International Cooperation on Domestic Policies: Lessons from the WTO Competition Policy Debate*

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INTERNATIONAL COOPERATION ON DOMESTIC POLICIES: LESSONS FROM THE WTO COMPETITION POLICY DEBATE

International trade gives firms and households access to world markets for goods, services and knowledge, expands employment opportunities, and generates consumption gains by lowering prices and increasing the quality and variety of goods and services. Encouragement of trade is widely seen as a critical dimension of national development strategies. Trade policy is of course only one element of the set of measures that determine growth and development prospects. The benefits of trade liberalization are conditional on many factors, including the prevalence of domestic distortions that may impede the process of adjustment and investment in new activities. Furthermore, trade performance and the gains from trade enjoyed by a country also depend upon on what trading partners do. Foreign market access restrictions may lower (raise) the prices of exports (imports) and have negative effects on the terms of trade, investment incentives and the growth potential of developing countries.

International agreements (both bilateral and multilateral) can help address negative pecuniary spillovers (externalities) caused by trading partners' policies. They may also facilitate the adoption of desirable national policies and be used as instruments to address non-pecuniary externalities. While the focus of most international trade agreements continues to be primarily on national trade policies that impose pecuniary spillovers, negotiating attention has been increasingly expanding to include so-called 'behind the border' policies—domestic policies that may only have indirect effects on trade (market access), if any. Examples include labor, environmental, competition, investment and intellectual property protection policies. The negotiating agenda in such cases often revolves around a determination of what policy should be, or should not be, generally motivated by negative externalities, but not necessarily.

The extension of trade agreements to behind the border policies is controversial. A key question confronting governments is where to draw the boundary of the WTO. More specifically, what type of international cooperation is best pursued through trade agreements? No general answers are possible—issue-specific analysis is needed of the

implications of status quo domestic policies, the existence and magnitude of any negative spillovers, and the impact (costs and benefits) of alternative forms of international cooperation—voluntary versus binding—on these two dimensions.

For concreteness, in what follows the case of competition policy is considered. This was one of the four so-called Singapore issues that were suggested for negotiation at the 1996 WTO ministerial meeting. The competition policy case suggests a number of insights regarding international cooperation on 'behind the border' policies:

- If the focus of discussions and potential negotiations is not clearly on negative spillovers and/or market access constraints associated with a set of policies (or there are no such spillovers) then the rationale for negotiating rules and disciplines for such policies is weakened.[1] The argument that a particular set of policies is important for 'development' is simply not compelling.[2] Virtually any policy domain can be argued to be important for development. In our view, the major externality dimensions that exist in the competition policy domain were not put squarely on the table. Most proposals for negotiations stressed national enforcement-related disciplines, including as a mechanism to deal with international cartels (including export cartels). International cooperation to address negative spillovers caused by national competition policy enforcement was generally to be on a voluntary basis.[3]
- If the primary rationale driving negotiation is not the attenuation of negative policy spillovers (i.e., the case made is based on "systemic" rationales), there must be significant *domestic* political economy problems that impede unilateral action. However, incentives for multilateral enforcement will be weak if there are no spillovers, implying that in such cases a key element of the agenda must be the establishment of *domestic* enforcement mechanisms. In principle, this is the case

[1] See Bagwell and Staiger (2004) for a recent formal analysis that supports this conclusion.

[2] This is not to deny that competition law and policy is important from a development perspective. It is. See e.g., Khemani and Dutz (1995). Kee and Hoekman (2003), in one of the few cross-country statistical analyses of the impact of competition laws, find a statistically significant impact of such laws on price-cost markups. The issue is not to argue against the benefits of national competition enforcement; the question is what the WTO can and should do in this domain.

[3] As discussed below, the proposals made by Thailand constitute an exception.

with antitrust. How valuable internationally binding commitments are in this type of situation depends on the circumstances of individual countries. In the run-up to Cancún, many countries appear to have concluded that the payoff was small, not least many of those countries that already had antitrust legislation—some 100 at last count (Epstein and Greve, 2004).

- A necessary condition for undertaking binding commitments, whether motivated by spillovers or domestic political economy, is experience with the policy. Countries need to be 'comfortable' with an issue and knowledgeable about the implications of proposed rule making. In the competition case this minimum comfort level often did not exist.
- Mechanisms involving voluntary exchange of information, peer review, etc. may be a precondition for governments (stakeholders) to identify where formal cooperation (rules) is beneficial. Indeed, this may be a more effective and efficient vehicle for cooperation. One result of the WTO Working Group discussions was that voluntary fora for cooperation were either established or strengthened. The primary example is the International Competition Network—a forum for competition enforcers and lawyers to collaborate on guidelines for, and assessments of, national competition regimes. Other examples are the OECD, APEC and UNCTAD.[4] These entities operate *outside* the WTO and involve formally non-binding (enforceable) cooperation.

In what follows we first discuss in general the rationales for international cooperation on domestic policies, and specifically what role trade agreements could play (Section 1). Section 2 analyzes the WTO competition policy case. Section 3 concludes.

1. Why Cooperate on Behind the Border Policies?

The 'behind the border' *trade* agenda is a rather broad concept that captures those aspects of the legal and regulatory environment, policies and institutions that affect the ability of firms to compete at home and abroad. An example is policies and institutions that deal

[4] The ICN is a non-governmental forum for cooperation, as opposed to OECD, APEC or UNCTAD.

with standards for quality, health and safety—increasingly a pre-condition for contesting export markets. Much of the behind the border agenda is services related. The cost, quality and variety of services available to firms and consumers is a major factor determining the competitiveness of firms. Many of the 'backbone' services that are critical to development—transport, energy, telecoms, finance—are key inputs into production. Services are activities where there is often need for some type of regulation to address market failures or achieve social (noneconomic) objectives. However, ensuring that markets are contestable—including the ability for new suppliers to enter, firms to connect to networks at a reasonable price, apply new technologies, etc.—is an equally important policy challenge.

