

International Competition Policy and the World Trade Organization

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Summary

This paper seeks to provide a balanced discussion of the issues involved in the conclusion of a framework agreement on competition within the WTO. It argues that the issue is not whether there should be international rules on competition, but what role the WTO should play. The paper shows that bilateral, regional and plurilateral provisions on competition policy are effectively shaping the current agenda and will most likely fill any vacuum left should no agreement on competition be reached in the WTO. The current proposals for a framework agreement on competition are found to be relatively modest. They would not require extensive harmonisation of national policies. Obligations on core principles such as transparency, non-discrimination and co-operation seem likely to be limited to the legal (de jure) measures establishing national competition regimes and not extended to (de facto) implementation of policies, which would be more controversial and costly. Whilst there are likely to be requirements to introduce national competition regimes and substantive obligations on so called hard-core cartels, there is also a broad measure of support for the flexible application of WTO disciplines. This flexibility should limit the obligations and costs imposed on developing countries, at least for the foreseeable future, should competition be included on the WTO agenda.

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1.0 The aim of this paper

The aim of this paper is to provide a balanced assessment of the issues involved in the current policy debate on the inclusion of competition policy provisions in the World Trade Organisation (WTO). The paper discusses the context within which the current debate is taking place. It points out, in particular, that there are already elements of competition policy in a range of WTO agreements. Perhaps more importantly, a growing number of bilateral, regional and plurilateral agreements now address the topic. In other words the topic of international co-operation in competition policy is already on the trade agenda. The question is what role the WTO should fulfil in such co-operation?

The paper is policy-oriented in the sense that, whilst it touches upon the principled and academic arguments for or against integrating international co-operation in competition policy with the trade regime, it focuses on the issues that form the substance of the current policy debate within the Working Group on Trade and Competition in the WTO. The aim is to inform readers of the issues and the pros and cons of policy choices and thus enable them to make their own judgements, rather than make the case for or against inclusion general provisions on competition within the WTO.

2.0 From Havana to Cancun via Singapore

The debate on what role the WTO should play in international cooperation in competition policy must be seen against the historical background of discussions on the topic and the developments in the international economy. When in 1947 the draft provisions of the International Trade Organization (ITO) included measures on restrictive business practices (RBPs), it did so against the background of the experience of the 1930s, when international cartels had been widespread and damaging to the world economy. Discussions within the GATT in the 1960s on whether there was a need to include provisions on RBPs, made little headway because perceptions had changed by that time and cartels were no longer seen to be a major problem or priority.¹ The progressive trend towards the globalisation of markets in the 1980s and 1990s, and in particular the growth of cross border merger and acquisition activity, which now accounts for a considerable share of all FDI flows, must now be factored into the debate.² In response to the ‘globalisation’ of the 1980s

and 90s a growing number of national competition authorities are seeking to cooperate internationally, whether through regional, bilateral, plurilateral or multilateral means. The 1990s also saw a growing awareness of the relative importance of competition policy, or the absence of effective competition, as a factor in market access, such as in the discussions on the Structural Impediments Initiative (SII) in US-Japanese relations.

The progressive liberalisation of public/government restraints on trade (tariffs as well as non-tariff border and domestic regulatory measures) also raised the question of whether public restraints on trade might not be in danger of being replaced by private restraints on trade. This was especially the case when widespread privatisation and deregulation in many economies increased the scope for private monopolies or market dominance. Policy reform therefore led to a need for more effective competition policies, but in an increasingly global economy.

It was against this background that proposals were made to establish an international regime for competition policy and include competition in the work of the WTO.³ These proposals ran into opposition on the grounds that national competition policies among the developed economies were diverse and many small or developing country members of the WTO had no competition policy at all. It was also argued that introducing national competition policies was not in the interests of many developing countries, which either did not wish to pursue competition based policies in preference to industrial or development strategies, or lacked the resources to implement effective competition policies.

At the Singapore WTO Ministerial in 1996 a compromise was reached to begin work on competition (as well as investment), and a WTO Working Group on Trade and Competition Policy was established. During the course of the next six years a good deal of work has been done within the WGTCP. This has helped clarify the issues and identify a number of areas in which there might be scope for agreement.⁴ The current debate in the WTO is covered in section six of this paper.

The outcome of this debate will be a decision, at the Cancun Ministerial Meeting of the WTO in September 2003, on the 'modalities' of negotiations on competition.⁵

Compared to the early ambitious proposals for the establishment of a global competition authority in the early and mid 1990s, the proposals currently on the table are modest in their scope. They do not, for example, envisage extensive harmonization of national competition policies. The aim is more to promote greater co-operation and the progressive introduction of best practice in the field of competition policy. Nor is there any undue focus on market access issues. Co-operation in competition is seen as a means of helping to ensure effective competition in an increasingly interdependent market, not (primarily) as a means of breaking into this or that market. Developing countries are not being asked to introduce inappropriate, resource intensive policies in a one-size fits all approach. There appears to be a consensus on the need for flexibility in the coverage of developing countries and the need for greater technical assistance for those countries that have chosen to introduce national competition policies.

