and

Mavroidis argue that even in the case of cartels there may be a point to look at Article XI:

> "Under the "effects" doctrine (or subjective territoriality), countries may take action against foreign practices that have negative effects in their markets. Cartels are an example. The WTO may be relevant in this connection through GATT Article XI, which states that "no prohibition or restriction … shall be instituted or maintained … on the exportation or sale for export". Export cartels are a restriction on exportation. As with national treatment, the threshold issue is whether the export cartel can be attributed to government behaviour[36]."

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

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

2.5.1.2 Co-operation

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

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

These are ranked in terms of the level of implied participation by countries. The discussion so far has tended to work on uniform principles, which creates dissonance based on different perceptions. Allowing a scheduling approach, one could seek to fine tune offers at different level of co-operation in different types of anti-trust efforts (an issue, to which we turn to later). Thus, countries could commit to 2 on cartels but 1 on mergers (say).

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

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

2.5.2 Structure of Matrix of Commitments

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

2.5.2.1 Classification of Sectors

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

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

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

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

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

2.5.2.2 Classification of Anti-competitive activities

Here, the discussion typically focuses on cartels, as in: international (hardcore?), export, import; other restrictive business practices; abuse of dominance (*e.g*. Microsoft); and mergers and acquisitions. The economic impacts of these different anti-competitive practices tend to be different and are listed in an increasing order of conceptual difficulty. In general, the economic efficiency argument for them tends also to be increasingly more complex. Thus while there is virtually no efficiency case for encouraging cartels (Clarke and Evenett 2003[37]), the picture is very different for mergers.

A paper by G. Oliveira (CUTS 2002[38]) argues that one can make a case for a phased domestic framework for competition based on level of development that a country is at. This would imply that we try to seek agreement on these in a phased manner with a minimal agreement on just international cartels being adequate to start with. This is, in fact, the EC position. What this implies is that participation would require a commitment on international cartels. All higher levels of anti-competitive practice are subject to domestic scheduling and later negotiations.

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

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

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

2.5.3 Scheduling Approach: Conclusion

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

2.6 Code of Conduct and Graduation Approach

It may be that India and others determine that they do not wish to be subject to any WTO rule that could possibly compel the establishment of a domestic law with any particular designated characteristics, whether or not subject to longer implementation periods. In this case, an alternative that would still allow for engagement on the issue would be that of a "code of conduct" approach dealing with the substance and application of national laws if and when a Member decides to have one. Such a code could establish the overall ground rules emphasising transparency and due process, and with other negotiated aspects would be of interest to developed and developing countries alike.

This approach need not be a "plurilateral" exercise whereby only a select group of countries would negotiate a framework, which would be joined later on a "take it or leave it basis" by those, who had no active participation in its negotiation. Rather, such a code could as well be a part of a single undertaking that was a subject of negotiation and exchange by all members, but then only lawfully applicable if and when a member determines to have a law. The analogy for this approach is that of the WTO Technical Barriers to Trade Agreement (TBT), which does not compel members to have technical regulations, but rather governs their preparation, adoption and application to the extent that they affect the trade of other members. Likewise, the TBT has provisions dealing with co-operation (mutual recognition of conformity assessment) and provides members with guidelines regarding a code of good practice. In all, the issue of timing as to when countries choose to adopt technical regulations is not a matter that is addressed at all by the TBT, other than an obligation to apply international standards as a basis for technical regulations.

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

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

2.7 Legitimate Objectives Approach

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

The EC proposal essentially eliminates the capacity to challenge any exclusion. In comparison, the GATT and GATS law as it stands, and as it appears to be developing, may not be so forgiving. If exclusions can be reached by a national treatment claim, then it must be acknowledged that there are also no existing development exceptions provided in GATT law that can be relied upon to re-validate more favourable treatment to domestic production as granted by an exemption or exclusion[39]. Moreover, when a party is found to violate a GATT Article, the burden of proof decidedly shifts to the respondent to demonstrate the conditions required for the GATT law exception. A legitimate objectives framework that would recite the permitted criteria for granting exclusions for economic development would have the effect of eliminating this burden-shifting by designating the "safe harbour" criteria that authorities could rely upon in assessing their agreements. For example, this approach has been employed by the EC Treaty in Article 81(3), which provides the criteria for granting pro-competitive exemptions, which nevertheless fall within the terms of the general stated prohibition.

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

2.8 Conclusion: Competition and Development

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

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

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

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

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

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

3. Potential Multilateral Disciplines on Hardcore Cartels

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

3.1 Defining Terms: Private International Cartels

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

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

This definition, therefore, rules out cartels that involve state enterprises (as in the case of OPEC). Furthermore, the definition requires an explicit agreement between firms, which distinguishes this form of cartelisation from collusion.[40] Another aspect of this definition is that it includes governments and the private sector as victims of private international cartels, as recent cases involving bid rigging in American aid projects in Egypt can attest.

It is worth differentiating between private international cartels and export cartels. The latter are a special type of private international cartel in which the conspiracy does not involve commerce in the economies where the cartel members are headquartered. Often discussions of export cartels implicitly assume that such a cartel is made up of firms from one nation and that the agreement is to cartelise markets abroad. (This assumption is not surprising as many nation's laws give specific exemptions from national antitrust laws to those cartels that only affect commerce abroad[41].) However, in principle, an export cartel could include firms headquartered in more than one economy.

Another term is prominent in the discussions of private cartels, that of, "hardcore cartels." This term has acquired a special significance since OECD members agreed to a non-binding "Recommendation" on such cartels. According to the OECD, a hardcore cartel is

> "an anti-competitive agreement, anti-competitive concerted practice, or anti-competitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markers by allocating consumers, suppliers, territories, or lines of commerce[42]. "

Perhaps, the most important distinction between the definition of private cartels elaborated earlier and that of hardcore cartels is the repeated use of the phrase "anticompetitive" in the latter[43]. This raises the issue as to whether a cartel could be pro-competitive, that is, whether a cartel's formation could result in lower prices for purchasers. As some Chicago-school scholars have pointed out, as a theoretical matter it is possible for a cartel—under certain specific circumstances—to result in large enough cost reductions that prices paid by purchasers actually fall[44]. The relevance of this theoretical observation for policy discourse has not been established in the available empirical evidence on private international cartels.

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

3.2 The Surge in Private International Cartel Enforcement Since 1993

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

Imagine you were a well-trained international trade economist, who rarely ventures outside the narrow confines of his or her own sub-discipline. Such an economist would have been taught about Bhagwati's path-breaking analysis of the way in which open borders can undermine the ability of domestic firms to exercise market power[45]. Furthermore, the empirical findings of James Levinsohn and Ann Harrison in the early 1990s supported the general thrust of Bhagwati's argument; namely, the ability to exercise market power in a domestic market for an internationally-tradable good is constrained by the level of tariffs on imports of that good[46]. Given this line of research, our international economist would be highly doubtful that a *private* international cartel could both exercise considerable market power and sustain itself over a large number of years. Surely, imports from non-cartel members would "discipline" cartel members? If so, arguments like those of Bhagwati would reinforce Stigler's long articulated contention that cartels are prone to collapse under the weight of their own internal incentive problems[47].

Such an international trade economist—if he or she followed actual cartel enforcement measures in certain industrialised economies—would have received a rude awakening after 1993. In that year, the United States introduced a far more generous leniency programme for cartel members that approached it with credible information about the conspiracy in which they were engaged. The scheme was deliberately designed to maximise the incentive for firms to defect from a cartel agreement. As a reward for coming forward with information and, if necessary, assisting in securing the conviction of other conspirators, a firm and its executives could receive full amnesty from criminal penalties in the United States[48]. Furthermore, the US authorities often agreed not to share any information received in this fashion with foreign anti-trust authorities (more on this matter much later.) The beauty of this scheme lies in its efficiency; much of the evidence required by the authorities is brought to it by the conspirators themselves in return for amnesty.

What would our parochial international trade economist predict about the number of firms seeking amnesty after this revised leniency scheme was introduced in the United States? At most, our friend would predict that some members of cartels with short duration might come forward to the American anti-trust authorities. In reality, the results have been quite different. Evidence collected from applied amnesty programmes in the United States and the European Union has been instrumental in the prosecution of most of the 40 or more private international cartels uncovered since 1993[49] [50]. The fines imposed on the remaining cartel members are so sizeable that since 1993, the United States has collected more revenues in fines on private international cartels than it has collected on all other fines for all other crimes committed in the United States since the formation of the Republic in 1776[51]. The European Commission is now also levying substantial fines—as the 855 mn euro fine on the vitamins cartel members in 2001 demonstrates.

Table 1 lists the headquarters of the firms, which participated in 40 private international cartels prosecuted by the United States and the EC since 1990. As can be seen, these cartels affected a wide range of products and were not confined to a small number of economic sectors. Moreover, the cartel members were spread all over the world having their headquarters in 31 economies, eight of which were developing economies[52]. These findings, and others, suggest that it is difficult to sustain the argument that private international cartels are a geographically-localised problem or one that is concentrated in a small number of industries. Furthermore, 24 of these 40 cartels lasted for at least four years, casting doubt on the claim that private international cartels quickly collapse under the weight of their own incentive problems or under pressure from imports from non-cartel members (Evenett, Levenstein, and Suslow, 2001).

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

Attempts to quantify the effects of private international cartels have grown in sophistication in recent years[53]. Initially, studies focused on the price reductions observed after a cartel collapsed and most estimates pointed to a 20-40 percent fall in prices (OECD, 2000, and Levenstein and Suslow, 2001).

In addition, various estimates have been made of the value of international trade flows that have been affected by cartelisation. Figure 1 reproduces calculations of the total value of developing economy imports of twelve cartelised products throughout the 1990s[54]. (In this Figure if, for example, a cartel were operating from 1993 to 1995 then only for those years are developing country imports of the cartel's goods included in the reported totals.) By 1995, annual imports of these 12 cartelised products by developing economies routinely exceeded $8bn. Moreover, since 1990, estimates of the total amount of international trade affected by these 12 cartels exceed $80bn. Assuming a 20-40 percent price overcharge, this implies that developing economies paid $12.5-25bn more than they should have done for these 12 products alone. This range of overcharges is likely to be a substantial underestimate of the true overcharges paid by developing economies since 1990 as it omits the overcharges on the products supplied by the other twenty eight private international cartels listed in Table 1 and the overcharges on the undetected private international cartels.

The effects of certain individual private international cartels have been analysed with econometric techniques (Connor, 2001; White, 2001; and Clarke and Evenett, 2003). A recent analysis of the international vitamins cartel, which divided up the world markets for various types of vitamins from 1989 until 1999, was able to recover estimates of the overcharges paid by 90 vitamins importing nations throughout the 1990s[55]. Table 2 presents the estimates (see Clarke and Evenett, 2003 for further details).

One of the key findings was that the vitamins cartel appears to have generated more overcharges in those jurisdictions with weak cartel enforcement regimes. The total overcharges in India amounted to $25.71mn (in year 2000 US dollars). The total overcharges for the 10 EU members reported in Table 2 were estimated to be $660.19mn; that is, two-thirds of a billion dollars[56]. The total overcharges by these 90 importers amounted to $2709.87mn throughout the 1990s; just under two and three quarter billion dollars for this one cartel alone. Furthermore, as Connor (2001) has noted and as various OECD reports can attest, the international vitamins cartel is not alone in creating over a billion dollars of overcharges. In sum, the 1990s saw many private international cartels exploiting the very open markets that the multilateral trade reforms seek to encourage, so as to raise prices and transfer billions of dollars of rents from purchasers to cartel members. Such cartels are indeed a cancer on international commerce.

3.3 The Rationales for an International Accord on Cartel Enforcement

Findings, such as those in Figure 1 and Table 2, may provide a rationale for robust national cartel enforcement regimes—but do they also provide a rationale for international initiatives on cartel enforcement? In the terminology used by economists, for this question to be answered in the affirmative, it is enough to show that national cartel enforcement efforts—or the absence of such efforts—create (economic) "spillovers" in other jurisdictions (which, in turn, an international agreement may be able to "internalise"). Both spillovers can be identified from recent enforcement experience.

The first spillover arises from public announcements in one nation about cartel enforcement actions tend to trigger investigations by trading partners. For example, Korean officials began investigating the graphite electrodes cartel after reading about American enforcement actions against this cartel. Likewise, Brazil initiated investigations into the lysine and vitamins cartels after US investigations were concluded[57]. Trading partners therefore benefit from active enforcement abroad—and these benefits are likely to be reinforced over time as formal and informal cooperation between competition authorities deepens.

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

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

3.4 Towards Multilateral Disciplines on Private International Cartels? Perspectives from India and the European Commission

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

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

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

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

> "International trade in itself is not a 'zero-sum' game. Trade could benefit both the players. However, anti-competitive behaviour by either of the two trading entities could help it corner the gains from trade. Much of the benefits of international trade over the last century have been made possible through the very same 'beggar-thy-neighbour' policies by countries in the absence of any binding rules restraining such practices." (India, 2000, page 2)

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

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

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

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

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

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

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

1. "A clear statement that [hardcore cartels] are prohibited" (EC 2002, page 5). This presumably includes domestic hardcore cartels as well as private international cartels.
2. "A definition of" what types of anti-competitive practices could be qualified as 'hardcore cartels' and would be covered by the multilateral ban" (EC 2002, page 5). (The EC notes, in this respect, that such a definition might include a description of the permitted exceptions and exemptions to such a multilateral ban, although she did not take a stand on what those exemptions and exceptions might be. See EC 2002, page 6).
3. A commitment by WTO members "to provide for deterrent sanctions in their domestic regimes" (EC 2002, page 6); while noting that a variety of sanctions are available.
4. On "appropriate procedures in the field of voluntary cooperation and exchange of information. Indeed, transparency is an essential element of a framework of competition. Provisions have, therefore, to be developed on notification, information exchange and cooperation between competition authorities. These would include provisions regarding the exchange of information and more generally, cooperation procedures, *e.g.* when authorities are launching parallel investigations into the same practice. Negative and positive comity instruments could also be addressed" (EC 2002, page 7).

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

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

In light of the evidence presented earlier, the EC proposal has correctly identified the importance of private international cartels as a distortion to the world trading system and has rightly located two of the policy-related causes of sub-optimal levels of enforcement: ineffective or non-existent national cartel enforcement regimes and inadequate information exchange. In assessing the Commission's proposal a number of points should be borne in mind. First, the EC is not advocating that WTO members adopt the full set of antitrust or competition laws. She is only advocating the enactment and effective implementation of cartel legislation, which is important as fighting cartels is widely regarded as the "high ground" of competition policy[58]. Nor is the EC proposing that each nation—irrespective of their level of development—adopt exactly the same type of cartel law. Rather, the EC is advocating that a cartel law, however implemented, should meet certain fundamental criteria. Consequently, it cannot be asserted that the EC is seeking to impose a "one-size-fits-all" solution to the cartel problem; to use that oft-repeated and tired cliché.

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

Third, the EC's submission does not propose the mandatory sharing of all cartel investigation-related information, which some experts and developing country officials have called for. Often, the argument given in defence of not sharing all such information is that some of it is confidential and is protected by statute. This particular argument is not very persuasive as the information needed for cartel prosecutions is often retrospective (and, therefore, need not be concerned with future business plans) and typically relates to information as to when corporate executives met, where and what agreements they signed. It is not clear that national statutes should be protecting this type of cartel-related information. Moreover, even if national statutes currently prevent such information being exchanged, nothing prevents a WTO member from proposing a provision that such statutes be amended to explicitly exclude protections for documents relating to cartel activities.

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

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

A third response, again which the EC submission does not rule out, is for a nation to automatically offer a firm that receives amnesty from another WTO member's competition authority no worse treatment (in terms of reductions in fines and non-incarceration of executives) if the firm comes forward with the same information it supplied the first competition authority and the firm supplies any additional information and assistance needed to secure a prosecution in the relevant jurisdiction[59]. This response has the advantage that a nation can implement such a provision unilaterally and does not rely on a nation finding willing partners for a regional competition body or joint leniency programme. Furthermore, a no-worse-treatment provision could be used as evidence in support of a nation's claim that it is serious about enforcing its cartel law. Finally, such provisions would strengthen the incentive of firms to defect from their cartel agreement in the knowledge that a successful amnesty application to a WTO member would result in comparable treatment from other WTO members.[60] In sum, there are creative ways to enhance the investigation-related information while remaining consistent with the EC's proposals.

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

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

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

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

But what can existing research say about the magnitude of implementation costs of competition policy?[61] For all of the bluster about implementation costs, few have ever bothered to collect data on the costs of running national competition policy regimes, let alone those national cartel enforcement regimes, which are at the core of the EC's proposal. Even fewer have compared these costs with some estimate of the benefits of running such an enforcement regime; but more on that later. As far as the costs of running a cartel enforcement regime is concerned, the costs should, in principle, include the government outlays on cartel enforcement, private expenditures on legal services to defend firms and individuals against accusations of cartelisation, the costs of court time (if court trials for cartel offences are required in national law) and, where relevant, the cost of incarcerating individuals involved in cartels.

The sad truth is that researchers have only assembled data on government outlays on competition policy enforcement and even the evidence marshalled here is rather meagre. For example, the World Bank's *Global Economic Prospects Report* for 2003 invokes implementation costs—amongst other reasons—for casting doubt on the efficacy of multilateral rules on competition policy without reporting a single country's government outlays on competition enforcement (World Bank, 2003)![62] Winters' (2002) discussion of implementation costs is based on just three pieces of expenditure data—two for British enforcement agencies and one from the United States[63]. CUTS (2002) assembled such data for seven developing economies. Clarke and Evenett (2003) reported such data for nine economies and Hahn and Layne-Farrar (2002) used OECD sources and assembled data on the budgets of 24 competition agencies (including the EC's agency). This seems rather a flimsy amount of data upon which to launch an implementation costs-based attack on a multilateral ban of hardcore cartels.

Matters are worse for critics now that some recent research has begun to quantify the benefits of active cartel enforcement bodies. Effective cartel enforcement regimes can have benefits other than those which flow from deterring the formation of hardcore cartels in the first place. If the punishment (fines etc) that cartel members can expect should they be successfully prosecuted is linked to the overcharges made by the cartel, then one might hypothesise that the size of those overcharges is lower in economies where the probability of successful prosecution is higher. Such a cartel may well raise prices less in a jurisdiction where cartel enforcement is more robust. A recent empirical analysis of the vitamins cartel has found support for this hypothesis (Clarke and Evenett, 2003). Indeed, so substantial was the estimated reduction in overcharges on vitamins imports that resulted from robust EC anti-cartel enforcement, that the price reduction in ten EC members equalled 96 percent of the total cost of these ten countries' state outlays on their competition authorities plus the cost of the Brussels-based EC enforcement agency (see Table 4).

Moreover, in Latin America the average annual reduction in overcharges on vitamins imports equalled seven percent, 46 percent, and 65 percent respectively of the Chilean, Mexican, and Brazilian state outlays on competition enforcement. In interpreting these results, it is important not to repeat the mistakes alluded to earlier—namely, drawing too strong a policy recommendation on the basis of a small amount of evidence. Even so, the evidence from the international vitamins cartel does suggest that the benefits of active cartel enforcement may well go a long way (and in some cases even all the way) to meeting the greater governmental outlays brought about by WTO disciplines on hardcore cartels. Much more research is needed here to gauge the net benefits of multilateral disciplines on hardcore cartels. Such research is intrinsically empirical in nature and policymakers should be on their guard against economic advice that is deduced solely from first principles.

3.5 Conclusion

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

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

Turning to the current discussions on potential multilateral disciplines on hardcore cartels, we described and analysed in detail the European Commission's proposals in this regard. For the moment, the Government of India has not offered a comparable proposal. Should it choose to do so, the Indian government may find that the flexibility inherent in the EC's proposals can be tailored to the interests of developing countries. Furthermore, trade negotiators and policymakers might be well-advised to hold its fire on the question of implementation costs, especially in the light of the hollow empirical basis of the claims advanced to date.

Table 1: Countries with Firm Convicted of Price Fixing by the United States and The European Commission During the 1990s	
Country	**Cartel**
Angola	Shipping
Austria	Cartonboard, citric acid, newsprint, steel heating pipes
Belgium	Ship construction, stainless steel, steel beams
Brazil	Aluminium phosphide
Canada	Cartonboard, pigments, plastic dinnerware, vitamins
Denmark	Shipping, steel heating pipes, sugar
Finland	Cartonboard, newsprint, steel heating pipes
France	*Aircraft*, cable-stayed bridges, cartonboard, citric acid, ferry operators, *methionine*, newsprint, *plasterboard*, shipping, sodium gluconate, stainless steel, steel beams, seamless steel tubes
Germany	*Aircraft*, graphite electrodes onboard, citric acid, aluminium phosphide, lysine, *methionine*, newsprint, pigments, *plasterboard*, steel heating pipes, seamless steel tubes, vitamins
Greece	Ferry operators
India	Aluminium phosphide
Ireland	Shipping, sugar
Israel	Bromine
Italy	Cartonboard, ferry operators, newsprint, stainless steel, steel heating pipes, seamless steel tubes
Japan	Graphite electrodes, lysine, *methionine*, ship transportation, shipping, sodium gluconate, sorbates, seamless steel tubes, thermal fax paper, vitamins
Luxembourg	Steel beams
Malaysia	Shipping
Mexico	Tampico fibre
The Netherlands	Cartonboard, citric acid, ferry operators, Ship construction, sodium gluconate, Tampico fiber
Norway	Cartonboard, explosives, ferrosilicon
Singapore	Shipping
South Africa	Diamonds, newsprint
South Korea	Lysine, *methionine*, ship transportation, shipping
Spain	*Aircraft*, Cartonboard, stainless steel, steel beams
Sweden	Cartonboard, ferry operators, newsprint, stainless steel
Switzerland	Citric acid, laminated plastic tubes, steel heating pipes, vitamins

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Taiwan	Shipping
UK	*Aircraft*, cartonboard, explosives, ferry operators, newsprint, pigments, *plasterboard*, shipping, stainless steel, seamless steel tubes, steel beams, sugar
US	*Aircraft*, aluminium phosphide, bromine, cable-stayed bridges, cartonboard, , citric acid, diamonds, ferrosilicon, Graphite electrodes, isostatic graphite, laminated plastic tubes, lysine, maltol, *methionine*, pigments, plastic dinnerware, Ship construction, ship transportation, sorbates, Tampico fiber, thermal fax paper, vitamins
Zaire	Shipping

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

Figure 1: Total Imports of 12 Cartelised Products by Developing Countries, 1981-2000

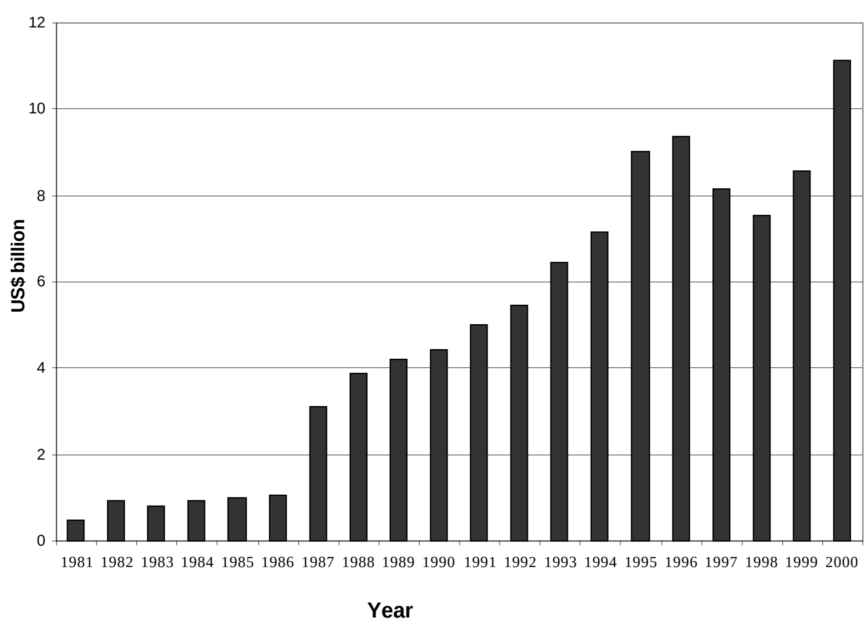

Table 2: Estimated Overcharge from the International Vitamins Cartel, 1990-1999 in year 2000 US dollars, by Importer

Importing economy	Millions of US dollars			Importing economy	Millions of US dollars		
	Overcharges paid on vitamins imports during the conspiracy	Total value of imports during years when importer did not have a cartel law	Total value of imports during years when importer did have a cartel law		Overcharges paid on vitamins imports during the conspiracy	Total value of imports during years when importer did not have a cartel law	Total value of imports during years when importer did have a cartel law
Economies with evidence of cartel prosecutions in OECD documents				Economies with no evidence of cartel prosecutions in OECD documents			
Brazil	183.37	0.00	665.19	Singapore	245.22	849.93	0.00
Australia	154.70	0.00	333.63	Hong Kong	178.48	618.61	0.00
Italy	153.78	0.00	1040.09	Turkey	82.89	287.31	0.00
Mexico	151.98	111.33	411.38	Thailand	78.45	271.91	0.00
UK	147.64	0.00	998.57	Argentina	73.83	213.08	0.00
Denmark	138.49	0.00	936.62	Colombia	54.95	158.60	0.00
South Africa	99.93	173.56	39.57	Indonesia	48.72	168.85	0.00
Spain	91.89	0.00	621.47	Venezuela	45.32	130.81	0.00
China	77.61	72.35	56.73	Iran	44.25	153.35	0.00
Austria	44.22	88.34	94.16	Egypt	38.49	110.66	0.00
Chile	38.43	0.00	139.41	Pakistan	36.82	127.62	0.00
Poland	31.50	0.00	213.07	Israel	32.30	111.97	0.00
New Zealand	29.26	0.00	63.11	Philippines	29.58	102.53	0.00
Hungary	24.71	48.73	54.11	Honduras	25.87	74.65	0.00
Sweden	23.47	36.10	75.03	India	25.71	89.12	0.00
Norway	19.27	34.85	49.47	Malaysia	22.94	79.50	0.00
Romania	18.99	48.36	16.29	Ecuador	14.82	42.78	0.00
Peru	18.91	3.32	64.43	Saudi Arabia	13.11	45.43	0.00
Ireland	17.76	0.00	120.10	Morocco	12.44	35.77	0.00
Finland	16.44	28.06	46.08	Algeria	11.09	31.88	0.00
Greece	13.73	0.00	92.83				
Portugal	12.77	0.00	86.93				
Bulgaria	5.04	2.87	27.47				
Zambia	0.06	0.14	0.01				

Importing economy	Millions of US dollars			Importing economy	Millions of US dollars		
	Overcharges paid on vitamins imports during the conspiracy	Total value of imports during years when importer did not have a cartel law	Total value of imports during years when importer did have a cartel law		Overcharges paid on vitamins imports during the conspiracy	Total value of imports during years when importer did not have a cartel law	Total value of imports during years when importer did have a cartel law
Economies with no evidence of cartel prosecutions in OECD documents				Economies with no evidence of cartel prosecutions in OECD documents			
Guatemala	10.41	30.05	0.00	Madagascar	0.60	1.73	0.00
Nigeria	7.00	20.14	0.00	Ethiopia	0.59	1.69	0.00
Bangladesh	6.42	22.26	0.00	Yemen	0.58	2.02	0.00
Syria	5.79	20.08	0.00	Mail	0.49	1.41	0.00
Paraguay	4.57	13.18	0.00	Mauritius	0.46	1.33	0.00
Tunisia	4.45	12.80	0.00	Cameroon	0.39	1.12	0.00
Vietnam	4.38	15.19	0.00	Cambobia	0.28	0.98	0.00
Costa Rica	3.82	11.03	0.00	Benin	0.22	0.63	0.00
Bolivia	3.45	9.97	0.00	Togo	0.19	0.53	0.00
Zimbabwe	3.41	9.80	0.00	Tanzania	0.16	0.46	0.00
Lebanon	3.11	10.77	0.00	Haiti	0.11	0.33	0.00
Dominican Republic	3.07	8.86	0.00	Angola	0.11	0.33	0.00
EI Salvador	2.70	7.80	0.00	Gabon	0.09	0.27	0.00
Jordan	2.54	8.82	0.00	Niger	0.07	0.19	0.00
Jamaica	2.11	6.09	0.00	Congo	0.06	0.19	0.00
Kenya	1.79	5.16	0.00	Burkina Faso	0.06	0.17	0.00
Ghana	1.32	3.81	0.00	Malawi	0.05	0.13	0.00
Nepal	1.21	4.21	0.00	Rwanda	0.04	0.12	0.00
Nicaragua	1.20	3.46	0.00	Uganda	0.03	0.10	0.00
Cote D' Ivoire	0.88	2.53	0.00	Guinea	0.03	0.09	0.00
Senegal	0.82	2.36	0.00	Laos	0.03	0.10	0.00
Trinidad Tobago	0.81	2.33	0.00	Chad	0.01	0.04	0.00
Panama	0.68	1.96	0.00	Mozambique	0.00	0.01	0.00

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

Table 3: Recent Cartel Enforcement Activities in Developing Economies			
Economy market	**Cartelised cartel**	**Duration of**	**Effects of conspiracy and fines imposed (where available)**
Bulgaria	Transportation on variable routes (intermediate transportation)	2000	Conspirators agreed on a price increase of approximately EUR 0,10 on transportation services. The companies were fined a total of EUR 47,000.
	Phone cards sales	One year (year not specified)	A common shareholder acted at as intermediary in price coordination between two conspiring companies. Both were imposed a fine of EUR 9,000.
	Gasification	2002	Two companies agreed on a five-years contract imposing non-compete clauses. A fine of EUR 25,500 was imposed on both companies.
China	Brickyard	1999	Bid rigging conspiracy involving five groups of companies affecting the operation of a brickyard plant in Zhejiang Province. They were fined EUR 6,500 each.
	School building	1998	Bid rigging involving ten construction companies.The bid was declared invalid and illegal gains confiscated.
	Engineering construction	1998	Bid rigging involving two construction companies.
Estonia	Milk products	2000	Price-fixing attempt by four leading milk processors and ten wholesalers. A prohibiting order was issued before an agreement came in place.
	Taxi services	1999	Three taxi companies (over 40perwcent of the taxi market) convicted of price fixing, and fined EUR 639 each.
	Road transport	1999	The Association of Estonian International Road Carriers was prosecuted for participating in price fixing involving the provision of international transport services. The Competition Board issued a proscriptive order. No sanctions were applied.
Indonesia	Pipe and pipe processing services	Formed in May 2000	Bid rigging involving four companies. The ensuing contract was dissolved. No fines were imposed.
Latvia	Aviation	1998-1999	International cartel involving one Latvian and one Russian company agreeing to cooperate in the organisation of passenger flights between Riga and Moscow. The Latvian company was fined 0.7 percent of its total turnover of 1998.
	Courier post	1999	Agreement between a Latvian state-owned courier post services and an international courier services operator. No sanctions were applied, as no practical effect on competition was ascertained.

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Peru	Building and construction	1997	Three companied involved in bid rigging. Fines of nearly EUR 1,800 were imposed on each of the respondents.
	Taxi Tours	1999	Price fixing agreement between a number of local companies. Only one company, which did not express their commitment to cease the restrictive practices, was fined EUR 900.
	Poultry market	1995-1996	Several associations and 19 firms investigated for alleged "price-fixing, volume control, restrain of trade, and conspiracy to establish entry barriers and development of anti-competitive mechanisms to suppress and eliminate competitors, in the market of live chicken in Metropolitan Lima and Callao". (*)
Romania	Mineral water	1997	Price fixing conspiracy relating to the bottling of mineral water.
	Drugs	1997-2000	Members of Pharmacists Association were convicted of participating in a conspiracy relating to market sharing in pharmaceutical distribution (approx. EUR 430 million per year) and deterring entry by other competitors. Fines were calculated as a percentage of profit of the Pharmacists Association (amount not specified).
Slovenia	Electric energy	2000 (year of conviction)	Price fixing conspiracy relating to the provision of electric energy in Slovenia. The cartel was prohibited by the Office.
	Organisation of cultural events	2000	Two companies agreed to co-operate and prevent entry in the market. The amount of fines imposed is not specified.
South Africa	Citrus fruits	1999	Conspiracy relating to the purchase, packaging and sale of citrus fruits.
Taiwan (China)	Wheat	1997-1998	The Flour Association was convicted of organising a buyers' cartel, instituting quantity control and quota system among 32 flour producers. The association was imposed a fine of EUR 620,000.
	Mobile cranes	1998	Six companies convicted of bid rigging.
	Liquefied Petroleum Gas (LPG)	Not specified	27 companies, controlling most of the market share, convicted of participating in a price fixing conspiracy relating to delivery of LPG in southern Taiwan. Total fines amounted to EUR 4,123,000.

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Ukraine	Electronic cash machines	1999	Price fixing conspiracy involving two companies. As an effect of the agreement, prices rose by EUR 1.0 – 2.0.
	Kaolin	2000	Two competing distributors concluded a contract specifying amounts of sales of the product.
Zambia	Poultry	Not specified	Two companies, the dominant producer and the largest buyer in the poultry market made agreements foreclosing competition. The agreement was declared invalid.
	Oil	1997 – not specified	Nine oil-marketing companies convicted of price fixing. The cartel leaders also forced other companies to comply with standard behaviour on prices.
Source: OECD 2001a	(*) OECD 2001 b		

Table 4: Estimating the Average Savings-Per-Dollar Spent on Competition Enforcement

Economy	Additional over chargees in the absence of cartel law (millions of US dollars)		Annual cost of competi-tion authority (1999-2000)	Saving on each dollar spent: ratio of last two columns	Overcharges actually paid (millions of US dollars)
	Total through-out the conspiracy	Annual average during 1990-99			
Austria	27.96	2.80			44.22
Brazil	72.09	7.21	10.96	0.658	183.37
Chile	15.11	1.51			38.43
Denmark	278.11	27.81	8.70	3.20	138.49
Finland	13.68	1.37	3.40	0.40	16.44
Greece	27.56	2.76			13.73
Ireland	35.66	3.57	1.60	2.23	17.76
Italy	308.83	30.88			153.78
Mexico	44.59	4.46	9.70	0.46	151.98
Norway	14.69	1.47	7.70	0.19	19.27
Peru	6.98	0.70	10.05	0.07	18.91
Portugal	25.65	2.57			12.77
Spain	184.53	18.45			91.89
Sweden	22.28	2.23	7.30	0.31	23.47
UK	296.51	29.56	46.60	0.64	147.64
Memorandum:					
Sum of entries for EU members above	1220.78	122.08	127.50	0.96	660.19

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

4. Overall Conclusions

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

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

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

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

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

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

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

- a comprehensive agreement that would extend such obligations from their present scope, *i.e.* tradable goods and scheduled services, to all goods and services not covered by an exemption.

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

Our second major finding was to identify two empirically-supported rationales for binding multilateral commitments to enact and enforce national anti-cartel laws, in line with the proposals of the European Commission. As noted in section three, the latter proposals leave open for negotiation many important matters that could be shaped to the advantage of developing countries, including India. We note, in closing, that the there is widespread agreement among WTO members as to the damage done by hardcore cartels to national and international commerce.

Endnotes

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

2 http://r0.unctad.org/en/subsites/cpolicy/docs/CPSet/cpsetp4.htm

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

4 That is to say where there is no single set of WTO obligations countries schedule their own commitments individually as in the General Agreement on Trade in Services (GATS).

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

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

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

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

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

10 http://dosconline.wto.org/DDFDocuments/t/WT/WGTLP/W216.doc

11 The case was filed by European consumers groups against an alleged anti competitive market sharing agreement between the UK Society of Motor Manufacturers and Trades (SMMT) and the Japanese Automobile Manufacturers' Association (JAMA).

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

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

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

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

16 Indian officials note that Article 9 of TRIMs provided for the possibility of negotiations on competition issues

17 For an explanation of the difference between a rule (more precise) and a standard (setting a more general aim) see "Rules and Standards in International Law" by Daniel Bodansky, NYU Law School March 31, 2003
http://www.law.nyu.edu/kingsburyb/spring03/globalization/BodanskyRules_v_StandardsPaper.pdf
"The distinction between rules and standards is, in essence, that between ex ante and ex post decision-making. Rules attempt to define in advance what conduct is permissible. They generally consist of two parts: a set of triggering facts and a legal result. If the triggering facts are present, then the rule specifies the legal outcome in a determinate manner. In contrast, a standard is less precise about what facts lead to what legal results."

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

pp.49-50.

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

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

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

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

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

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

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

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

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

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

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

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

31 WT/WGTCP/W/222, para 3 and 24.

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

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

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

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

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

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

38 Oliveira, G, "International Cooperation and Competition Policy" draft issue paper prepared for

CUTS IWOGDA conference, November 2002.

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

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

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

42 Organisation for Economic Cooperation and Development, 2002

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

44 See Landes (1983) for such a claim.

45 Bhagwati (1968).

46 Levinsohn (1993) and Harrison (1994).

47 Stigler (1964).

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

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

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

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

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

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

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

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

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

57 This is not to suggest that, at present, there is much inter-agency cooperation on cartel enforcement, with the potential exception of cooperation between US and Canadian agencies (see Waller 2000 for an account of the latter.) This dearth of cooperation is probably a reflection of the fact that confidential information on cartel cases typically cannot be shared with foreign enforcement agencies and that, until recently, few agencies beyond Brussels, Ottawa, and Washington, D.C., were enforcing their jurisdiction's cartel laws in the first place. The constraints on sharing confidential information are discussed at greater length in the next section. More generally, see Jenny (2002) for a discussion of the extent of cooperation on competition enforcement.

58 That is, the practical and conceptual arguments for attacking cartels are widely regarded as stronger than the arguments in favour of intervention in other areas of antitrust or competition

policy (such as vertical restraints and mergers.)

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

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

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

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

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

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Chapter 3

The Temporary Movement of Workers - GATS Mode 4

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This work was supported in part by the European Commission and draws on research supported by the Department for International Development, London. We are grateful to both. We are also grateful to colleagues at CUTS' workshops in Jaipur, New Delhi and Brussels and to an anonymous referee for comments on a previous draft, and to Mari Kangasniemi for help on preparing some of the text. Naturally, they are not responsible for any remaining shortcomings.

Introduction

Even before the General Agreement on Trade in Services (GATS) can flap its nascent wings, the literature is already overflowing with its likely hap. A group of developing countries have recently communicated to the WTO their assessment of liberalisation of trade in services "based on available research and analysis"[1]. The first among their five conclusions is that "The fundamental objective of the GATS Preamble – to achieve an overall balance of rights and obligations for all the WTO Members – has not been attained".