It is well known that trade (and trade liberalization) may do little to stimulate growth in economies with distorted product, capital or labor markets. A recent study by Bolaky and Freund (2004) illustrates this: they find that increased openness to trade is positively correlated with income in all countries but is associated with a lower standard of living in economies that heavily regulate new entry or impose high costs on restructuring.[5] Such regulations prevent resources from moving to the most productive sectors/firms. A large body of micro-econometric evidence find that entry and exit of firms (turnover rates) is a key determinant for positive productivity effects of trade openness—see e.g., the studies in Roberts and Tybout (1997). Thus, trade liberalization needs to be complemented by measures to facilitate/allow reallocation of factors of production, in particular policies to promote domestic competition (entry and exit) and labor market flexibility.

A basic question is how trade agreements might help governments to deal with these types of domestic distortions, and strengthen trade-related institutions. Of course, reducing transactions costs and improving policies can be pursued *unilaterally* by adopting international standards and better practices. In fact, many developing countries have taken autonomous decisions to adopt international standards and/or to recognize/adopt the regulatory norms and systems applied by major trading partners such as the EU or the US. This is an example of what can be called policy integration:

[5] Bolaky and Freund (2004) focus on regulation of new entry (number of procedures, time and cost

deliberate actions by governments to reduce the market segmenting effect of regulatory regimes. Unilateral action, voluntary cooperation and binding trade agreements are all alternative routes towards such integration.

Policy integration complements market access liberalization (the removal of discrimination at the border) and national treatment (governments treating foreign products or producers that enter their territory the same as domestic counterparts in terms of policy). It can do so by improving the efficiency of national policies, reducing transaction costs and saving resources otherwise wasted in unproductive activities, and removing (non-trade) policies that segment national markets for similar goods and services. As is the case for trade barriers, policy integration often reduces the detrimental impact of national policies on partner countries (terms of trade externalities). The latter has at least two possible dimensions: the policy itself may create negative spillovers, or, cooperation may offer scope to attenuate externalities associated with another policy (i.e., issue linkage).

International cooperation can take many forms. For example, coordination—efforts by governments or regulatory bodies to agree to (and implement) a norm or rule—generally implies no binding commitment on the part of governments; participation does not require enforcement mechanisms in that there are no incentives to 'defect' once agreement has been reached.[6] On the other hand, information sharing and other types of mutual assistance (legal or otherwise) is a form of cooperation that may require formal agreements—such as accepting to apply the principle of positive comity[7] in competition law cases. Here we are no longer in the coordination game setting as there are likely to be situations were reneging on commitments may be advantageous. The same is true in the case of harmonization, a more far-reaching form of cooperation that involves unilateral adoption by one country of another's set of rules, or negotiation of a common set of disciplines.

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involved) and labor market restrictions on new hiring or layoffs.

[6] In a coordination game agents (firms, countries) have an incentive to adopt a common standard (technology, behavioral norm, etc.) as that leads to higher sales, profits or welfare. The classic example is a decision on what side of the road to drive on. In game theory coordination games involve situations of interdependent decision making

Policy integration is generally motivated by political economy, externality or 'capacity' considerations. It may be useful to overcome domestic political constraints that impede adoption of what are regarded as good policies and may help enhance the credibility of domestic reform efforts. For a developing country, the pursuit of policy integration in a trade agreement context may help in altering policies that reduce economic growth. Policy integration may entail the adoption of better practices, reducing uncertainty, or anchoring expectations by increasing the probability of a sustained pro-growth policy environment.

In practice, international cooperation will mostly be driven by the existence of negative externalities. Domestic regulations that segment markets (impede foreign firms from competing with national ones) may have such segmentation as a goal or it may simply be a side effect. For example, administrative requirements may be duplicative or redundant: tax authorities in an exporting country may require data very similar to that demanded by the importer's customs officials—but in a different format, imposing additional transaction costs (spillovers) on enterprises that engage in international exchange, raising consumer prices. The same type of issue can arise in the competition policy context—multiple jurisdictions with varying notification and documentation requirements, and different standards, give rise to additional (redundant) costs for the firms involved.[8]

Voluntary (multilateral) cooperation between states to reduce such transactions costs and market segmentation has been the dominant form of inter-governmental cooperation historically. For example, more than 30 intergovernmental organizations emerged over 1860-1914 covering international mail delivery (1863), marine signaling (1864), technical railway standards (1883), ocean telegraphy (1897), and aerial navigation (1910) (Murphy, 1994). International interconnection—a key requirement to allow effective competition—was often a major objective. Examples are norms agreed under

[7] The principle of positive comity requires that a government body take into account the interests of another country in the application of national law.

