Joint Group on Trade and Competition

AN OVERVIEW OF POSSIBLE COMPLIANCE MECHANISMS IN A MULTILATERAL FRAMEWORK ON COMPETITION
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AN OVERVIEW OF POSSIBLE COMPLIANCE MECHANISMS IN A MULTILATERAL FRAMEWORK ON COMPETITION

Introduction

1. The Doha Ministerial Declaration reaffirms WTO Members’ interest in continuing work on the relationship between trade and competition. Paragraph 23 of the Declaration recognises “the case for a multilateral framework to enhance the contribution of competition policy to international trade and development” and provides for negotiations to take place after the Fifth Ministerial Conference on the basis of “a decision to be taken by explicit consensus” as to negotiating modalities. In the interim, the Declaration mandates further work to be undertaken by the WTO Working Group on the Interaction between Trade and Competition Policy (WGTCP) on specific issues relevant to a multilateral framework. As yet there is little consensus on the range of issues already covered by the WGTCP. One such issue is that of how compliance with any multilateral disciplines might be addressed in an eventual multilateral framework on competition (MFC).

2. The purpose of this paper is to canvass a range of generic compliance and/or enforcement mechanisms that feature in multilateral, regional and bilateral agreements dealing with trade and trade-related issues. Competition features in several Regional Trade Agreements (RTAs) although there are significant differences in treatment among Agreements. Some seek harmonisation of substantive rules (e.g. EU) while others focus on general obligations to act against anti-competitive conduct, including obligations to enforce national competition laws (NAFTA). Compliance and/or dispute settlement mechanisms such as consultation, good offices, conciliation, arbitration and peer review often feature in such agreements and are suggested in this paper as possible options for an MFC. Finally, and given that the Dispute Settlement Body (DSB) of the WTO has exclusive jurisdiction for matters arising from the multilateral agreements in the WTO system, the paper discusses the possibility of the DSB carrying out a de jure compliance function under an MFC. The methods covered in many cases are used in contexts quite different from that of the WTO; for example, they may apply in disputes between private parties and/or States and private parties. While noting these differences, this paper considers the question of whether these mechanisms can be adapted or transposed into a multilateral set of rules negotiated within the WTO. They are not necessarily mutually exclusive; indeed a combination of two or more methods may be desirable. More questions will be raised than answers suggested, with a view to stimulating ideas for further discussion and/or enquiry.

3. In order to evaluate the range of mechanisms that could be appropriate for an MFC, it is perhaps useful to reflect upon the type of disputes or compliance problems that might arise. While there is no

2. See OECD, Regional trade agreements and the multilateral trading system, Chapter 4, Paris, 2002.
3. WTO Understanding on Rules and Procedures governing the Settlement of Disputes, article 23.
consensus as to the content of an MFC, based on discussions at the WTO to date on the subject one could envisage the following types of compliance problems:

- The non-existence of a national competition law;
- The inadequacy of an existing competition law (e.g. due to non-inclusion of agreed core principles);
- The non-application/non-enforcement of a competition law;
- The discriminatory or non-transparent application of a competition law;
- Lack of co-operation between national competition agencies;
- The non-enforcement of a ban on hard core cartels.

Which of these would come under the scope of compliance provisions in an MFC?

4. In this connection, it may be useful to examine the ways in which existing WTO Agreements deal with compliance issues. The Agreement on Trade Related aspects of Intellectual Property Rights (TRIPS) for example, provides a compliance and monitoring mechanism with regard to the first two types of non-compliance mentioned above. Members must ensure that their laws comply with the obligations in the Agreement; to this end they must notify their laws to the TRIPS Council. This notification allows all Members to see how others comply with their obligations and provides the basis for the Council’s review of Members’ legislation. This system also may be of interest when considering peer review as a compliance method. Furthermore, it is an effective way to ensure and enhance transparency, one of the “core principles” identified in paragraph 25 of the Doha Declaration.

5. Finally, in considering the appropriateness of any given compliance method or combination of methods, it may also be useful to consider the objectives sought to be achieved. In this connection, possible objectives may include finding a positive solution to a dispute, clarifying provisions of the agreement, providing security and predictability to the multilateral trading system and/or re-establishing the balance of concessions. Encouraging closer co-operation and convergence, enforcing rules in a binding fashion or recommending non-binding solutions may be additional or alternative objectives. What should be the objective(s) of a compliance mechanism in an MFC?