One of the least liberal and most inequitable areas of the GATS is the Temporary Movement of Natural Persons (TMNP - Mode 4). Developing countries are replete with labour willing to move temporarily to work, and yet TMNP accounts for less than 2 percent of services trade (Karsenty, 2000) and even less of GATS concessions.[2] This neglect of TMNP as a route to market liberalisation stems at least partly from the extreme political sensitivity of migration within developing countries coupled with the current tendency to equate temporary mobility with migration in both popular perception and bureaucratic treatment. But the issue will become increasingly important in those countries as economic pressures build up.

The need for inflows of labour is arguably already high and is certainly growing, as developed countries' work forces age and their relative skill levels disconnect from labour demand. In some cases highly skilled overseas workers are essential to the continued functioning of critical sectors – e.g. health, education and, possibly, IT. In others, the growing demand for less-skilled labour is frustrated by the unwillingness of indigenous workers to take up such jobs – e.g. catering, the caring professions, and maintenance activities. TMNP offers a way out of this impasse: whereas the direct economic consequences of TMNP are similar to those of migration, TMNP is not the same as international migration, for it does not entail commitments to social welfare or shifts in residence of the workers concerned.

To put the potential of TMNP in perspective, it has recently been suggested that increased mobility of labour equivalent to just 3 percent of the receiving OECD countries' work forces would generate over $150 bn per year in extra economic welfare, about half as much again as all the gains available in the same model from the elimination of all barriers to goods trade. These gains are shared between developing and developed countries and owe more to unskilled than to skilled labour mobility.[3] Such figures are necessarily very crude and aggregated and one of the refinements they require is projection into specific sectors, as is proposed here. The need for labour mobility will vary from sector to sector as will the skills available in various parts of the world. The barriers that restrict mobility are sector-specific, so that not only is their measurement more accurate at the sectoral level, but negotiations under the GATS will necessarily have a strong sectoral dimension. (It is true that GATS allows for "horizontal" disciplines and concessions, which affect all sectors, but even these will be substantially determined by sectoral effects.) Thus one aspect of the present study of the mobility of health workers between Asia (especially India) and Europe (especially the UK) is as an illustration of the issues that will arise in general as governments come to explore the benefits of liberalisation via mode 4 of the GATS.

Trade in health services is covered in the GATS under "business services" (professional services)[4] and "health related social services"[5]. The former has three sub-components relating to health services, namely medical and dental services (1.A.h); veterinary services (1.A.i); and services provided by midwives, nurses, physiotherapists and paramedical personnel (1.A.j), while of the latter's four components, two relate directly to health, namely hospital services (8.A.); and other human health services (8.B.). Neither India nor the EC has made specific bindings in these sectors and their so-called "horizontal commitments" on mode 4 make no effective commitments to admit workers. Effectively, then, health services have yet to feel any liberalisation from the GATS. Given that, in fact, a good deal of ostensibly temporary mobility already occurs, and that medical mobility appears to satisfy many of the good practices urged on negotiators of mode 4 by informed commentators such as Mattoo (2000), it is an important question as to why the GATS has not yet been used to regularise and formalise it. Answering, this will help to shed light on how rapidly mode 4 is likely to be made use of more generally.

A study of health worker mobility also has attractions in its own right. First, given that as already noted, it is a sector where mobility is already high – at least between the countries we are considering – it is feasible to explore the motivations, costs and consequences of mobility with actual data rather than just via speculation. Second, the sector has a wide range of skill requirements, so that contrasts drawn within the sector may be able to isolate the skill-related dimensions of temporary mobility relatively efficiently.

Third, and perhaps most importantly, the mobility of health workers raises critical policy issues in its own right. Health is a sector in which official intervention is inevitable in the area of licensing and pervasive in terms of training and employment: thus governments should value information with which to formulate such policies. It is also argued by many to represent the classic case of a "brain-drain". India has been a major player among the main suppliers of skilled persons to the world market. The emigration of skilled persons may be viewed alternatively as brain drain, with negative impacts on the economies of the supplying countries, or a gainful globalisation of the labour force, generating benign impacts on the non-emigrating masses of the supplying countries through various feedback effects. Economists have long debated these alternative views, but with surprisingly little in terms of firm conclusions. The present study is not intended to address these issues per se, but it helps to shed light on them in several ways. Some EU health sectors rely heavily on overseas doctors and a high proportion of Indian doctors spend at least part of their careers abroad. But surprisingly, very little is known about the costs and benefits of such movement.

Exploiting the advantages of collaboration between European and Indian researchers, we are able to analyse the movement of health personnel between India and the EU (specifically the UK) in more detail than has been possible heretofore. First, it brings together research on a broader project conducted in London Business School and the University of Sussex on foreign doctors in the UK with information on the effects on the Indian health sector of the outflows of doctors and nurses. Second, it considers the flows of Indian and Filipino nurses to Europe. In the light of these elements it is then possible to consider how best to arrange mode 4 of the GATS to ensure a balance between the interests of the populations of the importing and exporting countries and the mobile workers themselves.

Two further advantages may be identified in studying the movement of workers between India and the EU. By focussing on one sector we can draw on both general and sector-specific statistical sources. Given the paucity of data on labour mobility that is a significant gain. Finally, in subsequent research, we will be able to contrast mode 4 (the movement of health service providers) with an alternative means of simultaneously improving health provision in Europe and the earning power of Indian health personnel: a combination of modes 3 (establishment) and 2 (movement of consumers – patients) to create health facilities for Europeans in India. That is, we can consider mode 4 not only relative to the status quo, but also relative to alternative policies to achieve the same ends.

1. *The General Agreement on Trade in Services (GATS)*

1.1 General Scope of Movement of Natural Persons Under Mode 4

Movement of people is a relatively new concern for the trading system. Although barriers to the movement of labour might reduce economic efficiency as much as barriers to the movements of goods, provisions on the movement of natural persons were introduced into GATS only at the insistence of some developing countries. Balancing movement of capital with movement of labour was the motivation. WTO Members' reaction has been cautious: Few commitments were made; market access is generally restricted and is usually granted only for high skilled workers.

In Europe current discussions on further liberalising trade in services under mode 4 take place in an environment that in Europe is increasingly influenced by policies seeking to limit immigration (1) from countries outside Europe and (2) of low skilled workers. This section discusses some aspects of the relationship between immigration policy and the GATS provisions on the temporary movement of natural persons under mode 4[6].

GATS covers four different modes of supply: The cross-border supply of services (mode 1), consumption abroad (mode 2), the establishment of a commercial presence (mode 3) and the movement of the person providing the service (mode 4). Labour mobility can take place either under mode 3 or as movement of natural persons under mode 4. Since the establishment of commercial presence generally requires significant amounts of capital, OECD countries mainly carry out services where the movement of persons is dependent on a commercial presence. Services which can be provided without commercial presence such as computer and health services are often carried out by non-OECD countries, which are then able to realise a comparative advantage because of their cheaper labour costs[7].

The general principles of the GATS such as most favoured nation treatment (MFN)[8] and transparency[9] are also applicable to the movement of persons. The latter is of particular importance because it implies the adoption of rules. Thus rules on the admission of service providers must be published which, in turn limits discretionary control.

Mode 4 is defined as the supply of a service by a service supplier of one WTO Member, through presence of natural persons of a Member in the territory of another Member on a temporary or non-permanent basis. Despite the ongoing debate on some aspects of mode 4, two key elements can be identified: duration and purpose of the stay. Therefore, with respect to the purpose, movement of persons under mode 4 of the GATS includes independent service suppliers and the self-employed, as well as foreign employees of foreign companies established in the territory of a Member. There is some debate about whether foreign employees of domestic firms are covered by mode 4[10]. Normally, service suppliers under mode 4 are confined to one sector, in contrast to workers who enter under general migration or asylum programmes who are often allowed to move between sectors.

Finally, migration under mode 4 is temporary, i.e. not permanent and not for seeking entry to the labour market[11]. In other words, mode 4 is concerned with the temporary movement of persons moving to other countries for limited periods for the purposes of providing services, but with no intention of entering the labour market or migrating permanently. In the negotiations of the GATS, it proved impossible to devise a common definition, or even sets of definitions, of "temporary", so this has to be defined in the schedules in which Members list their concessions. While this may seem unduly flexible, it reflects the fact that Members came to the negotiation with established national conventions and definitions rooted in their immigration law, and also the fact that a useful definition of temporary will vary between sectors and occupations.

The Annex on the Movement of Natural Persons Supplying Services under the Agreement (GATS) sets two general limits to the mobility of labour: Paragraph 2 states that the agreement "shall not apply to measures affecting natural persons seeking access to the employment market of a Member, nor ... to measures regarding citizenship, residence, or employment on a permanent basis."

Paragraph 4 of the annex holds that the GATS shall "...not prevent a Member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across its borders, provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment."

In other words, the annex makes clear that the Member States' commitments apply only to temporary admission of foreign nationals or foreign permanent residents as service providers in their territory. In addition, the temporary stay can be subject to specific conditions as long as these do not nullify or impair the benefits of any member under a specific commitment. Discriminatory visa requirements are not per se regarded as nullifying or impairing such benefits[12]. Common restrictions can be grouped into four categories[13]: (1) Immigration-related regulations, (2) regulations concerning recognition of professional qualifications, (3) differential treatment of domestic and foreign service personnel and (4) regulations on other modes of supply, particularly on commercial presence.

As mentioned above, work permits that are based on mode 4 are generally confined to one sector or to one employer so that workers cannot freely move to another position or relocate geographically. Where work permits and visas are extendable – which is often the case – such extensions and renewals are subject to stringent conditions[14]. One of the most common restrictions is the requirement of "pre-employment" meaning that persons must already be employed by the company that they will be working with. Another common eligibility condition is wage parity, which reflects the concern of labour unions in developed countries. While thought to prevent social dumping, developing countries perceive standards for minimal wages as restrictions of their competitive advantage[15].

Requirements on qualifications, work experience and certification are common for health services. Recognition requirements may either prevent market access for the foreign service provider by causing the rejection of the work permit or visa application or may limit the scope of work to specific activities following entry. Since there are no mutual recognition agreements (MRAs) between India and the UK and India and the US, Indian doctors and nurses must re-certify in order to work there. However, it is interesting to note that in the light of the shortage of trained nurses the US are offering training to Filipino nurses who have not passed the nursing board examinations and also allow them to work in the US without passing the exam for a period of three years.

Trade in services via mode 4 is also constrained by policies which discriminate against foreign service providers. For example, social security taxes and benefits often result in differential treatment between foreign and domestic service providers. In the US, in the absence of tax treaties between their home country and the US, temporary service providers are required to pay contributions to social security, yet are not eligible for its benefits.

1.2 Commitments Under Mode 4

Bindings under mode 4 are the least liberal of all modes. The sensitivity of the temporary movement of natural person (TMNP) is also reflected in a particularly high number of horizontal limitations that have been made in individual schedules to apply to all included sectors. Interestingly, there is no significant difference between developed and developing countries in this respect[16]. Generally, commitments under mode 4 are limited to higher skilled workers. Overall, recent estimates show that TMNP related trade only accounts for less than 2percent of world services trade[17].

Although GATS covers only the temporary movement of persons it seems that most countries link temporary admission with at least the possibility of seeking permanent residence. This could explain why the most common limitations that have been listed consist of general immigration legislation and labour market regulations, measures that are usually imposed on permanent movement of labour[18].

The commitments made by the EC and its Member States relate to three categories of international service providers: Intra-corporate transferees, business visitors and contractual service providers. With regard to intra-corporate transferees, commitments are limited to senior and specialised personnel. No economic needs test is applied. Similarly, business visitors do not need to comply with an economic needs test. For contractual service providers the length of the service contract must not exceed 3 months and must be obtained in one of a relatively limited list of activities.

Since the movement of health professionals is one of the most important factors in the trade of health services one would expect commitments in this field. Yet, even countries such as the UK and the USA that actually encourage the movement of health professionals to their countries do not have any bindings on mode 4.

How can this be explained? Partly it may just be that the mobility of health workers is well established and is seen as part of the employment nexus of government rather than the trade nexus – i.e. no-one thought of using the GATS in this context. In addition, however, it seems that a desire for flexibility plays an important role, especially in the European context. European countries appear to want to be able to target specific countries for specific services, especially where language, culture or qualifications are concerned – for example the green card introduced in Germany for Indian IT specialists or the preference for nurses from the Philippines in the UK[19] – or where they seek to offer preferences such as the training worker schemes available to workers from the former CMEA countries.

1.3 Measuring Services Trade

The Manual of Statistics of International Trade in Services (MSITS, 2002) is a major effort to resolve the divergence between GATS legal framework and the traditional statistical framework mentioned under IMF's Balance of Payments Manual, 5 (BPM5). The MSITS is the result of a joint effort among six international organisations[20]. An internationally agreed GATS-coherent framework for the compilation and reporting of statistics of international trade in services has been set out in MSITS. However, the MSITS conforms with and explicitly relates to BPM5.

International transactions under mode 3 are based on commercial presence of foreign affiliates. The foreign affiliate trade in services has been referred to as FATS under MSITS. The statistical concept of FATS is very much similar to the commercial presence notion under GATS (Karsenty, 2000). However, there are two major differences. First, while GATS refers to majority ownership and control, FATS data are based on majority ownership alone. Secondly, while GATS covers services whether produced by a service company or a company classified under manufacturing sector, FATS statistics aim at measuring the output of companies classified according to their primary activity.

Table 1: Trade in Services by Mode of Supply

Mode	Proxy Used	Value ($b) 1997	Share (Percent)	Value ($b) 2000	Share (Percent)
Mode 1	IMF BOP Commercial Services minus travel	890	40.9	972	41.0
Mode 2	IMF BOP Travel	424	9.5	463	19.5
Mode 3	FATS gross output in services	820	37.7	896*	37.8
Mode 4	IMF BOP compensa-tion of employees	41	1.9	41	1.7
Total		2,175	100.0	2,372	100.0

Sources: Karsenty (2000) revised, IMF Statistical Yearbook (various issues).
* Our estimate assuming growth in FATS is equal to that in IMF-BOP commercial services.

World exports of goods and commercial services averaged $7.2tr annually in the triennium ending (TE) 2000, including $1.42tr worth of exports of services accounting for about one-fifth of the total world exports (IMF-BOP data). While the export of services accounts for 16.2 percent of developing-country export, the corresponding share is higher at 21.5 percent for industrial countries during the TE 2000.

The share of developing countries in the world export of services increased from 22.3 percent in 1991 to 28.1 percent in 2000. The share of Asian developing countries in total world exports increased from 9.9 percent to 14.5 percent during this period (IMF-BOP data).

Tables 2 and 3 provide proxy estimates of net earnings of temporary migrants (Mode 4) using IMF-BOP values of compensation of employees. Many developed countries in the EU, France in particular, are also major beneficiaries.

Turning to the specific issues of the India-UK flow of labour there are no official records available with the Ministry of External Affairs providing profession-wise details of outflow of Indians migrating to other countries. However, the UK maintains some databases. The main UK government databases include the International Passenger Survey (IPS), the Labour Force Survey, Work Permit statistics produced by Work Permits UK (formerly called the Overseas Labour Service), and Asylum and Settlement statistics published annually by the Home Office. However, all official migration data are subject to estimation error[21]. The annual SOPEMI Report on the UK uses the International Passenger Survey to monitor migration flows, the Labour Force Survey to provide stock information and the Home Office statistical bulletin to report acceptance for settlement under different categories.[22] These sources do not publish data for migration flows from "developing countries" but use labels such as "New Commonwealth" and "Other Foreign". In addition, cross-tabulations of origin country by occupation or qualification are not published thus making it difficult to directly address many questions on migration from developing countries.

Table 2: Compensation of employees across regions: Net Credit (million USD) Moving Averages

	1992-94	**1995-97**	**1998-00**
Industrial countries	7069.0	-5129.7	-1456.3
EU countries	2694.7	5153.3	8235.0
US	-3808.3	-4643.3	-5086.7
Remaining industrial countries	-5955.3	-5639.7	4604.7
Developing countries	3991.7	6068.0	6225.3
Africa	14.7	97.0	-6.0
Asia	3641.7	6652.0	7091.7
Europe	236.7	-136.0	557.3
Middle East	-533.3	-1472.7	-2678.7
Western Hemisphere	631.7	927.7	1260.3
India	-190.0	-229.3	69.0

Table 3: Compensation of employees across EU countries: Net Credit (million USD) Moving Averages			
	1992-94	**1995-97**	**1998-00**
Austria	547.3	625.3	563.7
Belgium-Luxembourg	1918.0	1792.3	1018.0
Denmark	277.7	265.3	165.0
Finland	15.3	85.3	313.3
France	- 435.0	3428.7	7447.3
Germany	597.3	- 1044.0	- 875.3
Greece	41.7	- 75.3	233.7
Ireland	241.7	261.3	144.3
Italy	- 63.0	387.0	- 290.7
Netherlands	-346.0	-343.7	- 446.3
Portugal	53.0	48.3	44.3
Spain	73.3	-11.3	-18.0
Sweden	-139.7	- 203.7	- 254.3
UK	- 87.0	- 62.3	190.0
Total (EU countries)	**2694.7**	**5153.3**	**8235.0**

2. *Immigration and Mode 4 of the GATS*

2.1 Immigration Regulation in the European Union

With the entry into force of the Treaty of Amsterdam on 1 May 1999 policies on asylum, visas, immigration and other aspects related to the free movement of persons became a Community responsibility. In addition, the so-called Schengen acquis[23] was integrated into the Treaty of Amsterdam. As a result, immigration related to economic activity forms now part of the policies mentioned in the first pillar of the Union. Together with the fact that the new Article 133(5) of the EC-Treaty now gives the Community a general power over services in international agreements and negotiations as part of the general commercial policy, the movement of persons could – once these powers are exercised – come within the exclusive competence of the Community[24].

Common rules for visa, asylum and immigration are laid down in Title IV of the EC-Treaty. The UK, Ireland and Denmark have negotiated separate protocols, which allow them to remain outside the legal scope of Title IV. However, the UK and Ireland can decide on a case-by-case basis to join the other member states. Article 63(3) gives the EC the power to adopt measures on immigration policy. Still, Title IV does not mention a common immigration policy. Instead Article 63(3) and (4) explicitly preserves Member States' rights to maintain or introduce national provisions, which are compatible with the EC-Treaty and other international agreements. Overall, Article 63(3) must be interpreted in the light of the objectives mentioned in Article 61. In other words, it forms part of the measures needed to secure the area of freedom, security and justice[25].

Since the ratification of the Amsterdam Treaty, the European Commission has submitted several proposals on immigration topics, which are currently under discussion in the Council and the European Parliament.

So far, the measures adopted by the European Union reflect the difficulties in balancing the different interests in promoting the liberalisation of the internal market on the one hand and the respect for political frontiers in a world where the traditional nation state is less and less capable of fulfilling one of its traditional functions, the control of the economy[26].

After the entry into force of the Treaty of Amsterdam, the European Commission introduced several proposals for rules on the admission of third nationals[27]. The first proposals reflected much more the approach of the Member States under the third pillar in formulating some general principles but still granting discretionary powers to the Member States in controlling admission or rejection of individuals. Such a policy lacks certainty, which from an international trade law point of view is essential and contradicts the transparency requirement of the GATS. Following the Council summit in Tampere in October 1999 and its Presidency conclusions[28], the Commission adopted a more proactive approach in suggesting measures to control immigration according to the needs of the European labour market instead of creating a "Fortress Europe". While this represents a clear rupture with former immigration policies, it still needs to be seen to what extent Member States follow the Commission along this road[29].

2.2 The Relationship Between Immigration and Trade in Services Liberalisation

As the previous sections have shown, attempts to reinvest discretionary power in national authorities not only bears the risk of reversing a long process of shaping European immigration law into a more rule-based concept but also seems incompatible with the spirit of global services liberalisation and the transparency requirements under GATS.

Several factors are likely to influence the European position of further liberalising movement of persons under mode 4: Unemployment, that is still relatively high, limits policy options to liberalise immigration even on a temporary basis except for high-skilled specialists.

Second, it is estimated that the enlargement of the European Union will lead to labour migration from Eastern European Countries. Recent studies suggest that between 4 and 7 percent of the population of the Baltic States, Poland, the Czech Republic, Slovakia, Hungary and Slovenia will move to Western Europe by 2020.This amounts to 3-5 million people[30]. The Commission has proposed a general transition period of five years before extending the right to free movement of workers to the nationals of the Central and Eastern European countries with a possibility for each Member state to extend this period for two years. On the other hand, several of these countries[31] announced new visa regimes for citizens of Ukraine, Russia and Belarus complying with the requirements of the Schengen acquis.

Finally, many European countries have adopted measures to facilitate immigration of “privileged” foreigners, i.e. high skilled specialists[32]. Such permissions (“green cards”) are usually only given to persons with a university degree or outstanding specialist knowledge[33]. So far, they are considered successful. For example in Germany, a Green Card Regulation, which was introduced for IT specialists in August 2000, marks the beginning of a new policy to regulate immigration. Under this regulation, companies are allowed to employ up to 20,000 IT experts from non-EU states. To facilitate the process a fast-track procedure was introduced as well as more favourable conditions for these workers in terms of foreigners’ law. The government in 2001 with the goal of further relaxing the rules of skilled immigration proposed a revision of the scheme. Yet, for political reasons, this attempt was counterbalanced with tightening regulations for unskilled workers[34]. Although immigration of IT specialists did not reach the expected number of 10,000, the programme is considered a success. A similar pilot project has been developed in the UK[35].

On a more general note, with European integration progressing, persons from countries outside Europe are increasingly facing difficulties in obtaining work permits, even on a temporary basis. This is not only the case in EU Member States but also for other countries that have engaged in bilateral agreements with the EC such as Switzerland.
The EC offer[36] for the Cancun ministerial on services contains several measures to improve third countries’ access to the EU Services market. Under the EC proposal, service companies with graduate training programmes will be able to transfer their “managers of the future” for up to one year training with an affiliated company in the EU. Other intra-corporate transfers are possible for managers and specialists for a maximum

of three years and without an economic needs test. Also, companies which have a contract to provide services with a client in the EU will be able to send highly skilled personnel to the EU to provide these services for up to six months at a time[37]. This proposal could be of particular interest for non-OECD countries and small and medium enterprises that do not have a commercial presence in Europe. Yet, it only applies to service contracts in subsectors specifically named in the offer. Health services are not on the list.

Finally, self-employed skilled professionals, working in certain sectors (for example computer services, engineers) and who are based overseas will be able to enter the EU for up to six months to provide services to EU clients. Under the EC offer, Member States will continue to be able to refuse entry to persons that pose a security threat or that are considered to be at risk of abusing the terms of their entry.

The main categories for temporary transborder movement of people are refugees, transit, tourism, family visits, educational and cultural exchanges, and work. WTO law addresses only the last category, work, and only where it is related to services[38]. In other words, WTO law covers only a very limited sector of immigration. Yet, so far, the discussion on temporary movement of workers has been dominated by immigration policies and not by the requirements of international trade. Therefore, it is suggested in this paper that reconciling current immigration policy with liberalised services under GATS requires a conceptual move from a migration to a trade framework, from horizontal commitments reflecting a migration approach to sectoral commitments that better accommodate the particular sectoral needs[39].

With regard to temporary movement of workers in the health sectors, the following measures are – from a legal point of view – desirable to improve the current situation:

1. The extension of sectoral commitments by Member States in the health sector would allow for a more liberal treatment of mode 4. Specific types of services suppliers such as nurses or doctors could be targeted specifically according to receiving countries' needs.
2. Given the shortage of labour in the health sector with regard to nurses and assistant nurses, expanding the categories, which are granted access under mode 4, should be considered. Such a policy would meet developing countries' need for more liberalised migration of middle and lower skilled personnel and at the same time accommodate increasing demand for such personnel in industrialised countries (e.g. nursing homes, geriatric care etc.).
3. Administrative difficulties in obtaining temporary work permits can, to a great extent, be attributed to the lack of separation in procedures between temporary and permanent labour. As a result, most people seeking a permit for temporary work under GATS have to comply with the stringent requirements for permanent migration. Here, a specific GATS visa tailor-made to mode 4 could overcome these difficulties[40]. In addition, such a specific visa could require a certain period of stay in the home country after its expiration before becoming eligible for a permanent working permit. With such a requirement, concerns about possible brain drains that have been raised e.g. by the Philippines[41] could be addressed[42].

3. Brain Drain vs. Brain Gain

The two important characterisations of international labour mobility, namely brain drain and brain gain, have been fiercely debated during the last two decades. On the one hand, a developing country loses through brain drain when highly skilled persons migrate taking away with them their inherent talent, the built-in cumulated subsidies during their period of education and potential fiscal contributions had they remained and worked in their own country. In a recent study on the fiscal impact of high skilled emigration from India to the United States, dramatic loss of India's talent during the 1990s has been observed with migration concentrated among the prime-age workforce. Using PPP figures, it is estimated that the foregone income tax revenues associated with the Indian-born residents of the United States comprise one-third of current Indian individual income tax receipts[43].

On the other hand, there may be positive aspects to such migration – brain gain. The remittances sent by the high skilled Indian migrants are significant, as are the network they establish abroad for selling Indian goods or obtaining sophisticated inputs for Indian business and their higher productivity on their return endowed with better qualifications, experience, networks and capital resources.

Just to quote one example, the existing team of 14 cardiac surgeons at the famous Escorts Heart Institute and Research Centre (EHIRC) Hospital in New Delhi includes 7 surgeons with some exposure abroad. The Executive Director, Dr. Naresh Trehan, is among the pioneers of corporate health facilities in India. He had been educated in India followed by ten-year practice in the US. He came back to India in 1988 to establish EHIRC in New Delhi. The remaining 13 surgeons include four Senior Consultants, one Consultant and eight Junior Consultants. It may be interesting to note that all the 13 surgeons had their basic medical education, graduate as well post-graduate, in India. However, three out of four Senior Consultants have work-experience abroad varying between two to four years with one of them also having earned his Ph.D. concurrent to his foreign stay of four years. Three out of seven Junior Consultants have foreign work exposure varying between six months to six years.

The theory of the so-called "beneficial brain drain" (Mountford, 1997) supplements the remittances, network and returnee stories. It argues that migration increases the returns to education and so encourages training in developing countries. If not all those who receive training emigrate, we can imagine a situation whereby the higher expected returns to training encourage more additional people to train than actually leave the country, and thus that the developing source country ends up with more skilled labour than it would have had in the absence of migration options.

The argument depends critically on two assumptions – see Commander, Kangasniemi and Winters (2002): that decisions to train are influenced by migration opportunities and that those opportunities fall sufficiently widely and randomly across trained personnel that there is a fair chance that those who train will not get to emigrate. The latter condition requires essentially that recruiting countries and organisations abroad cannot screen applicants so effectively that they choose only the best applicants. If they can screen perfectly, they will typically choose people who would have trained anyway (or those who take training in the certainty of emigrating) and thus migration will have no effect on the expected returns of those who would not choose to train in the absence of migration (because they will never be in the favoured set). Under these circumstances, no additional skilled personnel are produced (except, perhaps, to replace emigrants) and hence migration opportunities represent a pure drain.

A recent case study has addressed the impact of highly skilled labour emigration, comprising both professionals and students, from India. The study also provides analysis of policies and policy options aimed at reducing the negative effects and consolidating the positive effects of the brain drain[44]. It is argued that policies focused on two major sectors, viz. education and health, as receptacles of expatriate participation in development would have long-term positive impact of generating a self-sustaining market with an expanded effective demand for alleviation of poverty. This would help in raising the average productivity and standard of living of the non-emigrating masses. Our analysis below also suggests that brain drain issues may arise in the flow of doctors from India to the UK.

4. *Temporary Movement of Indian Doctors to the UK*[45]

It appears that the system of imparting medical education creates market imperfections between the demand and the supply of Indian doctors within India. Medical education, both at graduate as well as post-graduate levels, is heavily state-subsidised. It is not that India would not need these doctors within the country, but rather that they are free to decide about their future with many of them choosing to migrate to other countries including the UK. Yet, if medical students in India were to pay for their education an entirely different scenario would emerge.

4.1 The Supply (India)

India has a large pool of medical doctors. Total number of registered medical doctors is close to 550,000. More than 20,000 doctors graduate out of 162 medical colleges in India every year[46]. The rate of growth of registered medical doctors has been 4 percent per annum during the 1990s when the population grew at the rate less than 2 percent per annum. India loses between 4,000 to 5,000 doctors due to out-migration every year, i.e. approximately 20 to 25 percent of the total number graduating annually. Medical education is subsidised in India. The average cost of education of a medical graduate is US$25,500 including an average variable cost of about US$18,500. A student typically pays about US$1,500 for his/her education to attain his/her first degree. The rest of the amount is subsidised by the state[47]. With approximate expenditure incurred by the state for each graduating doctor close to US$20,000, India loses about US$100mn every year[48].

4.2 The Demand (UK)

Persons of Indian origin (PIOs) have distinguished themselves in the field of medicine and healthcare in the countries of their settlement. The total foreign-born labour force was about 1 million in the United Kingdom in 1999, constituting about 3.9 percent of its total labour force. Indian-born workers constituted about 6.6 percent of foreign-born labour force (about 66,000)[49]. Up to 4,700 doctors are expected to retire in the next eight years, many of them are part of the wave of Indian doctors who were recruited in the 1960s[50]. There is an existing need for about 10,000 more doctors, including 2,000 General Practitioners, to join the National Health Service (NHS) in the UK. About 30,000 foreign doctors are already working for the NHS. The Department of Health is looking mainly for specialists in histopathology, psychiatry, radiology, cardiac services, anaesthetics and ophthalmology. The UK government has taken an ethical decision not to recruit from developing countries where there is already a shortage of trained doctors. Hence their concentration is essentially on the old Commonwealth countries and Europe. The Department of Health expects to sign recruitment accords with the Indian and Pakistani governments soon.

Indian doctors constitute a large proportion of the overseas doctors working in the UK. According to the General Medical Council they are the largest single nationality seeking registrations in the UK. In the following we describe the UK training system and visa regulation that applies to Indian doctors. As a part of an ongoing study of overseas doctors in the UK funded by DFID, we surveyed by means of a telephonic questionnaire 136 overseas doctors, 58 of whom are from India. The preliminary results of this survey can be used to describe the careers, motivation and return intentions of Indian doctors.

Traditionally the United Kingdom has welcomed large number of foreign doctors. There are various routes through which they can enter the country. For Indian doctors the most relevant ones are the PLAB (Professional and Linguistic Assessment Board) test and the ODTS (Overseas Doctors Training Scheme) which is described below. The latter system has been designed specifically to attract foreign doctors to work and train at junior and intermediate levels in the National Health System. Clearly, the accessibility of so large an employer is likely to have implications for the pattern and extent of migration from the main sending countries.

All doctors working in the United Kingdom have to be registered with the General Medical Council. The General Medical Council records the place where their initial qualification was obtained, and thus provides some information on the origin of doctors. There are different types of registration status, which also give indication on the post and the career progress of the overseas doctors.

The types of status of most relevance for Indian doctors are limited and full registration. Limited registration is initially given to non-EEA[51] doctors and allows them to work under supervision, until they have proved their clinical ability to be at the level expected from doctors working independently in the United Kingdom. A doctor can obtain limited registration only when he or she has an offer of suitable employment.

The number of overseas (non-EEA) qualified doctors currently in the register is not available (the total number of doctors in register is 193 000[52]). The number of new non-EEA doctors arriving was 2763 in 2000. This was 32 percent of the total number of new registrants, the share having been as high as around 40 percent of the new registrants in the 1990's (General Medical Council, Table 1). In 2000 878 new Indian doctors registered, which accounted for 32 percent of all new overseas doctors.

The majority of new non-EEA doctors initially obtain limited registration. In recent years 25-30 percent of those holding a limited registration have converted it into a full registration annually (General Medical Council, Table 2). The average period of holding limited registration is approximately 1000 days.

The immigration of overseas doctors to the United Kingdom is closely tied to the postgraduate training system. The aim has been to employ overseas doctors in training posts, thus providing the NHS with a workforce while simultaneously allowing doctors from developing countries to obtain a postgraduate training that can be subsequently used in their own country. It is also possible for fully trained doctors to work in the United Kingdom, but this route is less common. In the following we describe the system of medical training in the United Kingdom and the visa and work permit arrangements relevant for doctors and assess the importance of different routes of entry.

4.3 Medical Education and Postgraduate Training in the United Kingdom

The initial stage of medical education in the United Kingdom is university undergraduate education, which takes five or six years and is predominantly funded out of taxation. Taking this first stage in the UK is not very common among Indian doctors, as medical education is supplied in India, including the one offered by private institutions. Graduation from medical school in the UK is followed by Pre-Registration House Officer (PRHO) year, which is still the responsibility of the university and consists of two six month training posts. During this period the trainee is not fully registered with the GMC but has only provisional registration. According to our survey (and the fact that most Indian doctors initially obtain limited registration) very few Indian doctors do this stage of their training in the UK, although some of them initially take up PRHO posts to facilitate finding higher grade posts later on. In our sample of 58, however, only two Indian doctors who did not have a UK degree had his or her first clinical experience as a PRHO.

The next stage of postgraduate training is basic specialist training or the time spent in the Senior House Officer Grade (2-3 years). At this point doctors have limited registration and practice under the guidance of a senior doctor. They have considerably day-to-day independence, however. The majority of Indian doctors in our sample (75.9 percent) started their careers in the UK from this grade. This stage does not lead to the award of a formal certificate, but after basic specialist training the doctor can work in staff grade posts. The subsequent higher specialist training (4-6 years) which takes place in the Specialist Registrar (SpR) grade entitles the doctor to be awarded a Certificate of Completion of Specialist Training (CCST). The holders of CCST who are in GMC's specialist register can work as consultants. Entry to the higher specialist training, however, is highly regulated, and requires admission into a specialist training-programme. Even so, a relatively large fraction of the Indian doctors we interviewed (29.3 percent) were working at SpR grade.

In addition to these forms of training there are arrangements specifically for overseas doctors in the UK that do not lead to any formal qualifications or do not take the form of paid employment. Foreign doctors hoping to obtain the clinical experience in the UK necessary for getting a training post typically use these so-called clinical attachments[53]. They can be done without registration and with visitor immigration status, but are not paid and do not provide direct patient access. Clinical attachments normally last between two and four months. About 12.1 percent of Indian doctors we interviewed had clinical attachment as their first clinical experience in the UK.

At the higher specialist training level Fixed Term Training Attachments (FTTAs, or "type II" specialist training posts) provide the opportunity to obtain six months to two years of training in specialty for those without indefinite rights of residence in the UK. Unlike standard higher specialist training they do not lead to award of a certificate.

Not all doctors want to pursue all these training levels, and the number of people admitted to training would not even allow this. After basic specialist training the doctor can work at staff grade level posts and after higher specialist training they can be appointed as consultants which is the most senior post. Those specialist-trained doctors who are unable to obtain consultant posts can work as associate specialists. General practitioners are trained in a separate vocational training system, which is described below.

4.4 How Indian Individuals Enter the System

It is possible for overseas students to undertake undergraduate studies in medicine in the UK medical schools. However, the number of places is very limited and the cost for overseas (non-EEA) students is very high, approximately £16,500 per year. Those overseas students who choose to pursue medical degrees will be allowed to stay in the United Kingdom to complete their postgraduate general clinical and basic specialist training. In our sample there is only one Indian doctor who obtained a degree in the UK.

Most Indian doctors, like most other foreign doctors in the UK, enter the system with an undergraduate qualification from their own country. For the degree to be recognised in the United Kingdom, the medical school has to be included in the WHO list of medical schools of which there are 140 in India.[54] It is usually expected that overseas doctors also complete PRHO or corresponding clinical training in their own country. In order to be able to get registered in the United Kingdom they will also have to take Professional and Linguistic Assessment Board (PLAB) test to prove their professional skills, as well as a separate language test (IELTS) if English is not their first language.

Those who are part of special placement schemes are, however, exempted from the PLAB. Also some other special conditions like completion of basic specialist training to the satisfaction of the appropriate UK specialist training body, appointment to a Type 1 specialist registrar post (i.e. a post approved for training leading to CCST), eligibility for specialist registration or long experience can qualify the doctor for PLAB exemption. Indian doctors use the PLAB route more often than doctors coming from other countries.

Doctors in training have special immigration arrangements: they have a "permit free status" and hence do not need a work permit. They can apply for this status after having been appointed to a post. Doctors pursuing PRHO have an initial grant of maximum of 12 months that can be extended only with special permission. Doctors undertaking basic or higher specialist training for a fixed-period are granted permit free status for the period of training. Doctors participating in basic specialist or general professional training or holding appointments in the SHO grade are granted three years of permit free status, with a possible extension of one year. Similarly doctors qualifying for higher specialist training will be granted an initial period of permit-free training for maximum of three years, with possible extensions.

Those doctors who enter career grades (non-training hospital grades) need a normal work permit. Their employer will apply for this, showing, inter alia, that no EEA resident was suitable for the post. We have no details for doctors, but an estimated 90 percent of overall work permit applications are successful.

General Practitioners are trained in a separate vocational training system. This training lasts three years, out of which at least 12 months have to be spent in general practice and 12 months in approved hospital posts. GP training often takes place in training schemes. Training taken abroad can be taken into account, if considered relevant. The General practice element of training requires full registration. There used to be severe restrictions on the availability of funding for doctors who did not have rights of residence or indefinite leave to remain in the UK, but since November 2001 they are eligible for the same type of funding as UK/EEA applicants have . We have no information on the number of Indian doctors in GP training schemes.

Doctors doing GP training will get the "permit free status" for the hospital-based parts of the training but require a "training and work experience scheme work permit" (TWES) for the year they spend as GP registrars[55]. Holders of TWES are normally expected to return to their home country after the training period, but the Home Office has agreed that those in GP training are not subject to the normal regulations. After training, doctors undertaking GP registrar posts can apply for salaried jobs for which work permit is needed. GP principals (i.e. those who will be self-employed) can apply to remain in the UK through the Highly Skilled Migrant Programme (HSMP). The Department of Health has agreed with the Home office that doctors who are eligible to work as GPs will qualify under the HSMP as priority applications[56].

Most foreign doctors come to the UK initially for training. In table 4(A) we have presented the number and share of Indian doctors in different grades and in table 4(B) the distribution of Indian doctors across different visa status.

4.5 Evidence of Screening

The initial screening of overseas doctors entering the United Kingdom takes place through the conditions for allowing them registration. Taking PLAB test incurs considerable costs as part of it is taken in the United Kingdom. The test consists of two parts, the first of which can be taken in several locations (including India), but the second of which (the OSCE, Observed Structured Clinical Examination) can only be taken in Britain. The fees for the two exams are £145 and £430 respectively. The average pass rate is 59 percent for the first part and for part two it is 84 percent. There is, however, no pre-set pass rate. PLAB as such is not a part of NHS manpower planning and passing PLAB is not a guarantee of employment (MacDonald 200). The monetary cost of PLAB is considerable for Indian doctors: they may have to spend the equivalent of a year's salary on travel costs, examination fees and living costs before they get a job in the UK (Mahapatra 2000).

