

UK Government Briefing on the proposed WTO Agreements on Investment and Competition

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Introduction

The UK Government's second White Paper on International Development, December 2002; *'Eliminating World Poverty: Making Globalisation Work for the Poor'* sets out how it intends to help developing countries harness private finance and capture gains from trade in order to reduce poverty. A way of achieving this is through greater international cooperation on investment and competition issues. To this end, the UK Government believes that the proposed WTO Framework Agreements on Investment and Competition could make complimentary contributions.

Investment

Many developing countries are taking steps to create the right conditions for private investment – both foreign and domestic. The UK Government believes that a basic framework of multilateral rules on foreign direct investment could help reinforce sound domestic policies and encourage transparency. The existing WTO agreements covering investment¹ and the proliferation of bilateral investment treaties are no substitute for a coherent, basic framework of multilateral rules.

The Government will not sign up to something that it did not believe to be in the interests of developing countries. Suggestions that the UK is only interested in negotiating a WTO agreement on Trade and Investment to secure improved rights and greater protection for big business are unfounded, unhelpful and incorrect

Competition

Trade liberalisation should help make domestic markets more competitive. However, it has also meant that cartel activity and other anti-competitive practices increasingly extend beyond national borders. A WTO Framework Agreement on Competition will be a powerful tool that developing countries can use to combat domestic anti-competitive practices as well as abuses of dominant positions by international cartels.

This briefing sets out in more detail the EU proposals for WTO Framework Agreements in the areas of Investment and Competition. These proposals build on the principles outlined in paragraphs 20 – 25 of the Doha Declaration, attached in Appendix A.

Concern has been expressed that the negotiation of Framework Agreements in Investment and Competition will not be in the interests of developing countries. The UK Government will not sign up to something it does not believe to be in the interests of developing countries. The briefings on each of the proposals end with extended question and answer sections to respond to some of the specific issues that have been raised in recent months.

¹ Particularly, the General Agreement on Trade in Services (GATS), Agreement on Trade-related Investment Measures (TRIMS), and Agreement on Trade-related aspects of Intellectual Property Rights (TRIPS)

Section 1 - Investment

1.1 Proposed WTO Framework Agreement on Investment

Quality, productive investment is the engine of economic growth: it creates jobs, increases the productive capacity of an economy and lays the foundation for higher future income. Sustained high levels of productive investment – both domestic and foreign - are essential to achieve the growth rates necessary for poverty reduction envisaged by the Millennium Development Goals.

Foreign direct investment (FDI) is important for developing countries, and in aggregate overshadows aid flows. It establishes long-term commitments and lasting assets, which bring new technologies, skills and products into the country.

There has been a significant increase in FDI inflows to developing countries over recent years. Annual FDI inflows to developing countries averaged US\$74 billion between 1990 and 1995, increasing to US\$205 billion in 2001². However, FDI inflows to developing countries are highly concentrated in larger and more industrialised countries such as China, and much of the FDI in Africa has been concentrated in the mineral and petroleum-producing countries.

So how can developing countries attract a higher share of global FDI flows?

Investors seek low risk, stable and predictable conditions. An effective 'enabling' environment stimulates FDI and domestic investment, encouraging domestic savings and discouraging capital flight. The absence of conflict, a stable political environment, a sound macro-economic framework, a strong financial sector and a clear, fair and enforceable legal structure are all elements that help achieve the right conditions for productive investment. Good governance, fair taxation, good physical infrastructure and a skilled labour force are also key elements of a welcoming business environment for domestic and foreign investors alike.

Some recent research³ suggests that a good investment climate – in association with open trade policies – can enhance economic growth rates by up to 2% a year.

Many developing country governments are already taking steps to create these conditions. These include:

- Creating simple, transparent and non-discriminatory regulatory regimes, supported by fair commercial justice systems, so that investors know their rights and obligations;

² UNCTAD World Investment Report, 2002

³ IBRD Paper: Improving the Investment Climate in India, February, 2002

- Instituting competition policies and laws to ensure that the potential benefits of higher investment are not undermined by monopoly power or other market inefficiencies;
- Ensuring that the benefits of investments are enjoyed by all, including the poor, through appropriate taxation regimes as well as labour, competition and consumer rights laws; and
- Simplifying their licensing and tax arrangements eg. the East African Community (EAC) has begun to develop common laws by creating a simple, transparent and non-discriminatory investment regime for the region.