[8] As noted by Evenett (2002), the diversity of merger notification requirements, differences in the timeliness for merger review decisions, and differences in the scope and requirements for appeal all add to the cost of undertaking international mergers, abstracting from the costs and uncertainty associated with the probability that different and inconsistent decisions are made by national anti-trust authorities. These transaction costs

auspices of the International Telecommunications Union to permit cross border delivery of telegrams. The Radiotelegraph Union aimed to prevent a global radio monopoly by requiring interconnection across different technologies. International railway unions promoted networks by standardizing rolling stock, allowing companies to use each other's rolling stock, and enforcing a single bill of lading—so that a single document could be used for multi-country shipments (Pollard, 1974). Post Second World War, intergovernmental organizations proliferated further, with many aiming to foster economic growth by developing norms for 'good' policy and cooperating to reduce transactions costs—ranging from technical requirements for maritime transport (International Maritime Organization) to customs procedures (World Customs Organization) to labor rights and working conditions (ILO) to capital adequacy standards for banks (Bank for International Settlements).[9]

The distinguishing feature of multilateral trade agreements is that they are instruments through which cooperation can be made *binding*. Formal trade agreements differ from voluntary cooperation (even if treaty-based) by offering binding enforcement mechanisms. A consequence is that arguments in favor of inclusion of an issue in a trade agreement such as the WTO must address the question whether binding dispute settlement is appropriate, and if so, what type of instrument (remedy and retaliatory threat) would be most efficient. The classic answer offered by economists is that enforcement is necessary to allow countries to cooperate in the first place. This argument is straightforward if countries negotiate about policies that impose negative spillovers. Assuming these policies are in a country's national interest (enhance welfare), giving up the right to use them comes at a cost that must be offset by greater gains from concessions made by partners (the classic gains from trade). These concessions must be enforceable otherwise the deal will unravel.[10]

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have been a source of concern for firms and the International Bar—see ICPAC (2000).

[9] Cooperation may also be motivated by capacity constraints. These may create incentives for a government to seek to 'outsource' enforcement, either through informal free riding (letting others develop norms) or explicitly delegating implementation to outside agencies, which may include other governments.

[10] In the international relations literature this approach is espoused by the neo-realist school. This assumes that states are rational, unitary actors that must rely on self-help (e.g., a tit-for-tat-based threat of retaliation against defections from negotiated agreements to enforce international cooperation. The economist "enforcement model" of international cooperation is by no means uncontested and certainly not universal.

In the absence of any international spillovers, for cooperation in the WTO to make sense, there must be a constraint that prevents governments from adopting 'good' policies. In practice such constraints are likely to reflect political economy forces. If so, a trade agreement may support the ability of governments to implement and maintain a superior policy in the face of resistance by domestic interest groups. For enforcement to be effective in such cases, dispute settlement procedures must generate a credible threat that reneging—giving in to the domestic pressure—will give rise to costs. In the WTO case such costs arise due to the need to compensate foreign countries that are affected. However, if an issue does not create negative spillovers, the incentives to use the WTO mechanism will be weaker—foreign interests are not directly affected and have no incentives to bring a case to the WTO. Thus, a policy issue must have an externality dimension for the WTO framework to work. This well known—see e.g. Bagwell and Staiger (2002). A corollary of the above argument is that if there are no negative pecuniary spillovers, a key need from an enforcement perspective is the establishment of *domestic* enforcement mechanisms that give access to affected *domestic* interests. That is, this has to be part of the negotiating agenda—as was the case with the Agreement on Government Procurement, which established domestic bid challenge mechanisms as part of its enforcement technology (see Hoekman and Mavroidis, 1997).

The foregoing suggests there are two key questions: (i) do negative international spillovers arise in the context of competition policy and how large are these? and (ii) if the rationale for cooperation turns on domestic political economy rationales, are there domestic stakeholders that have an interest in using, and have access to, domestic enforcement devices?

2. The Competition Policy Case

Domestic competition law and policy can give rise to a variety of international external effects. A merger between foreign firms may increase prices on export markets, to the detriment of foreign welfare if the costs to consumers there outweigh any increase in

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In practice, a "managerial model" that relies on a cooperative, problem-solving approach as opposed to a coercive one is much more prevalent. See Chayes and Chayes (1995).

producer surplus of local competitors (Ordover and Willig, 1986).[11] National tolerance or encouragement of export cartels may have this as an explicit objective (Auquier and Caves, 1979). Firms may also collude to raise prices in export markets through an illegal international cartel. Entry barriers in downstream industries such as distribution may impede effective market access. Duplicative or conflicting merger standards generate transactions costs and regulatory uncertainty (Scherer, 1984). All such cases may act to alter the terms of trade by restricting output or raising prices—the types of effects that are associated with market access restrictions. The 'market access' or terms of trade effects of national antitrust therefore offer one potentially compelling rationale for inclusion of competition law disciplines into the WTO (Bagwell and Staiger, 2002).

It is not surprising therefore that competition issues have been on the international agenda for many years. The draft of the charter to create an International Trade Organization (ITO) in the late 1940s included a chapter on competition, reflecting concerns—driven by German cartels and Japanese zaibatsu in the pre-war period—that international cartels and restrictive business practices can block market access. In the 1970s an active discussion took place in the UN-context on the need to discipline restrictive business practices by multinational enterprises—this resulted in a best endeavors set of principles that was adopted by the United Nations in 1980.[12] Renewed attention emerged in the 1980s due to perceptions that restrictive distribution practices and conglomerates in Japan (keiretsu) impeded access to markets. The Kodak-Fuji dispute is a noteworthy example. In the 1990s, disputes between competition authorities on 'mega-mergers'—e.g., Boeing-McDonnell Douglas, Worldcom-Sprint, GE-Honeywell—as well as a resurgent interest in combating cartels reinvigorated calls for multilateral disciplines on competition policy—one reflection of which was a 1998

[11] In a recent paper, Saggi and Yildiz (2004) have argued that mergers can create international externalities, not all of which are negative – a merger in one country and can benefit its rivals in another country who also benefit from the price increase that follows the formation of a merger. In fact, such free-riding effects can make it rational for a country to pursue a tight merger policy itself (to avoid inflicting costs on its consumers) given that a competing foreign country pursues a lax merger policy. See also Horn and Levinsohn (2001) for a formal analysis of some of the general issues involved with respect to the interaction of trade and competition policy.