Good offices, consultation, mediation, and conciliation mechanisms

6. Consultation mechanisms are common to many RTAs containing competition provisions, in contexts such as co-operation, dispute resolution and compliance. The WTO Dispute Settlement Understanding (DSU) envisages alternative dispute resolution methods such as good offices, conciliation and mediation while consultations are also a key element of this Agreement and must be engaged before

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4. These are offered simply as a range of possibilities, assuming that such provisions were to be agreed in an MFC.
5. Article 63.2, TRIPS.
6. These goals form part of the WTO Understanding on Rules and Procedures governing the Settlement of Disputes.
7. WTO Understanding on rules and procedures governing the settlement of disputes, article 5.
the establishment of a panel.\(^8\) “Good offices” refers to the provision by a third party of the means by which two disputing parties may communicate with each other.

7. Apart from the general consultation procedures that apply to WTO disputes, special consultation procedures are provided for in other instruments containing competition-related provisions, e.g. the GATS\(^9\) and TRIPS Agreement.\(^10\) RTAs containing consultation and co-operation provisions in the area of competition are more extensive than WTO provisions, particularly where they extend to the direct enforcement of competition rules, including investigation of complaints, hearings and judgements.\(^11\)

8. NAFTA and the Canada-Chile FTA contain general consultation and co-operation procedures to consult on the effectiveness of national competition laws and co-operate on enforcement via mutual legal assistance and the exchange of information.\(^12\) APEC encourages consultation through forums for discussion, exchange of views and technical co-operation. The EEA Agreement has a general consultation mechanism that may be invoked on matters that are relevant to the Agreement and may “give rise to a difficulty”.\(^13\) The implementing rules of Antitrust in the Europe Agreements contain consultation procedures that may be requested where an Authority believes that anti-competitive practices in the territory of another are not being investigated and substantially affect its interests.\(^14\)

9. NAFTA review and dispute settlement provisions include consultation requirements with respect to changes in anti-dumping and countervailing duty laws. Conciliation and mediation are among the dispute resolution methods available, applying to complaints regarding action or proposed action that may be inconsistent with the Agreement or would cause “nullification or impairment” of benefits reasonably expected to accrue from the Agreement.\(^15\) Mediation is also one of several commonly used methods of dispute resolution in US Antitrust.\(^16\) The OECD 1995 *Revised Recommendation of the Council concerning Co-operation between member Countries on Anti-competitive Practices affecting International Trade*\(^17\) contains a consultation and conciliation procedure. Where consultation does not lead to a satisfactory conclusion, the Members may agree to recourse to the good offices of the Competition Law and Policy Committee (now the Competition Committee) with a view to conciliating the dispute.\(^18\)

10. Mediation involves the intervention of a mutually-agreed neutral third party to reconcile a dispute. It is voluntary, non-coercive and is a preferred option in cases where the parties have a history of co-operation and an ongoing relationship that they wish to preserve.\(^19\) The term “conciliation” is somewhat ambiguous and often used to refer to a formalised or mandated form of mediation. In this paper that definition is employed, i.e. conciliation refers to a mediation process in which the conciliator/mediator

\(^6\) COM/DAFFE/TD(2003)2/FINAL

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8. WTO Understanding on rules and procedures governing the settlement of disputes, article 4.
9. Article IX.
10. Article 40 (3).
11. OECD, Regional trade agreements and the multilateral trading system, Chapter 4, Paris, 2002.
12. Ibid.
13. EEA article 92 (2).
18. Ibid., Part 1B and paragraph 12 of the Annex to the Recommendation.
19. APEC, A guide to arbitration and ADR in APEC member economies, at http://www.apecsec.org.sg/
plays a more proactive role than in a simple mediation. Mediation is a slightly “softer” option in that the mediator assumes less control of the proceedings than a conciliator, although in both cases their function is assist the parties to reach a mutually acceptable settlement. Generally conciliators and mediators have no decision-making authority, as their role is simply to help the parties reach an agreement. To this end, the procedures are flexible and the conciliator/mediator may choose the tools that s/he considers to be the most appropriate – e.g. consulting with the parties individually, mediating a discussion; developing proposals for a solution. The settlement of a dispute is voluntary but may in some circumstances be enforceable through registration of the settlement with a court or formalisation in a contract. 20

**Issues for an MFC**

11. Experience with the WTO DSU shows that consultation is an effective way to resolve disputes and also to ensure that only those which really cannot be resolved otherwise will go to dispute settlement. In the latter case, consultations serve a useful preparatory function. It is therefore suggested that consultation may be an effective method when considered both as a stand-alone mechanism and as an “attachment” or precursor to other methods.

12. Mediation presents particular benefits as a compliance and/or dispute resolution mechanism in the trade and competition context because its voluntary and informal nature is more conducive to managing the interests of the parties (as opposed to enforcing rights) and preserving a co-operative relationship post-mediation. This is particularly valuable in the competition context, given the importance of co-operation between national authorities in competition law enforcement, sharing of expertise and establishing confidence and eventually convergence. Indeed, as is noted elsewhere in this paper, the formal adversarial nature of mechanisms such as the DSU may strain co-operative relationships between national authorities. 21 So insofar as enhancing co-operation and understanding of the trade and competition interface is an objective of an MFC, this type of compliance mechanism seems appropriate.