Anecdotal evidence also suggests that getting a training post is not straightforward even after passing the PLAB test: in 1998 one district general hospital had 147 applications for four SHO posts, and only four of the applications were from British nationals, two of whom were UK graduates (Sridhar 1998). In 2000 another SHO post attracted 224 applicants of whom 216 were non-EEA graduates (Sridhar 2000). How fierce competition for posts is depends on specialty, but these data suggest that UK hospitals have plenty of scope to choose among overseas doctors.

The Overseas Doctors Training Scheme was established in 1984 and is run by the Royal College and the Department of Health. Initially the scheme was a dual sponsorship scheme run by individuals, where a senior colleague from overseas arranged a training post with a consultant in Britain. Currently, however, overseas doctors apply to the scheme directly to the relevant College, and some Colleges are not running the double sponsorship scheme, but rather sponsor overseas doctors independently through their own placement schemes. Selection is made on the basis of certain criteria for example, the recommendations of their referees and their experience, but the exact requirements vary in various Colleges. Currently all Colleges require at least two years experience in the specialty in which the candidates wish to practice, and a primary qualification that is acceptable for GMC limited registration. The applicants must not have failed PLAB. (Constable et al 2002.)

Once accepted onto the training scheme, the College acts as the applicant's UK sponsor and the applicant joins a waiting list; obtaining a post can take as long as two to three years. Candidates are placed in their first post without formal interview, but for subsequent posts they have to apply for through normal procedures. (Gupta & Lingam 1999.) Direct placement has caused concern because it reduces the number of posts that are available through open competition (Welsh 2000). In our sample ODTS was the route of entry for 37.9 percent of Indian doctors. In addition to the ODTS, the British Council has its own sponsorship scheme, which is aimed at doctors with at least three years experience in their specialty. This sponsorship scheme also attracts large number of applications (Constable et al. 2002).

In our telephone survey we asked several questions that could give leads about how carefully applicants are screened. 36.2 percent of interviewed Indian doctors reported that they had got "excellent" grades for their degree (37.9 percent had degrees that were not graded at all). Indian doctors passed PLAB in their first attempt more often than other overseas doctors, and in general needed to make fewer applications than other overseas doctors[57]. As many as 19.3 percent of them, however, had experienced involuntary unemployment in India, which may of course indicate excess supply of doctors rather than low quality of migrant doctors.

4.6 Does Migration Affect Career Decisions?

An essential link in the theory of "the beneficial brain" (Mountford, 1997) is how the possibility of migration affects individuals' decisions prior to migration. Only 8.6 percent of Indian doctors say that the prospect of working abroad influenced their decision to study medicine, and an even smaller fraction stated that it influenced their choice of university or college. Larger fractions (22.4 percent and 34.5 percent) stated that the prospect of working abroad affected their choice of specialty and their decision to seek training abroad. 20.7 percent and 27.6 percent respectively said that the prospect of working abroad had influenced their decision on how to finance their education and how much effort to put into their medical studies.

Interviewees were also asked how they thought migration possibilities influenced the educational decisions of doctors in general. Slightly larger fractions stated that the possibility of moving abroad was influential in general than admitted it was personally.

Table 4: Status and Visa-Status of Indian Doctors

Current Grade	*Number*	*Percent*	*Cumulative Percent*
SHO	24	41.3	41.4
SpR (TypeI)	17	29.3	70.7
SpR (TypeII)	8	13.8	84.5
Locum	1	1.7	86.2
Staff Grade	1	1.7	87.9
Clinical Fellow	2	3.5	91.4
Other	5	8.6	100
Total	58	100	

Visa Grade	*Number*	*Percent*	*Cumulative Percent*
Indefinite	6	10.3	10.3
Residence			
TWES	1	1.7	12.1
Work permit	9	15.5	27.6
Permit free status	40	69.0	96.6
Unknown	2	3.5	100
Total	58	100	

4.7 Standards of Living

It is also of interest to note the initial motivations of migrants to relocate to the UK. The most commonly stated reason for migrating to the UK among Indian doctors was advancing their careers (87.9 percent); 55.17 percent mentioned financial advantages as a reason, although, of course, this could also be an aspect of career advancement. Fewer doctors mentioned departmental connections, personal or other reasons. When asked what their salary would have been had they stayed in India, 78.2 percent of those who responded say that in monetary terms their salary would have been lower, although two "optimists" claimed to be foregoing ten-fold larger private-sector earning by staying in the UK. In fact, nominal public sector salaries for doctors are at least six times higher in the UK than in India – as table 5 shows – and considerably more in practice given the large number of supplements that UK doctors earn.

In real terms the comparison of salary levels is more complex, but the ratio between UK and Indian levels are certainly much smaller. The average purchasing power parity (PPP) adjustment for price levels between the UK and India is about 6[58]. For doctors, however, whose consumption bundles are likely to have fairly high proportions of tradable goods and who are likely to use large shares of their income for monetary transfers or asset accumulation, the corresponding conversion factor will be much smaller. Moreover, the higher levels of unemployment in India reduce expected incomes there. On the other hand, the Indian tax regime allows the self-employed very generous allowances for business expenses (45 percent of gross income), and traditions of cash payment can reduce the tax-take, which mean that a given pre-tax real income goes much further in India than the UK. All told, it is likely that doctors' real incomes are higher in the UK than India, but the differences do not seem likely to be massive.

4.8 The Value of Doctors

As well as illuminating the private incentives for mobility, pay rates also presumably bear some relationship to the marginal productivities of doctors. The valuations include an implicit valuation of life, which may vary considerably between India and Europe, and whether this should be taken into account in policy making is both moot and sensitive[59]. However, the comparisons suggest that international mobility from India to Europe enhances global incomes.

The sample questionnaire also sought to explore whether part of the attraction of the UK as a place to work was because of the better facilities and support teams available to doctors relative to that in India. This view received some support in the survey, suggesting that there is a complication of complementary inputs to analyse in devising policies to manage the flow of doctors.

4.9 Remittances

50.2 percent Indian doctors send remittances back to their home country. On average these remittances are 17.6 percent of their salary (some doctors, however, said that their remittances are not regular, and they could not state any figure). The most important purposes of these remittances were supporting relatives (73.3 percent mentioned this) and savings (46.7 percent).

4.10 Financing Training

Most Indian doctors (70.2 percent) reported having received free or highly subsidised education. In addition to this private funds were the most common source of funding (82.5 percent)[60]. 22.8 percent had received a scholarship, but very few used grants, corporate sponsorship or borrowed money to fund their education.

4.11 Returning Home

In previous periods it was very difficult for overseas doctors to extend their stays in the UK beyond their immediate training periods. Currently, however, staying is easier, although the official aim is still that they return after finishing their training. Currently as many as 60-70 percent of doctors continue to stay after their training period, although the BMA has expressed a view that this is due to their training being inadequate or inappropriate and not providing the skills that the migrants initially came to the UK to obtain, rather than to the doctors' reluctance to return to their home countries.

Table 5: Comparative Salary Levels, 2002, current exchange rates				
	UK (NHS) Basic salaries only	India, government sector	India, private practice	India, private hospitals
Junior level	SHO £23,190 – £32,520	£2,351 –£5,485		£2,351 –£4,702
Middle level	SpR £25,920 – £37,775 Staff grade £28,150 – £41,980	£3,135 – £7,053		
Senior level, specialist	Consultant £52,640 – £68,505 Associate specialist £31,210 – £56,105	£3,918 – £6,531	£3,265 – £7,837	£,265 – £10,449
Note: The UK salaries given here do not include other fees and allowances, for example working time supplements. These are typically very significant, especially at more senior levels.				
Source: Department of Health, UK; private enquiry, India.				

According to our survey 45.5 percent of Indian doctors currently intend to return, 33.3 percent are undecided and 21.1percent are not going to return. As many as 75.9 percent reported that their initial intention had been to return home after training.

4.12 Analysis

The results above suggest, prima facie, rather weak links between migration opportunities and training decisions and at least some screening – e.g. via the limited number of WHO-recognised schools, the cost of PLAB, the apparently high quality (self-regard?) of emigrants. Both gravitate towards the refutation of the beneficial brain drain parable.

However, this does not by itself mean that there is a brain-drain problem. Gravitating in that direction, the non-returnee proportion of Indian doctors in the UK is quite high – around 50 percent. And worse, theory suggests (e.g. Stark, Helmenstein and Prskawetz, 1997) that return will be biased towards less able individuals, although they may still be skilled relative to non-migrants. India apparently subsidises medical training so there is also a public-finance aspect to the losses. On the other hand, the flow of remittances, the creation of networks, the skills of the returnees all promise benefits. We are not able to make a comprehensive assessment of the net benefits, but there is at least a possibility that India could be losing from the emigration of medical personnel to the UK and that the outflow is getting worse.

4.13 Implications for the GATS

The analysis above suggests that labour mobility may need to be accompanied by safeguards for countries of emigration. One of the issues that needs to be explored is how far this would also apply to mobility under the GATS, which is, after all, explicitly temporary. The fact that so much UK medical immigration is already ostensibly temporary but actually permanent suggests that it may apply here as well. However, since the general application of the GATS mode 4 seems likely to be accompanied by greater efforts to ensure that temporary labour does not turn into permanent residence – see, for example, Winters et al (2003) – it could be that bringing doctors in under the GATS would improve return rates rather than the reverse. On the other hand, in the absence of fierce self-denying regulations about the re-recruitment of GATS personnel after a short return to their home countries, a GATS window for doctors could just improve the efficiency with which the UK authorities are able to screen applicants. Such regulations seem almost unimaginable except on a voluntary basis such as that on which the UK government has agreed not to recruit from doctor-deficit countries.

If, despite the misgivings above, the Indian government wished to encourage the mobility of doctors abroad, one should enquire whether the current form of mode 4 of the GATS provides a useful means of doing so. On one hand the MFA clause of the GATS could be viewed as increasing the competition for Indian doctors because it strictly obliges the UK to consider all qualified doctors. It might also increase the bureaucratic cost of mobility, since the current "permit-free"schemes are fairly light-handed relative to other international mobility. On the other hand, GATS bindings would increase long-run predictability, removing the possibility of sudden changes as UK conditions change. This last benefit could be very important if the flow of doctors ultimately depends on investing in new training facilities.

We have already speculated that the UK has failed to identify health as a GATS-able sector because it values the flexibility of the current informal system. We note that the UK has started to issue GATS permits to various service categories since January 2002,[61] but that healthcare services have not been included in the list of 13 service sectors opened up so far. If negotiations are to occur, the UK as well as India must also see some benefits. The most important reason for such a move is the need to assure future market access in order to encourage others (i.e. India, at present) to invest in the training of doctors and UK health providers to place more reliance on the steady inflow of doctors from abroad. This, of course, is the traditional argument for binding market access barriers on goods in the GATS. It amounts to saying that the UK does not have a comparative advantage in the early stages of training doctors – school and undergraduate study – perhaps because they are rather labour intensive or because UK education technology (schools policy) is not very strong.

The UK could still have comparative advantage in the later stages of medical training via its endowments of capital and rich patients on whom to practice, or via its strong public sector orientation which stresses training. On this view, we are "slicing up the value-chain" in providing medical education, exactly the circumstance in which, in goods markets, stable low trade barriers are held to matter so much.[62] The UK may also wish to diversify away from India as a source of supply of doctors as competition for Indian doctors increases or supply decreases (see below), and making an explicit commitment in the GATS may help here. And, of course, offering medical services may be a relatively "cheap" concession to make under GATS in constructing a package deal.

It is also worth stressing that medical mobility already satisfies some of the conditions that informed scholars of mode 4 such as Mattoo (2000) urge on negotiators. For example, to qualify to practice in the UK doctors need to prove their competence via the PLAB, not undergo duplicative training or meet extensive residence requirements as are found with some other professions. That is, in Mattoo's term the qualification test focuses on the necessary fiduciary issues rather than irrelevant formalities. Moreover, the WHO accreditation of medical training facilities internationally goes a long way towards achieving mutual recognition in qualifications.

What is clear is that if the GATS is viewed by either party as an appropriate mechanism, India and the UK are almost as good a pair of negotiating partners as one is likely to find[63]. India is the UK's principal supplier of non-EEA doctors and the UK is one of India's principal markets. This maximises the internalisation of the negotiation, and in so doing will encourage agreement[64]. Internalisation is the extent to which the two parties to the talks can keep the benefits of improved market access to themselves even though they are obliged to throw any agreement they reach open to all WTO members through the MFN clause. In the GATT – and hence implicitly by extension in the GATS – the "benefits" of a deal are held to be proportional to the level of current trade in the good or service concerned – hence the special status of "principal suppliers" (i.e. the largest partner in a good) in initiating negotiations or responding to violations.

5. Nursing

5.1 Indian Nurses in the UK

The United Kingdom Central Council for Nurses (UKCC) is the statutory body for nursing, midwifery and health visiting in the United Kingdom. It establishes and monitors professional standards for nurses, midwives and health visitors. All nurses trained outside the UK need to be registered with UKCC in order to practice as a nurse in the UK. The UK is 22,000 short of its requirement for nurses.

The total number of qualified nurses in India is estimated at close to 600,000. The Indo-UK Nurses Association (INUKNA), a membership-based, non-profit organisation headquartered in London has welcomed a recent hike in the starting salary for nurses to £16,000 per annum with salary of a matron having gone up to £32,000.

The British United Provident Association (BUPA) wants to recruit 1,500 nurses from India. BUPA is Britain's largest private healthcare provider. It is ready to pay more than the NHS's £16,000 per annum. BUPA runs 37 hospitals in the UK and 240 care homes on its own, besides another 110 homes in partnership. It also subcontracts work from 25 NHS hospitals.

India is getting ready to meet the shortage of nurses, world wide including that in UK. The state of Kerala in India is a traditional supplier of nursing community to India as well as the world. The Apollo Hospital Group in India has recently started a Global Nurse Programme (GNP). It caters to the requirements of nurses in foreign countries. The first batch of nurses trained for international requirements has already graduated. The programme consists of clinical training in various areas of hospital including Intensive Care Unit (ICU), emergency and critical care and all operations theatres. In addition, training is imparted to cover cultural sensitisation and adaptation, personal grooming, etiquette to suit global requirements, communication skills, etc.

5.2 Filipino Nurses in the UK[65]

With the general relaxation of immigration rules in the UK, the approval of work permits for nurses has also increased. In 2001, of the 23,063 total work permits approved for nurses, the Philippines ranked first with 10,050 approvals, followed by India with 2,612. Although the Philippines started to deploy workers to the UK only in 1999, as of June 2002 there were an estimated 25,000 Filipino nurses in the UK, with about 40 percent of these coming from third countries, mainly from the Middle East which is the traditional destination for Filipino nurses. The UK proves to be very attractive for Filipino nurses because they earn as much as British nurses based on equal opportunity.

Similar to some US employers, the UK health trusts have set up a network of international recruitment coordinators. Some employers are sending staff to the Philippines to recruit nurses there and have even initiated government-to-government "concordats" on nurse recruitment with the Spanish and Filipino governments. The UK also evidently targets countries on the basis of its need for certain specialised occupations (Table 6).

Table 6 shows that the UK is targeting specific countries for specific occupations. From a legal point of view, it is questionable whether the preference for Filipino workers in the health sector and Indians in computer technology could be sustained under the MFN principle of the GATS. This need for flexibility may explain why commitments under mode 4 are still very limited.

However attractive employment abroad seems, Filipino nurses have raised several problems with regard to their employment in the UK: First of all, contract substitution is an issue, i.e. the fact that recruiters and/or employers substitute the approved POEA (Philippine Overseas Employment Administration) contract with a less favourable one before nurses start their new jobs. Second, in the context of a lack of recognition of qualifications, the terms for the required adaptation period for foreign-qualified nurses are considered ambiguous. Finally, despite equal opportunity legislation, cases of wage discrimination have been reported as well as incidents of employers keeping passports, working permits and/or registration cards of the workers.

Table 6: Industrial Classification of UK Work Permits Issued to the Philippines, India and South Africa during 1999-2000 (in percent)

	Philippines		India		South Africa	
	1999	2000	1999	2000	1999	2000
Administration, business and manpower services	13.4	6.7	13.3	7.7	18..4	13.4
Computer services	1.2	1.7	51.4	61.5	3.4	7.0
Educational and cultural	0.2	0.1	3.0	2.1	2.4	3.4
Financial services	0.6	0.5	6.4	5.2	6.1	6.6
Health and medical services	74.7	85.8	11.5	9.0	48.5	49.0
Others	5.3	27.4	14.4	14.5	20.6	9.9

Source: Analysis of OLS data by Migration Research Unit, University of London, 2000[66]

6. The Future

6.1 Relaxation of Labour Immigration Rules in the UK

There has been a relaxation of labour immigration rules in the UK from the year 2000. The logic behind the new UK migration stance was expressed as follows by the Immigration Minister Barbara Roche in September 2000: "The market for skilled migration is a global market – and not necessarily a buyer's market. ...The UK needs to have a policy that meets modern needs…it is important that we preserve and enhance the flexible and market-driven aspects of the current permit system." (www.homeoffice.gov.uk: 2000).

Total work permits and first permissions granted to foreigners by the UK have increased substantially by 54 percent from 41,950 in 1999 to 64,571 in 2000 (MRU, University of London). This is a big leap compared to a rate of growth of 12 percent in 1999 and 18 percent in 1998. The percentage of Indian permissions granted was 19 percent, second only to those from the United States at 20 percent. The corresponding ratios were 8 percent for India and 33 percent for the United States in 1995. Work permits granted to Indian migrants have touched the highest level registering a number 12,654 during October 2000 to March 2001 putting those from the United States to number 2 at 10,973. About 14 to 15 percent of the work permits issued to Indians were in "health and medical services".

A total of 15,526 work permits and first permissions were granted to health and health associate professionals in 2000 (24 percent of 64,571). This included 11,897 nurses and 56 midwives. Only 322 were doctors and 373 pharmacists. The main source countries for health and associate health professionals in 2000 were the Philippines (6344), South Africa (2056), India (1410) and Australia (602).

About 30 percent of all the registered doctors (60,000) working in the UK are of Indian origin. This is nearly 30 percent of doctors registered with Medical Council of India (MCI)[67].

The UK health care system is currently suffering a shortage of healthcare workers prompting both intra- and extra-EU recruitment of health care workers. However, there are some signs that the declining supply of workers in the nursing sector may have been halted or even reversed[68].

6.2 Falling Supplies of Indian Medical Workers

With the existing healthcare industry estimated at about US$17 bn and expected to grow at 13 percent per annum during 2002-2007, it is doubtful whether India will continue to supply medical professional to the UK, USA and other destinations in the world. Currently, India has more than 15,000 hospitals with approximately 870,000 beds. Apollo, Wockhardt, Escorts and Max India have already commenced a tradition of private corporate hospital culture in India.

It has been estimated that by 2007 the Indian healthcare industry will provide more jobs than the information technology sector[69]. The Association of British Healthcare Industries (ABHI) already has a keen eye on cashing in on such growth through establishing commercial presence in India through the initiative by Trade Partners UK. Opus Healthcare, Education and Research, UK has already signed collaboration proposals with Tamil Nadu Hospital Limited, Chennai and Eastcoast Hospitals Limited, Pondicherry during 1998 and 1999 (Gupta and Goldar, 2001).

6.3 Regulatory Regime Emerging in India

All practising doctors in India have to register themselves with the Medical Council of India (MCI). It is only recently that it has announced a screening test before granting recognition to Indian doctors holding medical degrees from Russia and the Commonwealth of Independent States (CIS). The All India Association of Foreign Returned Doctors has opposed this move as discriminatory. It has been claimed that there are 29 MCI cleared medical colleges in Russia and the CIS countries. At the same time, degree holders from neighbouring countries like Nepal and Bangladesh have not been asked to sit for the screening test.

7. Suggestions for Further Discussion

Obviously, the movement of health workers from India and the Philippines to Europe takes place despite missing commitments under GATS. The existing regulations are rooted in domestic immigration law and can easily be amended. Two arguments can be made in favour of extending the commitments under mode 4 of the GATS: First, such commitments would benefit the sending countries by providing a more predictable and transparent framework that is based on non-discrimination. Second, expanding mode 4 commitments could be used as a tool to overcome the bias in favour of qualified labour. Since evidence suggests that brain drain is a problem for countries with extensive export of health workers, a GATS framework could serve as a safeguard because it encourages explicitly temporary movement of persons rather than pseudo-permanent moves. A detailed study on Filipino nurses[70] shows that domestic health service delivery may seriously suffer if the movement of nurses to foreign destinations is left unregulated[71].

Whether the idea, to introduce a GATS visa[72] could further serve this purpose, needs yet to be examined. The introduction of such a visa would at any rate reduce the scope for discretion and thus add legal certainty to the domestic admission procedure. Since the temporary nature of movement is one of the characteristics of a potential GATS visa, it would address political concerns in developed countries like the UK since workers migrating under GATS are not to enter the job market on a permanent basis or to seek for permanent employment.

Endnotes

1 TN/S/W/3 dated June 10, 2002. "Communication from Cuba, Dominican Republic, Kenya, Nigeria, Pakistan, Senegal and Zambia."
2 The low share of mode-4 in total trade in services is almost certainly an indicator of severe restrictions on movement of natural persons, rather than of an inherent unimportance – Winters et al. (2003).
3 See Walmsley and Winters (2003).
4 Services Sectoral Classification List, MTN.GNS/W/120, Sec. 1.
5 Services Sectoral Classification List, MTN.GNS/W/120, Sec. 8.
6 Lavenex 2002.
7 See Young 2000.
8 GATS Article II.
9 GATS Article III.
10 WTO 1998; Winters et al., 29-30.
11 OECD, p. 6.
12 Nielson, para. 13.
13 Chanda, 634.
14 Chanda, 636.
15 OECD, para. 25. Winters et al (2003) discuss some of the economic issues raised by these requirements.
16 WTO 2001, 105.
17 WTO 2002, at 3.
18 Chanda, 643.
19 Collantes 2002.
20 European Commission, IMF, OECD, UN, UNCTAD and WTO.
21 Findlay, 43, 2001.
22 SOPEMI 2000.
23 The Schengen aquis encompasses the Schengen Agreements of 1985 and 1990, the accession protocols of other member states, decisions and declarations adopted by the Executive Committee established by the 1990 Convention, as well as acts adopted for the implementation of the convention by the organs upon which the Executive Committee has conferred the decision-making powers.
24 The European Court of Justice's opinion that the Community shares competences with the Member States on GATS with respect to the movement of persons would then no longer be valid. Opinion 1/94 [1994] ECR I-5267.
25 Guild, 72.
26 Hart, 75.
27 COM(2001)127 proposal for a Council directive concerning the status of third country nationals who are long term residents, COM(2001)386 proposal for a Council directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities, COM(2002)548 proposal for a Council directive on the conditions of entry and residence of third-country nationals for the purpose of studies, vocational training, voluntary work and all purposes other than those foreseen by Community law. The Commission has also adopted communications on the immigration policy: COM(2000)757 on a Community immigration policy and COM(2001)387 on an open method of coordination for the Community immigration policy. COM(2001)387 sets out annual guidelines which contain timetables and goals, which are then translated into national objectives. Member States shall prepare national action plans to be reviewed and adapted annually. The Communication suggests 6 guidelines. Regarding the partnership with third countries Guideline 5 states inter alia that "supporting measures to maximise the positive impact of migration as a factor for development for the country of origin (e.g. the impact of financial transfers from nationals living abroad) while minimising the negative effects (in particular the brain drain)" may be adopted. Furthermore, COM(2002)703 integrating migration issues in the European Union's relations with third countries states that the European Union's policy on migration takes into account both the interests of the European Union and those of the third countries in which migrants originate, and is intended to be coherent with efforts to address the negative effects of brain drain.

28 Especially paragraph 20 which stated the need for an "approximation of national legislation on the conditions for admission and residence of third country nationals, based on a shared assessment of the economic and demographic developments within the Union, as well as the situation in the countries of origin..."
29 Apap, 315.
30 Fassmann/Münz 2002.
31 Czech Republic, Slovakia and Estonia for Russian citizens.
32 SOPEMI Report 2003, at 17, 67.
33 Christen 2002.
34 Apap, 317-319.
35 The Highly Skilled Migrant Programme (HSMP) has been put in practice on 28 January 2002 and follows the Australian "point based" migration system. The main difference to the work permit is that the HSMP is driven by the individual and not by the employer.
36 Trade in services – conditional offer from the EC and its Member States, 29 April 2003.
37 The person must possess (1) a university degree or equivalent technical qualification, (2) professional qualifications where this is required to exercise an activity in the secotor concerned according to EC law or the law of the Member state where the service is provided and (3) at least three years of professional experience in the sector.
38 Charnovitz, 9.
39 See also OECD, para. 84.
40 OECD, para. 116-118.
41 Collantes (2002).
42 A similar policy is applied by the United States when granting visas for educational purposes.
43 Desai et al (2002).
44 Khadria (2002).
45 This section draws heavily on provisional results from an ongoing project funded by DFID through the Centre for New and Emerging Markets, London Business School on which Winters is a principal researcher. We are grateful to Dr Simon Commander and Mari Kangasniemi for permission to draw on it and to the latter for help in preparing the text.
46 Refer to www.mciindia.org
47 Shukla (2002).
48 Refer to www.cehat.org and Khadria (2002).
49 International Migration Statistics, U.K.
50 Refer to www.guardian.co.uk.
51 EEA doctors (EEA citizens trained in EEA) are automatically guaranteed full registration in the UK.
52 Not all registered doctors practice in the UK.
53 The ability of UK institution to extract unpaid work as the entry ticket for training indicates the perceived value of training.
54 The corresponding numbers are 141 for the United States and 27 for the United Kingdom.
55 The NHS funds the GP registrar element of training.
56 See www.workpermits.gov.uk.
57 This may reflect the better information that Indians have about PLAB given the large numbers who have taken it previously.
58 Based on the ratios of UK and Indian GDPs in nominal and PPP terms from World Development Indicators (The World Bank, on-line).
59 Different valuations of health and life reflect the amounts of other (tradable) goods that people are prepared to give up to get health in the two regions and so genuinely reflect the bundle of goods that providing a doctor's would release for other (welfare-creating) uses in the two places. On the other hand, many would argue that accounting in simple lives (or quality-adjusted lives – QALY's) was more appropriate.
60 Interviewees were asked to identify any source covering 25% or more of the cost of their training (over and above that provided free at place of delivery by the public authorities).
61 Refer to www.workpermits.gov.uk.
62 Hummels, Ishii and Yi, (2001).
63 Even though health and education are national competences in the EU, the formal negotiation would be between the European Union and India, because the Commission has responsibility for all negotiations in the WTO, even these, where, the issues at stake are national competences, as in this case.
64 See Finger (1979) or Winters (1987) on internalisation.

65 This section draws heavily on a study done by Verona Collantes as her master thesis at the World Trade Institute, Berne, in 2002. See Collantes (2002).

66 Ibid. p. 15. As the data for the year 2000 relate only to the first 6 months of the year, it is advised to consult the Migration Research Unit of the Office of Labor Statistics, now UK Work Permits Office (Immigration and Nationality Directorate Unit), about the limitations of the data set.

67 Rupa Chanda (2001).

68 Robinson, D., J. Buchan and S. Hayday (1999).

69 Statement by Dr. Devy Shetty, Chairman, Asia Heart Foundation (January 2001).

70 Collantes 2002

71 SOPEMI 2002, at 75.

72 Suggested by the WTO Deputy Director General, Roderick Abbott on 26 November 2002 in New Delhi.

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Chapter 4

The Use and Reform of Anti-dumping Measures

by

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Introduction

The growing use of anti-dumping duties (ADD) to protect domestic industries has occurred at the same time as tariff reductions and trade liberalisation have continued under the General Agreement on Tariffs and Trade (GATT) and World Trade Organisation (WTO) agreements. The potential for the former–illiberal–trend to undermine the latter one–liberal–has created a large volume of literature that examines the effect of both the ADD investigation event and the outcome (definitive measures, termination, or undertaking). It has also created an equally large volume of legal literature supporting amendments to the agreement that would prevent the misuse of its application.

This paper's contribution is to examine the economic effects of anti-dumping measures, with specific reference to the EU and India, and to propose substantive changes to the Anti-dumping Agreement (ADA). This paper's aim is three-fold: 1) to summarise the existing discussions and research done in the area of anti-dumping; 2) to provide a summary of the issues for quick reference for negotiators; and 3) to provide suggestions for possible amendments to the agreement, which would strengthen it and prevent misuse.

The paper is organised as follows: *Section 1* provides an overview of the history and trends in anti-dumping use. *Section 2* gives evidence on the qualitative and quantitative effects of anti-dumping measures. *Section 3* analyses the use of anti-dumping measures versus the use of "substitute" contingent protection devices such as countervailing duties (CVDs) or safeguards measures. This section attempts to elaborate on why countries choose anti-dumping measures rather than safeguards and, specifically, the trends within the European Union (EU) and India. *Section 4* will highlight some areas for potential reform of the WTO Anti-Dumping Agreement that could benefit both India and the European Union[1].

1. History and Trends in Anti-Dumping Use

1.1 The Spread of Anti-Dumping Use

Anti-dumping measures are a reaction to the alleged "dumping" of goods into a foreign market. An exporting country is said to be dumping when it sells its goods abroad for a price lower than it sells domestically, or if it sells these goods abroad at a price lower than its per unit cost[2]. An anti-dumping investigation against a specific country can have three possible outcomes: definitive measures, termination, or price undertaking.

Blonigen and Prusa (2001) point out that the Tokyo Round was a pivotal point in the anti-dumping debate since almost as many cases were filed in the first three years following the Tokyo Round as during the entire 1970s. Following the Tokyo Round, the US and the EC were able to use the threat of anti-dumping duties to leverage voluntary export restraints (VERs) or suspension agreements from foreign companies[3]. Despite the increase in VERs, more than 1600 AD cases were filed worldwide during the 1980s – a rate, twice that of the 1970s. The US, EU, Canada and Australia accounted for more than 99 percent of the filings between 1980 and 1985 (Finger, 1993) and more than 95 percent during the entire 1980s (Prusa and Skeath, 2001).

The Uruguay Round, like the Tokyo Round, "explicitly permits anti-dumping, then specifies substantive and procedural conditions that such action must meet" (Finger, 1996: 330). In effect, some argue (including Finger) that the Uruguay Round sanctioned the use of antidumping and countervailing dutiese (CVDs) as another type of "safeguard" mechanism for countries facing import competition: "International agreements now give sanction to expansions of coverage that were first won in domestic politics. In the end, international rules on AD do not control the power of protection-seeking interests – they are an expression and application of that power" (Finger and Dhar, 1994: 331). The vested interests represented by policymakers and lobbying groups succeeded in writing an agreement that is the very expression of those interests.

By 1999, the number of anti-dumping cases accounted for 86 percent of all types of contingent protection measures (anti-dumping, countervailing duty, safeguards) used by WTO members. At the same time, developing economies surpassed the traditional users (US, EC, Canada, Australia), accounting for over half-the-AD complaints, measured by the number of cases filed[4]. (See Appendices I for a breakdown of recent trends in the use of anti-dumping measures by reporting country.) India's share of global anti-dumping measures increased by over 7 percentage points between 1997 and 2001, while South Africa and Argentina's share rose between 2.5-3 percentage points during this same period. This marked a shift from industrialised countries (which saw their share fall by between 2.5 to 5 percentage points during this period) to developing countries with respect to the largest users of anti-dumping measures, by number of cases filed. There has also been an increase in "South-South" anti-dumping cases since 1995: India levied over half of its measures against other developing countries; Argentina levied half of its measures against Brazil and China; and South Africa, though its targets were more dispersed, still levied a quarter of its measures against China and Korea[5].

In addition to this increase in South-South anti-dumping cases, the number of cases initiated by industrialised countries against developing countries' exporters has been increasing, mainly against imports from China. And paradoxically, US companies are second only to China as the most frequent targets of anti-dumping measures. See Appendix II for a breakdown of countries whose firms are hit most frequently by anti-dumping measures.

1.2 Investigations and Outcome: General Observations and Specific Trends

As mentioned earlier, there are three possible outcomes of an investigation: definitive measures, termination and price undertaking, which are provided for in Article 8 of the ADA. Following a preliminary affirmative determination of dumping and injury, an individual exporter can enter into an agreement with the investigation authority to raise its export price to "normal value" or to a "lower level", (where exports no longer cause injury). Undertakings allow exporters to 'pocket the difference between the agreed-upon price and the previous dumped export price, rather than pay AD duties in the country of import (of course, this advantage is meaningful only so long as exporters still make sales subsequent to entering into the undertaking)" (Miranda, Torres, and Ruiz, 1998: footnote 17, p.33).

Statistics on undertakings are difficult to obtain since they are usually lumped in the same category as definitive duties. Some work has been done but only for the EC and the US[6]. Unless otherwise stated, all data is sourced from the WTO Rules Division Anti-dumping database**,** from 1987-2001. The statistics on definitive measures compiled by the WTO include both duties and undertakings. Since the statistics for this paper have been sourced from the WTO, it has not been possible to isolate the trends, by individual country, for undertakings and for duties.

1.3 The Results of the Investigation Undertaken in this Paper Suggest the Following Global Anti-Dumping Trends:

i) With respect to the investigations and definite measures by reporting country found in Appendix I, the US, the EC, Australia, India and Canada are the largest users of anti-dumping measures[7]. Prior to 1997, these 'traditional users' accounted for 60 percent of all investigations and 66 percent of all definite measures imposed. However, this pattern has changed as the traditional users now account for a little over half of these measures. In contrast, the new users (India, Argentina, Mexico, RSA and Brazil) initiate 30 percent of all investigations (an increase of 5 percent since 1997) and 31 percent of all definite measures (an increase of over 10 percent). The latter could suggest that not only are new users initiating more cases but they may also be finding in favour of 'dumping' more often than they have in the past.

   The proportion of affirmative outcomes[8] by reporting country is highest for the US (62 percent), Canada (65 percent), and India (60 percent), while the EC (55 percent) and Mexico (53 percent) are slightly lower. The Australian authorities approve definite measures in only 32 percent of the cases initiated. India finds in favour of dumping most often on imports from China (51 measures), the EC + EU-12 Member countries (40), the EC (22)[9], Korea (18), Japan (16) and Singapore (14).

ii) Appendix II provides data on investigations and definite measures, ordered by affected country. By 2001, almost half the cases where definitive measures have been imposed, are against the firms in 6 countries: China (14 percent), US (7 percent), Japan (7 percent), Korea (6 percent), Chinese Taipei (5 percent) and Brazil (5 percent). If the EU-12 Member countries are aggregated, they account for 13 percent of all measures. This share increases to 15 percent if the measures imposed against the EC as a whole are included. The former Soviet Union (Russia, Ukraine etc) and CEEC countries account for approximately 14 percent while developing countries of Southeast Asia and South Asia as well as Mexico account for approximately 12 percent.