[12] Formally, the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices.

OECD Recommendation on Hard Core Cartels (OECD, 1998).[13]

Developments in the WTO: A Short History

In 1997 a Working Group was established in the WTO to investigate the relationship between trade and competition policies. The 2001 WTO ministerial meeting in Doha agreed that negotiations on this subject were to be launched at the 5th WTO ministerial in 2003 on the basis of modalities to be agreed by consensus. At the 2003 Cancún meeting no such consensus emerged (the disagreement extended to other Singapore issues), reflecting continued differences in views on the merits of introducing binding competition law disciplines into the WTO. This despite some seven years of discussion and exchange of views in the Working Group, deliberations that had greatly changed the substance of what was being proposed by proponents.[14]

Initially, there were four types of arguments for introducing antitrust in the WTO (EC, 1995; 1996; US, 1998; Scherer, 1994). First, the EU, US and other OECD members emphasized market access arguments. The claim was that national enforcement (or non-enforcement) of antitrust laws could and did give rise to pecuniary externalities by impeding effective market entry (contestability of the market) by foreign suppliers. That is, private business practices (foreclosure, abuse of dominance, etc.) might nullify the expected benefits of negotiated trade liberalization commitments.

Second, proponents argued that that differences in merger standards and multiple notification requirements across different jurisdictions raised the costs of doing business and could give rise to regulatory (and trade) conflicts, i.e., a transactions costs-argument. The proposed solution generally involved harmonization.

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[13] See the September 1994 issue of *Aussenwirtschaft* (the Swiss Review of International Economic Relations) for several contributions that describe the history of international discussions on this subject. Scherer (1994) discusses the international dimensions of mergers and the case for international cooperation.

[14] Annual reports prepared by the WTO secretariat on the deliberations of the WTO Working Group on the Interaction between Trade and Competition Policy were prepared for the years 1998-2003 and provide a good synthesis of the issues discussed. See: Reports of the Working Group on the Interaction between Trade and Competition Policy to the General Council, WT/WGTCP/2 through WT/WGTCP/7. Clarke and Evenett (2003) provide a detailed discussion of the various proposals made. What follows draws in part on their summary of the various proposals, all of which can be found on the WTO web page and on Hoekman (1997).

Third, smaller countries, especially developing ones, raised concerns about possible anticompetitive behavior by multinationals ("abuse of dominance") and their limited capacity to discipline possible anticompetitive abuses by such firms on their markets. Developing countries therefore could have an interest in an international agreement that outlawed export and international cartels that raise prices in their markets. The same is true of an agreement that provided for their interests to be taken into account when large mergers are considered.

Fourth, several countries argued that a competition law and policy agreement might be used as a mechanism to discipline the use of antidumping and other competition-reducing trade and investment policies. In the case of antidumping, the idea was to take the predation rationale seriously, and to apply competition law criteria to investigate whether exporters engaged in predation in antidumping cases (East Asian WTO members were leaders of this camp).[15]

Roads not taken

As discussions progressed over the 1996-2003 period, the emphasis that was put on spillover rationales for cooperation was gradually reduced. Instead, increasingly stress was put on "systemic" or self-interest type arguments for antitrust disciplines—that legislation in this area was beneficial from a national perspective and would strengthen the global trading system (by complementing trade policy disciplines).

On the market access front—among the most prominent of the initial rationales—efforts to put competition-related issues on the WTO agenda were driven primarily by producer interests. In effect, the governments concerned were pursuing a traditional "export-promotion" objective, not welfare or efficiency—the major focus of many national antitrust regimes. Hence a basic tension existed regarding the consistency of an international agreement on competition policy geared towards dealing with market access

[15] Observers in the early 1990s noted that many types of government policies or measures may have the effect of restricting international competition, and, indeed, that private anticompetitive practices often will need to be supported by government policies (or at a minimum, benefit from government tolerance). An implication also was that these types of policies could well be more distorting and/or detrimental to world welfare. Of course, many of these types of policies can be negotiated through the WTO—examples include state trading, access to distribution services (covered by the GATS), agricultural subsidies, international shipping cartels, restrictive air transport agreements between governments, etc. See Hoekman and

pressures (specific producer interests) and the focus of antitrust on national welfare (dynamic efficiency). In the case of trade policy, the pursuit of mercantilist objectives by trade negotiators leads to an outcome that is welfare improving (unambiguously for small economies that are price takers on world markets).[16] In the case of competition policy this cannot be said—trading commitments on competition policy motivated by market access objectives could have negative implications for the enforcement of competition law more generally. Not surprisingly, it was therefore resisted by a number of competition authorities (e.g., Klein, 1996), and this part of the agenda was largely taken off the table in the course of Working Group deliberations.[17] Instead, the focus shifted to support for a more general approach involving strengthening of national competition authorities in developing countries.[18]

In the mid 1990s, a number of scholars and policymakers called for the establishment of international competition disciplines enforced by a supranational body—analogous (and inspired by) the EU model of integration—to deal with differences in merger standards and regulatory uncertainty created by simultaneous enforcement by differing jurisdictions. As was the case for market access concerns, this led to a vigorous response by antitrust authorities as well as analysts who feared an inappropriate 'one size fits all' approach could emerge (ICPAC, 2000). Differences in law and practice, as well as reasonable differences between enforcers in terms of interpretation of identical provisions made it clear that international convergence of substantive rules would be

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Mavroidis, 1994.

[16] This assumes a developing country is participating in reciprocal tariff negotiations. Gains may not arise (on net) from other countries' liberalization if barriers to its exports stay high because developing countries are not offering concessions, while tariffs in the rest of the world fall for the goods the developing country imports. The resulting increase in world prices could make the country worse off.