13. However, “soft” compliance mechanisms such as mediation and consultation have the disadvantage linked to their non-coercive nature that a participant might at any time abandon the process. The process is also open to misuse as a “fishing expedition” for information or as a delaying tactic. Furthermore, the results are generally non-binding, unless of course the decision to make them enforceable is agreed at the beginning of the process 22 (or incorporated in an eventual MFC as such).

14. Other issues to consider in this context include how consultation and good offices, conciliation/mediation mechanisms might be operationalised in an MFC. Would they be subject to time delays and what might those be; who could be qualified to be a mediator/conciliator; how formal would the process be, etc. Perhaps an interesting option would be to include such mechanisms alongside others, for example as “first port of call” methods before proceeding to “harder” forms of compliance and/or dispute resolution where these have been unsuccessful.

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20. Ibid.


22. APEC, A guide to arbitration and ADR in APEC member economies, at http://www.apecsec.org.sg/
Arbitration

15. Arbitration is a formal adjudicating process by which parties to a dispute submit the matter to an impartial third person or panel selected by the parties. In general, the parties may also choose the location, law and rules of the arbitration. The rules of procedure for the arbitration are generally prescribed by law or by an arbitral body, although the parties may modify them. Arbitral decisions are usually enforceable. Parties may designate an arbitral institution such as the International Chamber of Commerce (ICC)\textsuperscript{23} or may choose the alternative of ad hoc arbitration. Special dedicated institutions exist for arbitral disputes to which states are a party; the Permanent Court of Arbitration in The Hague was established for this purpose. Its mandate was extended in 1992 from disputes between states to include those between states and private sector parties, and disputes involving international organisations.\textsuperscript{24} The International Centre for the Settlement of Investment Disputes (ICSID), created in 1966, conducts arbitration and conciliation proceedings for disputes between host states and foreign investors.\textsuperscript{25}

16. An alternative method to litigation in court systems, arbitration as a dispute resolution mechanism is widely used for private international commercial matters. There are several reasons for this. Over 130 countries are signatories to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").\textsuperscript{26} Various other multilateral and bilateral arbitration conventions also exist. As a result, arbitral awards receive a greater degree of international recognition than judgements of national courts. Arbitration is generally quicker and less expensive than court litigation. In addition, given that arbitral decisions are usually not subject to appeal, the parties are assured that the outcome of arbitration is generally final. The possibility to choose specialised arbitrators is another feature that is appreciated by international commercial actors. Other flexibility aspects, in terms of choice of language, place of arbitration, choice of applicable laws and procedures and nationality of arbitrators alleviate problems due to mutual distrust of foreign legal systems.\textsuperscript{27} On the other hand, arbitration is not always the method best adapted to a dispute. For parties that wish to resolve disputes through a non-legalistic system based on accommodating mutual interests (rather than enforcement of rights) and of which they retain the control, another method such as mediation may be more appropriate.\textsuperscript{28}

17. Arbitration clauses for the settlement of disputes exist in a number of bilateral and multilateral free trade agreements, including EFTA Free Trade Agreements and NAFTA.\textsuperscript{29} Arbitration is also explicitly

\textsuperscript{23} The ICC arbitration court settles disputes from time to time on competition related issues. National courts in France, the US, Switzerland and Italy have expressly recognised the arbitrability of competition law disputes; see JWGTC Roundtable of public and private dispute resolution mechanisms, Note by A. Carelvaris, ICC International Court of Arbitration, COM/DAFFE/CLP/TD/RD(2000)118.


\textsuperscript{25} See ICSID’s website: http://www.worldbank.org/icsid/


\textsuperscript{27} For a description of arbitration as an example of alternative dispute resolution see the International Chamber of Commerce: http://www.iccwbo.org.

\textsuperscript{28} For a description of alternative dispute resolution methods, including a comparison of mediation and arbitration, see APEC, A guide to arbitration and ADR in APEC member economies, at http://www.apecsec.org.sg/

\textsuperscript{29} E.g the Agreement between EFTA states and Morocco, 1997, NAFTA chapter 11 and the EEA (article 111(4) and Protocol 33).
envisaged by the WTO DSU. Article 25, *inter alia*, of the DSU provides that resort to this alternative means of dispute settlement is possible, subject to mutual agreement and sufficient advance notice to all Members. Arbitral awards are to be notified to the Dispute Settlement Body (DSB), the Council and Committee of any relevant agreement.\(^{30}\) The DSU provisions on the surveillance of implementation and compensation and suspension of concessions apply to arbitral awards.\(^{31}\)