With respect to the ratio of definite measures to investigations, Romania, Japan, Poland and China are found to be dumping in over 60 percent of all investigations (Romania found to be guilty in 77 percent of all initiations though there are fewer cases). The number of measures levied against India doubled after 1997; its firms now account for over 3 percent of all anti-dumping measures levied. Indian goods are affected by duties imposed most often by the EC (25), South Africa (15), the US (11), and Indonesia (8). Similarly, the EC is affected most by duties imposed by India. Of the 35 measures imposed against the EC between 1995 and 2002, 22 were from the Indian investigating authority. This number increases if Member States are counted individually.

iii) These statistics demonstrate the growing use of anti-dumping measures against developing countries. According to Appendix II, Brazil was the only developing country, and significant exporter, not to witness an increase in anti-dumping measures invoked against its exporting firms. Although one might expect exporting countries to be hit more often by anti-dumping measures, as mentioned previously, this table does not offer any insight as to the intensity of the measures. Miranda, Ruiz and Torres (1998) point out that the distribution of cases by affected country is far less concentrated than by reporting country. Though many new countries were created by the break-up of the Soviet Union, the lack of concentration could also point out the growing number of competitors in the international market.

iv) The evidence provided in Appendix III, demonstrates a large degree of concentration, by sector. Almost eighty percent of all anti-dumping measures are within 5 sectors: base metals (34 percent), chemicals (17 percent), machinery and electrical goods (11 percent), plastics (9 percent) and textiles (7 percent). Miranda, Torres and Ruiz (1998) suggest that the concentration in these industries is due to the cyclical nature of their markets. World markets for steel, base chemicals, plastics, and pulp & paper are highly cyclical; at the bottom of the cycle, these firms may price sales well below cost. In addition, interest groups and lobbies are traditionally very well entrenched and powerful especially within the metals' and chemicals' sector.

v) In terms of sectoral distribution, the East Asian economies are alleged to be dumping within all sectors (base metals, chemicals, machinery and electrical equipment, plastics and textiles)[10]. In China, the sectors most affected are Chemicals (30 percent), Base Metals (27 percent), Machinery and Equipment (13 percent), and Textiles (8 percent). In the case of Japan and Korea, anti-dumping measures are concentrated in machinery and electrical goods: 34 percent and 27 percent share, respectively. Russia, Ukraine, Romania feature predominantly in the Base metals (70 percent, 81 percent, and 52 percent concentration, respectively) and Chemicals (22 percent, 17 percent, and 19 percent concentration, respectively) sectors (See Appendix IV.) It is useful to construct a percentage ratio between the bundle of measures and the bundle of exports. The following chart compares the percentage share of measures in these five sectors in overall measures (by number of measures, 1987-2001) versus the percentage weight of that sector of overall exports (by value, year 2000)[11]. The ratio, thus, represents an average for measures in this sector against the average value of exports in that sector:

The chart highlights some interesting results. In the case of China, 83 percent of the AD measures levied against them are in these five sectors. However, the percentage of these sectors in China's total exports is only 51 percent (by value). In particular, 57 percent of the measures were levied against China between 1987 and 2001 in chemicals and base metals but they are not large exporters of either. In fact, the ratio of base metals, chemicals and plastics suggests that measures are levied against countries despite the small overall value of their exports in this sector. This could be the result of successful lobbying by chemical, metal and plastics producers. In contrast, the low proportion of cases brought against machinery and electrical equipment and textiles producers could be due to the fact that these goods are used as inputs in production. In addition, textiles are covered by other agreements so the number of measures is low to begin with.

vi) Many investigations involve multiple respondents. The following chart highlights the number of investigations (involving three or more countries) for a specific product in the year 2001. It is evident that the majority of investigations involved steel products or chemical products.

vii) Appendix IIIc specifically highlights behaviour in India and in the EC. India levies measures predominantly in the chemicals sector (44 percent), while the balance is made up of the other four sectors. The EC imposes measures mainly within the base metals (29 percent), machinery and equipment sector (23 percent) and the chemicals (18 percent). This is one indicator that could suggest that such measures are being levied to prevent the loss of domestic production to emerging, stronger and more efficient producers in newly-industrialising countries. In the case of India, the increase in the number of measures coincided with the liberalisation of the chemical sector in

Country	**Ratio – % Measures/% Exports**					
	Base Metals	**Chemicals**	**Machinery & Electrical Equipment**	**Plastics & Rubbers**	**Textiles**	**Total**
China	27:5	30:5	13:33	5:1	8:7	83:51
Japan	31:5	16:5	34:68	14:2	1:2	96:82
Korea	25:6	11:4	27:58	21:4	15:7	99:79
Russia	70:9	22:5	0:5	5:1	2:1	99:21
Ukraine	81:31	17:10	0:10	2:1	0:1	100:53
Romania	52:10	19:4	15:19	11:2	4:2	100:37
India	40:5	19:8	4:7	15:1	19:11	97:32

Source: Data sourced from the WTO database and STATSCAN

Country	*Product*	*No*	*Country*	*Product*	*No*
USA	CR carbon steel flat products	20	**Egypt**	Electric filament lamps	6
Canada	Hot rolled steel sheet	13	**India**	Poly-Iso Butylene	6
Turkey	Polyvinyl chloride	11	**USA**	Stainless steel bar	6
USA	Carbon & alloy steel wire rod	11	**Australia**	PVC homopolymer resin	5
India	Cold rolled steel sheet	4	**China**	Caprolactam	5
USA	Structural steel beams	8	**EC**	Tube & pipe fittings	5
India	BOPP film	7	**EC**	Welded tubes and pipes	5
India	Lead acid batteries	3	**India**	Acrylic fibre	4
Brazil	Polyvinyl chloride	6	**USA**	Circular welded carbon steel pipe	5
EC	Hot rolled coils	6			

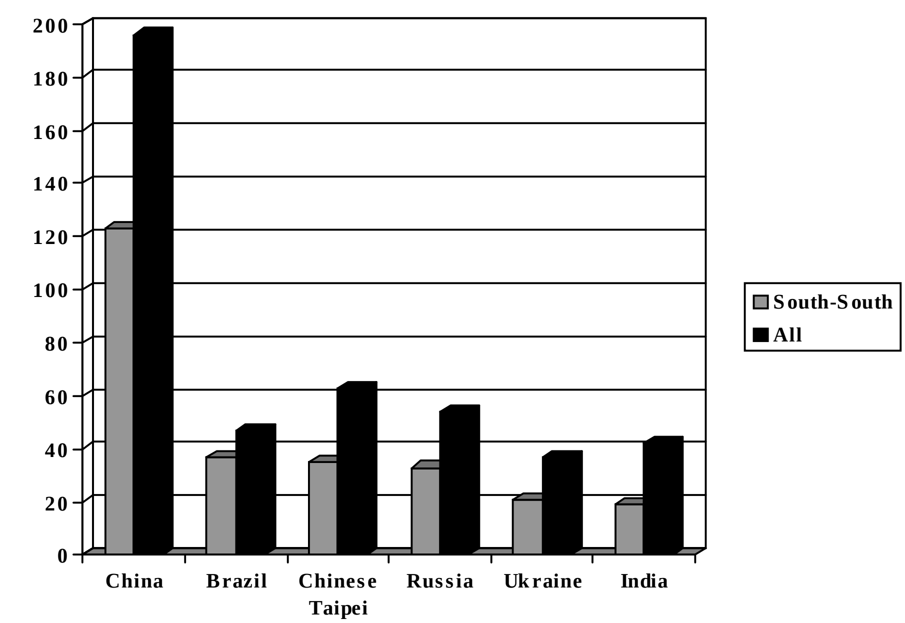
the late 1990s. Foreign companies entered the Indian market in the pharmaceuticals (motivated by changes in drug regulations), petrochemicals and agrochemicals industries. At the same time, low-cost chemicals were being produced in East Asia (China and Chinese Taipei), along with the countries of the erstwhile Soviet Union. Targeting competitors in the chemical sector with anti-dumping measures could be a way of "raising rivals cost"[12]. The intuition is that trade protection is a means of raising rivals' costs as the efforts of foreign firms are "undone" by higher tariffs[13].

viii) The percentage of cases resulting in duties or anti-dumping orders after an initiation by the EC, as shown in Appendix V, is highest for Russia (89 percent), Poland (77 percent), Romania (73 percent), Japan (72 percent) and Ukraine (71 percent). Russia, Romania, and Ukraine have been considered non-market economies (and hence, subject to the "constructed value" definition of "fair value", which is believed to underestimate costs) though this is changing for some of the FSU countries. The EC also imposes measures against firms in other "transition" economies, namely Yugoslavia (67 percent), and China (61 percent), as well imposing measures against industrialised countries like Japan (72 percent) and Korea (56 percent).

Thus, the percentage of cases resulting in duties is highest for the imports from the former Soviet Union and the CEEC. In comparison, the percentage of cases resulting in duties following an investigation by the Indian authorities is highest for the East Asian economies: China (67 percent), Korea and Japan (61 percent) and Chinese Taipei (67 percent). It is true that for both the EC and India, the above mentioned countries are more likely to be "found" to be dumping goods once an investigation has been initiated.

vii) The statistics also indicate an increase in South-South anti-dumping measures, highlighted in the following chart:

Total Number of South-South AD Measures by Affected Party, 1995-2002*

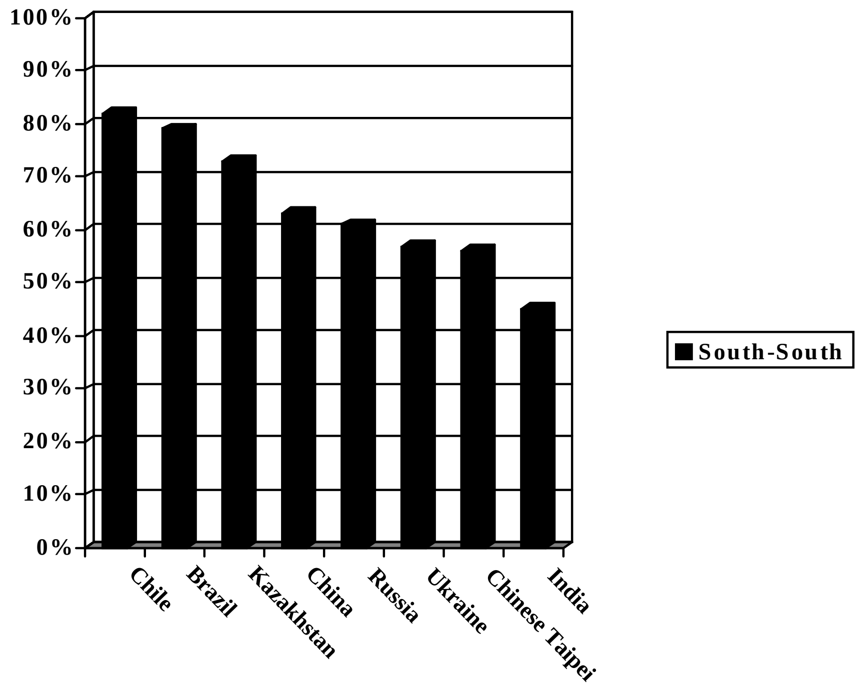


Source: Data from WTO Rules Division Anti-dumping Database
* 01/01/95 – 30/06/2002

It is clear from the above chart that the majority of measures imposed by developing and least-developed countries are against other developing and least-developed countries. This could strengthen the argument that countries are using trade protection to raise their rivals' costs. The following chart suggests that for countries facing more than 10 anti-dumping cases, other developing or least-developed countries initiate the majority of these cases:

The measures imposed against Chile, Brazil, and Kazakhstan were imposed by developing or least-developed countries over 75 percent of the time. China was the affected party in nearly 56 percent of all cases initiated by developing countries, and in particular, it was the affected party in nearly 25 percent of all cases initiated by India. Argentina levied 33 percent of its measures against other Latin American companies (2001) Tavares de Araujo Jr., Macario, and Steinfatt also point out that 485 of the 638 measures against FTAA countries originated in the area. The US and Brazil, the leading targets of these investigations in the region, were the targets in 63 percent of the cases initiated against FTAA countries, whilst Argentina, Canada, Mexico, and Venezuela were the targets 30 percent of the time.

Percentage of South-South AD measures
Out of total number of AD measures, by Affected Party 1995-2002*



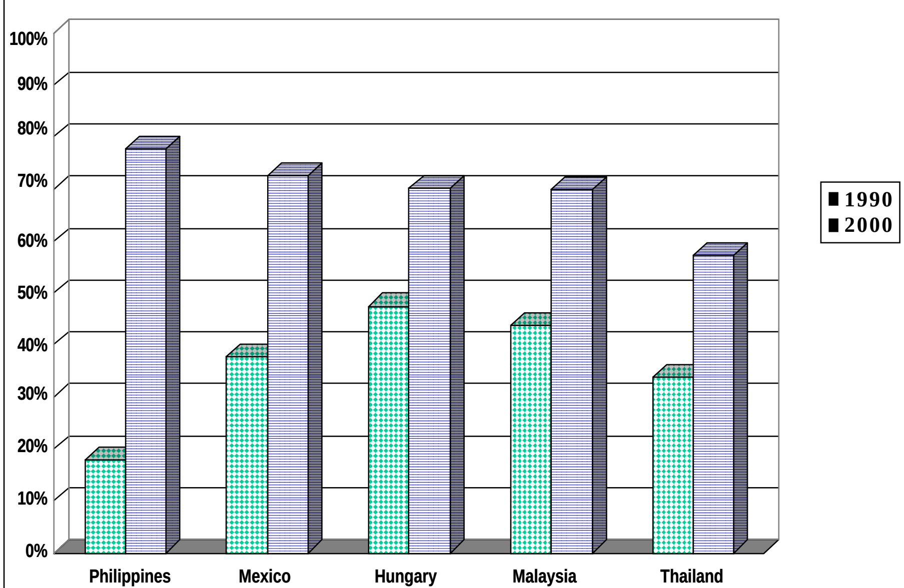
Source: Data from WTO Rules Division Anti-dumping Database
* 01/01/95 – 30/06/2002

1.4 How Serious is the Problem for Developing and Least-Developed Countries?

The level of vulnerability of a country to anti-dumping measures could be indicated by the percentage of its total exports that fall within the five sectors that are most hit by anti-dumping measures. Due to the increasing weight of these exports in their total exports, developing and least-developed countries have become more vulnerable to anti-dumping measures over the 1990s. The following developing countries are most vulnerable to anti-dumping measures:

Please refer to link http://cuts.org/eintad.htm for a more detailed breakdown, by country of its most vulnerable sectors. The following chart illustrates that the average level of vulnerability to anti-dumping measures has increased for both least-developed and developing countries[14]. The average level of vulnerability is calculated as the total percentage exposure in the five sectors (Base metals, chemicals, machinery and equipment,

Vulnerability of Countries to Anti-dumping Measures (1990 and 2000)

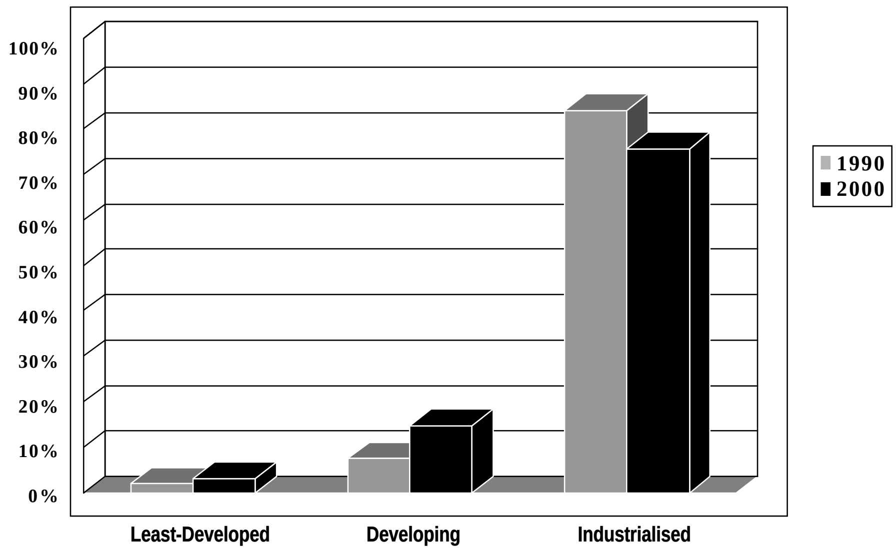


Source: Statistics Canada, World Trade Analyser. Country classifications based on the World Bank.

plastics and textiles). With the increasing number of anti-dumping measures being taken against and by developing countries against other developing countries, the potential export impact is substantial.

The developing countries are significantly more vulnerable to anti-dumping measures than they were 10 years ago, due to their increasing production of industrial products. On the other hand, least-developed countries have not experienced such a significant

Vulnerability to Anti-dumping Measures:
Average percentage share of exports in the five main sectors



Source: Statistics Canada, World Trade Analyser. Country classifications based on the World Bank.

increase due to the relatively static percentage of their exports that fall within the sectors most hit by anti-dumping measures. India and Pakistan are only slightly more vulnerable to anti-dumping measures than they were in 1990. This is likely due to the slower industrialisation of their productive sectors.

2. Economic Impact of Anti-Dumping Use

2.1 Economics of Dumping and Anti-dumping Measures

Deardorff (1989) and Willig (1998) both provide excellent frameworks for examining the different forms of dumping and the welfare effects associated with each. This section will summarise the results of this literature. Appendix VIII describes these positions in more detail identifying the possible circumstances under which countries become more vulnerable to anti-dumping measures. Firms may sell below average or marginal cost for various reasons depending on market structure and the objectives of the firm:

1) Predatory dumping
2) Strategic dumping
3) Short-run rigidities and market uncertainties
4) Specific corporate strategies (market expansion, increased sales)
5) Cyclical markets
6) State-controlled enterprises.

2.2 Welfare Effects of Dumping on Market Players — Summary

The following table summarises the effects of the various forms of dumping based on the assumption that in the absence of "dumping", prices would be equalised across countries. It is also based on the assumption that "dumping" *per se* is not always detrimental to all parties. The table suggests that there are economic benefits from 'dumping' (with the exception of predatory dumping) and that the reasons countries have legislated against it is based on non-economic arguments:

Welfare Effects of Dumping

Affected Group/ Type	Strategic Dumping	Predatory Dumping	Rigidities and Uncertainties	Corporate Strategies	Cyclical Markets	State Enterprises
Consumer - Home	-	-	Ambig	+	+	+
Consumer - Foreign	+	+S.R -L.R	+	+	+	+
Import-competing firms	-	-	-	Ambig	-	-
Exporter	+	+	Ambig	-S.R +L.R	+	+
Overall welfare effect	-	-	Ambig	+	+	+

Source: See Appendix IX

2.3 The Empirics of Anti-dumping Measures

Using various models and methods, empirical work on anti-dumping has estimated that increased imports tend to increase the probability of protection (see Moore, 1992; Baldwin and Steagall, 1994; Hansen and Prusa, 1997). Other research has examined the effects of anti-dumping measures on imports and domestic production as well as the resulting welfare effects from these policies. The traditional way of analysing these effects is by using a partial or general equilibrium model (Morkre and Kelly, 1994; Devault, 1996; Kelly and Morkre, 1998; Gallaway *et al*., 1999).

Gallaway *et al*. estimate that the (static) welfare loss to the US ranges from $2-4bn annually for using trade remedies. In addition, a US International Trade Commission study undertaken in 1995 estimated that the removal of outstanding AD/CVD orders (in 1991) would have resulted in a welfare gain to the US economy of $1.59bn[15]. The numbers indicate the lower bounds, since they only estimate those cases ending up with definitive duties. The approach taken by researchers in this area is either to examine the determinants of protection[16] or to estimate the effects of antidumping cases[17].

Empirical research has not only estimated the effects of measures, but also the effects of the investigation and the expectation of an investigation. Krupp and Pollard (1996) examine the effects of investigation events on chemical imports subject to US AD-investigations from 1976 to 1988, while Blonigen and Ohno (1998) argue that the anticipation of protection itself has an effect on imports. While this body of literature proposes that trade flows are affected by trade protection devices, few researchers have examined the trade diversion effects of the measures and the investigation.

Staiger and Wolak (1994) estimate that substantial trade reduction occurs during an investigation and for cases resolved through an undertaking. It has been suggested that some firms file petitions just to induce these trade-restricting effects. Staiger and Wolak found that during an investigation, imports from the named countries dropped by one-half to one-third more than did total imports. Prusa (1996) suggests that trade diversion is even larger, finding that most of the protective effect of anti-dumping duties is offset by an increase in imports from non-named countries. In contrast, Vandenbussche, Konings and Springael (1999) found that, unlike the diversion witnessed in the US, trade diversion is low in the EU. Their examination of EU AD-investigations initiated between 1985 and 1990 found that import diversion did not mitigate the effects of anti-dumping actions as in the US.

3. Alternative Trade Remedies

3.1 Background

The WTO Agreement also provides for anti-subsidy and safeguard duties in addition to anti-dumping duties. Countervailing duties (Anti-subsidy duties) are levied in response to subsidies given by a government to domestic industries for goods subsequently exported (or partially exported). Under the Agreement on Subsidies and Countervailing Measures (ASCM), the investigation targets subsidies provided by the government directly or indirectly and the extent of the benefit accruing to the recipient as a result of lower export prices. One may hasten to add that the ASCM is not restricted only to subsidies that may increase the competitiveness of the exporting Member in a foreign market, but also subsidies in any form that may be prejudicial to the interests of any other Member of the WTO.

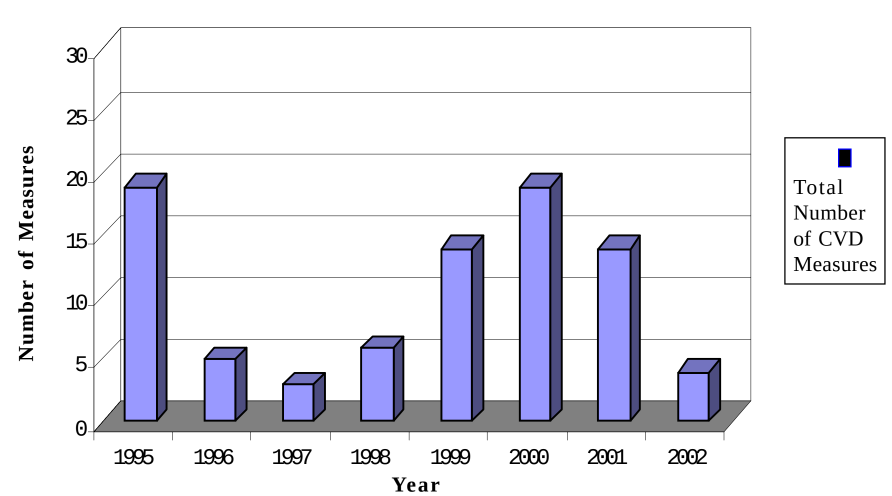
Safeguard measures are the third type of contingent "protective measures" used by governments to restrict imports. Safeguards are used in the situation where a sudden surge of imports causes serious injury to the domestic industry of the importing Member. Safeguard measures can take the form of safeguard duties as well as quantitative restrictions. In contrast to anti-dumping and CVD measures, which are considered "unfair trade practices", safeguard measures acknowledge the lack of competitiveness and provide a short reprieve to the domestic industry in order to make the necessary adjustments to face increased competition. The predominant use of the anti-dumping mechanism as compared to the other trade remedial measures has to be seen in the context of other remedies provided within the WTO framework of Agreements.

3.2 Anti-Subsidy Measures (CVDs)

The use of CVDs by governments in response to a foreign subsidy has been decreasing. Between 1995 and 2002, 147 cases were initiated and 84 measures were imposed. The following chart highlights the growth of CVD measures[18] in the late 1990s and the significant reduction since 2000:

Traditionally, the US and the EC have been the largest users of CVDs against foreign subsidies. Though the EC has not used them since 2000, the US has continued to be the pre-dominant user (34 cases in 7 years; 10 in 2001 alone). Appendix VIII lists CVD measures, organised by importing country versus exporting country from 1995-2002 (June 30th).

Total Number of CVD Measures 1995-2002



Source: Rules Division Countervailing Duty Database. www.wto.org

India (15), Italy (9), the EC (6) and Brazil (6) are the most affected parties from CVD measures. The sectors most affected are base metals (45 cases), prepared foodstuffs and tobacco (11), plastics and rubbers (7), vegetables (7) and live animals (4). The high number of measures in base metals is due to the number of duties imposed in steel in the last few years and specifically, in 2002.

The following chart summarises the number of measures imposed, by country:

Total Number of Measures Imposed by Importing Country 1995-2002

Importing Country	*1995*	*1996*	*1997*	*1998*	*1999*	*2000*	*2001*	*2002*	*Totals*
Argentina	0	2	0	2	0	0	0	0	**4**
Australia	0	0	0	0	0	1	0	0	**1**
Brazil	5	0	0	0	0	0	0	0	**5**
Canada	1	0	0	0	0	5	1	0	**7**
Chile	0	0	0	0	0	2	0	0	**2**
European Community	0	0	1	2	3	9	0	0	**15**
Mexico	7	0	0	0	0	0	0	0	**7**
New Zealand	0	1	2	1	0	0	0	0	**4**
Peru	1	0	0	0	0	0	1	0	**2**
South Africa	0	0	0	0	0	0	2	1	**3**
United States	5	2	0	1	11	2	10	3	**34**
Totals for 01/01/95 - 30/06/02	**19**	**5**	**3**	**6**	**14**	**19**	**14**	**4**	**84**

Source: Rules Division Countervailing Duty Database. www.wto.org

CVDs and AD are often levied simultaneously. With one exception, every CVD case initiated in 2001 was accompanied by a parallel AD case (Only five countries used CVD in that year).

Parallel Anti-dumping Investigations		
Countries	**CVD Cases**	**Parallel AD**
US	18	18
EC	6	6*
Canada	1	1
Brazil	1	0
South Africa	1	1
Total	27	26

Source: Taken from Stevenson (2002a)
* expiry review

In the lone exceptional case there was a parallel anti-dumping review. In the case of the EC, the CVD case was initiated at the same time as an anti-dumping expiry review.

3.2.1 Trends within the EC and India

With respect to the EC and India in particular, the EC has imposed six CVD measures on India since 1995 (of a total 15 measures against India). The EC has not imposed any new measures since 2000 and currently has measures imposed in the following products: broad spectrum antibiotics, polyethylene terephthalate (PET), polyethylene terephthalate (PET) film, stainless steel bars, stainless steel wire (1mm or more) and hot rolled steel coils[19].

India has not yet used CVDs as a contingent protection device. See Appendix IX for a full list of CVD measures levied, importing country versus exporting country.

3.2.2 The Economics of CVD

As mentioned in the previous section on anti-dumping, CVDs also act as a tax on imports. The degree of the price and trade distortions depends on the elasticity of the excess demand and excess supply curves; but the prices and volumes of exports are affected by a domestic subsidy only if the subsidiser is a large country. Importer welfare is reduced because more expensive domestic products or "fairly" traded imports are substituted for "unfairly" traded ones. Little empirical work has been done on CVDs alone – most of the estimations look at the effects of both AD and Anti-subsidy regimes[20]. With respect to the effects of both AD and CVD orders in the US, Gallaway *et al* (1999) estimate (using a General Equilibrium "GE" model) that the net economic welfare cost in 1993 of these orders was $4bn. The welfare costs are felt most acutely in the following three sectors: 1) telephones and pagers ($976mn); 2) bearings and crankshafts ($848mn); and 3) textiles and industrial belts ($577mn). With the exception of the Multifiber Arrangement (MFA), the presence of AD/CVD orders was larger than any other US import restraint programme in place in 1993.

The US ITC (1995) provides a more conservative estimate. Their study demonstrates that in 1991, existing AD/CVD orders imposed costs on consumers, "downstream" industries, and the economy as a whole of at least $1.59bn more than the benefits accruing to the petitioning industries. The welfare cost estimate is conservative because it does not capture cumulative effects, nor the effects of orders that were not imposed definitively. In addition to this, since the use of AD/CVD has been increasing since 1991, it is likely that the overall welfare cost was underestimated in this study.

The use of products as inputs for other goods raises the issue of "upstream" subsidies. For example, a subsidy on agri-food would imply a subsidy on food products since, provided that agrifood prices were not fixed by international trade, the latter would be benefiting from cheap inputs. The effect of the subsidy will also be felt along the supply chain. A large number of AD/CVD measures involve manufacturing sectors that are upstream to significant production sectors. As demonstrated by the GE model presented in Gallaway *et al* (1999), "these distortions result in larger welfare losses not only for US consumers, but also for the US producers and exporters downstream to the sector subject to an order".

3.2.3 The Future Scenario of CVD

As discussed above there is a declining trend in the initiation of anti-subsidy investigations. Moreover there are various reasons why this trend will continue in the future:

(i) Anti-subsidy investigations are politically more sensitive due to the fact that another government is being investigated apart from the exporting industry. Only the exporting industry is investigated in an anti-dumping investigation.

(ii) Under the WTO Agreement on Subsidies and Countervailing Measures, there is a time-bound schedule of phasing out the prohibited subsidies. In the case of industrialised countries, all prohibited subsidies have been abolished with effect from 1st January 1995. In the case of developing countries subsidies, the deadline for the phase-out for those subsidies covered under Article 3.1 (b) was 1.1.2000, and for Article 3.1 (a) was 1.1.2003, except for Annex VII countries.

    If the phase-out did not take place as planned or there are violations of the commitments, such violations are more likely to be challenged under the DSB mechanism than via an action for imposition of CVD under the ASCM. Even for the developing countries, with the phasing out of the subsidies under Article 3.1 by 1.1.2003, the possibility of a subsidy continuing which can result in a CVD action is low.

(iii) In view of the methodologies of calculation adopted by some of the major investigating authorities, it would be possible to bring a case of anti-dumping even if the dumping is actually on account of subsidisation.

(iv) Subsidy calculation methodologies are less established than dumping calculations and perhaps more complicated. Thus, countries using anti-subsidy measures for the first time are more vulnerable to challenge than if they rely on established anti-dumping methodologies.

3.3 Safeguard Measures against Sudden Increase in Imports

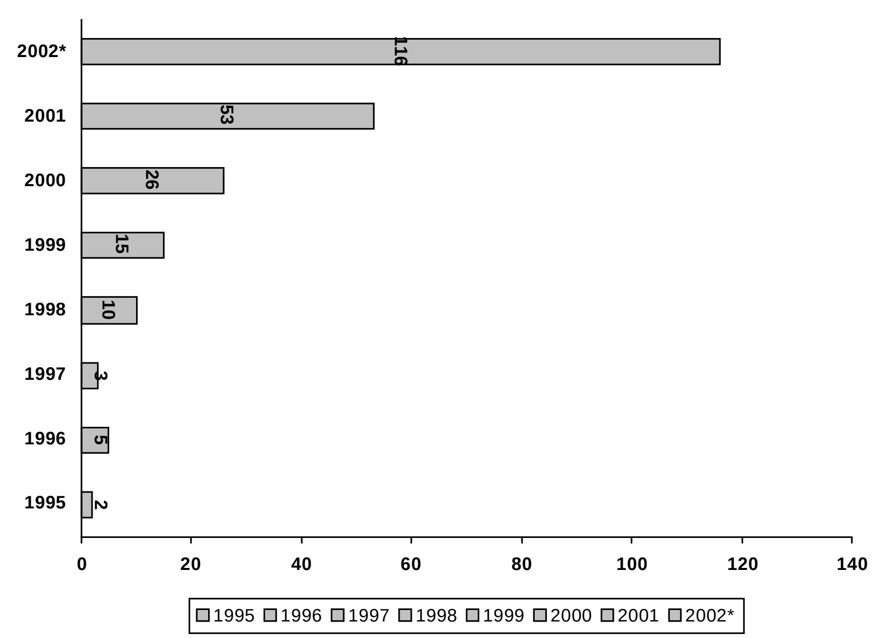
Safeguard duties are more comprehensive and far-reaching than anti-dumping or anti-subsidy duties. They target all imports of a particular commodity in comparison with source-specific imports in the case of anti-dumping or anti-subsidy investigations. Under Article XIX of the GATT and the Agreement on Safeguards, a country is able to impose safeguard duties or to impose quotas on the volume of imports that enter into the country if the domestic industry is suffering serious injury substantially caused by rapidly increasing imports. This allows the struggling domestic industry time to rebuild itself and become more efficient in response to increased competition from low-cost foreign producers.

Moreover, unlike anti-subsidy or anti-dumping investigation, safeguard investigations are not complex. While the injury standard is higher than in anti-dumping or in anti-subsidy cases (serious injury as against material injury), the analysis required is relatively straightforward. It must be established that an increase in imports has caused serious injury to the complainant industry. However, as discussed below, safeguard measures are used less frequently than AD duties or CVDs.

3.3.1 General Trends in Safeguards Use

The number of safeguards' cases initiated since 1995 has increased dramatically in the last year due to the steel safeguard investigations:

Number of Safeguards' Cases Initiated, 1995-2002



Source: Stevenson 2003
*January-October, 2002.

The method of counting the number of cases also differs in the chart above from that employed in the rest of the paper.

While statistics from the WTO count the number of cases on the basis of the number of countries targeted, the statistics compiled for safeguard cases are based on the number of investigations. This method seems appropriate since safeguard investigations are globally applicable (subject to the exception of developing countries or RTAs in certain cases) and not company-specific. The statistics used by Stevenson (2003) above count the number of cases by the number of products investigated. Stevenson defends this approach since the different products investigated are not like or directly competitive (as per the Agreement) and cannot, therefore, be counted as a single safeguard investigation.

Since the US ITC determined that imports were causing injury to domestic goods across 33 products (in 2001), the number of cases above reflects this. If the WTO method for counting cases is taken then the number of cases will be less. Three countries have predominantly been the major initiators of safeguards investigations for the period 1995-2001: the US (42), Chile (16) and India (11). In addition, 18 other countries have initiated safeguard investigations during this period[21].

3.3.2 Trends within the EC and India

The EC recently imposed safeguards measures against steel imports in response to the US steel safeguards. In March 2002, the EC launched an investigation and controversially imposed provisional measures on the same day. It has been suggested that the reason the EC has not used safeguards measures in the past is due to the difference in the voting structure in the Commission for approving the use of safeguards measures. Safeguards require the approval of a qualified majority unlike anti-dumping measures (that can be adopted by a simple majority)[22]. If the Commission determines that an investigation should be terminated, it will submit its findings to the Council, who will vote on its termination by *qualified* majority. The EC is aware that if a safeguard measure is passed without a qualified majority, it will be turned down at the Council level.

India has been initiating safeguards cases since 1997. Of the 12 measures initiated between 1997 and 2002, duties have been imposed on eight products[23].

3.3.3 The Economic Effects of Safeguards

There is no empirical work measuring the trade or welfare effects of safeguard measures. Whilst anti-dumping has been the focus of a multitude of different studies, the effect of safeguard actions has been neglected. One recent paper exception – Durling and Prusa (2003) – examines the US steel safeguards actions, and finds that taxing both the upstream and downstream import markets (in this example, steel slab and rollers) has distributional effects. The minimills that do not use slab as an input expanded their output while the traditional integrated mills (who were supposed to be the beneficiaries of the measures) decreased their output (since they required slab as an input). The authors also find that the firms that benefit have very low unit labour requirements and as a result, taxing the upstream product (slab) may lower domestic employment.

The reasons for the fewer number of safeguard cases, as compared to anti-dumping cases, are probably that: the recommendation of a safeguard duty is contingent upon the industry taking steps to make itself competitive over time; members are obliged to offer compensation in terms of tariff concessions on other items of export interest to countries whose exports will be affected by safeguard duties; and a good number of safeguard measures have not been able to withstand the scrutiny of the DSB procedure. There have been five safeguard cases before the WTO DSB and all have been found to be inconsistent with the Members' obligations to the WTO. Notably, this includes the biggest safeguard case of current times - the US steel case.

3.3.4 Future Scenario of Trade Remedial Measures

While evaluating the future scenario of the trade remedial measures, it needs to be underlined that protectionism may also take the form of various non-tariff barriers like, quality standards, TBT and SPS measures etc. However, these measures must be based on sound scientific principles and equally applicable to the domestic industry of the country applying the measures. In view of this fact, raising non-tariff barriers of standards and quality type have an inherent disadvantage of also inconveniencing the domestic industry. From the analysis above and the experience of the measures since 1995, it is probable that the most preferred trade remedy measure would continue to be anti-dumping despite the criticism and resistance by the target countries.

4. Proposals for Reform

Despite the overwhelming economic evidence that AD measures are welfare reducing, the political economy forces have ensured that "scrapping" the ADA is not on the agenda at Cancun. Since public policy is determined through the complex interactions between government and private common-interest groups, policymakers are influenced by a number of factors including ideological concerns relating to various economic and social goals. At the same time, varied interest groups who seek to maximise their own economic gains also influence government positions. Government representatives champion the set of policies that best achieves the desired balance between political reality and economic and social goals.

Countries are critical of protectionism when their exports are targeted but, paradoxically, active users of the very same measures when it comes to protecting their own goods. Industry groups resent protectionist actions with respect to raw material inputs but eagerly pursue the same with respect to their won outputs. Further, the bargaining process between the officials of different countries determines the final outcome of international agreements. Such agreements are often not the tightest of legal documents, since they tend to incorporate the compromises that precede the finalisation of the agreement. Thus, the outcome of the negotiations itself leaves considerable scope for interpretation of the broad guidelines set forth in the results of the negotiation. Different countries often implement differently the same set of laws.

Therefore, from the viewpoint of maximising welfare within the constraints set by political reality of Members of WTO, the best that can be achieved is to reduce the possibilities of misuse or abuse of international agreements. The ADA is no exception. In view of the above and the Doha mandate in so far it relates to Anti-dumping, this paper seeks to recommend and highlight certain areas of reform of the agreement that can achieve the above objectives.

4.1 Doha Mandate

The political reality maximising welfare under constraint was duly recognised in by the drafters of the Doha negotiation mandate:

> *"In the light of experience and of increasing application of these instruments by Members, we agree to negotiations aimed at clarifying and improving disciplines under the Agreement on Implementation of Article VI of the GATT, 1994…. While preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives and taking into account the needs of developing and least developed participants…"*

In brief, the purpose of negotiations in the area of the ADA is to further strengthen the disciplines, taking into account the special concerns of developing and least developed countries. The reform of the agreement is in the best interest of developing as well as developed countries. Reform is also important as the upsurge in investigations and imposition of duties worldwide has highlighted considerable divergence between the WTO members in the interpretation and application of current rules. Further, a strengthening of the rules will also reduce the cost of investigations. Due to these high costs, a large number of parties find it beyond their means to effectively participate in anti-dumping investigations.

4.2 Some Suggestions for Reform

4.2.1 Calculation of the Dumping Margin and the Determination of Normal Value (Article 2.1)

It must be understood that "dumping" is a legal fiction. Dumping is said to have occurred if the export price to an importing country is less than its normal value in the domestic market of the exporting country. The difference between the normal value and the export price is referred to as the "margin of dumping". While this concept seems simple, there are several areas of discretion and anomalies that need to be addressed carefully in the context of normal value, export price and the comparison between the two.

In terms of the Agreement, normal value is defined as follows:

> *2.1 For the purpose of this Agreement a product is to be considered as being dumped, i.e., introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.*
> *2.2 When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and any other costs and for profits.*

Article 2.2, provides two alternatives for determining dumping margin, when sales in the domestic market of the exporting country cannot be used for the purpose. However, it does not prescribe any hierarchy between the two. While in some countries, a hierarchical order has been established, most other countries have chosen to use the cost of production-based method for determination of normal value. Deliberation on the appropriateness of prescribing a hierarchy between the two alternative methods of determination of normal value, would be valuable.

Prima facie, it would appear that the third country export price should be a preferred method as it emanates out of price considerations as opposed to costs and, hence, takes into account the market realities. The cost of production based calculation of normal value, on the other hand, is retrograde as it fails to take account of the market forces.

4.2.2 Procedural Improvements Involving Transactions Between Related Parties (Article 2.3)

While calculating normal value, it has to be seen that the transactions are in the ordinary course of trade. Transactions made between related or affiliated parties need to be treated differently from transactions between unrelated and independent parties. However, there are no specific provisions in the ADA to explain the concept in the context of normal value. For example, if the sales are made by an exporter/producer to his related party in the domestic market, it would be considered a tainted sale and adjustments will be made to arrive at the independent normal value in the domestic market.

However, there are no specific provisions, which throw light on the concept of "related person" nor are there any guidelines to deal with such transactions. In the process, the present provisions of the Agreement leave considerable scope for discretion. This needs to be discussed and formalised in the proposed negotiations. Determination of a fair and untainted normal value in the domestic market of the exporter can only form an appropriate basis for comparison for the purpose of arriving at dumping margins.

4.2.3 Comparison under Article 2.4

While making comparisons between normal value and the export price, the investigating authorities are required to make adjustments for all the factors that affect the price comparability. In practice, most of the authorities allow only those adjustments that are covered by the specifically mentioned factors under Article 2.4 of the ADA. One such example of incorrect implementation of the system is that no adjustment is allowed if there is a difference between the raw material cost of the domestically sold product and the exported product.

One of the reasons for the difference in raw material costs can be on account of the fact that raw materials are made available to exporters at international prices while the raw material cost for domestic production is governed by the incidence of protective customs duties on the said raw material. Considering that in AD investigations, the exporter's behaviour is under scrutiny, it is imperative that those factors that are not a part of the Net Sales Realisation of the exporter, should be allowed as adjustments. This would be a fair and unbiased way of judging whether dumping is actually taking place or not.

4.2.4 Zeroing in Method (Article 2.4)

Subsequent to the decision of the WTO Panel in the Bed Linen case, it is clear that for all the transactions where the dumping margin is negative, the same must be accounted for in calculating the weighted average dumping margin. The same principle is to be applied for the individual models/types or grades of the product under consideration. It was the practice of the EC that all transactions which resulted in negative dumping margin were considered as zero margin for the purpose of calculating the weighted average dumping margin. It would be useful for the proposed negotiations to come out with specific methodology for calculating the dumping margins and to specifically prohibit the practice of zeroing in.

4.2.5 Broader Definition of 'Domestic Industry' in the Determination of Injury

The ADA defines the 'domestic industry' as follows:

4.1 For the purposes of this Agreement, the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that

(i) when producers are related to the exporters or importers or are themselves importers of the allegedly dumped product, the term "domestic industry" may be interpreted as referring to the rest of the producers;...