[17] Insofar as private practices are alleged to restrict access a first step should be to investigate whether there are policies that support such behavior—e.g., barriers to entry that impede access to distribution channels. In practice, the worst instances of entry/contestability restrictions are likely to be due to, or supported by government policies (Hoekman, 1997).

[18] While one might argue that this would indirectly promote the market access agenda, in general, stronger antitrust disciplines will not have a one-for-one positive relationship with market access, in contrast to trade liberalization. Thus, competition authorities may well have no problem from a welfare or efficiency perspective with exclusive relationships between firms along the production chain. This may be needed to ensure compliance with contracts or to guarantee a positive rate of return on relationship-specific assets that give rise to unrecoverable sunk costs. Moreover, given that the more prominent examples of access issues pertained to countries with long-standing competition legislation and enforcement authorities, and that different countries will apply even similar legal standards in different ways, a national approach implied that

impossible to negotiate.[19] The same is true of merger review standards. Only a supra-national decision maker that looks at the *global* effects of a merger, effectively internalizing the welfare gains and losses across different national markets, can avoid the resource misallocation created by national merger review (Scherer, 1994). Governments were far from ready to contemplate moving down this path.[20] Thus, both market access concerns and efforts to explore the scope for substantive harmonization of competition law were mostly abandoned in the course of Working Group discussions.

What about negative spillovers associated with cartels? In the 1990s, both the EU and US investigated a number of cartels in industries such as vitamins, steel, and animal feeds (Levenstein and Suslow, 2001). The cartels that were identified often affected more than one national market. Levenstein, Oswald and Suslow (2002) analyze the purchases of developing countries of sixteen goods whose supply was found to internationally cartelized by European and/or American enterprises at some point during the 1990s. They found that in 1997 developing countries imported US$36.4 billion of goods from a set of 10 industries that had seen a price-fixing conspiracy during the 1990s. This represented 2.9 percent of developing country imports and 0.7 percent of their GDP.

Such cartels are generally illegal under domestic antitrust laws. Similar effects may result from export cartels—agreements between domestic competitors that are designed to exploit market power on foreign markets or to allow firms to benefit from economies of scale or scope through cooperation. Export cartels may be legal, that is, firms engaging in such practices may be exempted from national antitrust in their home market, if they have no detrimental effect on home consumers. How damaging export cartels are is not known—this is an area on which little research has been done. Other cartel-type arrangements have been shown to have serious detrimental effects on

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the market access agenda would not really be addressed.

[19] For example, there are often differences in view and approach towards vertical restrictions. While vertical restraints can exacerbate other market imperfections especially with asymmetric information, they may be beneficial. US courts therefore use a rule of reason approach, as the costs and benefits must be assessed on a case-by-case basis. Even if identical language were adopted by different jurisdictions, interpretations and decisions could easily differ depending on the weights put on various factors by national authorities (Fox, 1998).

[20] On the issue of transactions costs associated with merger notifications and provision of company information, many competition authorities were more comfortable with bilateral cooperation than with multilateral disciplines requiring sharing of information or harmonization of procedures/criteria.

developing countries—examples include international air and maritime transport cartels, which impact on enterprise-level competitiveness. These are also legal in that the arrangements are (inter-)governmental, but can raise prices significantly for developing country shippers and consumers. Fink, Mattoo and Neagu (2002) estimate that restrictive trade and anti-competitive practices raise maritime liner transport costs by up to $3 billion on goods carried to the US alone.

In principle, national competition authorities can use domestic antitrust law against cartels that have effects in their territory—whether domestic or international. However, many developing countries have limited ability to do so. Recognition of capacity constraints in developing countries therefore provides another potential rationale for international cooperation in this area—poor countries may not be able to combat anticompetitive behavior of foreign firms on their markets. The obvious solution is technical assistance and capacity building, which became a major focus of the deliberations of the Working Group. Note, however, that the implication is that the burden of enforcement is put on developing countries. An alternative approach would be for developed WTO members to discipline the ability of their own firms to collude to raise prices in developing countries (Hoekman and Mavroidis, 2003). This would avoid implementation costs for developing country governments while addressing the negative spillover.

The WTO is a natural forum for such a deal as developing countries would have to 'pay' for such a commitment. In principle, the quid pro quo could take the form of market access concessions. Indeed, given that trade policy may be the only effective instrument developing country governments have at their disposal to respond to foreign cartelization, developing country governments may have less incentives to undertake market access liberalization commitments if they recognize the possibility that they may be confronted with foreign anticompetitive behavior.

Hoekman and Saggi (2003) develop a simple model to investigate the feasibility of a deal involving linkage between specific antirust disciplines of interest to poor countries—a ban on export cartels enforced by high-income countries—and market access commitments. They analyze the incentives a country that lacks the capacity to

enforce national antitrust law has to trade market access (controlled via a tariff) for foreign competition policy enforcement, i.e., whether such type of cooperation can be sustained as the equilibrium outcome of a repeated game.[21] They also compare this with a situation under which the developing country can 'buy' competition enforcement from the trading partner through a transfer of some kind, as well as a situation where the country can use both a carrot (transfer) and a stick (tariff). The latter option is shown to maximize the scope for cooperation. Moreover, the required transfers are less if developing countries have access to trade policy instruments. This suggests a rationale for countries to link binding of tariffs to an agreement to ban export cartels and 'outsource' the enforcement. However, no move in this direction proved possible in the WTO, although a number of developing countries did propose that export cartels be banned.[22] No such linkage appears to have been proposed by any WTO member in the Working Group discussions. Indeed, the closest a proposal came to the outsourcing idea was a suggestion by Thailand that there be a requirement that governments that are investigating a cartel engage in discussions with countries that may be affected (so as to allow them to take appropriate action), and that developing countries be financially compensated for delivering any "requested services".