**Issues for an MFC**

18. Given the widespread use of arbitration in both private and public commercial disputes, including in the competition context, and the fact that it is explicitly recognised by the WTO dispute settlement instrument\(^{32}\), an arbitral mechanism could perhaps be envisaged as a compliance and/or dispute resolution method in an eventual MFC. An institutionalised arbitral mechanism for WTO Members could provide the traditional advantages of arbitration – speedy dispute resolution, expert arbiters, final enforceable decisions – for those areas agreed in an MFC to be subject to dispute resolution provisions.\(^{33}\)

19. On the other hand, several of the benefits traditionally associated with arbitration do not seem amenable to an arbitral body that is institutionalised in the WTO. The freedom to choose the place of the arbitration, the language of the proceedings and the applicable law would seem to pose problems. In addition, the absence of a right to appeal and the confidentiality of arbitral awards are inconsistent with WTO dispute settlement principles. It might therefore appear inappropriate on the one hand to integrate competition issues into the WTO dispute settlement system and on the other hand subject competition-related disputes to special rules. In particular, it would seem counter-productive not to publish the reports of the dispute settlement or compliance mechanism, not only for transparency reasons but also for the “jurisprudential” guidance on interpretation and clarification of obligations.

20. Several other issues arise here: would such a mechanism replace the DSU in the competition context? Or would it exist in parallel? Would there be a register of arbiters (as in the ICC for example) and if so, would they be trade and/or competition experts? How would they be selected? What degree of choice would the parties have in terms of arbiter? Given the fact that many disputes in this area arise out of private trade restraints and/or anti-competitive behaviour, would it make sense to make access of private parties a

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30 . WTO Understanding on Rules and Procedures governing the Settlement of Disputes, article 25 (2) and (3). Arbitration is also used when a losing party to a dispute wishes to contest retaliatory trade sanctions proposed to be implemented by the winning party (article 22). In addition, arbitration is also envisaged as one way to determine a reasonable period of time for compliance with DSB recommendations and rulings, article 21 (3) (c).

31. WTO Understanding on Rules and Procedures governing the Settlement of Disputes, article 25 (4).

32. WTO Understanding on Rules and Procedures governing the Settlement of Disputes article 25, article 22.

33 . The idea of creating a WTO arbitral body for resolving competition related disputes has been put forward as an alternative falling between the two extremes of a fully-fledged competition code and the longer-term process of convergence. A mechanism that would be similar in its structure to the ICSID, it would have exclusive jurisdiction clearly delimited in terms of substance and subjects – its competence would be limited to market access disputes of a competition law nature involving private parties of different States who are parties to the Agreement. This idea was not put forward in the context of a compliance or dispute resolution mechanism for an MFC and several of its features appear not to sit well with such an Agreement. For example, the authors envisaged disputes between private parties and on substantive cases – two elements that appear inconsistent with the type of possible MFC currently under discussion to be negotiated within the WTO system. See Giardina, A., and Beviglia Zampetti, “Settling competition related disputes – the arbitration alternative in the WTO framework”, *Journal of World Trade*, Vol. 31 No. 6 December 1997.
feature of WTO competition arbitral mechanism, and thus allow private parties to “bypass” their governments? What advantages would an arbitral mechanism adapted to institutionalisation in the WTO (i.e. limited in flexibility, perhaps subject to appeal) have over use of the DSU?

Peer review

21. Peer review in the trade and competition context is a subject that has been dealt with in some detail by the Joint Group. Work addressing the general merits of peer review and possible approaches to it, taking into account experience with the WTO Trade Policy Review Mechanism (TPRM), OECD country reviews and other OECD peer review processes, has already been considered by the Joint Group. It has also examined a range of practical modalities for a competition policy review mechanism (CPRM) in an MFC, taking as a starting point for this study existing multilateral peer review mechanisms, such as those in APEC, the FTAA, the WTO and OECD. This section draws significantly on that work.

22. Peer review is a process by which the quality and efficiency of a country’s policies, laws, regulations, processes and institutions are assessed vis-à-vis those of their peers, in a non-adversarial context. At the multilateral level, peer review mechanisms share the following principal characteristics: a committee of experts carries them out, they take the form of a collegial type of monitoring and they involve interactive investigation. A generic CPRM framework would involve the following participants: the administering Secretariat, the country being reviewed, the peer group and a set of examiners (normally drawn from the peer group). The review process involves a number of stages, beginning with an investigation carried out in accordance with specific agreed review criteria, set by the Members of the administering organisation. These may include policy recommendations and guidelines, specific indicators, benchmarks and legal norms. The investigation is followed by the examination and ends with the dissemination of a report prepared by the Secretariat and based upon the investigation and discussion during the examination.