The injury analysis is primarily based on the performance of the domestic industry, as defined by the investigating authorities. For instance, even if the complaining domestic industry accounts for 40 percent of the production during the investigation period, the injury analysis may be based on the performance of the complaining industry alone. This current understanding of the law can lead to vastly different results depending upon the selection of the complainant domestic industry. Thus, this issue needs deeper examination. One of the ways to examine this issue more closely could be to make it imperative for the investigating authorities to examine the status of the non-complaining domestic industry with a view to ascertaining the real cause of injury and whether any anti-dumping action is warranted or not. While there have been Panel decisions to the effect that even 53 percent was not considered sufficient for the injury analysis in respect of certain factors, the provisions in the Agreement require more clarity and precision.

4.2.6 Major Proportion Definition

Article 4.1 of the ADA provides the definition of "domestic industry", as per the extract above.

The definition rests upon the concept of "major proportion", however, this has not been defined in other sections of the Agreement. It is important to note that the results of the injury analysis can vary significantly depending upon the way the term "major proportion" is interpreted by different authorities. This aspect needs to be discussed and strengthened in future negotiations.

Secondly, there is no indication in the Agreement to give guidance to the various national authorities as to the circumstances under which producers, who are related to the exporters or importers or are themselves importers of the allegedly dumped product, may be excluded from the term "domestic industry".

4.2.7 Mandatory Analysis of All 15 Injury Parameters (Article 3.4)

It is the consistent position of various panel reports that the investigating authorities are required to consider all 15 factors mentioned under Article 3.4 of the Agreement. It is anomalous that despite such importance being given to the said factors, there is no guidance available under the Agreement. For instance, it is a settled principle of anti-dumping that the examination for the purpose of injury assessment should be restricted to the product under consideration and not to the performance of the business enterprise as a whole. Some of the factors, however, are applicable only to the company as a whole and cannot be examined individually in a multi-product company (*e.g.* ability to raise capital, growth).

4.2.8 Issue of Causal Link — Most Efficient Producer Argument

While determining the causal link, it would be useful to provide for an analysis with reference to the most efficient producer of the domestic industry. Such an approach can eliminate the scope for manipulation by the complainant domestic industry to project the injury to the least efficient producer. Injury on account of inefficient production can also be eliminated to a great extent.

4.2.9 Mandatory Use of the "Lesser-Duty Rule"

Article 9.1 of the ADA encourages but does not require the importing country to apply the lesser duty rule – a duty no higher than that necessary to offset any injury being suffered by the domestic industry. Member countries use wide discretion in this regard. US law on the subject is for duty equivalent to the full margin of dumping. EC provides for the lesser duty. India, following the ECs practice, applied the lesser duty law until the late 1990s. However, the Customs Tariff Act as amended in July 1999 provides that an antidumping duty could be recommended up to the dumping margin, though in practice it still uses the lesser duty rule. The flexibility in applying duties up to full margin of dumping tends to give the domestic industry over protection, which necessarily is injurious to overall economic efficiency. The US strongly opposes the proposal of a mandatory lesser duty rule.

India and the EC should, in the light of the fact that they practice lesser duty rule, push for mandatory lesser duty in the ADA. This is also important because, in many cases, the level of cooperation demanded by investigating authorities in the developed countries is simply not possible for developing country exporters. The recent dispute between India and the US over anti-dumping duties imposed on steel exports by Steel Authority of India Limited (SAIL) is a classic example of how even large exporters from developing countries find it difficult to meet the information requirements imposed by US authorities. And, if the information requirements are not met the investigating authorities rely on the "best information available". This criterion will exaggerate the margin of dumping from an exporter. If the duty is restricted to the level necessary to offset injury to the complaining industry, the misuse of the best information provisions will also be checked.

4.2.10 Re-examining the Injury Margin (Article 2.2)

As a corollary to the lesser duty rule, it is also necessary to insist on clarification of norms and procedures relating to the methodology applied for determining the injury margin. Though the practices vary with regard to the calculation of injury margins, generally this is done with reference to the CIF import price from a particular country and the cost data of the petitioner industry after incorporating a reasonable rate of profits. Petitioner industries to have higher injury margins will tend to try to get this margin determined on the basis of the most inefficient producers.

To ensure that the domestic industry becomes more efficient and productive over the period, in which anti-dumping duties are in place, the injury margins should be determined in relation to the most efficient producers. This is especially important because only such a measure will ensure gains in efficiency, quality and productivity. Further, the desirable rate of profits (taken to calculate non-injurious price) should be transparent and have some relationship with the prime-lending rate in the country. To remove ambiguities on this account and to ensure that the lesser duty rule promotes economic efficiency an annex to the ADA should be added to specify the methodology to be used for determining injury margins.

4.2.11 Introduction of Public Interest Criterion

The ADA imposes no substantive obligations on the authorities to take the broader public interest into account. Many countries have recommended that investigating authorities must consider public interest before imposing anti-dumping duties. This is necessary, because anti-dumping measures tend to be continued for too long. Interestingly, 67 of 241 US anti-dumping orders were enforced for decades (as of June 2001). Consumers should not be asked to pay the price for the lack of commitment on the part of the domestic producers to take care of their interests.

However, public interest is not consumer interest alone. It is a much wider term, which covers in its ambit the general social welfare, which itself takes into account the larger public interest. The public authorities are expected to act in the public interest and, therefore, it is enjoined upon them to consider whether the imposition of an anti-dumping duty on any product would be in public interest.

The Public Interest test (in terms of an examination of the impact on economic operators), provides for a wider and more complete analysis of the situation on the domestic importing market. Linked with appropriate substantive and procedural provisions, the public interest test could be a useful additional condition before anti-dumping measures can be imposed. A mandatory public interest clause would ensure that the investigating authorities give due cognisance to the concerns expressed by various interested parties including the exporters, importers, consumer organisations, user industry etc. even on the issues of larger public interest.

4.2.12 Provisions for Relief to Small Enterprises in the Agreement

Domestic industries in developing countries that are fragmented and have thousands of producers face a serious problem in initiating anti-dumping investigations. They find it extremely difficult to meet the standing requirements contained in Article 5.4 of the agreement.

The Article stipulates that no investigation on complaint of dumping will be initiated unless the application is made by producers accounting for 25 percent of the domestic production of the like product in the country and it is supported by those domestic producers whose collective output constitutes more than 50 percent of the total production of the like product produced by that portion of the domestic industry, which supports or opposes the application. The twin requirements can easily be met if there are few producers. If there are a large number of producers then meeting the standing requirement can be almost impossible. To ease the situation, *footnote 13* to the agreement does provide for resorting to statistical sampling techniques in deciding on the 50 percent support criterion. But this does not address the question of application being made by producers accounting for 25 percent of the production.

A special provision should be made in the WTO agreement to deal with this problem. It should be provided that in case of fragmented industries if the 50 percent support test is established by statistical sampling techniques then the investigation authority should investigate the case on the basis of best information available without insisting on the applicant's satisfying the 25 percent test. Critics may find fault with the relaxation of the 25 percent test but it has to be noted that in case of fragmented or dispersed industries to meet the 25 percent test one might have an application being made by 1,000-plus producers, which is not practicable.

5. Conclusion

This paper has attempted to define the issue, to highlight some of the trends in anti-dumping in the past few years, to provide a reference point by comparing it to safeguards and CVDs and to provide a "wish-list" of substantive recommendations to the ADA. Despite resounding agreement on the welfare-reducing effects of anti-dumping measures, governments will continue to view them as an alternative to promoting efficient and competitive domestic industries. With this in mind, policy-makers in Cancun can hope to amend and improve certain provisions of the agreement to reduce these distortions and to prevent its gross misuse. From a legal perspective, this would help tighten the agreement and reduce the ambiguities, from which it currently suffers.

Endnotes

1 Sections 1and 2 of the paper have been written by Krista Lucenti. Section 4 has been written by Sharad Bhansali. Section 3 has been jointly authored.

2 The latter definition was one of the key amendments of the Tokyo Round, concluded in 1979. The definition of 'less than fair value' (LTFV) was extended to include sales below cost as well as price discrimination.

3 Finger (1996)

4 Namely India, South Africa, Mexico, Argentina and Brazil.

5 Source www.wto.org. Statistics compiled by author. Though the WTO statistics are comprehensive, there exist potential discrepancies in analysis between WTO reported numbers and those of member countries. The WTO reports the number of cases by countries involved whilst India for instance, does it by products investigated. For the purposes of this paper, numbers will be reported as per the WTO standard.

6 See Prusa, Blonigen.

7 Based on data from 1987-2001. The number of anti-dumping investigations and measures is compiled from data compiled by Miranda, Ruiz and Torres (1998) as well as from the WTO Rules Division Anti-dumping Database. However, these are done only by the number of cases investigated and filed and do not reflect any kind of intensity of usage. Finger, Ng, and Wangchuk (2001) offer another approach to measuring the use of anti-dumping measures by countries. Rather than use the number of cases initiated as a measure of usage, the authors maintain that the number of cases must be weighted by the dollar value of imports. The logic is that the number of AD cases should be larger for countries with a greater value of imports. The authors find that if the ratio of cases initiated to imports is high, this country uses AD more intensively. Their results indicate that ten developing countries alone initiate more cases than either the EC or the US By their logic, Argentina, South Africa, Peru, India and New Zealand are the major users of anti-dumping measures, measured by the number of AD initiations relative to the dollar value of imports by economy (1995-1999). Another method that has yet to be utilised is to measure the total number of investigations and measures according to the dollar value of affected exports. Since the value of targets is generally larger for the industrialised countries, this could suggest a higher intensity of usage. However, it is a difficult exercise to measure how much exports are affected by AD since some effects to named countries are mitigated by the benefits to non-named countries from trade diversion. See Prusa (1996, 1999).

8 Affirmative outcomes refer to the percentage of definitive measures imposed with respect to the number of investigations initiated.

9 I have chosen to look only at the EU-12 countries for consistency. Since my data set is going to measure the years 1990-1995, it is more precise to remove Austria, Sweden and Finland who joined the EU in 1995. The EC in this paper refers to those cases initiated by the Commission on behalf of Community Exporters. In addition, when a country levies measures against the EC, it does so community-wide. It can also levy measures against only one Member State of the Community. This paper will refer to the EC, and the EC + EU-12 for both importers and exporters. The EU-12 refers to the aggregated Member States.

10 These 5 sectors were chosen because overall, they represented the sectors with the highest number of measures imposed. For developing and least-developed countries, they represent over 90 percent of measures levied across countries. Data used from 1987-2001.

11 It is assumed that the share of exports in each sector is broadly constant over time. Thus the year 2000 is used as an average year.

12 Salop and Sheffman (1983, 1987)

13 See Baumol and Ordover (1985) for its application to trade and recently Durling and Prusa (2003) for its application to safeguards.

14 The version of this paper on the CUTS web site–http://cuts.org/eintad.htm provides the trade data on which this exercise is based.

15 US ITC (1995) "Economic Effects of AD and CVD Orders and Suspension Agreements," Publ. 2900, June 1995. The ITC used a CGE model to measure the economy wide effects of AD and CVD orders currently in effect.

16 Baldwin (1985), Goldstein and Lenway (1989), Moore (1992), DeVault (1993), and Baldwin and Steagall (1994)

17 Finger, Hall and Nelson (1982), Harrison (1991), Hansen and Prusa (1996)

18 All data taken from www.wto.org. The WTO counts the number of cases by the countries involved and not by product.

19 Taken from the European Union's Anti-subsidy Schemes Database. www.europa.eu.int. According to their database, the EC recently imposed measures on Sulphanilic acid from India. Since this has not been reported to the WTO, I have chosen to exclude it for purposes of consistency in data sources.

20 See Boltuck, Francois and Kaplan (1991); Morkre and Kelly (1994); USITC (1995); Chung (1999); Gallaway, Blonigen and Flynn (1999). A 1995 paper by Larry Qiu does look at the reasons why countervailing duties do not deter export subsidization (which is now illegal under the WTO agreements).

21 Argentina, Australia, Brazil, Columbia, Czech Republic, Ecuador, Egypt, El Salvador, India, Japan, Jordan, Korea, Latvia, Morocco, Philippines, Poland, Slovak Republic, Slovenia, and Venezuela. In 2002, the European Communities also became a user of safeguard measures when it took action against steel products.

22 Bourgeois and Messerlin (1998) point out that normally under Article 113 of the EC Treaty, the Council acts by qualified majority on a proposal from the Commission. However, in anti-dumping investigations, the Council acts by simple majority in adopting definitive duties (Article 9:4) – as decided in the *General Affairs Council Meeting, 15 Dec 1993* by French initiation. This has the obvious effect of making it easier to impose anti-dumping measures.

23 These are: Acetylene black (1998), Carbon black (1998), Flexible slabstock polyol (1998), Hard board (1998), Styrene butadiene rubber (1998), Phenol (1999), Aceone (2000), White/Yellow phosphorus (2000), Gamma Ferrie Oxide/Magnetic Iron Oxide (2001). See "India, Trade Policy Review", WTO, 2002, www.wto.org.

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1. Japan: Measures Affecting Consumer Photographic Film and Paper
2. Guatemala: AD Investigations against Cement from Mexico
3. The USA: AD on Drams from Korea
4. The USA: The US Anti-Dumping Act of 1916
5. Guatemala: AD Investigations Against Cement from Mexico
6. The USA: AD on Stainless Steel Strips from Korea
7. Thailand: AD on Angles Shape
8. EC: AD on Cotton Bed Linen from India
9. The USA: AD on Hot-Rolled Iron from Japan
10. Argentina: AD on Floor Tiles from Italy
11. The USA: AD and CVD on Steel Plates from India
12. The USA: The Uruguay Round Agreement Act of the USA
13. Egypt: AD on Steel Bars from Turkey
14. The USA: The Continued Dumping and Subsidies Offset Act, 2000

Sources of Data

www.europa.eu.int - EC Anti-dumping Cases

www.wto.org - Anti-dumping Statistics

www.worldbank.org - Recent world development indicators

STATCAN World Trade Analyser

Appendix

Appendix Ia: Investigations by Reporting Country: 1987-2001

Reporting	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	Total 2001	Total 1997	Share 2001	Share 1997	%△ +/-	% △ '97 v '01
US	15	40	24	34	63	83	32	48	14	22	15	36	47	47	74	594	390	17.3%	17.8%	-0.5%	52.3%
EC	28	27	18	48	29	42	21	43	33	25	41	22	65	32	28	502	355	14.6%	16.2%	-1.6%	41.4%
Australia	22	16	21	47	68	71	50	15	5	17	42	13	24	15	23	449	374	13.1%	17.4%	-4.3%	20.1%
India	0	0	0	0	0	8		7	6	21	13	27	65	41	75	263	55	7.7%	2.5%	5.2%	378.2%
Canada	31	15	13	15	11	46	25	2	11	5	14	8	18	21	25	260	188	7.6%	8.6%	-1.0%	38.3%
Argentina	0	0	0	0	1	14	27	17	27	22	15	8	24	45	26	226	123	6.6%	5.6%	1.0%	83.7%
Mexico	18	11	7	11	9	26	70	22	4	4	6	12	11	7	5	223	188	6.5%	8.6%	-2.1%	18.6%
RSA	0	0	0	0	0	0	0	16	16	33	23	41	16	21	6	172	88	5.0%	4.0%	1.0%	95.5%
Brazil	0	1	1	2	7	9	34	9	5	18	11	18	16	11	16	158	142	4.6%	4.4%	0.2%	11.3%
Total	120	124	96	165	228	326	299	228	157	224	243	254	356	281	330	**3431**	**2210**	83.0%	80.7%		**55.2%**
%	3.5%	3.6%	2.8%	4.8%	6.6%	9.5%	8.7%	6.6%	4.6%	6.5%	7.1%	7.4%	10.4%	8.2%	9.6%	100.0%					

Trad Users	52.6%	60.0%
New Users	30.4%	25.1%

Appendix Ib: Definitive Measures by Reporting Country: 1987 - 2001

Reporting	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	Total 2001	Total 1997	Share 2001	Share 1997	% △ +/-	% △ '97 v '01
US	35	13	26	16	17	23	47	27	33	11	20	16	24	32	33	373	268	21.1%	26.0%	-4.9%	39.2%
EC	10	11	10	15	19	18	20	20	14	17	23	25	18	41	15	276	177	15.6%	17.9%	-2.3%	**55.9%**
Canada	14	10	5	7	12	9	25	21	7	0	7	10	10	14	19	170	117	9.6%	11.3%	-1.7%	45.3%
India	0	0	0	0	0	0	0	5	7	2	8	22	22	56	38	160	22	9.1%	1.9%	7.2%	**627.3%**
Australia	4	12	10	6	23	35	13	14	1	1	1	7	6	5	10	148	120	8.4%	11.6%	-3.2%	23.3%
Mexico	1	4	4	3	10	8	12	26	16	4	7	7	7	7	3	119	95	6.7%	9.3%	-2.6%	25.3%
Argentina	0	0	0	0	0	0	3	1	13	20	11	13	9	16	15	101	48	5.7%	2.5%	3.2%	**110.4%**
RSA	0	0	0	0	0	0	0	0	0	8	18	14	34	13	5	92	26	5.2%	2.5%	2.7%	**253.8%**
Brazil	0	0	2	0	2	9	6	3	2	6	2	14	5	9	13	73	60	4.1%	3.1%	1.0%	**21.7%**
Total	67	57	62	48	90	117	132	128	118	84	124	162	181	234	163	**1767**	**1027**	85.6%	83.0%		**72.1%**
%	3.8%	3.2%	3.5%	2.7%	5.1%	6.6%	7.5%	7.2%	6.7%	4.8%	7.0%	9.2%	10.2%	13.2%	9.2%	100.0%					

Source: WTO Secretariat, Rules Division Antidumping Measures Database. Reprinted in Miranda, Torres, Ruiz (1998)

Updated from 1998-2001 by author

Trad Users	54.7%	66.8%
New Users	30.8%	19.3%

* calculated as (no. of cases 2001/no. of cases 1997) - 1 to get the growth rate

Appendix IIa: Investigations by Affected Country - 1987-2001

Affected Country	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	Total 2001	Total 1997	Share 2001	Share% 1997	Change% +/-	Change 1997 v 2001
European Union1	25	18	11	22	59	66	44	29	29	33	50	49	42	37	46	**560**	**##**	16.32%	11.25%	5.07%	6.67%
European Union 2	25	17	11	22	59	66	44	29	29	32	48	45	36	28	38	**529**	**##**	15.42%	20.58%	-5.16%	7.09%
China	1	5	4	12	16	31	45	39	20	43	33	28	41	43	47	**408**	**249**	11.89%	11.25%	0.64%	63.86%
US	18	10	8	18	16	26	30	14	12	21	15	15	14	12	13	**242**	**188**	7.05%	8.56%	-1.51%	28.72%
Korea	8	12	6	11	12	25	17	8	14	11	15	24	34	21	19	**237**	**139**	6.91%	6.33%	0.58%	70.50%
Japan	19	18	10	13	18	14	11	7	5	6	12	13	22	9	12	**189**	**133**	5.51%	6.06%	-0.55%	42.11%
Chinese Taipei	6	8	6	11	10	15	11	5	4	9	16	10	22	16	19	**168**	**101**	4.90%	4.55%	0.35%	66.34%
Brazil	5	6	7	7	7	18	23	9	8	10	5	6	13	9	12	**145**	**105**	4.23%	4.78%	-0.55%	38.10%
Thailand	0	2	2	7	4	10	5	11	8	9	5	2	19	12	16	**112**	**96**	3.26%	2.82%	0.44%	16.67%
India	0	0	1	8	3	9	5	10	3	11	8	12	13	10	12	**105**	**93**	3.06%	2.60%	0.46%	12.90%
Indonesia	0	0	1	3	2	5	5	8	7	7	9	5	20	13	13	**98**	**85**	2.86%	2.14%	0.72%	15.29%
Malaysia	2	3	0	1	3	6	8	4	2	3	5	4	7	9	5	**62**	**57**	1.81%	1.68%	0.13%	8.77%
Mexico	4	0	3	3	3	9	1	3	3	4	2	9	4	1	3	**52**	**49**	1.52%	1.59%	-0.07%	6.12%
Canada	3	5	1	1	5	8	5	1	2	1	3	3	0	1	7	**46**	**39**	1.34%	1.59%	-0.25%	17.95%
Poland	4	3	5	0	4	3	4	2	2	3	3	4	3	5	1	**46**	**45**	1.34%	1.55%	-0.21%	2.22%
Hong Kong	3	5	6	1	2	4	1	6	1	3	2	3	2	1	3	**43**	**40**	1.25%	1.55%	-0.30%	7.50%
Romania	3	4	6	1	1	5	1	1	1	2	1	4	4	4	5	**43**	**26**	1.25%	1.14%	0.11%	65.38%
Hungary	1	2	2	0	3	1	2	0	2	0	2	2	4	0	3	**24**	**15**	0.70%	0.68%	0.02%	60.00%
Total	120	124	96	165	228	326	299	228	157	224	243	254	356	281	330	**3431**	##	90.61%	90.70%		
Percentage	3.5%	3.6%	2.8%	4.8%	6.6%	9.5%	8.7%	6.6%	4.6%	6.5%	7.1%	7.4%	10.4%	8.2%	9.6%	100.0%					

Appendix IIa: Investigations by Affected Country - 1987-2001

European Union

Germany	7	4	2	6	8	17	10	8	7	9	13	8	13	4	9	125	116	3.64%	4.19%
United Kingdom	2	3	1	6	6	12	4	4	6	4	6	4	2	8	6	74	68	2.16%	2.46%
France	3	2	3	3	6	13	8	5	0	4	4	10	8	1	3	73	70	2.13%	2.32%
Italy	3	2	2	2	8	7	5	4	6	5	5	5	2	5	7	68	61	1.98%	2.23%
Spain	4	0	1	1	8	3	4	5	2	4	7	7	5	6	3	60	57	1.75%	1.68%
Belgium	4	1	2	0	6	8	4	3	1	2	3	3	2	0	4	43	39	1.25%	1.55%
Netherlands	1	2	0	1	6	3	7	0	6	1	5	3	2	2	3	42	39	1.22%	1.46%
Denmark	0	1	0	1	2	2	0	0	1	1	0	2	2	0	0	12	12	0.35%	3.60%
Greece	0	1	0	0	3	0	1	0	0	0	3	0	0	1	1	10	10	0.29%	0.36%
Ireland	0	1	0	2	2	0	0	0	0	0	2	1	0	0	0	8	8	0.23%	0.32%
Portugal	0	0	0	0	2	0	1	0	0	2	0	2	0	1	0	8	8	0.23%	0.23%
Luxembourg	1	0	0	0	2	1	0	0	0	0	0	0	0	0	2	6	6	0.17%	0.18%
EC	0	1	0	0	0	0	0	0	0	1	2	4	6	9	8	31	31	0.90%	0.23%
EU1 = EC + EU12	**25**	**18**	**11**	**22**	**59**	**66**	**44**	**29**	**29**	**33**	**50**	**49**	**42**	**37**	**46**	**560**	**525**	**16.32%**	**20.18%**
EU2 = EU12	**25**	**17**	**11**	**22**	**59**	**66**	**44**	**29**	**29**	**32**	**48**	**45**	**36**	**28**	**38**	**529**	**494**	**15.42%**	**20.58%**

Source: WTO Secretariat, Rules Division Antidumping Measures Database. Reprinted in Miranda, Torres, Ruiz (1998)
Updated from 1998-2001 by author

Appendix IIb: AD Measures by Affected Country - 1987-2001

Affected Country	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	Total 2001	Total 1997	Share 2001	Share% 1997	Change +/-	% Change 1997 v 2001
China	1	4	0	2	12	14	19	33	26	15	33	24	20	30	30	263	158	14.88%	15.38%	-0.50%	66.46%
European Union 1	13	7	15	6	13	14	27	13	16	6	10	32	37	23	24	256	140	14.49%	13.63%	0.86%	82.86%
European Union 2	13	7	15	6	13	14	27	13	16	6	9	31	33	18	17	238	139	13.47%	13.53%	-0.07%	71.22%
US	5	7	6	0	11	15	14	14	8	4	9	11	8	13	4	129	93	7.30%	9.06%	-1.75%	38.71%
Japan	7	10	9	8	11	6	7	9	5	6	5	7	10	19	8	127	83	7.19%	8.08%	-0.89%	53.01%
Korea	2	3	4	8	7	10	9	8	4	6	2	12	13	21	12	121	63	6.85%	6.13%	0.71%	92.06%
Chinese Taipei	1	2	3	4	5	6	6	3	2	2	6	11	7	18	9	85	40	4.81%	3.89%	0.92%	112.50%
Brazil	5	0	4	3	3	8	6	10	9	10	6	5	5	8	2	84	64	4.75%	6.23%	-1.48%	31.25%
Thailand	1	1	2	1	3	4	3	1	5	7	2	5	1	13	7	56	30	3.17%	2.92%	0.25%	86.67%
India	0	0	1	0	3	3	5	4	4	1	5	6	9	7	6	54	26	3.06%	2.53%	0.52%	107.69%
Indonesia	0	0	0	0	3	3	0	2	0	2	4	5	4	11	5	39	14	2.21%	1.36%	0.84%	178.57%
Mexico	1	3	0	3	0	3	4	1	0	2	4	1	3	4	1	30	21	1.70%	2.04%	-0.35%	42.86%
Malaysia	2	3	0	0	2	1	1	0	3	2	3	4	2	4	1	28	17	1.58%	1.66%	-0.07%	64.71%
Poland	4	1	1	2	0	1	2	1	1	1	3	1	4	2	4	28	17	1.58%	1.66%	-0.07%	64.71%
Romania	3	3	2	3	1	0	3	0	2	1	1	2	2	4	1	28	19	1.58%	1.85%	-0.27%	47.37%
Canada	3	2	2	0	0	3	2	0	1	0	0	2	1	0	0	16	13	0.91%	1.27%	-0.36%	23.08%
Hong Kong	0	2	1	2	2	0	0	1	0	3	1	1	1	1	1	16	12	0.91%	1.17%	-0.26%	33.33%
Hungary	2	0	2	0	0	0	2	1	0	1	0	0	2	2	0	12	8	0.68%	0.78%	-0.10%	50.00%
Total	67	57	62	48	90	117	132	128	118	84	124	162	181	234	163	**1767**	**1027**	**91.11%**	**93.18%**		
Percentage	3.8%	3.2%	3.5%	2.7%	5.1%	6.6%	7.5%	7.2%	6.7%	4.8%	7.0%	9.2%	10.2%	13.2%	9.2%	100.0%					

Appendix IIb: AD Measures by Affected Country - 1987-2001

European Union

Germany	5	3	3	2	3	2	8	2	4	2	2	6	5	6	2	55	36	3.11%	3.51%
United Kingdom	2	0	1	2	3	1	5	2	3	0	2	3	3	1	2	30	21	1.70%	2.04%
Italy	2	1	3	0	1	3	2	3	2	2	1	6	5	1	2	34	20	1.92%	1.95%
France	2	0	2	2	1	2	4	2	1	1	2	4	7	3	5	38	19	2.15%	1.85%
Belgium	1	1	2	0	1	2	4	0	0	1	0	3	5	0	1	21	12	1.19%	1.17%
Spain	1	0	1	0	2	2	1	2	3	0	0	4	4	3	3	26	12	1.47%	1.17%
Netherlands	0	2	1	0	1	1	1	2	2	0	1	1	1	3	1	17	11	0.96%	1.07%
Denmark	0	0	1	0	0	0	2	0	1	0	0	1	0	1	1	7	4	0.40%	0.39%
Greece	0	0	1	0	0	1	0	0	0	0	0	2	0	0	0	4	2	0.23%	0.19%
Ireland	0	0	0	0	1	0	0	0	0	0	0	0	2	0	0	3	1	0.17%	0.10%
Portugal	0	0	0	0	0	0	0	0	0	0	1	1	1	0	0	3	1	0.17%	0.10%
Luxembourg	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0.00%	0.00%
EC	0	0	0	0	0	0	0	0	0	0	1	1	4	5	7	18	1	1.02%	0.10%
EU1 = EC + EU12	**13**	**7**	**15**	**6**	**13**	**14**	**27**	**13**	**16**	**6**	**10**	**32**	**37**	**23**	**24**	**256**	**140**	**14.49%**	**13.63%**
EU2 = EU12	**13**	**7**	**15**	**6**	**13**	**14**	**27**	**13**	**16**	**6**	**9**	**31**	**33**	**18**	**17**	**238**	**139**	**13.47%**	**13.53%**

Source: WTO Secretariat, Rules Division Antidumping Measures Database. Reprinted in Miranda, Torres, Ruiz (1998)
Updated from 1998-2001 by author

Appendix IIIa: Investigations by Sector - 1987- 2001

HS Section	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	Total 2001	Total 1997	Share 2001	Share 1997	% Change 1997 v. 2001
Base Metals	20	22	6	42	36	136	76	82	43	39	63	103	110	107	128	1013	565	29.8%	25.9%	79.29%
Chemicals	32	16	19	35	27	52	62	34	31	38	21	24	76	56	65	588	367	17.3%	16.8%	60.22%
Machinery & Electrical Equipment	24	37	18	20	41	28	20	13	26	34	34	10	28	30	25	388	295	11.4%	13.5%	31.53%
Plastics	6	13	13	27	28	40	23	19	20	25	36	32	39	21	40	382	250	11.2%	11.5%	52.80%
Textiles	6	2	12	17	8	11	30	34	1	23	8	28	34	17	24	255	152	7.5%	7.0%	67.76%
Total	119	123	95	164	227	325	298	225	157	224	243	254	356	281	330	**3401**	**2180**	**77.2%**	**76.7%**	

Appendix IIIb: Definitive Measures by Sector - 1987 - 2001

HS Section	1987	1988	1989	1990	1991	1 992	1993	1994	1995	1996	1997	1998	1999	2000	2001	Total 2001	Total 1997	Share 2001	Share 1997	% Change 1997 v. 2001
Base Metals	14	9	8	7	15	19	75	43	49	22	45	60	81	81	64	592	306	33.4%	29.7%	93.46%
Chemicals	13	12	10	12	26	19	17	27	17	12	20	13	13	52	40	303	185	17.1%	17.9%	63.78%
Machinery & Electrical Equipment	22	4	20	8	22	8	12	11	8	13	16	28	3	13	11	199	144	11.2%	14.0%	38.19%
Plastics	0	6	5	6	7	22	5	8	10	10	13	14	25	22	12	165	92	9.3%	8.9%	79.35%
Textiles	1	7	1	3	2	14	3	12	4	8	9	1	21	24	8	118	64	6.7%	6.2%	84.38
Total	66	57	62	48	90	117	132	127	118	84	124	162	181	234	163	**1771**	**1031**	**77.8%**	**76.7%**	

Appendix IIIc: Sectoral Distribution of Definitive Measures by Reporting Party 1987-2001

	Base metals		Chemicals		Machine & Electric		Plastics		Textiles		Total
	Number	Share%	Number	Share %	Number	Share %	Number	Share %	Number	Share %	Number
Reporting Country											
EC	81	29%	52	18%	66	23%	13	5%	33	12%	284
India	17	11%	69	44%	15	9%	26	16%	18	11%	158
	EC	**Total Percentage Distribution for 5 categories**									**86.3%**
	India	**Total Percentage Distribution for 5 categories**									**91.8%**

Source: WTO Secretariat, Rules Division Antidumping Measures Database.
Data from 1987-1995 taken from Miranda, Ruiz and Torres (1998)

Percentage of Affirmative Outcomes	
Base Metals	58.4%
Chemicals	51.5%
Machinery etc	51.3%
Plastics	43.2%
Textiles	46.3%

Appendix-IVa: Sectoral Distribution of Initiations 1987-2001						
Affected Country	**VI - Chemicals**	**VII - Plastics**	**XI - Textiles**	**XV - Base Metals**	**XVI - Machinery & Elec Equip**	**Total (all sectors)**
China, P.R.	99	18	31	83	43	405
United States	78	39	9	29	18	239
Korea, Rep. of	17	58	33	56	53	236
Japan	27	25	2	48	55	188
Chinese Taipei	15	23	19	50	24	166
Brazil	18	11	5	60	21	146
Germany	29	15	3	30	14	125
Thailand	10	18	14	19	13	111
India	21	13	23	35	5	104
Indonesia	8	15	16	11	6	98
Russia	19	4	2	57	0	87
United Kingdom	16	7	5	20	10	73
France	17	10	1	20	9	72
Italy	4	5	2	23	10	68
Malaysia	4	6	5	17	10	62
Spain	6	3	3	21	11	58
Ukraine	12	2	0	41	0	56
South Africa	5	0	0	37	1	53
Mexico	3	9	5	20	3	52
Poland	9	4	1	15	2	46
Turkey	2	1	12	18	4	45
Romania	10	5	1	19	4	42
The Netherlands	11	6	2	7	2	42
European Community	16	6	1	2	1	33
Denmark	3	0	0	2	0	12
Greece	1	1	0	0	0	9
Portugal	0	0	3	1	0	8
Ireland	1	0	0	1	1	8
Luxembourg	0	0	2	2	0	6
Belgium	13	3	1	12	1	0

Appendix-IVb: Percentage of Affirmative Outcomes by Affected Country						
Affected Country	**VI - Chemicals**	**VII - Plastics**	**XI - Textiles**	**XV - Base Metals**	**XVI - Machinery & Elec Equip**	**Total (all sectors)**
China, P.R.	63	11	17	57	27	210
Korea, Rep. of	12	24	17	28	31	114
Japan	18	16	1	35	38	112
United States	41	21	7	15	8	105
Brazil	8	6	2	46	8	74
Chinese Taipei	7	9	9	30	11	73
Russia	14	3	1	45	0	64
India	10	8	10	21	2	53
Germany	10	3	1	16	7	46
Thailand	3	9	5	13	6	45
Ukraine	7	1	0	34	0	42
France	9	6	0	12	4	34
Indonesia	5	5	5	6	2	32
Italy	3	2	1	14	7	30
United Kingdom	7	2	2	10	5	29
Romania	5	3	1	14	4	27
Spain	4	2	2	11	4	26
Mexico	2	5	3	12	1	25
Malaysia	3	3	1	7	7	23
Poland	5	2	1	9	1	21
South Africa	1	0	0	18	0	19
Turkey	1	1	4	10	0	18
European Community	10	5	0	0	0	18
Belgium	6	0	1	6	1	17
The Netherlands	4	0	1	5	2	13
Greece	1	0	0	0	0	11
Denmark	3	0	0	2	0	5
Ireland	0	0	0	0	0	2
Portugal	0	0	1	0	0	0
Luxembourg	0	0	0	0	0	0

Appendix-IVc: Percentage of Affirmative Outcomes by Affected Country

Affected Country	VI - Chemicals	VII - Plastics	XI - Textiles	XV - Base Metals	XVI - Machinery & Elec Equip	Total (all sectors)
Romania	50%	60%	100%	74%	100%	77%
Japan	67%	64%	50%	73%	69%	65%
Poland	56%	50%	100%	60%	50%	63%
China, P.R.	64%	61%	55%	69%	63%	62%
Belgium	46%	0%	100%	50%	100%	59%
Italy	75%	40%	50%	61%	70%	59%
Spain	67%	67%	67%	52%	36%	58%
United States	53%	54%	78%	52%	44%	56%
Russia	74%	75%	50%	79%	0%	56%
Mexico	67%	56%	60%	60%	33%	55%
Korea, Rep. of	71%	41%	52%	50%	58%	54%
The Netherlands	36%	0%	50%	71%	100%	52%
Malaysia	75%	50%	20%	41%	70%	51%
Brazil	44%	55%	40%	77%	38%	51%
India	48%	62%	43%	60%	40%	51%
Chinese Taipei	47%	39%	47%	60%	46%	48%
Turkey	50%	100%	33%	56%	0%	48%
Thailand	30%	50%	36%	68%	46%	46%
France	53%	60%	0%	60%	44%	43%
Indonesia	63%	33%	31%	55%	33%	43%
United Kingdom	44%	29%	40%	50%	50%	42%
Denmark	100%	0%	0%	100%	0%	40%
Ukraine	58%	50%	0%	83%	0%	38%
Germany	34%	20%	33%	53%	50%	38%
European Community	63%	83%	0%	0%	0%	29%
Greece	100%	0%	0%	0%	0%	20%
South Africa	20%	0%	0%	49%	0%	14%
Portugal	0%	0%	33%	0%	0%	7%
Ireland	0%	0%	0%	0%	0%	0%
Luxembourg	0%	0%	0%	0%	0%	0%

Source: WTO Secretariat, Rules Division Antidumping Measures Database.
Data from 1987-1995 taken from Miranda, Ruiz and Torres (1998)

Appendix Va: EC Investigations and Definitive Measures -Reporting Country vs. Affected Country				
Affected Country	**EC - Investi-gations**	**Share per country %**	**EC - Definitive Measures**	**Share per country**
China	64	18.0%	39	21.08%
Japan	36	10.1%	26	14.05%
Korea	45	12.7%	25	13.51%
Russia	18	5.1%	16	8.65%
India	33	9.3%	16	8.65%
Thailand	23	6.5%	14	7.57%
Poland	17	4.8%	13	7.03%
Chinese Taipai	20	5.6%	11	5.95%
Ukraine	14	3.9%	10	5.41%
Malaysia	15	4.2%	9	4.86%
Yugoslavia	12	3.4%	8	4.32%
Romania	11	3.1%	8	4.32%
Indonesia	13	3.7%	8	4.32%
Turkey	20	5.6%	5	2.70%
Hungary	8	2.3%	5	2.70%
Czech Republic	10	2.8%	5	2.70%
Hong Kong	11	3.1%	4	2.16%
Bulgaria	4	1.1%	4	2.16%
Belarus	5	1.4%	3	1.62%
Croatia	6	1.7%	3	1.62%
Lithuania	8	2.3%	3	1.62%
Slovak republic	7	2.0%	1	0.54%
Macedonia	2	0.6%	0	0.00%
Slovenia	3	0.8%	0	0.00%
USSR	0	0.0%	0	0.00%
Total	355		185	

Source: WTO Secretariat,
Rules Division Antidumping Measures Database.
Reprinted in Miranda, Torres, Ruiz (1998)

Appendix Va: Percentage of Affirmative Outcomes	
Affected Country	**% of Definitive Measures**
China	60.9%
Japan	**72.2%**
Korea	55.6%
Russia	**88.9%**
India	48.5%
Thailand	60.9%
Poland	**76.5%**
Chinese Taipai	55.0%
Ukraine	**71.4%**
Malaysia	60.0%
Yugoslavia	66.7%
Romania	**72.7%**
Indonesia	61.5%
Turkey	25.0%
Hungary	62.5%
Czech Republic	50.0%
Hong Kong	36.4%
Bulgaria	100.0%
Belarus	60.0%
Croatia	50.0%
Lithuania	37.5%
Slovak republic	14.3%
Macedonia	0.0%
Slovenia	0.0%
USSR	0.0%

Source: Author's own calculations

Appendix Vb: India Investigations and Definitive Measures -Reporting Country vs. Affected Country				
Affected Country	**India - Investi-gations**	**Share per country %**	**India - Defini-tive Measures**	**Share per country**
China	52	20.1%	35	23.3%
EC	42	16.2%	25	16.7%
Korea	19	7.3%	13	8.7%
Japan	19	7.3%	13	8.7%
Chinese Taipai	15	5.8%	10	6.7%
US	14	5.4%	9	6.0%
Russia	11	4.2%	5	3.3%
Thailand	11	4.2%	2	1.3%
Singapore	10	3.9%	3	2.0%
Indonesia	8	3.1%	2	1.3%
Ukraine	6	2.3%	3	2.0%
Hong Kong	5	1.9%	2	1.3%
Iran	5	1.9%	3	2.0%
Brazil	4	1.5%	2	1.3%
Malaysia	4	1.5%	2	1.3%
Czech Republic	4	1.5%	2	1.3%
Turkey	3	1.2%	2	1.3%
Saudi	3	1.2%	2	1.3%
UAE	3	1.2%	2	1.3%
Kazakstan	2	0.8%	1	0.7%
Canada	2	0.8%	0	0.0%
Mexico	2	0.8%	1	0.7%
Austria	2	0.8%	2	1.3%
Romania	2	0.8%	2	1.3%
Hungary	2	0.8%	1	0.7%
Poland	2	0.8%	2	1.3%
Argentina	1	0.4%	0	0.0%
Finland	1	0.4%	1	0.7%
Bangldesh	1	0.4%	1	0.7%
Macedonia	1	0.4%	1	0.7%
RSA	1	0.4%	1	0.7%
Bulgaria	1	0.4%	0	0.0%
Nepal	1	0.4%	0	0.0%
Total	259		150	

Source: WTO Secretariat,
Rules Division Antidumping Measures Database.
Reprinted in Miranda, Torres, Ruiz (1998)

Appendix Vb: Percentage of Affirmative Outcomes	
Affected Country	**% of Definitive Measures**
China	67.3%
EC	59.5%
Korea	68.4%
Japan	68.4%
Chinese Taipai	66.7%
US	64.3%
Russia	45.5%
Thailand	18.2%
Singapore	30.0%
Indonesia	25.0%
Ukraine	50.0%
Hong Kong	40.0%
Iran	60.0%
Brazil	50.0%
Malaysia	50.0%
Czech Republic	50.0%
Turkey	66.7%
Saudi	66.7%
UAE	66.7%
Kazakstan	50.0%
Canada	0.0%
Mexico	50.0%
Austria	100.0%
Romania	100.0%
Hungary	50.0%
Poland	100.0%
Argentina	0.0%
Finland	100.0%
Bangldesh	100.0%
Macedonia	100.0%
RSA	100.0%
Bulgaria	0.0%
Nepal	0.0%

Source: Author’s own calculations

Chapter 5

The Coming Death of the ATC and China's WTO Accession:Will Push Come to Shove for Indian T&C Exports?

by

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The authors would like to express their appreciation to Will Martin and Alan Winters for their very worthwhile comments on an earlier version. Any remaining errors or inconsistencies are inevitable, as nobody is perfect.