No progress was made either on suggestions to explore whether competition policy could be used to discipline the explosion in the use of antidumping. This is an idea that has been proposed for many years (see, e.g., Wood, 1989; Hoekman and Mavroidis, 1996). Although the logic is compelling (at least to economists), as this would imply a focus on injury to competition as opposed to injury to only certain competitors (petitioners), the lobbies supporting the antidumping status quo were successful in preventing this option from getting any traction in the Working Group. In practice, although the rhetoric of antidumping is couched in terms of "fair competition" (trade), the

[21] In a recent paper, Bhattachareja (2004) has argued that while importing countries ought to evaluate foreign cartels under a `role of reason' approach, they will frequently be constrained by their lack of knowledge and limited enforcement capacity. He then suggests that an approach akin to that used in the antidumping process could help deal with export cartels – i.e. importing countries could adopt an administrative procedure (instead of a judicial one) wherein cartelization would deem to have been harmful if the price charged by a cartel exceeded a `normal/fair' value.

[22] E.g., Thailand and India, although the latter proposed that any ban on export cartels apply only tohigh-income countries (Clarke and Evenett, 2003).

primary aim of antidumping policies *is* to protect domestic firms, not the competitive process (Finger, 1993).[23] More generally, the discussions in the Working Group focused almost exclusively on private practices and their regulation, not on government policies that may restrict competition and impose negative spillovers on trading partners.

The Situation Pre-Cancún

As of mid 2003, the most far-reaching proposals on the table were limited to WTO members adopting anti-cartel laws; insofar as they had broader competition laws, that these abide by certain principles—transparency, due process, and nondiscrimination; and that authorities cooperate on a voluntary basis in enforcement activities. The only substantive requirement suggested in many submissions was to ban 'hard core' cartels. Whether this included export cartels remained unclear, as the definition of hard core cartels was to left to negotiation. However, past experience suggests that many OECD countries would not be keen to include export cartels under any definition (indeed, as noted, many jurisdictions explicitly make allowance for such cartels) (OECD, 1998).

In parallel to an agreement along the foregoing lines, several WTO members also stressed the importance of voluntary cooperation. Thus, Canada (supported by other OECD countries as well as Thailand), suggested the creation of a Competition Policy Committee that would act as the focal point and clearing mechanism for notifications and exchange of information, coordination and monitoring of technical assistance, and a forum for non-binding peer reviews of national implementation of competition laws.

Thus, the focus of proposals revolved primarily around national enforcement of competition law, with an emphasis on the need for technical and financial assistance to strengthen national competition authorities. Proposals for a compulsory positive comity requirement (a binding commitment to respond to requests to investigate activities claimed to negatively affect another country's interests) were not supported in most submissions, let alone the 'outsourcing' of enforcement analyzed by Hoekman and Saggi (2003). While there can be no objection to improving competition law and enforcement offices, an almost exclusively domestic policy focus begs the question of the rationale for

[23] This is quite clear from the injury standard that is laid down in the antidumping agreement.

using the WTO for such cooperation. As discussed above, in the absence of externality motivations, cooperation in the WTO must rest on domestic political economy considerations. Here it must be borne in mind that the suggestions that were being made were quite limited—essentially that WTO members adopt anti-cartel laws, abide by transparency and nondiscrimination, and ban 'hard core' cartels. As some 100 countries already have such laws or are in the process of adopting them, it is not clear that this would do much to address political constraints. As mentioned, the incentives to invoke WTO dispute settlement procedures would be weak under an agreement that is limited to basic principles for national antitrust, especially insofar as there is not scope to contest decisions in specific cases.[24] Given that foreign governments would not have much scope/incentive to bring cases,[25] a major focus of the proposals for WTO rules in this area was on national enforcement and provision of technical assistance and capacity building (Clarke and Evenett, 2003).

What Next?

A basic question confronting WTO members was whether a model of binding disciplines enforced through the threat of trade sanctions was appropriate. A necessary condition for answering this is a good understanding of the associated costs and benefits of the specific disciplines concerned. The discussions in the Working Group suggest that as of 2003 there was still substantial uncertainty on the part of many countries regarding the cost/benefit ratio of the proposals on the table. An alternative model to a binding agreement—various dimensions of which were included in many proposals—is a voluntary, 'learning to learn' framework (Sabel and Reddy, 2002). An advantage of a voluntary approach to cooperation is that peer review and information sharing, applied to specific policy areas (and ideally complemented with the provision of technical

[24] This was suggested in many proposals, i.e., that the reach of the DSU be limited to implementation of the "framework" rules (nondiscrimination, transparency, etc.), and not extend to specific cases. Thus, it would not be possible to argue against the substance of a decision, or that the authorities *should* have taken action against a purported cartel.

[25] There would be some incentives, however, e.g., if an antitrust authority of a country that is concerned with the behavior of firms from another country on its market did not get adequate cooperation following a request for information from the home country authorities of the firms.

assistance) is less threatening in terms of potential downside.[26] It can also lead to the development of consensus standards on technical issues that members agree constitute good practice, even if participation and implementation is left to individual decisions by countries. The 'learning' or 'focal point' models that underlie voluntary cooperation help ensure that when implemented, policy changes have national ownership – there are constituencies that support adoption or changes in existing practices.