There is also substantial evidence linking foreign direct investment to growth. For example, one study⁴ suggests that developing countries may have gained as much from access to foreign capital as from access to trade in goods and services. In a calculation of emerging countries access to global capital they find that by 2000, developing countries were gaining \$387 billion a year in additional GDP from FDI expansion, compared to \$358 billion from trade expansion. Their GDP levels are 5% higher than they otherwise would be. Another study⁵ examines the impact of average FDI inflows (as a percentage of GDP) on average real per capita GDP growth in 69 developing countries during 1970-1989. A one percentage point increase in the average FDI inflow was associated with an increase in the average per capita annual GDP growth rate of 0.66%.

The UK government believes that FDI can contribute to economic growth in developing countries, and thus to achievement of the Millennium Development Goals. FDI can create employment, introduce and transfer new technologies, build human capital, raise efficiency through increasing competition, provide access to foreign markets, introduce new goods and services into a country, and expand and improve infrastructure. On the other hand, it has been criticised for crowding out domestic investment (particularly that of small enterprise), building insufficient linkages with the domestic economy, creating foreign monopolies in host markets, having adverse environmental impacts, and causing social disruptions as a result of accelerated commercialisation.

In order to ensure that the benefits outweigh the costs, and to promote measures to ensure that the benefits of investment can reach the poor, the role of national policy is key. Any international agreement should build in mechanisms to allow sequenced approaches to opening up to FDI, and complementary measures to allow countries to establish regulatory frameworks and structures.

Many governments recognise the benefits of FDI and have signed up to bilateral, regional and some multilateral rules to help create the conditions

⁴ Dobson and Hufbauer, 2001

⁵ Borenztein, De Gregorio and Lee , 1998

that attract FDI. However, the current treaties vary considerably in their scope and coverage. The resulting overlaps, gaps and inconsistencies are inefficient, not always transparent and can promote a misallocation of resources. Taken together, these rules do not add up to a coherent global framework. There were more than 2000 bilateral investment treaties in place at the end of 2001. It is estimated that it would take about 7500 bilateral treaties to link all the WTO member countries.

Whilst reducing uncertainty and risk may not guarantee a country will get more FDI, a multilateral rules framework - by forming the basis of a level playing field for all WTO members - should facilitate investment flows. It should particularly benefit smaller developing countries, which often do not have the resources to negotiate numerous bilateral treaties or devise and implement an appropriate investment regime independently.

It is expected that a WTO agreement will:

- improve the legal framework for foreign direct investment world-wide
- improve the transparency of domestic laws and regulation
- respect the interests of home and host countries
- preserve the right of host countries to regulate investors' activities
- unlock access to funds and specialists to provide technical assistance in preparing legal frameworks
- be subject to a regular review, especially if applying a uniform dispute settlement mechanism

1.2 The Proposal – What it is

The EU supports the launch of negotiations to establish a coherent, basic framework of multilateral rules on investment. The main elements proposed are:

- Transparency – clear bureaucratic procedures, access to judicial processes, and publication of national rules and regulations.
- Scope - focus on long-term cross-border investment, in particular foreign direct investment, leaving aside short-term capital movements or other forms of financial investment.
- Content – (i) Basic principles of non-discrimination (most favoured nation status and national treatment), and (ii) Market Access commitments with each government deciding for itself which sectors to open to foreign investment.
- Special and differential treatment for developing countries - provisions consistent with developing countries' development policies and their capacities to implement an agreement.
- The right to regulate - each government preserving the right to regulate domestic economic activity, including in development, environment and social policy.

- Exceptions and balance of payment safeguards where appropriate.
- State-to-State dispute settlement only – no investor can take a state to dispute. Investor-to-State arbitration does not fit in the WTO framework.
- Account taken of existing regional and bilateral arrangements on investment.

1.3 The Proposal – What it isn't

Many of the concerns now expressed about investment negotiations at the WTO arise from the far-reaching nature of the failed Multilateral Agreement on Investment (MAI) proposed by the OECD in 1996. The current EU proposal differs from that initiative in several important respects:

- The negotiations would include all WTO members and not just those of the OECD;
- The definition of investment covered by the agreement is confined to longer term cross-border investment;
- The proposed coverage and treatment of issues is more appropriate to developing country needs and concerns;
- There will be no investor-to-state dispute settlement – individual investors cannot invoke the WTO rules to challenge national laws or decisions by domestic regulators;
- Countries would make commitments sector-by-sector in a bottom-up approach. The timing and extent of these commitments would be for each WTO member to decide.

1.4 Questions and Answers

1.4.1 Is the WTO a suitable forum for this type of agreement ?

There are concerns that the proposed agreement would extend the scope of the WTO beyond its traditional areas of competence. The UK Government, however, believes that this is an opportunity to deal with trade and investment in an integrated way as they are inextricably linked – FDI accounts for at least a third of world trade flows. In addition, investment has already been addressed at the WTO in the GATS, TRIMS, and TRIPS agreements. These agreements, however, only partially address investment issues. The UK Government believes more comprehensive rules are desirable.