23. Peer review is widely used in international and regional organisations for a variety of objectives, including compliance monitoring. It has the benefits of facilitating the exchange of information and experiences and as such it plays an important educative role, essential to the encouragement of convergence of policies and practices. Greater convergence in the field of competition law and enforcement has become a priority for national authorities within the OECD and wider competition community, independently of other efforts to improve coherence between trade and competition policies. Peer review also functions as a transparency mechanism and contributes to better quality domestic regulation through the examination and evaluation that it provides. Discussions of the WGTCP have revealed a general consensus among WTO members that peer review in the trade and competition context is an effective means to carry out evaluation of policies and laws, stimulating discussion and co-operation, knowledge and experience sharing and thus generally advancing the goals of an MFC. In the same vein, it has been noted that because one of the functions of peer review is to identify capacity constraints, it can serve as a useful step in the process of capacity building and facilitating understanding of complex technical issues that arise in this area.

37. See for example the record of the WTO WGTCP meeting of July 2001, (WT/WGTCP/5).
Issues for an MFC

24. In the context of an eventual MFC, the benefits of a peer review mechanism are thus widely recognised. The principal question to be determined seems to be the role that might be attributed to such a mechanism: should it be the sole method for ensuring compliance with multilateral obligations and thus serve as an alternative to the use of dispute settlement provisions in the WTO? Or should a peer review mechanism play a broader and more general role oriented more towards policy review and information exchange than strictly compliance issues?

25. Some WTO members have suggested that peer review in an MFC might usefully serve as an alternative to the DSU because it offers a non-adversarial way to assess policies, exchange experiences and work towards convergence in an ongoing manner.\(^{38}\) Similarly the view has been expressed that peer review is an appropriate alternative to dispute settlement on substantive issues because it would avoid review of decisions of national authorities. Furthermore, peer review would be unlikely to employ the specific rules-based approach traditionally undertaken in trade law enforcement, an approach considered inappropriate to that taken to competition law compliance and enforcement issues.\(^{39}\)

26. One of the principal strengths of peer review in the trade and competition context is its “regulatory/convergence approach”.\(^{40}\) This approach involves international activities based on extensive contacts and co-operation between regulatory officials in the form of discussion and information exchange. Over time these practices can facilitate convergence of views and beliefs as to principles and techniques of competition regulation. This is seen by some as the most effective way in which to deal with transnational anti-competitive conduct.\(^{41}\)

27. This is to be distinguished from the “statutory/adjudicatory approach” typical of formal international agreements, such as the WTO. It may be that the character of the DSU, and in particular its adversarial nature, may put under some strain the co-operative relationships established between Members pursuant to enhanced efforts for multilateral co-operation.\(^{42}\) In this connection some commentators have noted that if the WTO is to effectively deal with compliance and dispute resolution in the competition context, it will need to adopt a “dispute prevention” and “regulatory convergence” approach.\(^{43}\)

28. Proponents of peer review as an alternative to the DSU seem generally to favour the peer review option so as to avoid review of decisions by national competition authorities in the WTO system. However, it is worth noting that proposals to date for an MFC do not envisage such an extensive role for the DSU. Certain proponents have made it clear that in their view, compliance and/or dispute settlement provisions should apply only to obligations to adopt legislation based on multilaterally agreed principles and not to substantive cases. In this way, dispute settlement would ensure accountability for commitments undertaken within an MFC. It would not therefore apply to the application of national laws nor review enforcement

\(^{38}\) WTO WGTCP meeting of July 2001, (WT/WGTCP/5).

\(^{39}\) Ibid.

\(^{40}\) For a more detailed discussion of these issues, and in particular the work of D. Tarullo on this issue, see OECD, Peer Review: merits and approaches in a trade and competition context, OECD, Paris, 2002.


\(^{42}\) Ibid.

decisions taken at the national level. Peer review however still could play a role in this type of framework. Given that individual decisions of national competition authorities would not be subject to dispute settlement, a peer review mechanism could be the means by which a Member is able to raise concerns relating to the way another Member applies its laws.

29. Both of these scenarios give rise to further questions. If peer review was to take a complementary role in compliance to the limited dispute settlement provisions described above, it would seem logical to envisage an automatic process akin to that of the TPRM whereby each Member would be reviewed in turn. Would participation be compulsory? What relationship would such a process have with the TPRM – for example could conclusions of a TPRM on competition-related issues affect the competition policy peer review process or vice versa? Should they co-exist as separate mechanisms or should the competition policy peer review process be integrated into the TPRM? How often would reviews be conducted? Should the frequency of reviews depend on a member’s share in world trade and development status, as is the case in the TPRM? What should be the review criteria – should there be a particular focus on issues deemed particularly appropriate for this exercise – substantive, institutional, cooperation arrangements, technical assistance – and if so which ones? Should follow-up be built into the reviews?