One option therefore was to limit cooperation to such voluntary interaction. This could have been pursued under auspices of the WTO Working Group. Again, however, the question to be answered is why do this in the WTO? There are many fora already that provide venues to discuss international competition issues. Indeed, a result of the WTO discussions (as well as parallel interactions at the bilateral and plurilateral level –OECD, APEC, FTAA)[27]—was the establishment of the International Competition Network (ICN). This brings together competition law enforcement officials from OECD and non-OECD countries to share information and develop "good practice" guidelines for enforcement. The ICN is an inter-agency entity, not an inter-governmental body, reflecting a desire on the part of the "competition community" not to have to engage with trade and other officials on modalities of international cooperation (disciplines) in "their" area. Practitioners engage in a cooperative effort to improve national policies and converge, where appropriate, on common standards that are applied on a voluntary basis. Some of the inter-governmental bodies (such as the OECD and APEC) are also focal points for technical assistance in this area.

Such voluntary international cooperation may help improve domestic policies and performance. Even if this is not the case, as long as such fora generate more analysis and objective assessments of policies, they can help generate information on the size and distribution of the costs and benefits of the status quo, as well as the likely net payoffs of reform. This in itself may help change a given political economy equilibrium. It can also

[26] It is important to note that even non-binding types of cooperation may not be completely toothless. Thus, for example, international peer review and assessments of national performance in a policy area may influence country credit risk perceptions, etc.

[27] See UNCTAD (2002) for a list of existing international cooperative instruments dealing with competition law and policy, including bilateral agreements on enforcement (e.g., mutual legal assistance treaties) as well as multilateral and plurilateral instruments (OECD, UNCTAD, etc.).

reduce the uncertainty regarding the possible repercussions of a subsequent engagement to negotiate binding commitments on competition policy. Information and analysis are important inputs into a well-functioning trading order. Greater monitoring and assessment of the impacts of policies would allow more informed and proactive engagement by civil society (think tanks, non-governmental organizations, consumers and taxpayers) in the policy formation and negotiation process. Progress has been made in the WTO in terms of surveillance and collection of basic data on trade policy, but much more can be done to estimate the magnitude and incidence of costs of protection.

The lacunae are an order of magnitude greater in the case for competition policy. To what extent are the preconditions for cartelization in place? Are markets contestable? How large are barriers to entry, sunk costs, etc.? The more that is done to determine on an objective basis the effects of prevailing policies in achieving stated national objectives, the more scope for countries (stakeholders) to assess their efficacy and efficiency and, if needed, adjust them. Such analysis could be taken up in the WTO Working Group, as well as in research organizations and networks of think tanks and researchers (e.g., the Global Development Network) and bodies such as the ICN, OECD, APEC, etc. Indeed, "competition" in the provision of such information is important, as not all fora will be willing (have incentives) to deal with the issues that are most important to developing countries. Thus, the ICN has focused more on merger related issues and enforcement techniques than on cartels, vertical restraints or abuse of dominance. It is also very unlikely to ever become a mechanism through which agencies would agree to engage in enforcement of legislation in favor of non-nationals.

The acid test for the inclusion of binding disciplines on regulatory issues in trade agreements is whether benefits outweigh costs. International mechanisms to exchange information on good practices and develop rules of thumb for behind the border, trade-related policies can be very beneficial for developing countries. If the end point for the foreseeable future to efforts to negotiate binding rules in the WTO on competition law is greater cooperation in sharing experiences and information on policies and outcomes, this is by no means a failure. As noted, a 'soft law' approach that relies on transparency and increases accountability through regular (multilateral) monitoring of performance may be

more effective to increase cooperation by enhancing the feeling of ownership of specific norms. While detailed international harmonization through trade agreements is likely to be inappropriate in many instances, multilateral norms and disciplines, especially monitoring and information exchange, can help prevent capture and provide information on the effectiveness and impacts of policies. Moreover, as argued in ICPAC (2000) for the specific case of international competition policy issues, and more generally in the international relations literature (e.g., Chayes and Chayes, 1995), it may well be that international treaty instruments, if deemed beneficial, will be multidimensional and rely primarily on non-coercive forms of enforcement.

4. Concluding Remarks

A vigorous competition policy is beneficial for developing countries. This can and should be implemented unilaterally. Indeed, many countries have implemented antitrust laws, although the extent to which such laws are enforced vigorously clearly varies enormously. Thus, whether it makes sense to have competition legislation—something that was belabored ad infinitum by proponents of WTO competition policy disciplines—is not the point. The question is what are the payoffs to international cooperation and what type of cooperation makes sense.

Countries can and do cooperate on a bilateral, plurilateral and multilateral basis in this area—mostly on a voluntary, non-binding basis. For an international agreement that relies on binding enforcement to be beneficial, it must either offset a negative spillover imposed by other countries or help governments to overcome domestic political economy constraints that impede the adoption of welfare enhancing policy changes. In principle, both conditions are satisfied in the competition policy context for developing countries. Although market access impediments resulting from anticompetitive behavior by firms can and should be dealt with by domestic competition authorities, in many countries institutional weaknesses may impede this. One solution is to assist such countries through ‘education’ (learning through information exchange, etc.) and technical and financial assistance. This was at the end of the day a major element of the proposals that were on the table in the run up to the Cancún ministerial. The main focus had shifted from market access and other potential sources of negative spillovers to improving domestic capacity

to enforce national antitrust type legislation (with the emphasis on anti-cartel laws). In itself this would be beneficial—the question is whether the WTO is the right (most effective and efficient) venue for such activity. Given the existence of complementary fora for such cooperation, the revealed preferred answer of many countries was negative.