Any agreement that would come out of the WTO negotiations is likely to be more acceptable to the majority of members than agreements negotiated in exclusive 'regional settings', such as the OECD, as demonstrated by the failed MAI. The Government also believes that the 'binding' nature of WTO

agreements gives investors' confidence that reforming governments will not reverse their policies. Alternative voluntary measures – some have suggested that they could perhaps be housed in the UN - would not provide the 'credibility' effects of a WTO Agreement.

1.4.2 FDI is growing rapidly. Is there any value-added from a WTO agreement? Will it increase FDI flows to developing countries?

The dominant trend in FDI policy in developing countries is towards liberalisation. If these changes are taking place bilaterally and regionally without a multilateral push, then the question remains about what more a multilateral regime would offer.

A multilateral set of disciplines would help developing countries send a positive signal to potential foreign investors regarding the permanence of policy changes, the expected standard of treatment afforded to foreign investors, and recourse to a dispute-settlement procedure (for states rather than private investors).

A WTO agreement will not guarantee increased or redirected investment flows. However, it could reduce distortions caused by high risk, uncertainty and discriminatory practices. Governance is just one of the factors affecting the decision to invest in a foreign country – but it is an important one. By improving the legal framework for FDI worldwide, multilateral rules will contribute to improved governance. The evidence shows that FDI tends to go to countries with good governance, holding constant, the size of the country, labour costs, tax rates, incentives and other factors⁶. The European Services Forum view, supported by the UK Confederation of British Industries, is that multilateral rules would 'create a climate of trust that will make positive investment decisions easier and more likely'.

1.4.3 FDI is growing rapidly. Is there any value-added from a WTO agreement? Will it increase FDI flows to developing countries ?

Having made a WTO commitment, a government cannot immediately change its policy. The binding nature of WTO agreements gives investors confidence that reforming governments will not reverse their policies, helping them make positive investment decisions. However, developing countries should be able to negotiate whatever exceptions and safeguards they feel necessary.

In particular, it is envisaged that the agreement would contain provisions equivalent to those in the GATT, allowing for emergency temporary suspension of commitments, for example, in order to safeguard the Balance of Payments.

⁶ For example, Levine, Loyaza and Beck (2000) show that legal systems help determine differences in financial development. Smarzynska and Wei (2000) show that poor local governance reduces the quality of FDI by discouraging technologically advanced firms. Morisset (2000) shows that a few countries in Africa (Mozambique, Namibia, Senegal and Mali in the late 1990s) were able to attract more FDI by virtue of the quality of their domestic business climates, which included modernising investment codes and adopting international FDI agreements.

1.4.4 Why do the proposals only impose obligations on host governments and not on investors ?

WTO rules deal with the behaviour of governments. They are rules about rules, for example transparency. It is up to host countries to establish the obligations of investors, including foreign investors, and to determine which sectors or activities will be open to foreign investors and under which conditions.

The UK Government encourages greater engagement by business with national governments as partners in the development process. The Extractive Industries Transparency Initiative (EITI), announced by the UK at the World Summit on Sustainable Development (WSSD), is a good example of joint action by companies and government on transparency. The UK Government also supports businesses' involvement in initiatives such as the OECD Guidelines for Multinational Enterprises, the Global Reporting Initiative, the Ethical Trading Initiative, and the UN Global Compact.

1.4.5 Will developing countries no longer be able to discriminate between investors or pursue national development objectives?

Under the EU proposal, governments will be able to discriminate between local and foreign enterprises. The EU proposes an agreement that is similar to GATS in the following respects:

- It would be based on a positive list approach; and
- It would recognise the right of WTO members to regulate - and given asymmetries existing in the development of regulations in different countries - the particular need of developing countries to exercise this right.⁷

The above features of the GATS agreement allow WTO members to discriminate between local and foreign enterprises. National treatment obligations would not apply across the board but only in '*sectors inscribed in the members schedule, and subject to any conditions and qualifications set out therein*'. This means that countries first decide which sectors to open up to foreign investment, and then list those measures that they wish to keep in place even though they violate national treatment principles. National treatment obligations and limitations on regulatory action are therefore determined not only by the interaction of the national treatment provision and general exceptions, but by the exclusions set out in each member's schedule of commitments.

Finally, non-discrimination is not incompatible with pursuing national development policies. For example, many policies to maximise employment generation are generally applied in a non-discriminatory way and do not restrict market access. To the extent that these conditions are fulfilled, these

⁷ This language is used in the GATS preamble

policies would not even need to be listed as limitations to national treatment or market access in the schedule of commitments of the member that applies them.