Introduction

Much work has been done since the Uruguay Round was finalised in April 1994, on the implications of the agreed-upon phase-out of the quotas on exports of textile and clothing (T&C) products from developing countries to industrialised countries. Within the framework of the Agreement on Textiles and Clothing (ATC), it had been stipulated that all such quotas on T&C products would have to be eliminated by 01/01/2005. In more recent studies in this context, the impact of China's WTO accession has been incorporated. While there does not seem to be a consensus opinion on what the impact of the elimination of T&C quotas within ATC might imply, there seems to be a growing concern that the impact of China's accession to the WTO will have a massive impact on global T&C exports.

In the case of the phasing out of quotas, there are those, who expect the final tranche of 49 percent of T&C trade to be liberalised as of 01/01/05 to go over without a major hitch[1], while others are more skeptical, noting that back-loading of the actual elimination of quotas to the final tranche (a recent WTO report by the textiles committee notes that merely 15 percent of the quotas have been eliminated) embodies the danger of attempts to possibly postpone their elimination. This danger seems all the more real in the light of worsening overall economic conditions and of an increasing number of participants, who seem to be lobbying for a continuation of quotas for one reason or another.

As concerns the additional impact of China's accession to the WTO, there would seem to be little reason to doubt that the implied massive shift of resources, caused by the elimination of ATC quotas and the liberalisation of tariffs will occur. But can this really be considered a threat to those exporting and importing countries worried about the uncertain future? And in the context of this paper, should India truly be worried about China's accession to the WTO and the elimination of quotas by 2005? And if it is worried, what are the issues and what must be done to improve India's competitive position. On the other hand, perhaps India should consider it a one-off opportunity instead.

The paper will address the relevant issues in this context. It begins (Section 1) by generally describing the computable general equilibrium (CGE) model used. It then specifically portrays the aspects of the model used here (GTAP5), which incorporates the essentials of the ATC liberalisation process and China's accession to the WTO and covers 25 countries/regions and 23 specific sectors. The results of the model runs are then portrayed (Section 2) and analysed particularly with respect to their importance for India.

Building upon the results of this model the study then shifts to look at evidence of what has been happening and whether such evidence fits into the conclusions drawn from the model (Section 3). Initially, this involves an examination of shifts in trade-flows, where known policy parameters have been changed. Specifically: what has happened when certain products under quota are suddenly liberalised? And why has this happened? But even more important is the basic question about those factors, which fundamentally attract the demand for products from a given country, be it via investment decisions or via merely sourcing from the country. In other words, the question is asked about the underlying reasons for some countries being better able to benefit from such changes in trade policies.

Specifically, the core of the study focuses on those possible barriers to export success, which might actually be keeping foreign businesses or buyers out of some countries, or rather shifting demand to other countries, which reveal a much more conducive investment/sourcing environment. In this context, it is crucial to realise that throughout South and in particular Southeast Asia, T&C products are heavily sourced through Hong Kong-based companies. Although the T&C industry in Hong Kong is domestically of relatively small importance, the global impact of Hong Kong's T& C industry is quite extensive. That is, it plays a unique role in producing and sourcing globally from an open and relatively undistorted economy.

By drawing on inputs at world market prices or producing elsewhere when new locational advantages (be they due to changes in economic policies or the availability of T&C export quotas to industrialised countries) were perceived as being spawned, Hong Kong's T&C industry has developed large human capital and service sector capacities. They, thus, have an overview of where it is most opportune to invest and fully realise the factors, which influence their decision to invest or purchase products from such countries. This section, thus, attempts to determine the overall importance of key factors influencing investment/sourcing decisions by relying on the evidence gained from interviews with major textile/clothing companies and large trading houses in Hong Kong.

Drawing on this evidence the study then turns to the Indian economy (Section 4) to try to determine what could be done in order to make India more competitive, either as a sourcing or a production location. All this then feeds into the conclusions (Section 5), where the key question is answered as to how India might be able to succeed in becoming more successful as an export location in light of what is viewed by many as the Chinese threat. After all, roughly 50 years ago some economists perceived India to be almost on equal footing with China…can India get it's economic show on the road?

Perhaps it should be added that, in the light of the attention drawn to the success of IT industries in India and other countries, it might seem like dealing with the dying remnants of the old economy. However, it should not be forgotten that this sector still commands almost 25 percent of China's (PRC) merchandise exports, roughly 30 percent of India's and about 80 percent of Bangladesh's. And needless to say, if there ever was an industry, which widely contributed to economic growth in many Asian economies, then it was the textile and clothing industry (TCI). As can be seen in Overview I, exports of these products from India have been growing faster than those from most other countries in Asia, and for that matter, from the top 25 exporters in the world (see also Table 1).

To summarise: This study starts by showing what the impact of China's WTO accession on global trade patterns and on India might be. It then examines–based on surveys of T&C manufacturers and trading houses–what is necessary as concerns changing the set of economic and political parameters in a given country in order to create a business environment conducive for increasing the demand for a country's products. It then draws on this to examine India's competitive position and notes what needs to be done to improve India's global competitiveness in the T&C industry.

1. Modeling the Likely Impact of Greater China Accession to the WTO

1.1 Introduction

We next turn to a description of our modeling assessment of the likely impact of the accession of Greater China to the WTO and its implications for India, particularly with respect to the textile and clothing sector. In simple terms, this means that we will examine the changes that will occur with respect to output, foreign trade and income when China's (PRC) as well as Chinese Taipei's membership of WTO becomes fully operative. The "computable general equilibrium" (or CGE) model we use allows assessment of the economic impact of Overview I—Textile[a]/Clothing[b] Exports of Asian Countries 1973–2001 (Shares[c]/Ranking[d]/Growth Rates[e])

regional, multilateral and global trade agreements. It, likewise, permits the assessment of liberalisation across broad sectors of individual economies, including interactions between sectors that may result. The estimated effects from the CGE model at the national level, of course, reflect the interactions with neighboring economies as well as with economies/regions in other parts of the world.[2]

1.2 Some Background

The GTAP5 model we use (GTAP = Global Trade Analysis Project) belongs to a family of economic models characterised by an input-output structure (based on regional and national input-output tables) that explicitly links industries in a value added chain from primary goods, over continuously higher stages of intermediate processing, to the final assembling of goods and services for consumption. Linkages between sectors are both direct (like the input of textiles in the production of automobiles) and indirect (like the use of mining inputs into steel, which feeds into machines, which weaves the textiles). The model captures these linkages by modeling firms' use of factors and intermediate inputs when producing goods and services.

The most important aspects of the model can be summarised as follows:

i. it covers all world trade and production;
ii. it includes intermediate linkages between sectors; and
iii. it allows for trade to affect capital stocks through investment effects, hence we model medium to long-run investment effects.

In the last two decades, the use of CGE models to estimate the impact of trade liberalisation has moved from academic settings to those institutions (like the World Bank, IMF, OECD and the WTO), dealing specifically with trade policies (see the discussions by Francois, 2000; Francois *et al*, 1996; and Francois and Shiells, 1994). While the results of these exercises are hampered both by the assumptions and the quality of the data

Overview I—Textile[a]/Clothing[b] Exports of Asian Countries 1973–2001 (Shares[c]/Ranking[d]/Growth Rates[e])

	Exports in percent of world				Growth rates[f]			
	1973	1990	1994	2001	1973-90	1990-94	1994-2001	1990-2001
				Textiles and Clothing				
China	2.98 (12)	7.91 (3)	13.13 (1)	15.64 (1)	**18.15**	**20.46**	**6.01**	**11.05**
Korea	3.56 (11)	6.54 (4)	6.04 (4)	4.46 (5)	**15.61**	4.03	-0.99	0.81
Taiwan	3.81 (10)	4.74 (7)	5.06 (5)	3.62 (6)	**12.99**	**7.89**	-1.43	1.86
India	2.38 (13)	2.21 (15)	2.78 (11)	3.45 (8)	11.07	**12.45**	**6.61**	**8.70**
Hong Kong	5.51 (7)	5.36 (5)	4.21 (7)	3.02 (11)	11.37	-0.08	-1.42	-0.94
Indonesia	0.01 (51)	1.35 (20)	2.11 (15)	2.26 (14)	**45.66**	**18.56**	**4.44**	**9.37**
Pakistan	1.38 (17)	1.72 (17)	2.06 (16)	1.95 (15)	**13.00**	**10.91**	2.61	**5.55**
Japan	8.40 (3)	3.01 (11)	2.72 (12)	1.95 (16)	5.02	3.46	-1.43	0.32
Bangladesh	0.00 (60)	0.42 (36)	0.67 (29)	1.66 (17)	–	**19.57**	**17.63**	**18.33**
Thailand	0.37 (32)	1.75 (16)	2.27 (14)	1.60 (18)	**22.29**	**13.23**	-1.69	3.49
Malaysia	0.13 (39)	0.78 (24)	1.07 (20)	0.91 (23)	**23.74**	**15.02**	1.07	**5.94**
Philippines	0.11 (41)	0.87 (23)	0.89 (24)	0.77 (29)	**26.25**	**6.56**	1.34	3.21
Sri Lanka	0.02 (50)	0.31 (41)	0.59 (32)	0.76 (31)	**32.83**	**24.77**	**7.12**	**13.23**
Vietnam	–	0.07 (56)	0.20 (52)	0.58 (35)	–	**54.20**	**20.04**	**29.40**
Macau	0.22 (34)	0.58 (27)	0.50 (34)	0.57 (36)	**18.01**	2.25	**5.18**	4.10
Singapore	0.62 (28)	0.53 (29)	0.34 (41)	0.19 (50)	10.61	-5.01	-5.00	-5.00
Total[g]	29.50	38.09	44.67	43.37	**13.24**	**10.43**	2.97	**5.62**
World[h]	**33.27**	**213.41**	**270.65**	**342.01**	**11.55**	**6.12**	**3.40**	**4.38**
				Textiles (65)				
China	3.41 (9)	6.87 (3)	9.07 (2)	11.45 (1)	**14.21**	**13.11**	**5.18**	**8.00**
Korea	1.97 (16)	5.78 (6)	8.21 (4)	7.44 (4)	**16.77**	**15.18**	0.33	**5.49**
Taiwan	2.53 (12)	5.83 (5)	7.88 (5)	6.75 (6)	**15.11**	**13.75**	-0.48	**4.47**
Japan	10.96 (2)	5.58 (8)	5.21 (7)	4.21 (9)	5.33	3.72	-1.30	0.50
India	3.12 (10)	2.08 (14)	2.94 (12)	3.89 (10)	7.00	**15.12**	**5.88**	**9.15**
Pakistan	2.00 (15)	2.54 (12)	3.06 (11)	3.08 (11)	**11.12**	10.60	1.83	**4.94**
Indonesia	0.02 (48)	1.18 (20)	1.92 (14)	2.18 (14)	**40.23**	**19.11**	**3.61**	**9.00**
Thailand	0.40 (29)	0.88 (21)	1.26 (20)	1.28 (19)	**14.87**	**15.42**	**1.97**	**6.67**
Malaysia	0.11 (40)	0.33 (31)	0.64 (25)	0.72 (24)	**17.08**	**24.76**	**3.48**	**10.76**
Hong Kong	2.03 (13)	2.07 (15)	1.49 (18)	0.72 (25)	**9.70**	-2.70	-8.42	-6.38
Bangladesh	0.00 (60)	0.29 (32)	0.28 (35)	0.38 (31)	–	4.38	**6.38**	**5.64**
Macau	0.02 (47)	0.13 (44)	0.12 (48)	0.19 (42)	**22.22**	3.98	**8.31**	**6.72**
Vietnam	–	0.05 (51)	0.06 (58)	0.19 (43)	–	**58.88**	**21.24**	**31.46**
Philippines	0.11 (39)	0.13 (47)	0.17 (43)	0.17 (45)	**10.52**	**13.62**	**2.13**	**6.17**
Singapore	0.36 (30)	0.13 (43)	0.19 (42)	0.17 (46)	3.33	**15.16**	0.17	**5.38**
Sri Lanka	0.01 (49)	0.02 (53)	0.10 (55)	0.14 (50)	**13.38**	**51.87**	**6.26**	**21.00**
Total[g]	27.06	33.84	42.60	42.95	**11.05**	**11.77**	**1.86**	**5.36**
World[h]	**22.12**	**105.04**	**130.24**	**146.98**	**9.60**	**5.52**	**1.74**	**3.10**
				Clothing (84)				
China	2.12 (13)	8.92 (2)	16.90 (1)	18.79 (1)	**24.40**	**25.18**	**6.41**	**12.88**
Hong Kong	12.41 (1)	8.55 (3)	6.74 (3)	4.75 (3)	11.84	0.50	-0.30	-0.01
India	0.90 (25)	2.33 (13)	2.64 (11)	3.12 (8)	**20.88**	**9.98**	**7.34**	**8.29**
Bangladesh	–	0.54 (33)	1.04 (26)	2.62 (10)	–	**25.62**	**19.64**	**21.78**
Indonesia	0.01 (51)	1.52 (18)	2.28 (14)	2.32 (11)	**55.90**	**18.14**	**5.07**	**9.64**
Korea	6.72 (5)	7.27 (5)	4.03 (5)	2.21 (13)	**14.84**	-7.97	-3.81	-5.34
Thailand	0.31 (32)	2.60 (11)	3.21 (9)	1.83 (14)	**29.57**	**12.47**	-3.26	2.19
Taiwan	6.35 (6)	3.68 (7)	2.45 (12)	1.27 (21)	10.70	-3.59	-4.60	-4.23
Sri Lanka	0.02 (47)	0.59 (29)	1.05 (25)	1.23 (22)	**39.02**	**23.29**	**7.20**	**12.79**

../..

Philippines	0.10 (40)	1.60 (16)	1.56 (16)	1.22 (23)	**34.41**	5.97	1.25	2.94
Pakistan	0.15 (39)	0.94 (23)	1.12 (23)	1.10 (26)	**27.20**	**11.69**	4.42	**7.01**
Malaysia	0.19 (35)	1.21 (19)	1.47 (18)	1.06 (27)	**27.60**	**12.02**	0.00	4.22
Vietnam	–	0.12 (49)	0.34 (45)	0.87 (31)	–	**53.50**	**19.85**	**29.09**
Macau	0.63 (29)	1.03 (22)	0.86 (27)	0.85 (32)	**17.63**	2.03	4.72	3.73
Japan	3.31 (10)	0.52 (34)	0.41 (42)	0.24 (46)	2.55	0.70	-3.04	-1.70
Singapore	1.11 (22)	0.92 (24)	0.48 (37)	0.20 (47)	13.03	-9.18	-7.41	-8.06
Total[g]	34.33	42.21	46.58	43.69	**15.71**	**9.35**	3.85	**5.82**
World[h]	**11.15**	**108.37**	**140.41**	**195.03**	**14.31**	**6.69**	**4.81**	**5.49**

[a]SITC 65, Rev. 2. – [b]SITC 84, Rev. 2. – [c]Share of world trade. – [d]Ranking based on values in 2001; covering most Asian textile and clothing exporting countries; ranking in given year in ( ) refers to ranking in world. – [e]Average annual growth rate. – [f]**Bold typed numbers** designate an above world average growth rate . – [g]Sum of shares of listed countries. – [h]In bill. US$.

Source:Own calculations, based on UNCTAD tabulations and WTO annual reports.

available, their relevance in estimating the possible overall pattern of impact–*i.e.*, both of direct and indirect nature–has proved to be helpful in policy formulation and the assessment of existing economic policies. For instance, what could India do to improve its competitive position with respect to trade issues.

1.3 The Data Used in the Model

The data come from a number of sources. Data on production and trade are based on national accounting data linked through trade flows and drawn directly from the Global Trade Analysis Project (GTAP) version 5 dataset. (GTAP, 2001; see Reinert and Roland-Holst, 1997, for a discussion of the organisation of such data for CGE models). The GTAP version 5 dataset is benchmarked to 1997, and includes detailed national input-output, trade, and final demand structures. Significant modifications have been made to the basic GTAP database. The basic social accounting and trade data are supplemented with trade policy data, including additional data on tariffs and non-tariff barriers. We have updated the dataset to better reflect actual import protection for goods and services (the basic GTAP database includes no information at all on trade barriers for services).

Basic data on current tariff rates come from the UNCTAD and WTO data on applied and bound tariff rates and from the WTO protocols of accession for China (PRC) and Chinese Taipei. They are supplemented with data from USTR and USITC on regional preference schemes in the Western Hemisphere. For agriculture, protection is based on OECD and USDA estimates of agricultural protection, as integrated into the GTAP core database. Tariff and non-tariff barrier estimates are further adjusted to reflect remaining Uruguay Round commitments, including the phase-out of remaining textile and clothing quotas under the Agreement on Textiles and Clothing (the ATC). Data on post-Uruguay Round tariffs are taken from recent estimates reported by Francois and Strutt (1999). These are taken primarily from the WTO's integrated database, with supplemental information from the World Bank's recent assessment of detailed pre- and post-Uruguay Round tariff schedules. All of this tariff information has been concorded to our model sectors.

While the basic GTAP dataset is benchmarked to 1997, and reflects applied tariffs actually in place in 1997, in this study we of course want to work with a representation of a post-

Uruguay Round world, that is before China (PRC) and Chinese Taipei have entered it. To accomplish this we have done the following:

- Before conducting any policy experiments whatsoever, we first run a "pre-experiment" in which we implement the remaining Uruguay Round **tariff cuts** across all countries except China (PRC) and Chinese Taipei. For the most part these cuts are already in place in the 1997 benchmark dataset.

The dataset we work with for the actual experiments is therefore a representation of a notional world economy (with values in 1997 dollars), wherein we have full Uruguay Round tariff cut implementation. We then structure the analysis as follows:

- We examine the elimination of **non-tariff barriers** incorporated within the ATC phase-out.
- Then the Greater China accession with reference to the above-mentioned post-UR tariff benchmark and the services liberalisation is carried out.

The national accounts data have been organised to 23 sectors and 25 regions (see Overview II.1). Note that we have included some detail on the value added chain linking fibers into textiles and clothing production, to better capture the initial impact of the ATC on our base scenario.

1.4 A Brief Overview of the Analytical Structure

On the model's production side, in all sectors, firms employ domestic production factors (capital, labor and land) and intermediate inputs from domestic and foreign sources to produce outputs in the most cost-efficient way that technology allows. In these sectors, products from different regions are assumed to be imperfect substitutes in accordance with the so-called "Armington" assumption. This product differentiation by country/region of origin and destination is a very important feature of the model. Domestic demand in each region is made up of goods that are differentiated by country/region of origin (i.e., there are domestic goods and imports from trading partners). These goods are aggregated into a single consumption good for intermediate and final use with a constant elasticity of substitution as suggested by Armington.

Basically this assumption allows the demand for generically similar products (e.g., red wine) to be differentiated by source (e.g., France vs. Thailand)[3]. Domestic production in each economy/region is allocated among differentiated destinations (i.e., domestic markets and exports to trading partners). This specification also allows for substitution among destinations in response to changes in the relative prices they will pay, which, in turn, respond to factors like commercial policy and exchange rate changes.

The prices of goods and factors adjust until all markets are simultaneously in (general) equilibrium. This means that we solve for equilibria in which all markets clear. While we model changes in gross trade flows, we do not model changes in net international capital flows. Of course, this does not by any means preclude changes in the level of gross capital flows.

Another important feature of the model involves a dynamic link, whereby the static or direct income effects of trade liberalisation induce shifts in the regional pattern of savings and investment. These effects have been explored extensively in the trade literature, including Baldwin and Francois (1999), Smith (1976, 1977), and Srinivasan and Bhagwati (1980). Several studies of the Uruguay Round have also incorporated variations on this mechanism. Such effects compound initial output effects over the medium-run, and can magnify income gains or losses. How much these "accumulation effects" will supplement static effects depends on a number of factors, including the marginal product of capital and underlying savings behavior. In the present application, we work with a classical savings-investment mechanism. This means we model medium- to long-run linkages between changes in income, savings, and investment. The results reported here, therefore, include changes in the capital stock, and the medium- to long-run implications of such changes.

Overview II.1— Regions/Economies and Sectors

Model Regions/Economies

Economies	*Description*
Hong Kong	Hong Kong
China (PRC)	**People's Republic of China**
Chinese Taipei	Chinese Taipei
Japan	Japan
Korea	Korea
ASEAN5	ASEAN5 member states[a]
Vietnam	Vietnam
India	**India**
Bangladesh	Bangladesh
Other South Asia	Other South Asian economies[b]
Australia	Australia
New Zealand	New Zealand
Canada	Canada
United States	United States of America
Mexico	Mexico
Brazil	Brazil
MERCOSUR, other	MERCOSUR[c]
CBI	Caribbean Basin Initiative economies[d]
ATP	Andean Trade Pact economies[d]
Chile	Chile[d]
OtherLatAm	Other Latin America[d]
European Union(15)	European Union, 15 economies.
Turkey	Turkey
Africa, MidEast	Africa and the Middle East
Rest of world	Rest of World

Model Sectors

Sectors	*Description*
Wool	Wool
Other natural fibers	Natural fibres (cotton etc.)
Primary food	Primary food production
Other prim. prod.	Other primary production
Sugar	Sugar
Processed food	Processed food, tobacco, and beverages
Textiles	Textiles
Clothing	Wearing apparel
Leather goods	Leather products
Chem/rubber/refine	Chemicals, refinery prods, rubber, plastics
Primary steel	Steel refinery products
Primary NF-metals	Non-ferrous metal products
M. vehicles, parts	Motor vehicles and parts
Electronics	Electronic machinery and equipment
Other mach/equip	Other machinery and equipment
Other manufacturer	Other manufactured goods
W-sale/ret. Trade	Wholesale and retail trade services
Transport services	Transportation services (land, water, air)
Communications	Communications services
Construction	Construction
Fin/ins/r. estate	Finance, insurance, and real estate services
Comm. Services	Other commercial services
Other services	Other services (public, health, etc.)

[a]ASEAN5 includes Philippines, Thailand, Indonesia, Singapore, and Malaysia. – [b]Pakistan, Sri Lanka, Nepal. –
[c]MERCUSOR includes Argentina, Paraguay, Uruguay. Brazil is represented separately. – [d]Not treated in tables and diagrams.

1.5 The Policy Experiments

We turn now to a description of the actual policy experiments. The experiments are outlined in Overview II.2. Of particular importance in this study is our attempt to move the structure of the model as close as possible to reality in the real world. Hence, within the scenario "Implementation of China's (PRC) WTO accession package" is a step called "cost savings in textiles and clothing." This was designed by Francois and Spinanger (2002) to do justice to the overwhelming opinion of CEOs or similarly-positioned executives in some 14 major companies interviewed in Hong Kong (in 01/2000) that, when China (PRC) is finally a full member of the WTO and quotas and other non-tariff barrier constraints on T&C products have been removed, they will shift production to China. Since Hong Kong entrepreneurs, who operate around the world, expressed such views, it seemed logical to attempt to portray this as a measure, which would impact on the relative competitive position of firms manufacturing in China.

Overview II.2 — Experiment Definitions

1 ATC quota phase-out for all 1997 WTO Members
2 ATC quota phase-out for Mainland of China (PRC)
3 ATC quota phase-out for Chinese Taipei
5 Implementation of China's (PRC) WTO accession package
  industrial tariff reductions
  agricultural liberalisation
  liberalisation of cross-border services trade
  cost savings in textiles and clothing
6 Implementation of Chinese Taipei's WTO accession package
  industrial tariff reductions
  agricultural liberalisation
  liberalisation of cross-border services trade
8 Full accession (sum of 1+2+3+5+6)

In particular, those executives interviewed were of the opinion that conditions for doing business in China (PRC) would be improved by joining the WTO beyond the changes in relative prices due to tariff reductions and market access improvements stipulated in the protocol of accession. This involves not only changes in external conditions, but also improvement in the conditions for doing business in China (PRC). This includes the rules and administrative treatment of firms doing business, the underlying infrastructure, and related factors that impact on the general business climate. Basically, the second survey of the same set of companies and CEOs, carried out in connection with this study in 2003, confirmed or even strengthened these points.

To reflect these changing conditions, a scenario was introduced with the assumption, which captured an emergent 10 percent cost advantage for firms doing business in China (PRC)[4]. What this does in the context of the model is to simply divert the demand for products away from other countries like India to China (PRC). Globally, to the extent the CEOs of firms interviewed are correct (and there is little reason to doubt them), an additional shift in production toward China was expected. Those companies that take advantage of these opportunities are presumed to be strategically better off and those, that do not, will lose market shares.

It should be noted that–despite the normal assumptions in the model that exporters pocket quota rents–we do not really know whether quota rents accrue to the exporters or the importers. That quota rents might be shifting to importers in industrialised economies could well be possible in this era of Walmarts and Karstadts. While a special calculation to this extent was not attempted, such an assumption would increase the welfare effects of liberalisation in those economies, *e.g.*, Hong Kong, China (PRC), which now "profit" from the ability to pocket quota rents.

1.6 Some Limitations of the Model

Since this exercise is based on an economic model, it is useful–as with all models–to keep the limitations of the exercise in mind. First, the model cannot forecast all future events. It is highly likely that unanticipated economic, political, and/or natural events will occur and will have important effects on some of the agents and activities identified in the model. (Consider the East Asian financial crisis, which was not included in Uruguay Round assessments, or the major earthquake in Taiwan, the 2001 terrorist attacks on the USA or the SARS illness in Asian economies.) In this regard, it helps to think of the model as saying "in a world like the one we currently observe and with the assumed structure, if policies were different, this world would then be different in the ways reported in the tables." This is not the same as saying we are forecasting with precision. Rather, in the absence of surprises (which will occur, of course, in the next decade), we are making estimates of likely economic effects.

Another limitation is the simplifications embodied in the model. When we model economic policy, we try to develop a reasonable, though stylised representation of complex policy, demand, and production relationships. The trade-off is between keeping the model workable, and keeping it realistic enough to actually be useful. This having been said, we should emphasise that this class of models does actually do well in identifying resource, production, and trade shifts. For example, Kehoe (1996) provides a comparison of CGE model-based estimates of the impact of EU Membership on Spain with actual experience. The CGE model performed quite well and identified effects not anticipated at the time.

2. The Effects of a WTO Accession

2.1 Introduction

In the following sections, the reader needs to be aware of the time-frame covered when we examine the results of the China's (PRC) and Chinese Taipei's accession to the WTO as produced by the model described in Section I. By definition, we are modeling equilibrium conditions in multiple markets. This means that we are modeling the way markets are expected to look *after* firms that have adjusted their behavior to reflect changes in market conditions. This adjustment is a complex process, involving the shifting of resources between sectors through hiring and firing of labour, installation of new plant and equipment, and decisions not to replace old plant and equipment as it depreciates. It also involves the shifts in consumer demand that follow from changing incomes and from changing relative prices.

Obviously, all this does not happen overnight. Rather, this process, as reflected in the model, can be expected to take up to seven years, depending on the type of policy shock, but depending also on the industry involved (*e.g.* for clothing industry much shorter). We are not modeling a seven-year adjustment path (*i.e.*, what happens each month, quarter, or year), but rather we are looking at what happens once the adjustments have taken place and the market has settled down to reflect the new expenditure and production patterns that have emerged.

The scenarios are specifically broken down step-by-step in the table headings. The calculations are shown in the following sequence:

- First, the results are examined for the changes estimated by the model for specific macroeconomic variables (*i.e.*, gross domestic product and exports) across all regions/ economies used in the model (Tables 2 and 3).
- Second, the impact of the WTO accessions for the exports of the textile and clothing industries (Tables 4 and 5) are examined across all countries.

2.2 The Macroeconomic Effects of Accession

Gross Domestic Product (GDP)[5] : We next turn to estimates of the macroeconomic effects of accession. Beginning with **the elimination of ATC quotas only for old WTO members** and focusing on percent changes in GDP (Table 2, column 1), it is in particular the Southeast Asian and other South Asian countries, especially India (+2.1 percent), which profit from the improved access. Obviously, China and Chinese Taipei lose out, since this step still maintains quotas on their T&C exports. Even larger losses are shown for economies, which enjoyed preferential access to the markets of the EU15 and North America, namely Bangladesh and Mexico.

When **the ATC is then applied to the PRC + Chinese Taipei** and they, therefore, no longer face quotas, these losses then double. In the case of Bangladesh, they amount to –0.54 and in the case of Mexico to over -2 percent; India also loses one-third of its initial gain and–after Mexico–registers the largest absolute decrease (-0.7 percent).

Of course, when all the ramifications of **the entire WTO accession package** (liberalisations to Chinese imports and exports) are taken into consideration, the bottomline for China (PRC) is a massive 5.8 percent increase in GDP. While India does lose in the final round again (-0.45 percent), thereby more than halving the initial gains it made, it still profits more than any other country/region in the model after China (col. 8).

If there is an overall message to be drawn from these initial results it is that China's (PRC) WTO accession will be for the benefit of nearly all regions/economies. In many cases, the pattern, which evolves after the liberalisation of ATC quotas for Greater China (column 4) is not significantly changed by the liberalisation of tariffs and improved access to the service sectors that follows. There are notable differences, however, as in the case of Bangladesh, which loses across the ATC liberalisation scenarios, regains about 75 percent of these losses during Greater China's tariff and service sector liberalisation scenarios.

Of all the countries losing as a result of China's WTO accession, it is Mexico, which was most negatively affected, by 2.8 percent. The reasons are simple: as a member of the North American Free Trade Agreement (NAFTA), Mexico profited strongly from quota-free access to the US and Canadian markets in the area of textiles and clothing. On top of that, it enjoyed tariff preferences and special market access arrangements in other product and service sector areas as well. Hence, to the extent that these preferences are removed (as in the case of quotas) or reduced (as in the case of tariffs), the advantages for Mexico decreased and accordingly negated the positive effects of liberalisation. In terms of numbers: on top of an initial loss of –1.07 percent due to the elimination ATC quotas by all WTO members, an additional loss of –0.99 percent can be attributed to China (PRC), no longer being subjected to ATC quotas and –0.77 percent due to the tariff cuts and services' liberalisation.

Exports: Generally speaking, the results for exports (see Table 3) reflect the overall GDP results. Beginning with an examination of the **overall impact of the elimination of ATC quotas**, it is primarily only Hong Kong, Bangladesh and other parts of South Asia, which show significant differences from the GDP results. In all, three cases show the sign of the overall impact of the elimination of ATC quotas shifts from negative to positive. This phenomenon, which is seen largely in the case of the South Asian economies, can be attributed to relatively large decreases in the terms of trade.

The size of the impact of the elimination of ATC quotas on Greater China's exports is considerable in the case of China (PRC)—+5.87 percent—and very considerable in the case of India—+12.91 percent. That the other South Asian economies also exhibit the next highest export growth rates underlines the potential that stands to be tapped if these economies can maintain efficient economic policies. The reason for Mexico and Turkey being the two largest losers in this constellation is—as noted above—due to their loss of preferential treatment as concerns the elimination of quotas.

Turning to the **overall impact of Greater China's WTO accession on exports**, the pattern can be seen to be similar to GDP. The gains for China (PRC)—+23.08 percent—dominate even more than in the case of GDP. Despite the relatively large size of these results for Greater China, it is quite probable that in reality the growth rates could be larger. The reason for this must be seen in the nature of the model used, which calculates the impact of tariff rate changes and services sector liberalisation based on specific reaction parameters. However, in the case of Greater China, the trade ties between China (PRC) and Chinese Taipei have been constrained by non-tariff barriers, which have led to highly distorted trade flows between the two economies. While the GTAP model database does try to correct for such trade diversion via Hong Kong, it is quite probable the actual trade flows are higher. Furthermore, to the extent that Greater China does develop into an effective economic area with low internal trade barriers, agglomeration economies may be engendered, export growth rates accordingly accelerated and GDP expanded at an even faster rate.

Table 3 also reveals how sharply the South Asian economies lose as a result of China's (PRC) entering the WTO. As a matter of fact, all the gains made after quota liberalisation for Bangladesh and other South Asian economies are wiped out by the time the final tariff and liberalisation scenarios are carried out. While India suffers "only" a 50-percent drop in the increase in exports after the elimination of ATC quotas for WTO members, it does chalk-up the largest decrease as a result of the tariff reductions and services sector liberalisation by China (PRC).

But even if the promised liberalisation moves ahead, there is the problem of contingent protection under the standard GATT/WTO rules. Textile and clothing trade has been somewhat sheltered from standard safeguard measures and few measures regarding dumping of T&C items have been instituted. However, once the ATC cover is lifted, the US and EU may feel compelled to take new measures under safeguards or dumping and countervailing duty regimes. The rush of developing countries to implement anti-dumping regimes of their own, has greatly weakened their moral case against the use of such mechanisms in the OECD. As a matter of fact over the three years ending mid-2002, more ADMs were initiated than in any other period in the GATT/WTO history.

In turning to the elimination of ATC quotas and the liberalisation of tariffs, it should be noted that despite the hype about other sectors, this sector still drives large shares of numerous economies. T&C products still command 20 percent of China's goods exports, 30 percent of India's and about 85 percent in the case of Bangladesh. Needless to say, if there ever was an industry that put its stamp on the economic success of Hong Kong, then it was the textile and clothing industry (TCI).

The results of the model calculations can be summarised as follows (see Tables 4 and 5):[6]

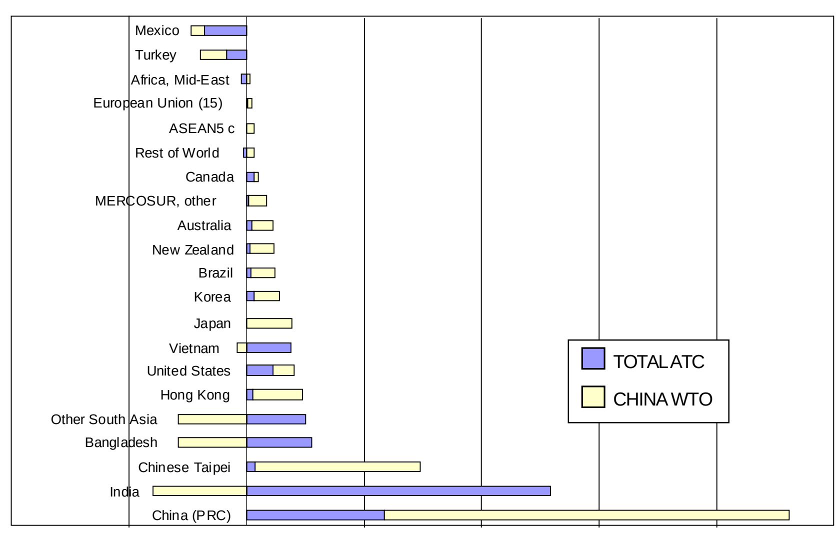
- Aside from the sizeable increases in textile exports registered by China (PRC) and Chinese Taipei, Japan and Bangladesh (and other South Asia) exhibit similar results. India like virtually all other economies experience losses, with the largest decrease shown by Mexico. In the latter case, the loss of preferential treatment because of the elimination of quotas severely affects Mexico and to a lesser degree Turkey.
- In the case of clothing exports, the massive shift to Chinese sources (+167.84 percent) is overshadowed by an even larger increase in India's exports (+217.51 percent).

India's increase – which is applied to a level of exports roughly one seventh the size of China's (PRC) – can be explained to some extent by the highly restrictive quotas, which prevailed on top of a large domestic industry which could begin to tap into the global potential. However, while India has often been viewed as having an export potential in numerous areas, its internal policies have usually been seen as keeping it from being successful. Among other economies, Vietnam shows that it too can profit from the ATC liberalisation.