30. On the other hand, if the peer review mechanism was to serve as the alternative to dispute settlement for issues arising under the MFC, a range of different questions arise. How would the peer review process be triggered – by the complaint of one Member against another? Or would it be appropriate to allow the administering body launch a review process on its own initiative?

31. Added to these questions are several others that arise in either case. For example, how should confidential information be treated? Who should make up the peer group? Should there be examiners, and if so, how should they be selected? Would participation be compulsory? What role should be played by the Secretariat or administering body and the Member being reviewed during the process? Should final reports be approved by a specialised committee or the WTO Council?

WTO Dispute Settlement Understanding (DSU)

32. The institutionalisation and reinforcement of the GATT dispute settlement mechanism was one of the principal features of the Uruguay Round. The Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) strengthens the GATT mechanism with the objective of providing security and predictability to the multilateral system. Its role is thus to clarify existing WTO provisions, maintain a balance between Members rights and obligations under WTO Agreements, and to secure a positive solution to a dispute. With an expanded jurisdictional scope to cover claims based on any of the multilateral agreements of the first annex to the WTO Agreement, the DSU provides for the establishment of a panel of experts to resolve disputes where consultations have been unsuccessful. A system of strict time delays is imposed so that the dispute may be resolved in a timely manner. Panel decisions are binding and there is the possibility of appeal of decisions. The DSU also provides for compensation and the suspension of

44. Ibid.
47. Understanding on Rules and Procedures governing the Settlement of Disputes, article 3 (2) and (7).
concessions in cases of non-compliance with decisions and recommendations of the Dispute Settlement Body (DSB). In accordance with the 1994 Marrakesh ministerial mandate and the Doha Declaration, procedures for reviewing dispute settlement rules have been initiated and negotiations for improvement and clarification of the Understanding are to be concluded by May 2003.  

34. WTO Members may have recourse to the dispute settlement mechanism in cases where they consider that a benefit that should accrue to it under a WTO Agreement is being nullified or impaired or that the attainment of any objectives of the Agreement is being impeded as a result of (i) the failure of another Member to carry out its obligations under the Agreement; (ii) the application by another Member of any measure (whether or not it conflicts with the provisions of the agreement) 49, or (iii) the existence of any other situation. 50

35. Any multilateral agreement concluded in the WTO and integrated into the WTO system implies coverage of the DSU and thus the jurisdiction of the DSB to resolve disputes between Members pursuant to the obligations contained in the agreement. 51 Indeed, there would be a theoretical inconsistency with the WTO system in concluding a multilateral WTO agreement that is excluded from the operation of the DSU. The institutionalisation of the dispute settlement mechanism in the Uruguay Round and the consequent evolution of the system towards hard law is widely regarded as one of the most important attributes of the WTO. Excluding the application of the DSU or creating within the WTO another type of mechanism to deal with a complaint of non-compliance with multilaterally agreed obligations would undermine this achievement. In addition, it would establish an undesirable type of precedent that may be difficult to reverse in the case of future negotiations in other disciplines. This could also weaken the complementary functions of trade and competition rules for protecting non-discriminatory conditions of competition. 52

**Issues for an MFC**

36. From the point of view of further integrating competition policy issues into WTO jurisprudence, it would be difficult to justify the non-application of the DSU with regard to a multilateral framework on competition. Indeed, a number of observers have pointed out that, due to the existing application of WTO rules to national competition law and practice, the negotiation of additional and specific commitments in an MFC should not be regarded as an “innovation” in substantive terms. 53 Ehlermann and Ehring for example, argue that it would in fact be a “step back” to negotiate an MFC to which the DSU did not apply. These authors analyse the suitability of the DSU and competition matters and conclude that while DSU panels have some weaknesses that are particularly pertinent in the competition context, other aspects, including the DSU standard of review, ensure its ability to adjudicate competition law matters. However, consideration of these issues goes beyond the parameters of the current WTO discussion on the application of the DSU to an eventual framework agreement, and is thus outside of the scope of this paper.

49. The so-called “non-violation” complaint, GATT article XXIII: 1 (b).
50. Article XXIII GATT and article 26 DSU.
51. WTO Understanding on Rules and Procedures governing the Settlement of Disputes, article 1, 23.
37. The debate concerning the suitability of submitting an MFC to the DSU takes place in the context of *de jure* compliance, i.e. compliance based on assessment of national laws vis-à-vis commitments undertaken in a multilateral agreement. This approach would focus upon the *prima facie* compliance of the laws, regulations and guidelines of a competition law framework. This is to be distinguished from a *de facto* approach (discussed at some length in the WGTCP in the context of the proposed core principle of non-discrimination). 54 The latter goes beyond consideration of the wording of laws to consider the application of law in individual cases, which may involve evaluating enforcement policies, national priorities, and the prosecutorial discretion of competition authorities. 55 The *de facto/de jure* distinction has similarly been explored in the context of national treatment by the Joint Group. 56