1.4.6 If the main sectors that are still closed to foreign investment are in services, and GATS covers services-related FDI, then why not let multilateral efforts concentrate on expanding the still-limited coverage of the GATS ?

The main purpose of the proposed investment agreement is not to secure market access commitments, but to improve the legal framework worldwide on a consistent basis, reducing the risks of investing abroad, and in turn giving foreign investors increased confidence to make positive investment decisions.

1.4.7 What is the combined impact of TRIMS and the proposed WTO Framework Agreement on Investment?

The scope of the two agreements is completely different. The new proposed agreement is intended to promote long term stable FDI, whilst the TRIMS Agreement restricts certain investment measures (such as local content or trade balancing requirements) that distort trade – but other types of investment measures are permitted.

The TRIMS agreement is therefore outside the scope of the present negotiations and there are no plans to extend the limited range of measures it covers.

1.4.8 Has corporate accountability been addressed in the agreement ? What measures are in place to guard against the erosion of regulation to protect environmental and labour standards?

Much of the criticism of the failed MAI was due to failure to address these issues – the same criticism is directed at the currently proposed WTO agreement. However, the bilateral and regional investment agreements already in force do not address these issues. An agreement at the WTO, on the other hand, would include explicit provisions recognising the right of national governments to regulate investments in keeping with their development goals.

Governments would continue to regulate the operations of investors in accordance with their national legislation. In particular, there would be provisions explicitly confirming the rights of individual countries to introduce national regulations in the areas of national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. This would reinforce the rights of countries to act in this way, as already provided for in the WTO Technical Barriers to Trade Agreement.

1.4.9 Why is transparency so important ?

A lack of transparency raises information costs, increases uncertainty and risk, diverts corporate energies toward rent-seeking activities, and may give rise to corrupt practices.

Transparency involves making investment laws and regulations available to the public, publicising changes to the law and ensuring uniform administration and application. Transparency can be increased by consultation, which implies communicating the policy objectives of proposed changes and allowing time for public review and discussion.

1.4.10 Thin end of the wedge – will developing countries be forced to open up their markets?

Under the proposed approach, countries would not be forced to open up their markets. The adoption of a 'bottom-up' approach means that each WTO member would choose sectors to which the agreed rules would apply and the extent to which it liberalised and at a time of their choosing. Every member would be free to decide whether or not to open a particular sector to FDI. Any lessons to be learnt from how GATS operates in practice will be drawn upon to ensure that developing countries make informed decisions about any liberalisation commitments they wish to make.

Moreover, since developing countries are increasingly becoming active as investors themselves, they may decide they have a mutual interest in clear rules of access. Estimates suggest that nearly a third of foreign investment flows to developing countries originate in other developing countries. FDI outflows by developing countries grew from \$1.7bn in 1980 to \$99.5bn in 2000 (8.7% of world outflows in 2000)⁸.

1.4.11 Would the proposed agreement have any impact on the ability of host governments to offer incentives to attract FDI?

The current EU proposals do not include any measures that would impact on the ability of governments to offer incentives to foreign investors in order to attract FDI. However, the creation of a level playing field may no longer compel developing countries to offer incentives to overseas investors that they may not be able to afford.

1.4.12 Scope for forum shopping between bilateral, regional and multilateral treaties?

A WTO agreement will only provide for state-to-state dispute settlement. Some bilateral treaties already extend this to investor-to-state disputes, as do regional agreements such as NAFTA. Bilateral and regional agreements

⁸ UNCTAD Handbook of Statistics, 2001

typically provide for the resolution of investment disputes by way of arbitration in international forums such as the International Centre for the Settlement of Investment Disputes (ICSID) in the World Bank Group. The European Commission agrees that the relationship between these different dispute settlement mechanisms needs to be addressed – any conflict between the systems (ie interaction of the rules) would have to be resolved at an early stage.

1.4.13 What about special provisions for developing countries ?

Firstly, the Doha Declaration makes reference to special provisions that reflect the interests of developing countries, and addresses the importance of technical assistance and capacity building. There is a commitment to work with other relevant intergovernmental organisations, including UNCTAD, and through appropriate regional and bilateral channels, to provide strengthened and adequately resourced assistance to respond to these needs. Indeed, the ongoing work of the WTO Working Group on the relationship between Trade and Investment is serving a valuable educative role in advance of negotiations taking place. The obligation and need for appropriate ongoing technical assistance would form part of an agreement that is negotiated.