To put the above changes into proper perspective: **just the increase in clothing exports estimated for China (PRC) would amount to over 25 percent of total world trade in clothing products in the base year**. Given such massive changes the question must be asked whether China (PRC) will be able to accommodate them. In this connection one must recall that numerous other industries in China (PRC) suffered relatively large decreases in output in the course of applying the WTO accession conditions. These highly inefficient industries will help provide the workforce for the newly operating textile and clothing companies. Nonetheless, it does seem to be worthwhile keeping in mind that a rush to the Middle Kingdom, for sure not a rush to the bottom, is something, which is expected to take place over a period of up to seven years. And in seven year's time, the necessary adjustments would seem to be manageable. The key question is: what must India do to try to ensure that it maintains a competitive position so as to tap the posited gains?

Diagram I helps to make it easier to understand where the major winners and losers are after the completion of the ATC. It clearly shows how much India could profit if other factors, not explicitly embodied in the model (*e.g.*, bureaucratic barriers, poor infrastructure, etc), don't get in the way of an efficient, easily accessible economy.

Diagram I: Percentage Impact of ATC Phase-out and China Accession on Total Exports



3. Some Initial Observations on Trends in T&C Trade

A glance at Diagram 1a and 1b shows that, since the existence of multilateral restraints on T&C exports in 1973 (*i.e.*, the Multifibre Arrangement - MFA), trade in clothing products has overtaken trade in textile products. Furthermore, whereas textile products have lost shares in world trade since the second-half of the 80s, the share of clothing products has remained roughly the same in this time period. The degree, to which the trade restrictions themselves were responsible for these shifts, has not been determined. However, it can be contended that currently the trend is toward just-in-time production, so the textile production is moving closer to where clothing products are manufactured. And this will, no doubt, tend to be a driving force in the coming years.

Turning to the structure of imports of specific countries and products, a clear picture can be developed from the imports of clothing products by key industrialised economies. Refer http://cuts.org/eintad.htm for detailed background diagrams. The story is actually quite straight forward: India's performance across almost all of these countries is at best sobering, whereas among the four South Asian countries Bangladesh performs the best, But, as can be seen from Diagram I, Bangladesh does not profit from the elimination of quotas and suffers like the rest from China's WTO accession.

But how do we know what will happen when quotas are eliminated? This can be very simply illustrated in the case of Sweden, which already eliminated quotas at the beginning of the 90's only to have to reinstate them again upon joining the EU in 1995. But before examining this in more depth, let us examine what else could be put forward to support the contention that quota elimination will massively and rather quickly cause T&C capacities in Europe to shrink.

The basic question is, what has the MFA quota system inflicted on the structure of T&C production and hence on the structure of T&C trade? Or rather, what will happen to the structure and direction of trade flows when all quotas on T&C products are finally lifted by 01/01/05? There are four important pieces of evidence, which point in the direction we may be heading:

1. First, there was the reaction to Canada's 1997/98 lifting of quotas on woven shirts, blouses, etc: sourcing was almost immediately shifted to China, out of countries like Bangladesh, South Korea, Thailand and Indonesia.
2. Secondly, there is the toy industry, which is just as labor intensive as the clothing industry, but basically unaffected by quotas. It is highly concentrated in China and Taiwan, with Hong Kong, acting as a service centre and source of human and physical capital inputs. These three economies account for close to 75 percent of the toys (SITC 894) exported by DCs and are already highly integrated. There are few other labor-intensive products, which reveal such a high concentration.

3. Most recently, the USA–in the course of its liberalisation of ATC products–had included brassieres (HS621210) as a product no longer subject to quantitative restraints. When China joined the WTO, it was then able to fully benefit from this liberalisation. As a result, it exhibited a very notable increase in its share of the market to become the largest single supplier within just a-year-and-a-half. Specifically, its share shot from roughly seven percent in early 2001 to over 20 percent by the end of 2002, much to the detriment of Mexico.
4. The USA, likewise liberalised suitcases and similar luggage of textile fabrics (HS420212), thereby allowing China to more than double its share to over 60 percent by the end of 2002–relegating Thailand to a far behind second.

So, will more and more T&C items be shifted to China as other quotas are eliminated, even beyond what might be expected based on relative prices? Are we going to experience a much higher concentration of the T&C industry in China, thus undoing developments in an industry which was footloose, one of the first to globalise and upon which many developing based their initial development and trade expansion efforts?

In the earlier quoted paper by Francois and Spinanger (2000), evidence was brought into the model, which stipulated that the change in the relative competitive position of China will be larger than the actual change in relative prices due to the WTO accession. This contention was based on evidence from interviews carried out in Hong Kong in January 2000.

The individuals interviewed were chief executives of 14 major textile/clothing companies and trading houses in Hong Kong. Virtually, all of them stated or implied that they would be shifting or massively shifting operations into China once they became a member of the WTO. In many cases, these were successful operations located throughout Southeast Asia, so it would be in particular these countries that would be most severely affected. Recent, but less extensive interviews carried out in Hong Kong this year allow the conclusion to be drawn that this additional impulse for exports from China has not been reduced, but rather has actually increased.

There are, of course, differences in the results between textiles and clothing exports, but these basically reflect the major differences in the factor intensities of production:
- the textile industry has long since become one of the more capital intensive manufacturing processes, particularly when producing for export markets; and
- the clothing industry has continued to remain very labour intensive, even if sewing machines have become more intelligent and production lines more automated.

But given that proximity between textile production and clothing manufacturing is becoming more important, the earlier constellation of primarily capital-intensive production in industrialised countries leading to exports to clothing manufacturers in developing countries has long since disappeared.

As far as the EU is concerned, the prevailing OPT legislation dates back to 1994 and has been instrumental in shaping the flow of the EU's T&C trade flows[7]. The impact of the OPT legislation as well as the existence of regional trade agreements within and around Europe would seem to be evident just reviewing what has happened in Italy. There can be no question of this as concerns the overall shifting of trade in the 90s away from Asian suppliers to those located on the European Rim (EURORIM), whereby the Eastern European countries (EURO-East) profited more than those on the Mediterranean Rim (EURO-Med).

Given the recent lifting of all non-tariff restraints in the area of T&C products from EURO-East (as of 1/1/99), such trends can be expected to continue and could well even be strengthened by Asian producers, who have been showing more interest in investing in EURO-East countries. Another factor, which will be positively influencing the EU importation of clothing products from these countries, is the possibility of now using textile inputs from Turkey for OPT production in EURO-East countries. This should particularly affect those countries more easily accessible from Turkey and whose interface with the EU market has been less intensive than those of Central European countries.

In examining individual country developments, the dominant role of Germany in tapping the EURORIM potential to the east is just as evident as France's stress on the EURO-med countries, Italy's sudden and rapid shift to the RIM-east or the UK's–albeit shrinking–preference for Asian countries. But perhaps most interesting are the above mentioned developments, which have been documented in Sweden (see Diagrams 2a-2c). After 1990 Sweden exhibited not only a sharp drop in imports from the EU Mediterranean countries, but also a noticeable rise in imports from Asian countries, in particular those in East Asia. What lies behind this is of prime importance in understanding how the elimination of quotas in the framework of the ATC as well as the influence of RTAs might impact on T&C trade flows.

Sweden, as a member of the EFTA, was able to preferentially access EU countries and thus through 1990 sourced an increasing amount of clothing products in Greece, Portugal and Spain (see particularly Diagram 2c).

Accordingly, the share of these three countries in Sweden's clothing imports rose rapidly over the course of the 80s, so that by the end of the decade it was over 100 percent higher than at the beginning[8]. The dramatic shift after 1990 was primarily induced by a decision of the Swedish Government in 1991 to eliminate all non-tariff barriers on imports of T&C products. The more than 50 percent drop in the share of imports stemming from Greece, Portugal and Spain was accomplished within less than half-the-time that these countries needed in the 80's to double their share.

The extremely rapid shift to imports from East Asian (E-Asian) countries (primarily China) after 1990 upped their share by 30 percent within just three years to the 50 percent level they had held some 10 years prior. This surge was brought to a quick stop when Sweden joined the EU in 1995 and since then the E-Asian countries reveal a relative decline similar to the trend prior to 1991.

As in the case of other EU countries, Sweden also began to source more clothes in Euro-East after 1990. And this trend was not interrupted by Sweden's EU membership in 1995, but rather continued to increase as OPT operations were very rapidly expanded. This can easily be seen in the diagram of Swedish textile exports where Euro-East had captured almost 70 percent of the market by 1999–an increase of some 200 percent as against the market share just 10 years back. At the same time, as Sweden joined the EU, the share of clothing imports from Euro-Med countries also began to increase noticeably, so much so that clothing imports from EURORIM countries now account for over 25 percent of the total clothing imports— a similar increase of some 200 percent from eight years earlier.

The evidence presented above on the massive shift out of preferential imports (in this case from Greece, Portugal and Spain) to more efficient cloth-producing countries (basically China) when quotas were unilaterally removed, can be backed up by somewhat similar evidence elsewhere, namely by the impact of measures effected by Canada in 1997/98, after it had unilaterally removed quotas on several clothing articles, *i.e.* on shirts, blouses, etc. Examining the trends in Canada's importation of men's and boys' woven shirts[9], it can be shown that while the value of imports from the four major non-OECD suppliers in 1996–1997 (*i.e.* India, Hong Kong, South Korea and Bangladesh) had **decreased by 20 percent** through 1999–2000, the value of imports from China had **increased by over 200** percent. To put it another way: while Canadian imports from China originally amounted to about 32 percent from the other four countries in 1996–1997, they amounted to 125 percent in 1999-2000[10]. Similar trends can be determined for other suppliers like Indonesia, Thailand and Vietnam, who matched imports from China in 1996-1997, but were less than 25 percent of imports from China in 1999–2000[11]. The above examples from the USA, EU and Canada would seem to be conveying a rather clear message: the quota system established under the MFA and now being eliminated by the ATC has generated a structure of exporting countries, which has less to do with comparative advantage than with market sharing, based on the availability of quotas. And if the above shifts in trends are indeed indicative of developments, which will be forthcoming under a MFN regime without quotas as of 1/1/05, then major lower cost suppliers today will be losing out to countries like China.

But what are the essential steps for countries like India and Bangladesh to take in order to ensure that they do not miss the boat when the "deck of major exporters" is shuffled and quotas no longer are a factor in determining where buyers purchase T&C products and/or where investors establish production facilities? To find this out two surveys were carried out among 14 major T&C producers/traders in Hong Kong in January 2000, and February/March 2003. The companies had activities in Hong Kong, China, throughout Asia and around the world. Some of them were major players, others were medium-size businesses. In all cases, the individuals had senior positions in their firms, most were owners, CEOs or managing directors. **In all but cases one were the individuals contacted in 2003 the same as those in 2000.**

In the survey, they were asked to estimate the relative importance of 18 factors determining where they would buy/source clothes or invest in manufacturing facilities. The factors selected were those usually found in the relevant literature and respondents were requested to give a "gut" reply to each factor by responding with a number **between "10" if a factor was totally and absolutely important, and "1" if it was totally and absolutely unimportant.**

The overall results of the surveys are presented in Diagrams II and III. For details, refer http://cuts.org/eintad.htm .They clearly portray a world, which fits well into the picture of how the MFA works and what makes countries competitive. Diagram II, which contains the average of the two surveys, is a plot of the average rankings (scores) given to each question (on the vertical axis) against the coefficient of variation (on the horizontal axis). The resulting downward sloping pattern portrays those questions with little variation in rankings between companies (*i.e.*, low coefficient of variation) but high average ranking values on the upper left side of the diagram and those answers with a high variation (*i.e.*, high coefficient of variation) on the bottom right, but lower average ranking values on the left.

Let us first focus on the questions that received the highest values and had the lowest degree of variance. These are the key issues, which must be interpreted as being the essential factors shaping investment and sourcing decisions, like whether the companies were in the textile or clothing sector or trading houses or were Chinese or foreign nationals or interested in setting up their own facilities or were just sourcing? Some other factors, which are also relevant, may be influenced by more subjective issues or rather more differentiated by type of operations.

Diagram II clearly reveals three groups of factors, which influence investment and sourcing decisions. The top group, with the highest rankings and lowest coefficients of variation contained the following factors:[12]

1 Politics and stability in host country
3 Quality of transportation infrastructure in host country
4 Quality of telecom infrastructure in host country
5 Policies affecting international trade and investment
6 Labour costs
8 Policies affecting labour, health and environment
10 Lack of restrictions on capital/profit transactions

***** Business considered **politics and stability in the host country (1)** is the most important factor influencing investment and sourcing decisions. This requirement has also been shown to be crucial in numerous other studies and is definitely not restricted to the T&C industry.

***** That the **quality of transportation infrastructure (3)** is now second in the order reflects the increasing importance of time in getting inputs into a country and outputs quickly to the final buyer. This is all the more important to know that each additional day in transport is equivalent to an extra 0.8 percentage point increase in applied tariff rates (Hummels, 2001). Hence, an extra 20 days of goods lying around in harbors, waiting to be unloaded and processed adds (given prevailing tariff rates), at least an additional eight percent to products being further exported–and this could well be that amount, which decides over the competitiveness of a company and hence of a country vying for investments or for demand for its goods.

***** The third most important key factor deals with **policies affecting trade and investment (5)**. In essence this could be conceived as those policies, which are deemed as conforming to liberal WTO rules and are aimed at keeping the economy open and relatively free from distortions. That India and other South Asian countries have much more to improve here than East Asian economies is a known fact.

* Close behind was the factor **quality of telecom infrastructure (4)** in the host country, which complements the transportation infrastructure, and is generally mentioned in numerous other surveys of factors essential for attracting foreign investments.

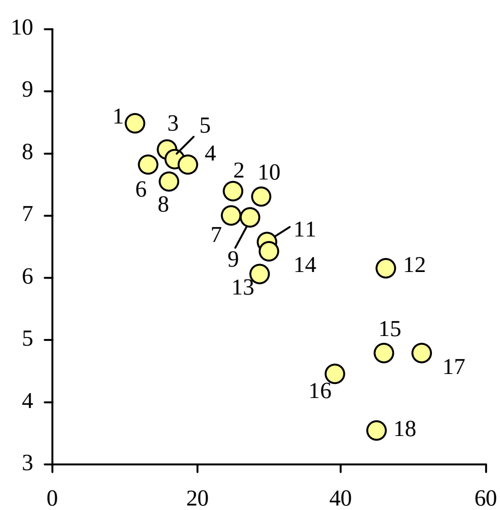
* The next factor – **labour costs (6)** – should be expected to be crucial in the case of such a labor-intensive industry such as clothing. However, the fact that it is not given a higher rating points to statements underlined by numerous interviewees, namely that in many cases higher labor costs can be easily accepted if they are accordingly compensated for by other factors.

* The next factor – policies affecting labor, health and environment (8) – has become more important recently, no doubt as a result of government and NGO controls to ensure that certain standards are upheld. This is bound to become more important over time.

* The final factor in the top group is **lack of restrictions on capital/profit transactions (10)** is crucial since such ventures are to produce returns. With countries trying all the harder these days to solve fiscal problems, it has become all the more essential to ensure that such barriers are dealt with openly and up front.

Of the remaining factors, it can probably be contended that factors 11 through 18 can be generally considered as not being highly relevant with respect to influencing investment/

Diagram II: Average Ranking of Factors Influencing Investment Decisions from 01/2000 and 02/3003



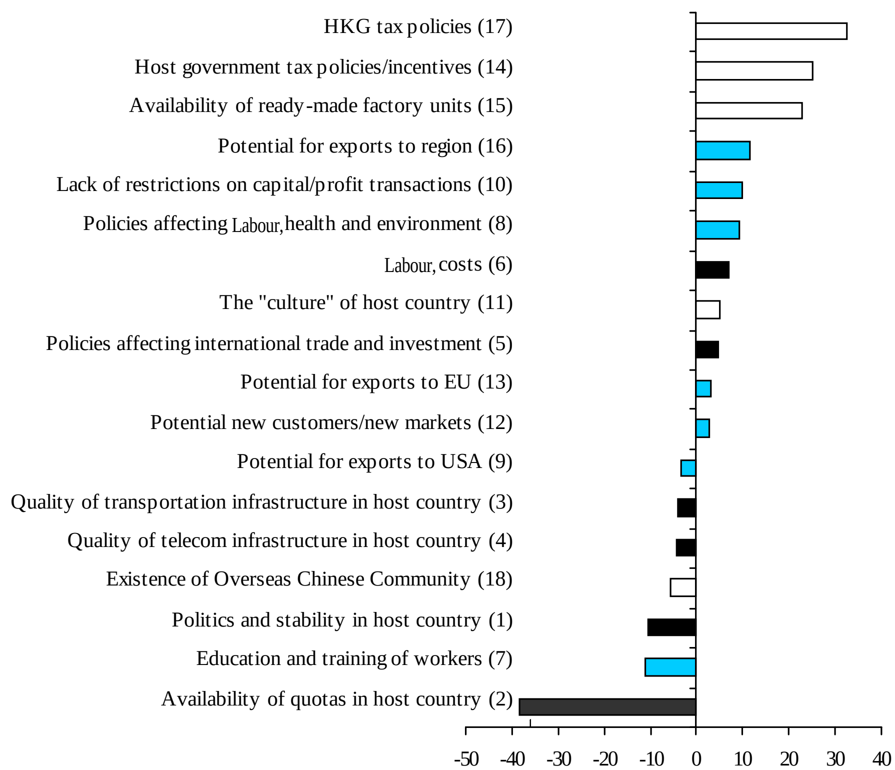
1 **Politics and stability in host country**
3 **Quality of transportation infrastructure in host country**
5 **Policies affecting international trade and investment**
4 **Quality of telecom infrastructure in host country**
6 **Labour costs**
8 **Policies affecting labour, health and environment**
2 Availability of quotas in host country
10 **Lack of restrictions on capital/profit transactions**
7 Education and training of workers
9 Potential for exports to USA
11 The “culture” of host country
14 Host government tax policies/incentives
12 Potential new customers/new markets
13 Potential for exports to EU
15 Availability of ready-made factory units
17 HKG tax policies
16 Potential for exports to region
18 Existence of Overseas Chinese Community

Source: See text and also refer http://cuts.org/eintad.htm for detailed Diagram presentation (20a and 20b).

sourcing decisions. It is particularly interesting to note that the existence of an Overseas Chinese Community is not a relevant factor in influencing the choice of investment and sourcing decisions. This is positive in particular for South Asian countries in the sense that it means that the negligible presence of ethnic Chinese in the region do not hinder their chances in profiting from FDI or sourcing contracts from Hong Kong Chinese.

Of the four remaining factors, *i.e.* numbers 2, 7, 9 and 10, the lack of restrictions on capital/profit transactions could be considered as essential and thus belonging to the "must" factors. What has changed over the three years between 2000 and 2003 can be seen in Diagram III. Among the six most important factors in 2000, only one revealed a major negative shift, namely the availability of quotas[13] . Since quotas were considered

Diagram III: Changes (percent) in Importance[a] of Factors Influencing Investment Decisions: 2000-2003



[a]Ranking based on results of interviews in 01/2000. The designates the six factors of most importance in 2000; designates the seven factors of medium importance in 2000; designates the five least important factors in 2000.

Source: See Diagram II and text.

to be a key, virtually binding factor influencing sourcing and investment/production decisions in 2000, this means that the situation has changed for the following factors:

- First, with the impending elimination of quotas by January 1, 2005, longer-term investment decisions are evidently already being adjusted for the post-ATC period, when quotas no longer are supposed to be in existence.
- Secondly, numerous trade agreements have been reached to permit new countries to enter the markets of industrialised countries. Countries like Vietnam and Cambodia have been provided with extensive access to the USA. As a result of the recently-concluded bilateral trade agreement between Vietnam and the USA, imports of clothing products from Vietnam increased by 1800 percent between 2001 and 2002. The US now imports 25 percent more from Vietnam (23rd largest supplier in 2002) than from Costa Rica (24th), the fifth largest supplier from Latin America (excluding Mexico). As for Cambodia (#21), it now exports more to the USA than Pakistan (#22), even though just a few years ago it was hardly on the map.
- Third, as noted above, some quota items have been liberalised in the course of the ATC, which have permitted China to rapidly increase its exports. This has led to a significant shift in imports from Latin American, including Mexico.
- Fourth, the overall demand for T&C products in industrialised countries has been considerably dampened as a result of continuing economic sluggishness. Given the built-in growth rates of quotas, this means that potential supply increases have exceeded demand increases. The result is that the “binding” constraint becomes less binding.

4. Improving Access to Domestic Markets: What Can India Do?

Basically, this section deals with the competitiveness of the Indian T&C industry and the role of infrastructure and policy parameters. In the light of the above background, what factors in India must be examined with respect to their impact on costs and hence on the competitiveness of the economy? Costs can be classified as being either internal or external to the firm. The factors mentioned in the prior section dealt to a large degree with costs external to the firm.

Let us primarily examine these costs, which we classify as economy-wide, non-specific product input costs. As Bhardwaj and Kathuria (1998) stress, the benefits to reform will be much greater after quotas are abolished than before. And for sure, the scope for reform is very large, as shown in a report carried out by the World Bank with the Confederation of Indian Industries (2002:11): "While the specific estimates [of the impact of certain reforms] have some uncertainty around them, the general point is quite robust: removing bottlenecks that prevent efficient infrastructure services and private initiative more generally would lead to faster growth and poverty reduction in India." What, then, are some of the specific areas where they must be carried out.

4.1 Non-specific Product Input Costs

These are inputs that affect all firms within an economy and are not specific to any single firm. They relate to those factors influencing investment and production decisions and include government macroeconomic policies, economic and political stability, openness to trade, foreign direct investment policies, labor market rules and regulations, efficacy of an economy's regulatory policies, and quality and quantity of physical and financial infrastructure. They also include, at the macro-level, other overriding factors, such as property rights, rule of law, level of corruption and judicial efficacy,[14] but these will not be specifically dealt with here.

However, particularly relevant for this study are the micro-ramifications of the economic policies and regulatory framework for investment, production and trade, as well as the availability and efficiency of the physical and financial infrastructure. The relevance of these issues is underlined in a recent analysis of Argentina's economic performance[15]. There it is noted that that "macroeconomic reform in Latin America has failed to promote sustained economic growth – a failure that has led to one financial crisis after another, in Mexico, Brazil, and, now, Argentina. Why? [Because] … broad-based macroeconomic reform isn't enough: barriers at the microeconomic level distort competition, protect outdated practices, and hold back labour productivity and economic growth." It concludes that unless these problems are dealt with, Argentina will continue to under perform its potential. And what about India? Similar conclusions have been drawn by a recent CII-World Bank Study[16] on Indian investment climate too.

What then are the micro-aspects of investment climate that are relevant to the Indian textile and clothing sectors? For sure the Indian textile and clothing industry has been among the most regulated industries in India, with government textile policies massively intruding into both price related and price non-related factors of competitiveness**.**

Let us first turn to the crucial factor of infrastructure. According to the World Competitiveness Report 1997, India was ranked 45th among 46 countries in terms of competitiveness in infrastructure. India's rank in 2002 was 42nd out of 49 countries. Which factors contributed to these poor rankings?

1. As far as **international transportation infrastructure** is concerned, the inefficiency is directly reflected in the cost of shipping containers of garments to the USA. Despite longer shipping routes, shipping to the US eastern seaboard out of Bangkok is almost 18 percent cheaper compared to Mumbai or Chennai, or 23 percent if weighted by trade volumes. China enjoys a 13 percent cost advantage in shipping garments from Shanghai to the US East Coast, or in weighted terms an even larger advantage of 37 percent. All this can be basically attributed to the delays and inefficiencies plaguing Indian ports compared to other Asian economies.

   With respect to time being lost due to customs processing inefficiencies, the mean delay (*i.e.*, for exporting and importing) at Indian customs houses is 10.3 days, compared to 7 days in South Korea and Thailand. The mean delay involved in importing raw materials for garments and then exporting finished garments from India is 15.5 days. Refer http://cuts.org/eintad.htm for a table on Custom Delays. Given an average production cycle of 45 days, this implies a 33 percent increase to 60 days – a very sizeable amount for fashion products, whose shelf life does not normally exceed 45 days. For an industry driven by continually new fashions with even shorter shelf lives, such delays lead to incompetitiveness .

   On top of such disadvantages come the delays due to the additional delivery times necessary to reach US markets because of distance and the lack of direct shipping links. For instance, the minimum delivery time from India to US is 24 days compared to 18 days from Thailand, 15 days from China, 12 days in Hong Kong and 3 days in Mexico. *Vis-à-vis* the EU, however, India has a slight advantage of eight days against China and three days against Hong Kong and Thailand[17].

2. As far as **domestic transportation infrastructure** is concerned, major deficiencies are evident. These refer to the poor quality of inland roads, especially state highways, the large number of 'octroi' posts and numerous local regulations restricting road use to specific hours. Generally speaking, it is the lack of efficient expressways in a country the size of India, which causes considerable delays and hinders modern, just-in-time production strategies to be instituted. All these factors add unnecessary time and costs to the production chain, aside from leading to graft at 'octroi' posts and in connection with traffic police in numerous 'chowks', through which the trucks would otherwise be not allowed. In more recent times the delays caused by the inadequate infrastructure have caused buyers to begin to penalise (*i.e.*, ask for financial discounts) for late arrivals of their consignments.

3. The negative impact of an **inefficient energy infrastructure** is particularly evident in the high industrial energy costs that prevail in India. Numerous surveys have shown that high energy costs are among the biggest deterrents to being competitive. Much of this is due to cross-subsidisation in different states, as well as to major transmission and distribution (T&D)[18] losses. The impact of all this is borne primarily by large-and medium-size companies in the industrial sector, which neither can receive small-scale industry (SSI) exemptions, nor can they otherwise avoid payments. On top of this the large units have often had to spend money to purchase their own power generating units because the grid does not provide reliable power. And reliable power is absolutely essential to meet quality demands placed on fabric production and sewing operations. Furthermore, productivity is reduced in those stages where power is converted into heat, such as in the all-important finishing process in the textile industry and in pressing the final garments.

   A comparison of the prices of industrial power (Refer http://cuts.org/eintad.htm for a table on Retail Price of Industrial Power) across countries shows that they are higher in India than in Mexico, Taiwan, Korea and USA. The result of this is directly reflected in the structure of production costs of yarn, be it ring or open endsee Tables 6 and 7. Hence, it is not surprising to determine that, even in the Indian states with the best investment climate, such as Maharashtra and Gujarat, almost half-the-manufacturing firms had their own power generating units[19]. In states with just an average investment climate, such as Delhi and Punjab, over 85 percent of firms have their own generator units.

4. Further disadvantaging India's internal competitiveness is its **inadequate financial infrastructure,** as reflected, for instance in high interest costs[20]. Interest costs as a percentage of sales in Indian manufacturing companies were close to 5.5 percent compared to less than four percent in countries, such as Indonesia, S Korea, Malaysia, Philippines and Thailand.

   The figures for the Indian textile industry, however, are considerably higher and amounted to 8.6 percent of sales and 12.9 percent of value added. The garment industry, on the other hand, does not seem be as adversely affected on this account. Its respective ratios were 2.05 percent and 3.3 percent. This difference is often attributed to the fact that the garment sector is more decentralized. Funds are mostly obtained from the investible surplus of the business itself, and rarely obtained from institutional sources, or even from expensive, unorganised moneylenders.

5. The poor quality of **communications infrastructure** (STD/ISD/ faxes and e-mails) has often been cited as a yet another factor that contributed to delays, since often the telephone lines were jammed or simply not in service. However, more recently this problem seems to have been largely eliminated, since the telecommunication sector has been deregulated and liberalised to a large degree.

6. The **transaction costs**, *i.e.* the time and money involved in adhering to policies and procedures involved at each stage of exporting and importing, in India are extremely high. For example: to procure a duty-free advance license for export production, the average time required by 35 exporters in one survey was seven months. Since another two months were needed to redeem the legal undertaking, a total of nine months

accrued. However, at a cost of Rs. 10,000, the exporter could purchase a licence in two-and-a-half months, and for another Rs. 8,000, the legal undertaking could be redeemed in 15 days. Similarly, at a cost of three-five of the drawback claim, the exporter could collect the drawback claim in Seven days instead of Six months[21]. Obviously this is nothing more than an almost explicit tax on exports.

4.2 Product Specific Costs - Supply Chain Management

Since it is not the purpose of this study to portray and analyse the deficiencies of the Indian T&C industry extensively, it must suffice to point out where government and institutional policies infringe on the efficient functioning of market economies.

With only five percent of fabric being produced in the organised mills, and about 57 percent being produced in the decentralized power looms, the quality of fabric supply to the garment sector is poor[22]. And since garment manufacturing is reserved for SSI in India, they cater to small orders for seasonal demand and for fashion garments in niche products. Their demand for fabrics is thus limited to small lots, which organised mills cannot competitively produce. Besides, with the demand for Indian garments from overseas being more fashion-driven than local demand, a high degree of production flexibility is required to be able to quickly revamp colors, fabrics and styles quickly. Power looms again are better suited as suppliers, compared to organised mills.

As far as labor costs in the textile industry are concerned, there would seem to be little connection between them and performance in world trade Refer http://cuts.org/eintad.htm for a diagram on 'Textile Industry: Labour Costs 2002, Export Growth Rates 1994-2001 and Export Rankings'. However, as noted earlier in connection with the survey in Hong Kong, they may reflect other factors (higher skills) or can be compensated for by other factors. Based on the performance of T&C products in world trade it can be seen that India fared relatively better in textiles than in clothing (see Overview I)[23].

To underline the contention that higher wages do not necessarily reflect lower competitiveness, a recent study on the Indian garment industry shows that higher wage rates are one of the determinants of export performance of Indian garment units[24] . Export firms paid higher wages to their employees than those firms oriented towards the 'domestic market-oriented'. The study attributed this difference in wage rates to the unique and indispensable skills of designers, pattern makers and craftsmen, as well as to better-trained cutters and tailors employed by exporting firms[25].

One reason for poor productivity in garment manufacturing has been the extremely fragmented structure that has arisen chiefly due to the government SSI reservation policy. This has prevented modernisation, quality investments, scale adoption and change in product mix from exclusive reliance on cotton garments to mass clothing items based on synthetic and man-made fibres. It has also impeded the growth of exports to non-quota markets like Latin America and Asia, which demand blended and synthetic garments much more than the USA and EU. Indian fiscal and customs policy too has discriminated against development of synthetic base in India in line with the government belief that 'synthetic is for the classes and cotton is for the masses'[26].

Another factor reducing the competitiveness of Indian T&C products is the cost of raw material (fibers). Until recently, Indian cotton prices have been lower than international cotton prices of comparable varieties due to the ban on imports and the controls on exports of cotton. In fact, in the 1980s, for each of the varieties of cotton, Indian prices were lower than their international counterpart[27]. While this gave a cost advantage to Indian textile and garment exporters, industry sources mentioned that given a choice, they would prefer to import cotton, especially for export products. The reasons were simple: foreign cotton was of better quality and offered long-staple quality not available in India[28].

As noted above 'cotton for the masses and synthetic for the classes' was the implicit belief that underlay the government policy in India. As a result, while cotton prices were not allowed to increase (trade control, and buffer stock operations), synthetic fibre was deliberately priced uncompetitively, since it was viewed as a luxury fibre for higher income groups. Despite years of liberalisation, the excise duty, for instance, on PFY is still 36.8 percent (2000-01), as opposed to 9.2 percent on cotton. Similarly, the raw materials for synthetic fibres have an excise duty at 16 percent. This discrimination against synthetics is visible customs duty rates also. While the effective import tariff on cotton import was 5.5 percent in 2000-01, it was 48.5 percent for man-made ones[29]. As a result of the government's policies, while the world consumption of synthetic fibre is growing faster than that of cotton and wool, India's production and exports are predominantly cotton-based textile and garments.

A final issue concerns the fragmentation of the Indian textile and clothing industries, which have one of the longest and most complex supply chains in the world. There are as many as 15 intermediaries between the farmer and the final consumer. Each intermediary not only lengthens the lead times, but also adds to the costs. The Hong Kong apparel industry, for instance, developed effective strategies in this context and managed to shrink the supply chain in terms of lead times, as well as costs[30].

That the supply chain in India is extremely fragmented is chiefly due to government policies and lack of coordination between industry and relevant trade bodies[31]. Tables 8 and 9 clearly show the extent of fragmentation of the Indian textile and clothing sectors. They also compare the extent of fragmentation/consolidation of the different activities in the supply chain internationally. It should be noted that the countries that are globally competitive are the ones, who have a significantly consolidated supply chain. Some of the countries listed in the table – Korea, China, Bangladesh, Turkey, Pakistan and Mexico – can be considered to be India's competitors in global market for exports.

5. Conclusions

Will push come to shove for India's T&C exports in the aftermath of China's WTO accession and in the elimination of T&C quotas as of 01/01/2005? For sure, the accession of China to the WTO will give China's exports an additional boost; but based on calculations presented in this paper, it was shown that India is actually one of the few countries that can expect net gains from accession coupled with the elimination of T&C quotas. That's the good news.

And the bad news? The results of surveys carried out in Hong Kong with major T&C companies and trading houses revealed that, for many of those factors essential for attracting investments or sourcing contracts, India has neglected "to get its show on the road". What were some of the particular problems India was facing? These were accordingly defined and examined. It should hence just be a relatively simple matter of beginning to eliminate the most difficult impediments in this connection in order to be prepared for the time after 2004, when quotas no longer exist. Since these issues are not new, coming up with solutions should not be a problem. The big question is, of course, can the solutions be effected to develop a more competitive edge in time to ensure that India can begin to profit before the expected surge from China?

As a matter of fact there are three very illuminating articles which capture the essence of this rivalry between India and China dating back to the early 1950s. The first (appearing in 1956, Malenbaum) sets the stage for the battle during a time when many efforts were into devising ever better "plans". The conclusions of this paper pointed to seemingly potential advantages for India. But already in the second paper (Malenbaum, 1982) the performance of China's economy led to a closer look at what was wrong with India, since China had shown some success. However, it wasn't until the third article (Srinivasan, 2002) that the full force of the Chinese economy's performance could be appreciated. Here China's successful export performance and its ability to attract FDI were pointed out and it was noted that tapping "overseas Chinese" was helpful in this connection. Can't a better tapping of the "overseas Indians" potential be one possibility to be pursued much more intensively than now? But it was also noted that the Chinese reforms were different from India's and this difference made the difference (Srinivasan, 2002: 43).

Whatever the case, knowledge from the past about where policies went wrong in India is easily accessible. This paper points to some key areas where efforts could produce results to eliminate those distortions making access to India expensive, thus improving India's competitive stance. If the analysis carried out in this paper, as concerns the overall impact of China's WTO accession, does roughly capture India's ability to profit, then it is truly a win-win path for India to venture down as quickly as possible.

An example of how this could well succeed can be found in a speech delivered by the President of the J.C. Penny Corporation in January 2003 (mimeo). He describes why textile luggage exports to the United States surged so much after China profited from the US elimination of quotas on these products. He noted that such pieces of luggage are highly labour intensive and put together from a large number of different pieces (*i.e.*, metal frames, buckles, clips, hooks, rivets, hinge partitions, handle and wheel systems and zippers), which are all produced in China. Hence, "that logistical nightmare, including cost and time, has finally ended." Such products could no doubt be just as well be produced in India but weren't. It missed the boat, but there is still time to catch the next one, because the J.C. Penny president likewise noted that most companies do not like putting all their eggs in one basket.

Since a lack of efficient infrastructure is one of the major causes of India's lack of competitiveness, it would be a good idea just to open up these sectors to private companies, be they local or foreign. Open up these sectors to those who can quickly design and construct state-of-the-art facilities so as to cut down the delays. Then back this up with a wide-sweeping reform of labour markets (see Kathuria *et al*. 2000) as well as of the financial sector coupled with a major elimination of tariff and non-tariff measures.

Certainly, the recent attempts to jump-start industrial and service sector developments by setting up special zones should be intensified, as experience in other Asian countries has shown how it can be used (see Spinanger, 1984). This approach has the additional advantage of being able quickly to limit the impact of policy distortions (like labour markets) to a specified area, hence avoiding countrywide political difficulties. But don't wait for the next WTO round to bargain through the above tariff and non-tariff changes. China is in the WTO now and T&C quotas are being eliminated in less than 600 days. There is no time to wait. India has already waited too long.

Endnotes

1 Based on the ATC the first tranche of 16 percent of T&C imports in industrialised countries was liberalised as of 01/01/95; the second liberalisation tranche covered 17 percent as of 01/01/98; the third tranche covered 18 percent as of 01/01/02. For an evaluation of the ATC see Baughman et al., 1997 and Spinanger, 1999.

2 Sections 1 and 2 draw on an unpublished paper on Greater China's accession to the WTO by Francois and Spinanger (2002).

3 What this means is actually quite simple: if prices of French red wine increase relative to those of Thai red wine, then the demand for French red wine will not decrease to zero. The reasoning behind this is primarily based on the realisation that seemingly like products are actually different.

4 The 10 percent figure seemed to be a reasonable estimate based on statements by the interviewed companies in the T&C industry. If the actual percentage advantage was higher or lower the corresponding adjustments would have to be made in the results.

5 GDP at market prices deflated by an appropriate price index.

6 A caveat should be noted here particularly in connection with the exports of clothing products from China (textile products are less affected since they are less input intensive). In many cases such exports contain imported cloth, which has long received duty rebates. Since the results of the GTAP model are not adjusted for such rebates, the reduction in the costs of producing exports tend to be overestimated. To what extent this happens is not known, but since this applies also to any country that reduces its tariffs in the accession process, the relative impact across countries may still be correct. Furthermore, since bound tariff rates on textiles amount to only 10 percent in China, the effects of mistakenly applying and then removing them will be well below 10percent (it is all the greater below 10 percent the smaller the textiles' share is in the export value of the product). A comparison with Ianchovichina & Martin, [ADD REF] which included corrections for rebates, actually reveals similar values for textile exports (+33 percent vs. +39 percent), but lower values for clothing exports (+106 percent vs. +168 percent). To a large degree the 62 percentage point greater value in this paper probably reflects the imputed additional 10 percent comparative advantage.

7 EU regulation number 3036/94; it replaced No. 636/82.

8 The flip side of these developments can be seen in the rapid increase in Swedish textile exports to Greece, Portugal and Spain, approaching almost 40 percent towards the end of the 80s.

9 This category consists of the following four HS categories by type of material: 620510 (wool/hair), 620520 (cotton), 620530 (man-made fibers) and 620590 (nes).