38. The idea that the DSU could have jurisdiction to review decisions taken by national competition authorities has been a key issue of concern for a large number of WTO Members. Many have stated their opposition to this during discussions in the WGTCP. One of the proponents of the MFC has made clear that it envisages a limited role for the DSU in an eventual WTO agreement. 57 There seems now to be a consensus that dispute settlement in an MFC should not apply to individual cases. 58 A compliance mechanism focusing only on *de jure* evaluation of laws would thus preserve national competition authorities from supranational review of their decisions. At the same time it would require that national laws comply with multilaterally agreed rules, principles and obligations.

39. The rationale for a *de jure* approach lies in the belief that prosecutorial discretion, a core competition enforcement concept, should be preserved. The prerogative of national decision-making on enforcement issues lies at the heart of the competitive system. In principle, competition enforcement should not take place unless the authorities are able to predict with some certainty that their intervention in a specific case will lead to an improvement in the functioning of the marketplace. Proponents of a *de jure* approach argue that multilateral obligations should not deprive competition authorities of this necessary and legitimate discretion nor second-guess the exercise of this discretion. For this reason, the *de jure* approach to compliance is compatible with the notion of convergence of competition law and policy, implying consensus building through discussion and the exchange of experiences.

40. With regard to the DSU and competition issues, it is often noted that competition law enforcement is generally based on a “rule-of-reason” approach rather than the enforcement of rules *per se* as in trade law. Thus, it is argued that the WTO is ill equipped to undertake dispute resolution in the sort of
fact-intensive matters that characterise competition disputes.\textsuperscript{59} This is an argument for carefully defining the scope of application of the DSU, e.g. to exclude reviewing the facts of individual cases. However, \textit{de jure} compliance by definition does not involve consideration of specific cases and thus the rule of reason approach would not apply. In any case, a limit on the DSB’s scope in determining MFC-related issues could be imposed on the DSB to avoid any supposed tendency to go beyond \textit{de jure} compliance and evaluate the application of laws and policies in specific cases.

41. It is interesting to note in this context that the Anti-Dumping Agreement contains provisions that reflect some of the concerns described above in relation to deference to decisions taken by national authorities. When the DSB is requested by a complaining party to establish a panel in an anti-dumping case, the panel determines whether the authority’s establishment of the facts was proper and whether the evaluation of those facts was unbiased and objective. If these two criteria are satisfied, the evaluation of the authority shall not be overturned, even though the panel may have reached a different conclusion. In addition, where the panel finds that there are a number of permissible interpretations of the Agreement, it will find the authority’s measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.\textsuperscript{60} These provisions require the panel to turn its attention to specific procedural aspects of the decisions of national authorities.

42. The issue described above relates to differing enforcement approaches and methods in the trade and competition policy domains. Continuing in this vein but on a substantive level, some commentators argue that the DSB cannot be expected to have sufficient competition law and policy expertise to be able to properly determine such matters coming before them. However, in a scenario of \textit{de jure} compliance under an MFC, it is difficult to see why a lack of specific competition expertise would be problematic. This would be an issue if the DSB were to determine substantive competition issues. If that were the case, it is worth noting that the DSB has already been adapted to adjudicate a variety of new and complex subject matters, such as for example, matters arising from agreements like the Agreement on Sanitary and Phyto-Sanitary Measures to Trade (SPS Agreement) and TRIPS, etc. Moreover, the DSU envisages the possibility of panels consulting experts for opinions on any specific matter and if necessary may request an advisory report from an expert review group.\textsuperscript{61} This issue is also dealt with in other WTO Agreements: the Agreement on Subsidies and Countervailing Measures\textsuperscript{62} and the Agreement on Technical Barriers to Trade\textsuperscript{63} provide for the establishment of expert groups. Similarly, the SPS Agreement provides for panels to seek expert advice on scientific or technical matters.\textsuperscript{64} If considered necessary, an eventual MFC could similarly include provisions to the effect that an expert group to assist a panel could be established.

\textsuperscript{59} E.g. Crampton, P., and Barutciski, M., Trade distorting private restraints: a practical agenda for future action. \textit{Southwestern Journal of Law and Trade in the Americas}, Spring 1999, Volume VI, Number 1. These authors suggest that before going as far as considering the WTO DSU, a plurilateral dispute system could be tried, perhaps in the framework of the OECD for example, where countries who already have experience with competition law become accustomed to this type of system.

\textsuperscript{60} Anti-Dumping Agreement, article 17.6.

\textsuperscript{61} WTO Understanding on Rules and Procedures governing the Settlement of Disputes, Article 13 and Appendix 4.