Secondly, the GATS approach is recognised as the most development friendly of all the WTO agreements. Article XIX of the GATS agreement ‘recognises developing countries right to open fewer sectors, liberalising fewer types of transactions, progressively extending market access in line with their development situation’. The UK Government believes that this principle should be set out clearly in the proposed agreement, and that the agreement should be designed to ensure that it works in practice.

1.4.14 What is the UK Government doing to help developing countries to attract FDI?

The UK Government White Paper; *Eliminating World Poverty: Making Globalisation Work for the Poor*, pledges to work with others to encourage more socially responsible investment in developing countries, to encourage international cooperation (including closer regional cooperation) on investment, and to strengthen the capacity of developing countries to attract and regulate investments.

The Government recognises that the Doha Round covers a wide variety of issues, from Agriculture and TRIPS to Services and the Singapore issues. This is a broad agenda, challenging the negotiating capabilities of the poorest countries. The Government recognises the potential burden this could place on developing countries and is providing assistance in a wide range of areas to help them manage.

In particular, substantial support is being provided to UNCTAD’s multi-year, multi-donor project to provide technical assistance and capacity building in developing countries on issues relating to international investment agreements. UNCTAD’s activities in 2002-2003 focused on strengthening

developing countries capacity to negotiate effectively at the WTO, as provided for in paragraphs 20 to 22 of the Doha Ministerial Declaration.

The UK Government has also funded various research/advocacy initiatives related to the Doha Agenda on Investment, including a network-based project by CUTS⁹, examining topics referred to in the Doha Declaration, trade policy dialogues on the New Issues under a project by the Commonwealth Business Council, and a Working Group on the New Issues under the auspices of the Federal Trust.

The UK Government also supports various initiatives to help developing country governments better understand the components of a conducive environment for private investment, and how to achieve them. To this end, the Government is supporting:

- a 3-year policy-oriented research and advocacy project by CUTS, investigating the experience of FDI in 7 countries, mainly in Sub-Saharan Africa and South Asia.
- the preparation of UNCTAD's World Investment Report 2003, as well as the attendance of officials from developing countries at UNCTAD Expert Group Meetings on Investment.
- World Bank Investment Climate Surveys in specific countries (China, Pakistan, and Bangladesh), as well as the Commonwealth Business Council's Business Environment Survey, 2003.
- OECD/CIME research into the costs and benefits of FDI and implications for policy.

DFID country offices are also undertaking a number of specific activities in conjunction with partner governments aimed at improving the business environments in-country for both domestic and foreign investment.

Finally, the Government supports initiatives that promote Corporate Social Responsibility (CSR) best practice through business and other networks. As referred to earlier, the Government strongly encourages businesses' involvement in initiatives such as the OECD Guidelines for Multinational Enterprises, the Global Reporting Initiative, the Ethical Trading Initiative, and the UN Global Compact.

⁹ Consumer Unity Trust Society, an Indian-based NGO.

Section 2

2.1 WTO Framework Agreement on Competition

The basic idea of provisions to promote competition at a multilateral level is not a new one. The 1948 Havana Charter, the precursor of the GATT, had provisions on restrictive business practices. It is also worth noting that it was the developing countries, not the developed countries, who called for multilateral negotiations on competition rules during the preparation of the Punta del Este Declaration that launched the Uruguay Round.

A competitive environment is directly linked to enterprise productivity, and thus to growth and poverty reduction. Effective competition promotes efficient production methods. Resources go to the products society values most highly. Incentives to innovate raise productivity. Consumers benefit from lower prices, better quality and greater variety of goods and services.

An effective competition policy and law allows innovative new entrants an important role in the development process. It also makes bribery and corruption less likely. Moreover, where competition policy is part of an open and well-regulated economy, it can help encourage both domestic investment and FDI, because it increases investor confidence.

Although these benefits are widely recognised, there remains the issue of what role initiatives at a multilateral level can play in bringing about more effective competition.

Trade is becoming ever more global in nature. It is estimated that some 60,000 multinationals, with 500,000 affiliates, now account for a quarter of world trade. Hand-in-hand with this has grown the phenomena of international anti-competitive practices. The most pernicious of these must be international hardcore cartels, where would-be competitors conspire to engage in collusive practices, most notably bid-rigging, price-fixing, market and customer allocation schemes, and output restrictions.

The damaging effects of hardcore cartels are now widely understood and a number of studies provide some illuminating findings on the economic damage they cause. The available evidence suggests that hard-core cartels have particularly damaging effects on developing countries, for the following reasons:

- Developing countries have to rely heavily on imports given their generally narrower industrial base. To the extent that their imports are subject to anti-competitive practices, the importing developing country will be penalised by higher-than-necessary import prices.
- Developing countries tend to have small, more narrowly based domestic markets, which leads them to rely on exporting. Where anti-competitive practices exist in the countries to which they export, this undermines their export growth.