10 In terms of shares in total imports, this corresponds to a change from 13 percent to 36 percent for China and 41 percent to 29 percent for the four big-four suppliers.

11 It is perhaps interesting to note that among these four major suppliers, imports from Hong Kong and Bangladesh decreased the most (-55 percent and -20 percent, respectively), those from India actually increased by 7 percent.

12 Please note that the numbering in the table and noted in ( ) in the text, is based on the rankings of importance in the year 2000. The actual listing of the various factors in the text is based on an attempt to combine the ranking of importance with the coefficient of variation.

13 The roughly +/-10 percent shifts in the other factors can probably be considered to be normal for such surveys. *i. e.*, a shift of just one number in the importance in factors otherwise rated "8" implies a shift of over 10 percent. Hence, such minor shifts can be ignored.

14 It is interesting to note, for instance, that overall indicators of investment climate, including governance issues such as government effectiveness, regulatory burden, rule of law, graft and political stability and violence, suggest very few fundamental differences between India and China (CII-World Bank, 2002). However, a comparison of China's and India's export performance since 1990 reveal that, while China's share in world trade increased from 1.8 percent to 4.35 percent in 2001, India's increased from 0.52 percent to 0.71 percent in the same time period. With respect to textile and clothing exports China's share increased from 7.91 percent to 15.64 percent, while India's increased from 2.21 percent to 3.45 percent.

15 McKinsey Quarterly (2002, Number 2).

16 Goswami et al. (2002).

17 McKinsey (August 2001).

18 Several entrepreneurs mentioned that T&D losses were an euphemism for energy theft!

19 World Bank.CII (2002: 17, t. 11).

20 World Bank-CII (2002).

21 Kathuria & Bhardwaj (1998).

22 The quality of raw material is viewed as representative of product quality in the garments industry. Lal (2000).

23 Aside from developed countries, there are countries such as South Korea and Taiwan that have still maintained sizeable presence in certain labor intensive products despite rising labor costs. The reasons is that international competitiveness in labor intensive products is derived not just from low wage rate per worker, but low ratio of wager rate to average productivity, *i.e.*, wage cost in efficiency units rather than in crude terms of workers. Higher efficiency of labor (as reflected in productivity per worker) can enable payment of higher wage rate as well as employing larger number of workers. See Tendulkar [2000], Bhavani & Tendulkar and Kell & Richtering (1991).

24 Lal (2000).

25 This was affirmed during interviews too.

26 Based on this belief, the government has kept excise duty on synthetic and blend products higher than that on cotton products. It has also had very high customs duty in place for raw materials used in synthetic sectors. This has protected cotton from competition against the synthetic sector, and hence also prevented product upgradation in cotton based items.

27 Ashok Gulati's study (1987) quoted in Mohan and Chatterjee (1993).

28 Based on interviews.

29 USITC (2001).

30 Kurt Salmon Associates. VITAMIN (1999).

31 Singhal (2000).

32 Contains some relevant sources not explicitly noted in text.

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Background Tables and Diagrams

Table 1: Total Exports of Major Textile and Clothing Exporting Countries 1973–2001

	Total exports in % of world								Growth rates[d]			
	1973		1990		1994		2001		1973 - 90	1990 - 94	1994 - 01	1990 - 01
United States	**12.72**	**(1)**	**11.43**	**(2)**	**11.96**	**(1)**	**11.93**	**(1)**	**10.62**	**6.83**	5.20	**5.79**
Germany	12.14	(2)	11.91	(1)	10.02	(2)	9.31	(2)	11.19	1.18	4.13	3.04
Japan	6.65	(3)	8.35	(3)	9.26	(3)	6.58	(3)	**12.82**	**8.39**	0.23	3.13
France	6.59	(4)	6.29	(4)	5.46	(4)	4.81	(4)	11.01	1.95	3.35	2.84
United Kingdom	5.32	(5)	5.38	(5)	4.76	(5)	4.36	(5)	**11.38**	2.44	3.94	3.39
China	1.06	(18)	1.80	(14)	2.82	(11)	4.35	(6)	**14.88**	**18.16**	**11.94**	**14.17**
Canada	4.75	(7)	3.71	(8)	3.86	(7)	4.24	(7)	9.70	**6.69**	**6.67**	**6.68**
Italy	3.99	(9)	4.95	(6)	4.47	(6)	3.94	(8)	**12.73**	2.94	3.39	3.23
The Netherlands	4.91	(6)	3.83	(7)	3.63	(8)	3.53	(9)	9.69	4.23	4.81	4.60
Belgium	4.49	(8)	3.79	(9)	3.50	(10)	3.23	(10)	10.29	3.68	4.06	3.92
Hong Kong	0.91	(21)	2.39	(10)	3.53	(9)	3.10	(11)	**17.80**	**16.51**	3.29	**7.91**
Mexico	0.40	(40)	1.18	(20)	1.42	(19)	2.59	(12)	**18.57**	**10.58**	**14.65**	**13.16**
Korea	0.58	(34)	1.89	(12)	2.24	(13)	2.46	(13)	**19.33**	**10.24**	**6.63**	**7.92**
Taiwan	0.79	(23)	1.95	(11)	2.17	(14)	2.00	(14)	**17.41**	**8.47**	4.03	**5.63**
Singapore	0.66	(28)	1.53	(17)	2.26	(12)	1.99	(15)	**17.00**	**16.41**	3.33	**7.90**
Spain	0.93	(20)	1.61	(16)	1.70	(15)	1.88	(16)	**14.95**	**7.06**	**6.74**	**6.86**
Malaysia	0.55	(36)	0.86	(25)	1.37	(20)	1.44	(18)	**14.27**	**18.89**	**5.92**	**10.46**
Switzerland	1.71	(12)	1.85	(13)	1.54	(17)	1.27	(20)	**11.83**	0.94	2.38	1.85
Austria	0.95	(19)	1.19	(19)	1.05	(23)	1.09	(23)	**12.83**	2.28	**5.77**	4.49
Thailand	0.28	(46)	0.67	(31)	1.06	(22)	1.06	(24)	**17.15**	**18.35**	**5.33**	**9.89**
Indonesia	0.58	(35)	0.75	(27)	0.93	(27)	0.94	(28)	**13.01**	**11.76**	**5.26**	**7.58**
India	0.52	(37)	0.52	(34)	0.58	(32)	0.71	(31)	11.29	**8.63**	**8.26**	**8.39**
Turkey	0.24	(51)	0.38	(40)	0.42	(35)	0.59	(33)	**14.40**	**8.72**	**10.43**	**9.81**
Czech Republic	–		–		0.38	(39)	0.55	(35)			**10.86**	

../..

	Total exports in % of world								Growth rates[d]			
	1973		1990		1994		2001		1973 - 90	1990 - 94	1994 - 01	1990 - 01
Philippines	0.34	(43)	0.24	(47)	0.31	(42)	0.53	(36)	8.97	**13.15**	**13.69**	**13.49**
Portugal	0.33	(44)	0.48	(36)	0.42	(36)	0.39	(43)	**13.73**	2.33	4.13	3.47
Vietnam	–		0.07	(65)	0.09	(63)	0.25	(50)		**13.96**	**20.67**	**18.18**
Romania	0.66	(27)	0.17	(52)	0.14	(57)	0.19	(55)	2.67	1.59	**9.20**	6.37
Pakistan	0.17	(58)	0.16	(53)	0.17	(53)	0.15	(59)	**10.96**	**7.14**	3.22	4.63
Luxembourg	0.27	(47)	0.18	(51)	0.15	(56)	0.13	(62)	8.86	1.00	2.72	2.09
Morocco	0.16	(60)	0.12	(57)	0.13	(58)	0.12	(64)	9.51	**6.83**	3.66	4.80
Tunisia	0.08	(75)	0.10	(61)	0.11	(60)	0.11	(67)	**13.30**	**7.20**	5.13	**5.87**
Bangladesh	0.06	(79)	0.05	(75)	0.06	(75)	0.08	(71)	9.49	**12.33**	**8.88**	**10.12**
Sri Lanka	0.07	(76)	0.06	(69)	0.07	(69)	0.08	(72)	9.48	**13.81**	**5.98**	**8.76**
Macao	0.02	(108)	0.05	(73)	0.04	(83)	0.04	(86)	**18.14**	2.34	3.03	2.78
Dominican Rep.	0.08	(72)	0.02	(94)	0.02	(110)	0.01	(113)	3.03	-3.23	3.23	0.83
Total[e]	73.71		79.74		81.98		79.87		**11.83**	**6.37**	4.85	**5.40**
World[f]	**556.6**		**3442.7**		**4286.9**		**6127.7**		**11.31**	**5.64**	**5.24**	**5.38**

[a]Share of world trade. – [b]Ranking in ( ) based on values in 2001. – [c]Average annual growth rate (%). – [d]**Bold typed numbers** designate an above world average growth rate . – [e]Sum of shares of listed countries. – [f]In bill. US$.

Source: Own calculations based on IMF, IFS data (2002).

Table 2: Greater China's WTO Accession – % Change in Gross Domestic Product (constant US$)

Economies	Elimination of ATC[a] quotas				Greater China accession – Tariff cuts and services liberalisation[b]			Total (4)+(7)
	WTO members only	China (PRC)	Chinese Taipei	Total	PRC	Taipei	Total	
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
Hong Kong	**-0.14**	**0.08**	**-0.06**	**-0.12**	**0.25**	**0.02**	**0.27**	**0.15**
China (PRC)	**-0.16**	**1.20**	**0.09**	**1.12**	**4.63**	**0.06**	**4.69**	**5.80**
Chinese Taipei	**-0.13**	**0.28**	**0.03**	**0.18**	**0.43**	**-0.95**	**-0.52**	**-0.34**
Japan	-0.01	0.01	0.00	0.00	0.08	0.01	0.09	0.09
Korea	-0.01	0.01	0.00	0.00	0.18	0.02	0.20	0.20
ASEAN5[c]	0.11	-0.17	-0.02	-0.08	0.03	0.08	0.10	0.02
Vietnam	0.31	-0.19	-0.02	0.10	0.02	0.12	0.14	0.24
India	**2.09**	**-0.55**	**-0.13**	**1.42**	**-0.46**	**0.01**	**-0.45**	**0.97**
Bangladesh	-0.26	-0.24	-0.04	-0.54	0.38	0.01	0.40	-0.14
Other South Asia[d]	0.22	-0.28	-0.04	-0.10	-0.17	0.01	-0.16	-0.26
Australia	0.02	-0.01	0.00	0.02	0.13	0.03	0.16	0.18
New Zealand	0.02	0.01	0.00	0.03	0.16	0.08	0.24	0.27
Canada	0.05	0.07	0.00	0.12	0.09	0.01	0.10	0.22
United States	0.05	0.03	0.00	0.08	0.04	0.01	0.05	0.13
Mexico	-1.07	-0.99	0.01	-2.05	-0.77	0.02	-0.74	-2.80
Brazil	0.02	-0.01	0.00	0.01	0.07	0.01	0.08	0.09
MERCOSUR, other	0.01	-0.01	0.00	0.01	0.04	0.01	0.05	0.05
European Union (15)	0.00	0.02	0.00	0.02	0.04	0.01	0.05	0.07
Turkey	-0.03	-0.04	0.00	-0.07	-0.02	0.01	-0.01	-0.08
Africa, Mid-East	0.02	-0.03	0.00	-0.02	0.05	0.01	0.06	0.04
Rest of World[e]	0.00	-0.01	0.00	-0.01	0.09	0.01	0.09	0.09

[a] ATC = Agreement on Textiles and Clothing. – [b] For services a 50% reduction in estimated protection was assumed. –
[c] ASEAN5 = Indonesia, Malaysia, Philippines, Singapore and Thailand. – [d] Pakistan, Sri Lanka, Nepal. – [e] Rest of world does not include some parts of Latin America not elsewise list. It reflects primarily results for Central and Eastern European countries.

Source: Own estimates based on GTAP5 model; see the text and appendix for explanation.

Table 3: Greater China's WTO Accession – % Change in Export (US$)								
Economies	Elimination of ATC[a] quotas				Greater China accession: Tariff cuts and services liberalisation [b]			Total (4)+(7)
	WTO members only	China (PRC)	Chinese Taipei	Total	PRC	Taipei	Total	
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
Hong Kong	**2.11**	**-1.80**	**-0.04**	**0.27**	**1.97**	**0.13**	**2.10**	**2.37**
China (PRC)	**-0.40**	**6.31**	**-0.04**	**5.87**	**16.87**	**0.34**	**17.21**	**23.08**
Chinese Taipei	**-0.24**	**0.56**	**0.05**	**0.38**	**1.09**	**5.91**	**7.00**	**7.38**
Japan	-0.07	0.06	0.00	-0.01	1.71	0.21	1.92	1.92
Korea	0.04	0.28	0.00	0.32	1.02	0.05	1.07	1.39
ASEAN5[c]	0.30	-0.27	0.00	0.03	0.15	0.12	0.27	0.29
Vietnam	2.62	-0.71	-0.02	1.89	-1.01	0.63	-0.38	1.51
India	**18.10**	**-4.38**	**-0.81**	**12.91**	**-3.99**	**0.02**	**-3.97**	**8.94**
Bangladesh	10.00	-6.53	-0.68	2.80	-2.90	0.03	-2.87	-0.07
Other South Asia[d]	5.69	-3.00	-0.18	2.51	-2.90	0.00	-2.89	-0.38
Australia	0.13	0.09	0.00	0.22	0.71	0.21	0.92	1.14
New Zealand	0.06	0.10	0.00	0.16	0.67	0.34	1.01	1.17
Canada	0.09	0.21	0.00	0.30	0.20	0.01	0.21	0.51
United States	0.48	0.65	0.01	1.14	0.74	0.13	0.88	2.01
Mexico	-1.00	-0.80	0.01	-1.80	-0.56	-0.01	-0.57	-2.36
Brazil	0.11	0.06	0.00	0.17	0.99	0.08	1.07	1.24
MERCOSUR, other	0.07	0.05	0.00	0.12	0.56	0.15	0.72	0.83
European Union (15)	-0.02	0.09	0.00	0.06	0.13	0.05	0.18	0.24
Turkey	-0.17	-0.67	0.00	-0.84	-1.17	0.03	-1.14	-1.98
Africa, Mid-East	-0.05	-0.14	0.00	-0.19	0.11	0.03	0.15	-0.04
Rest of World[e]	-0.09	-0.04	0.00	-0.13	0.28	0.03	0.31	0.18

[a] ATC = Agreement on Textiles and Clothing. – [b] For services a 50% reduction in estimated protection was assumed.
– [c] ASEAN5 = Indonesia, Malaysia, Philippines, Singapore and Thailand. – [d] Pakistan, Sri Lanka, Nepal. – [e] Rest of world does not include some parts of Latin America not elsewise list. It reflects primarily results for Central and Eastern European countries.

Source: Own estimates based on GTAP5 model; see the text and appendix for explanation.

Table 4: Impact of Greater China's WTO Accession on Textile Exports – % Change

Economies	Elimination of ATC[a] quotas				Greater China accession			Total (4)+(7)
	WTO members only	China (PRC)	Chinese Taipei	Total	Tariff cuts and services liberalisation[b]			
					PRC	Taipei	Total	
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
Hong Kong	**-3.20**	**4.38**	**-0.12**	**1.06**	**1.87**	**-0.19**	**1.68**	**2.73**
China (PRC)	**2.23**	**3.86**	**0.09**	**6.18**	**32.51**	**0.23**	**32.74**	**38.91**
Chinese Taipei	**0.74**	**7.95**	**0.00**	**8.69**	**1.52**	**3.86**	**5.38**	**14.07**
Japan	0.94	7.16	0.12	8.22	3.16	-0.08	3.08	11.30
Korea	2.10	3.08	0.07	5.25	-1.47	-0.17	-1.64	3.61
ASEAN5[c]	7.95	-1.42	-0.08	6.46	-7.58	0.15	-7.42	-0.97
Vietnam	3.94	0.06	0.07	4.08	-9.83	0.64	-9.19	-5.11
India	**1.93**	**1.28**	**0.05**	**3.26**	**-4.26**	**-0.04**	**-4.30**	**-1.04**
Bangladesh	17.19	-0.18	-0.02	16.99	-1.45	-0.02	-1.48	15.51
Other South Asia[d]	12.35	0.87	0.13	13.35	-3.18	-0.02	-3.20	10.15
Australia	1.50	1.25	0.04	2.80	-4.48	-0.18	-4.66	-1.87
New Zealand	3.33	0.84	0.06	4.22	-6.68	-0.37	-7.05	-2.83
Canada	-5.08	-4.95	0.23	-9.80	-6.67	-0.11	-6.78	-16.58
United States	-2.86	-3.00	0.09	-5.77	-7.71	-0.04	-7.75	-13.52
Mexico	-6.26	-6.71	0.40	-12.57	-8.04	-0.09	-8.13	-20.70
Brazil	6.02	-2.38	-0.15	3.49	-5.24	-0.03	-5.27	-1.78
MERCOSUR, other	-0.67	1.59	-0.01	0.91	-2.15	-0.21	-2.36	-1.46
European Union (15)	-1.85	-1.97	0.04	-3.79	-6.67	-0.07	-6.73	-10.52
Turkey	1.94	-2.76	-0.05	-0.88	-6.43	-0.06	-6.49	-7.36
Africa, Mid-East	-3.30	-3.21	0.10	-6.40	-6.69	-0.07	-6.77	-13.17
Rest of World[e]	-2.66	-2.45	0.07	-5.05	-6.56	-0.08	-6.64	-11.69

[a] ATC = Agreement on Textiles and Clothing. – [b] For services a 50% reduction in estimated protection was assumed.
– [c] ASEAN5 = Indonesia, Malaysia, Philippines, Singapore and Thailand. – [d] Pakistan, Sri Lanka, Nepal. – [e] Rest of world does not include some parts of Latin America not elsewise list. It reflects premarily results for Central and Eastern European countries.

Source: Own estimates based on GTAP5 model; see the text and appendix for explanation.

Table 5: Impact of Greater China's WTO Accession on Clothing Exports – % Change								
Economies	Elimination of ATC[a] quotas				Greater China accession			Total (4)+(7)
					Tariff cuts and services liberalisation [b]			
	WTO members only	China (PRC)	Chinese Taipei	Total	PRC	Taipei	Total	
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
Hong Kong	**30.18**	**-19.54**	**-5.98**	**4.66**	**-7.66**	**0.68**	**-6.98**	**-2.32**
China (PRC)	**-6.41**	**100.89**	**-6.66**	**87.81**	**79.35**	**0.67**	**80.03**	**167.84**
Chinese Taipei	**-20.41**	**-24.63**	**12.73**	**-32.31**	**-30.51**	**9.76**	**-20.75**	**-53.07**
Japan	-4.47	1.51	-0.07	-3.03	-16.28	1.65	-14.63	-17.65
Korea	-8.52	-16.09	1.33	-23.29	-21.45	1.33	-20.12	-43.41
ASEAN5[c]	28.79	-20.97	-6.14	1.68	-23.98	0.23	-23.76	-22.08
Vietnam	26.92	-7.55	-2.05	17.32	-8.59	3.39	-5.21	12.11
India	**337.90**	**-21.69**	**-73.67**	**242.55**	**-24.86**	**-0.18**	**-25.04**	**217.51**
Bangladesh	20.87	-15.97	-3.40	1.51	-9.47	0.04	-9.42	-7.91
Other South Asia[d]	21.93	-18.67	-4.18	-0.92	-17.22	-0.08	-17.31	-18.22
Australia	-5.78	-5.60	0.30	-11.08	-16.29	-0.00	-16.29	-27.37
New Zealand	-1.13	0.06	-0.00	-1.08	-24.43	-0.39	-24.81	-25.89
Canada	-19.86	-24.38	4.75	-39.49	-28.56	-0.09	-28.64	-68.14
United States	2.15	3.90	0.11	6.16	-7.60	0.13	-7.47	-1.31
Mexico	-26.23	-33.73	8.74	-51.21	-36.26	-0.15	-36.40	-87.62
Brazil	12.45	-13.36	-1.71	-2.62	-19.67	0.37	-19.30	-21.92
MERCOSUR, other	-5.63	-5.92	0.32	-11.23	-15.12	-0.15	-15.27	-26.50
European Union (15)	-4.09	-5.14	0.20	-9.03	-18.19	0.10	-18.08	-27.11
Turkey	-4.57	-9.27	0.40	-13.43	-18.43	-0.06	-18.49	-31.92
Africa, Mid-East	-11.79	-12.55	1.46	-22.88	-18.53	-0.10	-18.62	-41.50
Rest of World[e]	-6.57	-11.34	0.73	-17.18	-18.98	-0.08	-19.06	-36.24

[a] ATC = Agreement on Textiles and Clothing. – [b] For services a 50% reduction in estimated protection was assumed.
– [c] ASEAN5 = Indonesia, Malaysia, Philippines, Singapore and Thailand. – [d] Pakistan, Sri Lanka, Nepal. – [e] Rest of world does not include some parts of Latin America not elsewise list. It reflects premarily results for Central and Eastern European countries.

Source: Own estimates based on GTAP5 model; see the text and appendix for explanation.

Table 6: Total Cost of Ring Yarn, 1999							
In US$ per kg of yarn							
Cost Element	**Brazil**	**India**	**Indonesia**	**Italy**	**Korea**	**Turkey**	**USA**
Waste	0.18 6.8%	0.17 5.7%	0.21 6.2%	0.18 5.5%	0.18 6.7%	0.24 7.5%	0.21 6.8%
Labour	0.1 3.8%	0.05 1.7%	0.01 0.3%	0.78 23.8%	0.18 6.7%	0.12 3.8%	0.52 16.7%
Power	0.1 3.8%	0.3 10.1%	0.1 3.0%	0.26 7.9%	0.14 5.2%	0.19 6.0%	0.17 5.5%
Auxiliary Material	0.1 3.8%	0.1 3.4%	0.1 3.0%	0.1 3.0%	0.1 3.7%	0.1 3.1%	0.11 3.5%
Capital (dep. & interest)	0.9 34.1%	1.08 36.5%	1.55 46.0%	0.67 20.4%	0.8 29.6%	1.09 34.3%	0.74 23.8%
Raw Material	1.26 47.7%	1.26 42.6%	1.39 41.2%	1.29 39.3%	1.29 47.8%	1.45 45.6%	1.36 43.7%
Total Yarn cost	2.64 100.0%	2.96 100.0%	3.37 100.0%	3.28 100.0%	2.7 100.0%	3.18 100.0%	3.11 100.0%
INDEX (Italy = 100)	80	90	103	100	82	97	95
Source: Compendium of Textile Statistics, 2000, Vol. II							

Table 7: Total Cost of Woven Ring Yarn Fabric, 1999							
In US$ per yard of fabric							
Cost Element	**Brazil**	**India**	**Indonesia**	**Italy**	**Korea**	**Turkey**	**USA**
Waste	0.031 4.33%	0.030 4.19%	0.037 4.91%	0.032 3.29%	0.032 4.65%	0.041 5.37%	0.037 4.30%
Labour	0.052 8.21%	0.031 4.33%	0.007 0.93%	0.333 34.22%	0.092 13.37%	0.044 5.76%	0.243 28.26%
Power	0.043 6.79%	0.114 15.92%	0.040 5.31%	0.109 11.20%	0.057 8.28%	0.074 9.69%	0.072 8.37%
Auxiliary Material	0.043 6.79%	0.057 7.96%	0.039 5.18%	0.058 5.96%	0.056 8.14%	0.046 6.02%	0.051 5.93%
Capital (dep. & interest)	0.244 38.55%	0.263 36.73%	0.387 51.39%	0.215 22.10%	0.226 32.85%	0.306 40.05%	0.220 25.58%
Raw Material	0.220 34.76%	0.220 30.73%	0.243 32.27%	0.225 23.12%	0.225 32.70%	0.253 33.12%	0.237 27.56%
Total fabric cost	0.633 100.0%	0.716 100.0%	0.753 100.0%	0.973 100.0%	0.688 100.0%	0.764 100.0%	0.860 100.0%
INDEX (Italy = 100)	65	74	77	100	71	78	88
Source: Compendium of Textile Statistics, 2000, Vol. II							

Table 8: Level of Fragmentation in Different Stages of Value Chain Across Countries

	Japan	Korea	China	Bang-ladesh	India	Turkey	Pakistan	Italy	Mexico	USA
Spinning	–	C	F	C	C	C	C	C	–	C
Weaving	F	F	C/F	C	F	C	C	F	F	C
Processing	C	C	C	F	F	C/F	C	C/F	C	C
Made-ups	C	C	C	F	F	C/F	F	C	C	C
RMG	C	C	C	C	F	C/F	F	C	C	C

C: Consolidated

F: Fragmented

Source: Shanbhag and Nair (2000).

Table 9: Typical Cost of a Brand, as % of Selling Price in India?

Fabric/ Purchase Cost	15.00%
Trims Cots	7.00%
Washing Materials	4.00%
Washing/ Conversion Charges	4.00%
Freight, Octroi & Insurance	2.00%
Selling Expenses	4.00%
Sales Tax	5.00%
Sales Commission	28.00%
Royalty, incl Cess @ 5%	4.00%
Excise Duty	8.40%

Total will not add to 100% due since scheme costs and other drawback computations have been excluded.

Source: Author's calculations.

Diagram 1a:Textile, Clothing and World Exports in Bill. US$

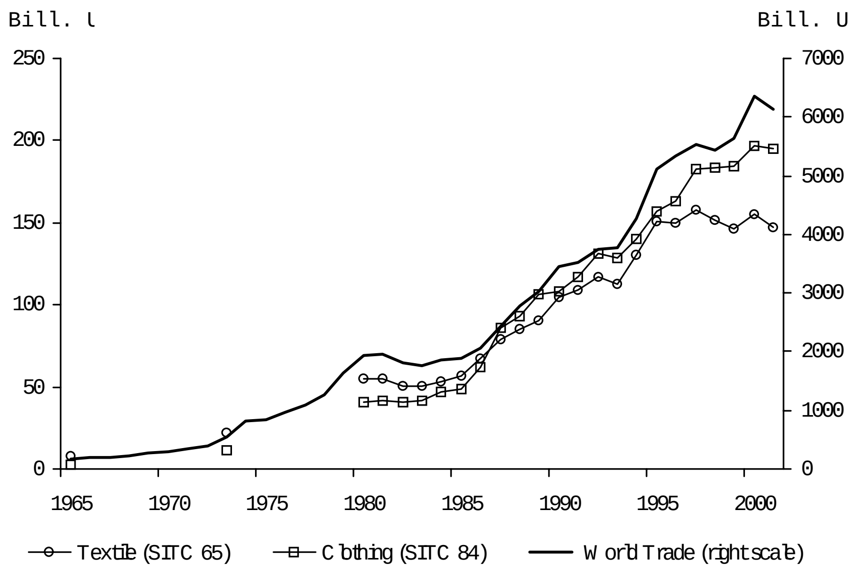
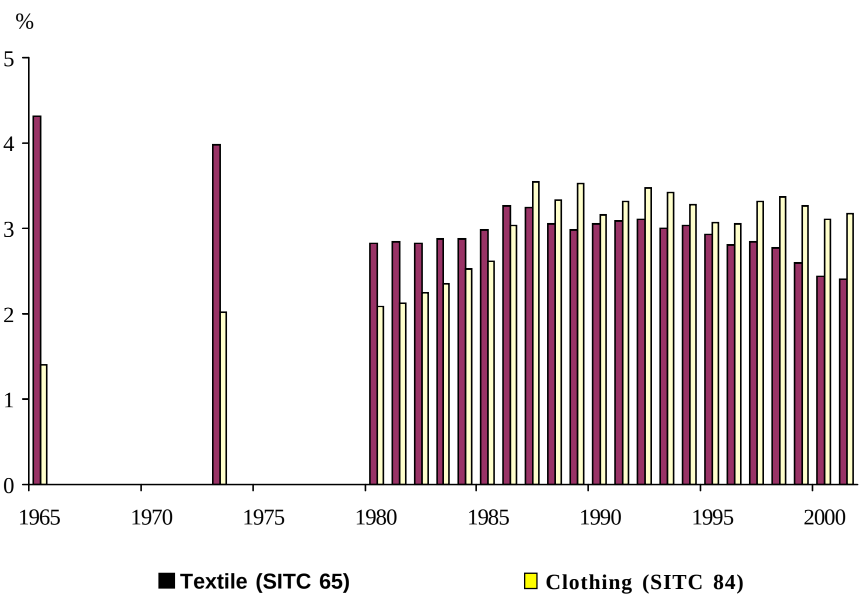
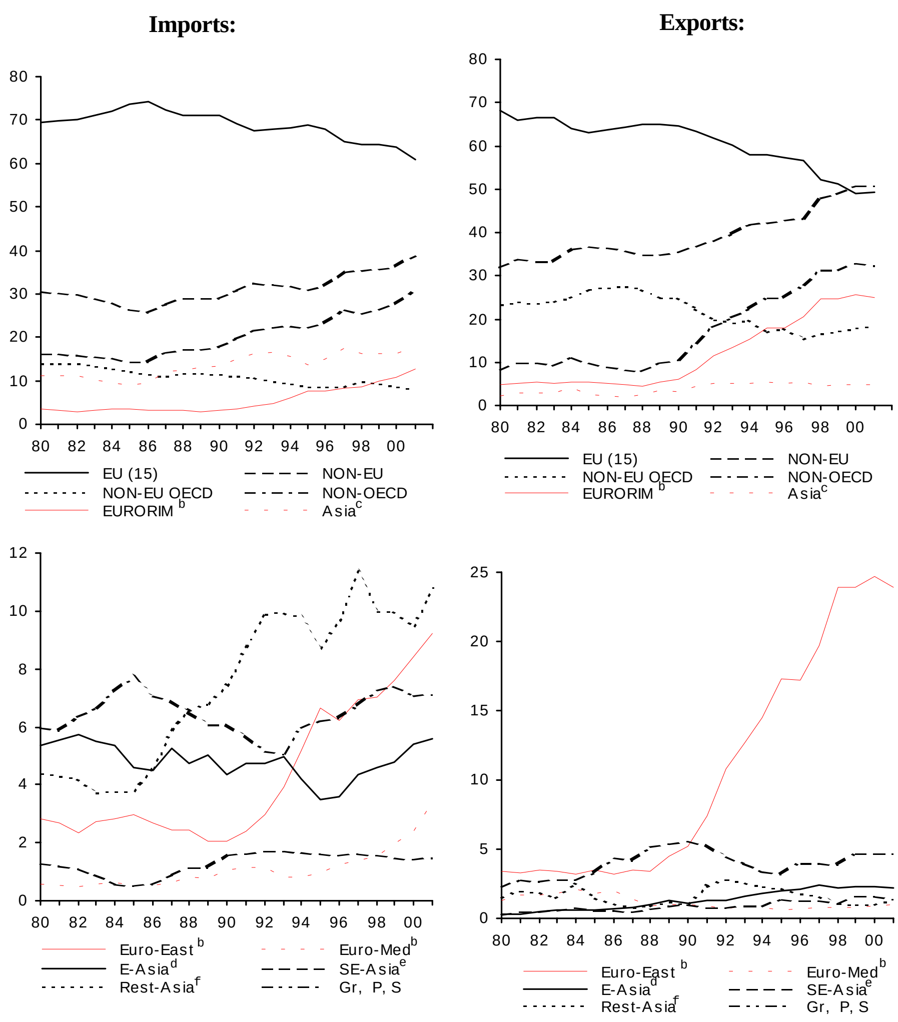


Diagram 1b:Textile and Clothing Exports in % of World Exports



Source: Own calculations based on GATT/WTO data.

Diagram 2a:Sweden Textile Imports (SITC 65)[a] and Exports from Selected Regions in % of Total Textile Imports/Exports, 1980-2001

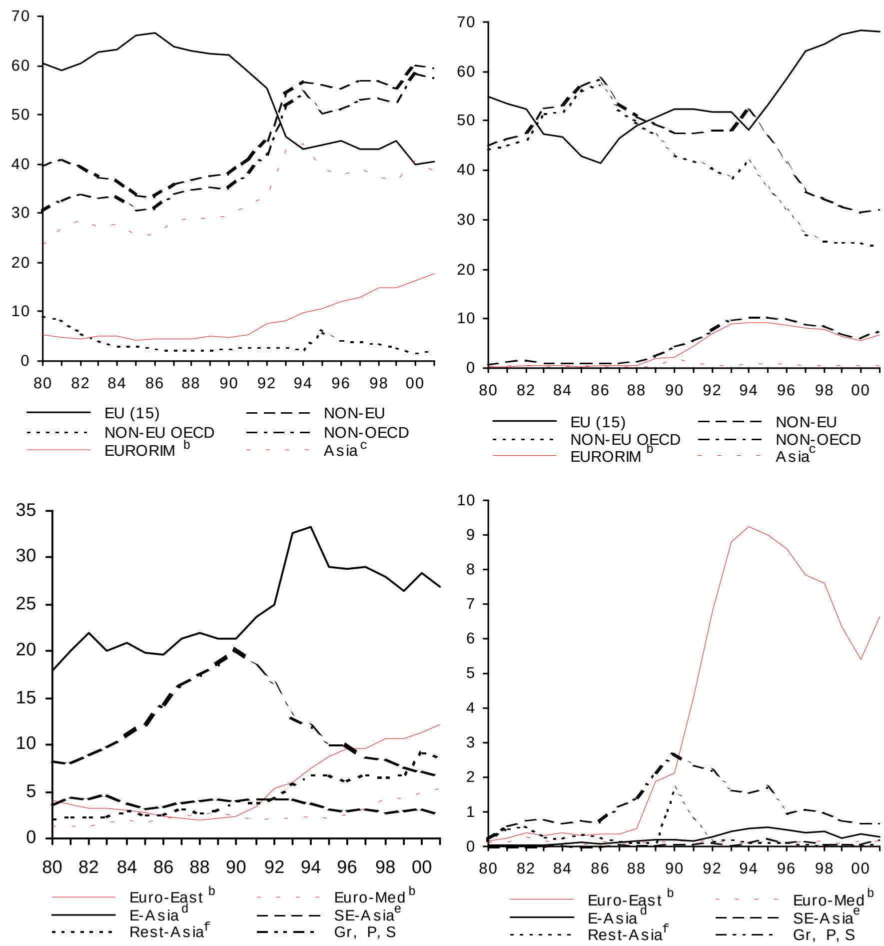


[a]Textile yarn, fabrics, made-up articles, related products.— [b]All countries east of former "Iron Curtain" (EURO-East) and Morocco to Turkey plus Cyprus and Malta (EURO-Med).— [c]From Gulf Countries to Korea (excl. Japan).— [d]Hongkong, Macau, China, Taiwan and Korea.— [e]ASEAN countries.— [f]Asia minus E-Asia and SE-Asia.

Source: OECD, ITCS and data provided by the Swedish government for the years 1999-2001.

Diagram 2b:Sweden Clothing Imports (SITC 84)[a] and Exports from Selected Regions in % of Total Clothing Imports/Exports, 1980-2001

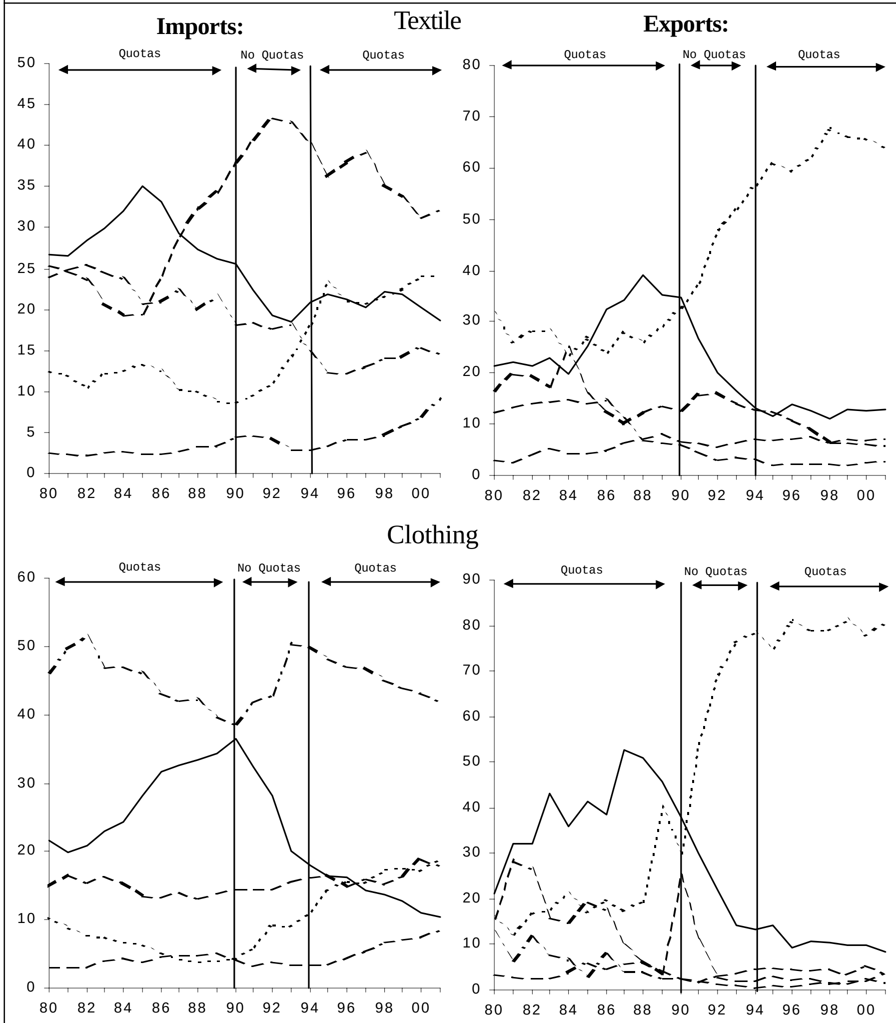
Imports: **Exports:**



[a]Articles of apparel and clothing accessories.— [b]All countries east of former "Iron Curtain" (EURO-East) and Morocco to Turkey plus Cyprus and Malta (EURO-Med).— [c]From Gulf Countries to Korea (excl. Japan).— [d]Hongkong, Macau, China, Taiwan and Korea.— [e]ASEAN countries.— [f]Asia minus E-Asia and SE-Asia.

Source: OECD, ITCS and data provided by the Swedish government for the years 1999-2001.

Diagram 2c: Sweden Textile (SITC 65)[a] and Clothing (SITC 84)[a] Imports and Exports from Selected Regions[b] in % of (NON-OECD+P;GR;SP) Textile Imports/Exports, 1980-2001[c]



___ P, SP, GR Euro-East Euro-Med E-Asia SE/Rest Asia

[a]Textile yarn, fabrics, made-up articles, related produces. — [b]See Diagram 8a.

Source: OECD, ITCS and data provided by the Swedish government for the years 1999-2001.