\textsuperscript{62} See articles 4.5 and 24.3 of the Agreement on Subsidies and Countervailing Measures. This article provides for the establishment of a Permanent Group of Experts, ("PGE") which among other functions may be requested to assist panels with regard to a determination of whether a given measure may be qualified as a prohibited subsidy. The PGE’s conclusions on this issue shall be accepted without modification by the panel.

\textsuperscript{63} See article 14.2 of the Agreement on Technical Barriers to Trade.

\textsuperscript{64} Article 11, Agreement on Sanitary and Phyto-Sanitary Measures.
43. A DSU *de jure* approach does have some limitations however in terms of a compliance method. Because *de jure* assessment looks only as far as the “letter of the law”, non-compliance will only be found where a law explicitly breaches multilateral obligations, e.g. discriminates against foreign firms. Such laws are rare and unsurprisingly so; given that competition law and policy aim to encourage and protect the competitive process rather than specific competitors. Discrimination does occur much more often in a *de facto* sense – that is that while a law does not on its face discriminate, it may effectively be applied in a discriminatory manner or its discriminatory effect may be implicit. Determining *de facto* discrimination would require the DSB to evaluate national structures and decisions, which raises issues of prosecutorial discretion, referred to above. There is general agreement that this potential incursion on national authorities’ decisions and administration is undesirable.

44. Furthermore, a *de jure* compliance method assumes the existence of competition law. Many WTO Members, and in particular developing country Members, do not have such laws and an MFC that takes this approach would oblige them to adopt at least a basic competition law. Some developing countries argue that to ensure the “appropriate flexibility” mentioned in the Doha Declaration, an MFC should refrain from prescribing the means by which Members fulfill their obligations, notably through the enactment of a horizontal law. In addition, for those countries that do not have a competition law regime, such an obligation could be considerably burdensome.

45. *De jure* compliance adjudicated by the WTO can thus be seen as one element of a broader effort to ensure compliance that deals with only one type of non-compliance. For this reason, it would seem wise to avoid focussing the compliance question on a single method. Indeed, other methods that are complementary to *de jure* compliance could also usefully be considered in the design of the agreement. Peer review, consultation and conciliation could be good complements to DSU *de jure* compliance because, unlike *de jure* compliance, these methods allow for one Member to raise directly with another problems related to the administration of a Member’s competition law regime. Use of these methods, being less adversarial and less formal than the DSU, can also serve the objectives of co-operation between national authorities. The confidence building and trust involved in creating effective co-operation is more compatible with these methods than the DSU.

46. A further issue that may arise in the context of submitting competition-related disciplines to the DSU is that of the suspension of concessions in cases of non-compliance with a panel or appellate body decision. If, after the reasonable period of time for implementation of a DSB ruling, the losing party to a dispute has not complied, the other party(s) may negotiate compensation or impose trade sanctions in retaliation. The DSU must authorise such retaliatory measures. Is the retaliatory suspension of concessions an appropriate response to non-compliance in the trade and competition context for *de jure* non-compliance? Would it be better to limit any retaliatory measures to areas covered by the MFC (for example such a measure might take the form of non-co-operation with the national authority of the Member in question, or suspension of rights to participate in the work of WTO competition bodies)? Imposing such a limitation would however need to be balanced against the necessary inconsistency with DSU provisions entailed.

67. WTO Understanding on Rules and Procedures governing the Settlement of Disputes, article 22 (2) and 23.
68. The DSU provides principles and procedures for the suspension of concessions or other obligations when rulings and recommendations are not implemented within a reasonable amount of time and when no satisfactory compensation has been agreed. The complaining party shall first seek to apply such measures
Concluding remarks

47. An essential feature of an MFC is its compliance mechanism(s). The final choice of mechanism(s) will depend upon the objective(s) to be served and the types of compliance issues to be addressed. The role that the actual WTO dispute resolution mechanism might play with regard to compliance issues for an MFC is a key question in this discussion. Many of the issues raised in the section on the DSU reflect the broader debate about how best to further integrate competition policy into the WTO. Negotiations on a multilateral framework on competition still await the "explicit consensus" referred to in para 23 of the Doha Ministerial Declaration, only after which the content and modalities for multilateral rules will be known. Consequently, at this stage the paper offers some preliminary discussion as to the strengths and drawbacks of a range of possible options.

in the same sector that is the subject of the dispute (article 22 (3) (a)). When this is not practicable or effective, it may look to other sectors under the same Agreement (article 22 (3) (b)) and if that option is not practicable or effective, then the party may look to other Agreements. The reasons for choosing to act pursuant to (b) and (c) must be included in the request for authorisation to suspend concessions or other obligations (article 22 (3) (e)).
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