- Many developing countries still do not have effective competition regimes. Yet firms tend to engage in across-the-border anti-competitive behaviour in countries without enforcement of a domestic competition law, as their behaviour cannot be challenged.

A number of recent studies have attempted to estimate the costs to developing countries of private international cartel practices. One indicative study¹⁰ estimates an overcharge on imports to developing countries of US\$16 to 32 billion by 16 cartels in 1997, equivalent to between one and two thirds of the total multilateral and bilateral aid for that year.

Tackling these abuses is not easy. It is difficult for prosecutors/enforcers to assemble evidence of such anti-competitive activity because it is held in different jurisdictions all around the world. There is a clear need for the international community to work together and the WTO is the most logical forum in which to establish a set of rules for this co-operation - any other forum would just not have the backing of a sufficient number of countries.

A WTO Framework Agreement on Competition would give credibility to national governments' efforts, and provide the impetus for more co-ordinated technical assistance in the introduction and enforcement of appropriate competition legislation.

It is expected that a WTO agreement will:

- Improve the legal framework for competition world wide
- Enhance the capacity of all countries to address anticompetitive practices across borders through international co-operation
- Respect the interests of developing countries and of their particular needs on a case by case basis
- Support competition institutions in developing countries

2.2 The Proposal – What it is

The EU – including the UK government – believes that a WTO Multilateral Framework Agreement on Competition should provide a solid basis for dealing with basic competition issues, and should facilitate international co-operation on these issues.

The proposed framework includes:

- A requirement to *progressively* adopt a competition law that suits domestic circumstances and reflects the basic principles below;
- A framework of principles on which countries should base their competition laws, including transparency (of laws, regulations, sectoral exclusions and administrative procedures), non-discrimination and procedural fairness;

¹⁰ Background paper for the World Bank's World Development Report, 2001, by Levenstein and Suslow.

- Account taken of countries at different stages of development;
- A ban on hard-core cartels; and
- Creation of a flexible framework for international co-operation.

2.3 The Proposal - what it isn't

The proposal does NOT:

- Require a full-scale convergence of anti-trust laws, or merger control regimes. An important principle of the proposed agreement is that 'one size does not fit all'. There is no universally applicable harmonised model: domestic law should be designed to suit a country's stage of economic development, legal system and enforcement capability.
- Subject individual cases to WTO dispute settlement procedures – an agreement would not limit the independence of domestic competition authorities in the exercise of their enforcement responsibilities. The WTO would not be able to overrule their decisions.
- Prevent governments from regulating competition policy and the behaviour of companies as they see fit with respect to such issues as environmental or health regulations, provided that the new regulations are non-discriminatory.

2.4 Questions and Answers

2.4.1 Why the WTO instead of another forum like the UN?

Trade and competition are inextricably linked. The benefits of trade liberalisation can only be realised if there is genuine competition. Anti-competitive practices - whether conducted by domestic businesses or multinationals - mean that consumers do not benefit from increased choice or reduced prices that trade liberalisation would normally bring. Addressing competition issues within the WTO recognises the importance of consumers' interests – and helps puts their welfare at the top of the agenda.

Competition laws and the political and administrative commitment to implementing them vary considerably. Some tasks cannot be performed effectively by national agencies, even of the most developed members, without the cooperation of competition authorities in other jurisdictions. So minimum standards in terms of cooperation and the basic principles of the domestic law are highly desirable. With near global membership, we believe that the WTO is the right forum to agree basic principles on which competition legislation should be based, as well as to encourage cooperation.

However, we are not saying that the WTO should be the only international forum dealing with competition issues. Other international institutions, like

UNCTAD and the OECD, play important but different roles. For example, UNCTAD has a strong record in providing technical assistance to promote competition in developing countries. This includes a 'model competition law' to share best practice on developing appropriate competition laws and how to enforce them. Nevertheless, we believe that the existence of a rules-based system – as provided by the WTO - is particularly important for small or vulnerable economies. Without it, they would be adversely affected by the unilateral actions of more powerful economies.

2.4.2 Thin end of the wedge. Will developing countries be forced to open up their markets – resulting in the shut down or take-over of domestic firms?

This agreement is not about market access. It is about tackling anti-competitive practices that undermine the benefits of trade liberalisation. Competition is about curbing the market power of dominant sellers, while trade liberalisation is about opening up markets.

If increased market access (as a result of negotiations taking place elsewhere in the WTO) leads to developing country firms facing competition from multinational firms, then the proposed WTO Framework Agreement on Competition would help WTO member governments to protect domestic firms and consumers from any anti-competitive practices that may arise.