In terms of pro-active measures by industrialized countries to discipline anticompetitive practices that have effects on developing country markets, very little was being proposed. It is rather ironic that in areas where there clearly are spillovers and potential gains from more binding forms of cooperation—e.g., requiring developed country competition authorities to take the interests of affected developing countries into account in merger decisions, disciplines on export cartels and enforcement action against international cartels, replacement of antidumping law with competition law, etc.—proposals were either quite weak or nonexistent. While the outcome of an eventual negotiation cannot be predicted, and some of these facets might have been pursued, prior experience suggests that significant progress along these lines would have been unlikely. Thus, it proved impossible to agree to ban export cartels even among the OECD membership (OECD, 1998). For large OECD countries, any agreement to make binding commitments to follow a compulsory positive comity rule in mergers and anti-cartel enforcement or a prohibition on export cartels that have a detrimental effect on developing countries will imply costs. These costs are both direct (e.g., the need to spend enforcement-related resources) and indirect (potential reductions in home country welfare insofar as it lowers the terms of trade). The implication is that any move in this direction would require a significant *quid pro quo* on the part of developing countries, one that goes beyond a general willingness to adopt and enforce competition legislation.

At the time of writing competition policy is no longer on the Doha table, although it is likely that the Working Group will continue its deliberations. If and when this topic is brought back to the negotiating table, the case will be much stronger if the focus is more explicitly on spillovers that are created by national enforcement of competition law (or the lack thereof), along the lines discussed above. Arguments to the effect that involving the WTO can help overcome domestic political economy constraints in developing countries by imposing external discipline are not very compelling. The same

effect can be obtained through voluntary cooperation that generates information on the existence and effect of anticompetitive market structures and practices. Indeed, this may well be more effective in mobilizing support for competition law enforcement. A major problem with using the WTO to address such domestic political economy constraints is that the existing enforcement mechanism (threat of trade sanctions by governments) is unlikely to be very effective. The WTO is driven by export interests (market access), not national welfare considerations. Given the lack of a one-to-one relationship between competition law enforcement (or the lack thereof) and market access, the ability of a WTO-based process to play a constructive role is inherently limited.[28]

The alternative, voluntary mechanisms that have emerged could help over time to identify where progress may be possible and binding cooperation beneficial. Indeed, the main outcome of efforts to launch WTO negotiations was to strengthen international voluntary cooperation in this area. "Transparency institutions" have long been promoted by trade and competition policy analysts who argue that public information on the costs and benefits of government policies is required in order to countervail rent-seeking activities (e.g., Finger, 1982). The International Competition Network is a useful vehicle to improve the transparency of competition policy, as are the activities of UNCTAD, APEC, and the OECD. A "soft law", voluntary approach is premised to a large extent on the generation and exchange of information, in turn a precondition for building a common understanding of what types of practices and cooperation is beneficial.[29]

Competition enforcement is an *ex post* endeavor, and the "state of competition" is inherently difficult if not impossible to "quantify"—there are no tariff equivalents to be calculated. Nonetheless, a concerted effort to collect cross-country data on entry and exit (turnover), the number of firms in a market and their size distribution, import penetration, the share of FDI by industry, etc. can provide useful indicators of the state of competition and trends over time if complemented by systematic information on the policies that

[28] But not zero. What matters are the existence of negative spillovers, and these are not necessarily limited to market access effects.

[29] For additional discussion focusing on antitrust, see Wood (2004), more generally, see Abbott (2001) and Abbott and Snidal (2000).

affect these outcomes.[30] Such analysis can complement assessments of the impact of government measures that restrict competition and distort international trade and investment flows. The latter are of course the primary focus of existing WTO rules. Much more can and should be done to strengthen multilateral disciplines on government policies so as to enhance the contestability of markets. As has been argued by many, this is an area where the WTO has both the mandate and the capacity to move forward. Many of the policy areas are on the Doha agenda—services (transport, distribution, telecommunications), agricultural subsidies, antidumping and regional integration (i.e., discrimination) are all examples of policy domains where much remains to be done to enhance international competition (Hoekman and Mavroidis, 1994; Wood, 2004). This should be seen as an important international dimension of the "antitrust" agenda and a priority for action through the WTO.

An immediate question confronting WTO members is what role if any the Working Group should play in the future. One constructive role for such a body would be to become much more of a "transparency body" as opposed to engaging in a pre-negotiation process of the type it has pursued to date. The focus in our view should be on the trade/competition interface broadly defined—acting as a vehicle to identify the existence and magnitude of negative spillovers—whether due to private behavior or to government policies such as those just mentioned. In the deliberations of the Working Group, advocates of competition law disciplines frequently pointed towards the need and value of so-called competition advocacy by national enforcement authorities. This is a principle that could very usefully be used as the central element of the terms of reference for the Working Group looking ahead. Any government policies that are identified as having competition reducing/distorting effects could be put forward as issues to be addressed in the relevant existing WTO agreements. This could provide a basis for moving the competition agenda forward. A multilateral body could also usefully monitor and complement the voluntary types of cooperation that have now emerged, such as the

[30] See Djankov and Hoekman (1998), Evenett and Suslow (2000), Fox (1998), and Graham and Richardson (1997) for complementary discussions of criteria and options revolving around procedural cooperation and enhanced transparency.

ICN. As mentioned, such fora may not deal with dimensions of the competition agenda broadly defined that are important for developing countries.

Finally, it can be noted that from a development perspective—e.g., achievement of the Millennium Development Goals—there is much that could be done by developed countries unilaterally to assist developing countries reduce poverty. There is nothing that prevents rich countries from unilaterally deciding to make export cartels illegal, from shifting to decoupled support of farmers, from liberalizing access to their markets, from making it much more difficult to impose antidumping duties on developing country exports, etc. These types of actions would constitute important non-fiscal (financial) forms of development assistance, types of assistance that would do much to leverage the growth-enhancing impact of official development transfers *and* to promote competition.

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