2.4.3 Will developing countries be unable to pursue national development objectives by discriminating between foreign and domestic companies ?

No. The principle of non-discrimination is not incompatible with pursuing national development objectives. Moreover, the EU proposal does not require that national treatment be applied to any form of government law or regulation. Rather, only that domestic competition laws should be designed so as not to discriminate against firms on the grounds of nationality. Non-discrimination does not mean prohibiting different activities in different situations.

The Government also supports the view that any framework should be flexible, allowing room for countries to maintain policies that limit the application of domestic competition law regimes - for example, through the use of sectoral exclusions and exceptions.

2.4.4 Will a WTO Agreement stop governments from regulating ?

No. Competition law is itself regulation that is intended to ensure fair competition.

A WTO agreement will not prevent governments from regulating – for example, from introducing new environmental or health regulations – provided that the new regulations do not favour one company over another in such a way as to allow a company to control the market.

2.4.5 Different countries have different needs – yet forced to harmonise domestic competition law ?

There is no one-size-fits all mentality in the proposed WTO framework agreement on competition. That could not work. Countries will NOT be forced to harmonise domestic competition law. Nor will there be a requirement to set up expensive competition laws and authorities from the date of conclusion of the agreement, but rather an agreement that allows developing countries the flexibility to progressively introduce competition legislation and enforcement capacity (backed up by technical assistance) at their own pace, and to suit their own particular circumstances and needs. What matters is that each WTO member in time develops an effective competition regime and that such a regime is geared towards their own specific needs and capacity.

2.4.6 Scope for regional rather than national initiatives?

Some countries might wish to address competition policy primarily through a regional competition policy – although some form of national law is usually also necessary to give effect to the regional law. The Government believes the existence of such frameworks is beneficial, especially where countries in the same region have similar experiences and problems relating to competition. Regional laws could be a solution for small developing states lacking the resources to implement national laws. Regional bodies could provide a monitoring role on anti-competitive and restrictive business practices affecting the whole region. For a number of countries, regional approaches could also serve as a stepping-stone for national capacity building¹¹.

2.4.7 Would OPEC be dealt with by a multilateral agreement?

The proposals focus on private anti-competitive practices. OPEC is an arrangement implemented by sovereign member governments and is outside the scope of national competition laws of most countries.

2.4.8 What would be the scope of a ban on hard-core cartels?

It is difficult to be definitive at this stage and the precise definition of the type of anti-competitive practices that would be covered by a ban will be subject to negotiation. However, it is likely to include practices that include price fixing, quantitative restrictions, market sharing and collusive tenders.

2.4.9 What about export cartels ?

An export cartel may not necessarily have a dominant market position as it might face strong competition from substantial exporters of other countries. An export cartel may be formed because individual producers in the country concerned are too small to undertake exporting separately – its formation may have ‘pro-competitive’ effects. The reasons for the formation of an export

¹¹ DFID is currently helping COMESA to develop a regional competition policy.

cartel may need to be examined on a case-by-case basis. An outright ban could eliminate potential beneficial effects.

2.4.10 Will the agreement be subject to a dispute settlement mechanism?

Yes. However, the proposal is that any dispute settlement mechanism should only apply to the overall obligation to enact a competition law based on core principles. Only member governments, not private businesses, will have recourse to the dispute settlement mechanism. Individual case decisions would not be the subject of dispute settlement. The use of periodic peer review as a helpful tool for developing countries is also under discussion.

2.4.11 How would the agreement curb the activities of hard-core cartels?

Any hard-core cartel ban would have to be implemented by means of corresponding domestic legislation. In practical terms, this would mean that national competition laws should include clear prohibitions against cartel activity. These could be backed up by substantial penalties including fines, imprisonment and investigatory powers. The proposed agreement would also provide for voluntary co-operation and information exchange between competition authorities to tackle cartel activity.

2.4.12 How does the UK government's wish to include the 'new issues' on the agenda fit with its efforts to improve the capacity of developing countries to cope with the existing agenda ?

The UK Government, in line with EU policy in this area, is committed to improving the capacity of developing countries to negotiate effectively in the Doha Round and shares concerns over the burden imposed, particularly on poorer and least developed countries, of participating in a broad range of negotiations. But the government believes that the proposed agreement on competition offers significant benefits for developing countries, for example in dealing with hard core cartels. These benefits need to be set against the costs of progressive establishment of competition authorities.

In addition, the UK Government is working to reduce the burden on developing countries of negotiating and implementing new agreements in a number of ways:

- by providing financial support, notably through UNCTAD technical assistance programmes, to build developing countries' negotiating capacity in the run-up to Cancun;
- supporting proposals that are flexible and sensitive to the needs of developing countries, for example, the progressive adoption of competition law that suits domestic circumstances;

- supporting proposals that would help build the capacity of new competition authorities, providing longer term technical assistance needed to enforce competition legislation.

2.4.13 On what basis would technical assistance be provided?

Enhanced support for the progressive reinforcement of competition institutions in developing countries through capacity building is already being made available through a number of channels, including UNCTAD, the WTO, the International Competition Network (ICN) and support from individual countries such. However, efforts will be increased when a WTO Framework Agreement comes into place. It is also recognised that technical assistance programmes should be:

- country-driven
- for countries identifying competition issues as a priority
- based on long term plans, with assistance of international organisations and donors
- provided by those well placed to provide tailored assistance

2.4.14 What is the UK Government currently doing to promote competition in developing countries ?

Aside from activities related to the Doha Mandate, the Government supports initiatives at the national and regional level to promote competition in developing countries. These include the following recent work by DfID:

- The development of regional competition policies in COMESA and CARICOM
- National efforts to improve competition laws and their enforcement, for example in Tanzania and South Africa
- A variety of research and advocacy programmes to help build a culture of competition; for example, a comparative research and advocacy project on competition regimes in seven countries in Sub-Saharan Africa and Asia by CUTS, and support to Consumers International to develop a competition handbook and toolkit to help their membership promote consumer interests in developing countries.

In addition, the Office of Fair Trading (OFT) sits on the ICN Capacity Building Working Group, which seeks to generate recommendations on best practice for competition authorities worldwide. The OFT also provides expertise to newly established competition authorities through short-term secondments of its staff.

Finally, as outlined in this briefing, the Government is supportive of greater international cooperation on competition issues, particularly through the proposed WTO Framework Agreement on Competition. To counter any risk that developing countries will be prevented through lack of capacity from

gaining the maximum potential benefit from the multilateral negotiations, the Government is helping developing countries ensure their voices are heard in negotiations.

In particular, DFID supports UNCTAD's multi-year programme of technical assistance on competition policy for developing countries. The programme for 2002-3 focused on policy analysis and development, human resource development and institutional capacity building, as called for in paragraphs 24 to 25 of the Doha Ministerial Declaration.

DFID is also supporting other work to help developing countries formulate appropriate negotiating positions. Projects include a CUTS project examining topics referred to in the Doha Declaration, and similar work by the Federal Trust, the Commonwealth Business Council and Consumers International.

Appendix A - The WTO Doha Declaration on Investment and Competition

RELATIONSHIP BETWEEN TRADE AND INVESTMENT

20. Recognising the case for a multilateral framework to secure transparent, stable and predictable conditions for long-term cross-border investment, particularly foreign direct investment, that will contribute to the expansion of trade, and the need for enhanced technical assistance and capacity-building in this area as referred to in paragraph 21, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations.

21. We recognise the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development. To this end, we shall work in cooperation with other relevant intergovernmental organisations, including UNCTAD, and through appropriate regional and bilateral channels, to provide strengthened and adequately resourced assistance to respond to these needs.

22. In the period until the Fifth Session, further work in the Working Group on the Relationship Between Trade and Investment will focus on the clarification of: scope and definition; transparency; non-discrimination; modalities for pre-establishment commitments based on a GATS-type, positive list approach; development provisions; exceptions and balance-of-payments safeguards; consultation and the settlement of disputes between Members. Any framework should reflect in a balanced manner the interests of home and host countries, and take due account of the development policies and objectives of host governments as well as their right to regulate in the public interest. The special development, trade and financial needs of developing and least-developed countries should be taken into account as an integral part of any framework, which should enable Members to undertake obligations and commitments commensurate with their individual needs and circumstances. Due regard should be paid to other relevant WTO provisions. Account should be taken, as appropriate, of existing bilateral and regional arrangements on investment.

INTERACTION BETWEEN TRADE AND COMPETITION POLICY

23. Recognising the case for a multilateral framework to enhance the contribution of competition policy to international trade and development, and the need for enhanced technical assistance and capacity-building in this area as referred to in paragraph 24, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations.

24. We recognise the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development. To this end, we shall work in cooperation with other relevant intergovernmental organisations, including UNCTAD, and through appropriate regional and bilateral channels, to provide strengthened and adequately resourced assistance to respond to these needs.

25. In the period until the Fifth Session, further work in the Working Group on the Interaction between Trade and Competition Policy will focus on the clarification of: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building. Full account shall be taken of the needs of developing and least-developed country participants and appropriate flexibility provided to address them.