This paper first indicates the nature of the existing provisions on competition in both existing multilateral agreements (GATT, GATS, TRIMs and TRIPs in the WTO and UNCTAD); as well as in plurilateral agreements (OECD), regional trade/integration agreements (28 at one recent count included competition provisions)⁶ and in bilateral competition agreements (of which there are currently more than 20). Although the regional and bilateral agreements are mainly between countries with well-established domestic competition policies, developing countries are progressively becoming more engaged.

In order to provide a rounded view of the debate, a range of general arguments for and against including competition rules in the WTO are covered. But the main aim of the paper is to inform readers of the real issues at stake in the decision in Cancun and beyond on competition in the WTO. The paper then discusses the universe of potential competition related provisions that could figure in the current or future debate, drawing on the experience that has been gained from the various provisions in existing rules.

As noted above, the work the Working Group on Trade and Competition Policy of the WTO, which was set up after the Singapore WTO Ministerial, and in particular the

work since the Doha Ministerial has focused on a number of modest proposals. These will form the substance of any decision in Cancun, although any decision to include competition may of course be seen by some as the first step down a slippery slope to more comprehensive provisions. These modest proposals include the establishment of national competition authorities, core principles on competition policy, non-discrimination, hard-core cartels, ‘modalities’ for international co-operation in enforcement of competition laws, and the progressive strengthening of competition policies in smaller WTO Members. This list may not be exhaustive, and ideas of proposals for what measures should be included in the WTO may still emerge in negotiations.

Finally, the paper suggests some broad conclusions. It argues that the issue at hand is not one of far-reaching harmonisation of existing national competition policies or indeed, imposing standardised competition regimes on WTO members that do not yet have national competition provisions. The issue is what role the WTO can play in helping to promote good/best practice in national competition policies by co-operative procedures on **policy formulation**, promoting national **institutional structures**, establishing some **basic principles**, promoting **effective international co-operation** in enforcement and **some specific obligations** to tackle a few specific RBPs, such as hard-core cartels.

On many of these issues the proposals put forward by the EU and other supporters of including competition in the Doha Development Agenda are not far reaching and do not represent major obligations for developing countries. But they do represent a first step towards integrating competition rules into the WTO. The paper therefore discusses implications of this integration for developing countries.

3.0 What might WTO provisions on competition include?

It is not the aim of this paper to rehearse the general debate on whether international co-operation in competition policy is required, but for completeness some of the main arguments for and against integrating competition and trade regimes are given in the table below.

An Overview of the cases for and against inclusion of competition in the WTO.

The case for integration of competition provisions

There is a disjuncture between the globalisation of markets including the growth of cross border merger and acquisitions, and the territorial limitations of competition authorities. This should be overcome by agreement on some form of international competition policy. Voluntary co-operation has been shown to be inadequate in dealing with policy differences.

As public restraints on trade, such as measures at the border, are removed it becomes necessary to ensure that they are not replaced by private restraints on trade. The growing evidence of costs of hard-core cartels is probably only the tip of the iceberg.

Given the global nature of markets and the move by a growing number of developing countries to introduce domestic competition regimes, it is now appropriate to consider how competition rules can be progressively introduced into the WTO.

Competition provisions in the WTO are needed to help facilitate market access and could ultimately replace other trade remedies for 'unfair' trade practices such as dumping.

There is a patchwork of multilateral (GATT, GATS (especially the sector agreements), TRIPS and TRIMS) and plurilateral (OECD) agreements which include elements of competition policy. A set of principles is needed to ensure these are compatible.

If no multilateral norms exist, regional and bilateral agreements will fill the vacuum. A multiplicity of provisions will result in policy conflict and mounting costs of compliance for business.

Common rules on competition are needed to avoid conflict between national policies, especially those that claim extraterritorial reach.

The case against

There is no evidence that national competition policies cannot cope with international markets especially if there is cooperation between them. National policies diverge and change over time, so that any agreement international competition rules would be both ineffective and rigid. Policy development should be more flexible but assisted by dialogue.

Time would be better spent removing the remaining public restraints on trade such as agriculture, than introducing new WTO rules. Open markets mean more contestable markets and therefore reduce the risk of welfare losses from cartels.

Different levels of development and the differing needs of countries, both developing and developed, with regard to competition regimes mean that a 'one size fits all' approach is inappropriate. There should therefore be voluntary co-operation on competition policy backed up where necessary with bilateral agreements.

The major trading entities are unlikely to cede powers to apply anti-dumping measures and national business practices, such as vertical integration, cannot easily be harmonized.

There are opportunities under the GATT (non-violation cases under Art XXIII and other existing provisions) that can be used against RBPs that restrict trade.

The WTO should cover trade issues and not risk becoming overburdened with non-trade issues. Developing countries are in particular not ready to make commitments in international competition policies because they need to promote domestic industries and develop capacity in competition policy.

Policy conflict can be avoided by bilateral or ad hoc cooperation between national competition authorities.

It is not so much a question of whether but what type of coverage there should be of competition in the WTO. It is therefore important to look at the substance of a WTO agreement might be. This section of the paper therefore summarizes the universe of possible provisions that could come into consideration, either now or at some time in the future. These take the form of core principles, substantive provisions, procedural measures, means of accommodating countries at different levels of development (and

more or less developed competition policies and ‘cultures’) and dispute settlement provisions.

Core principles

One of the core principles in any international agreement is **transparency**, or the provision of information on national competition laws and their implementation and enforcement. Providing information on the *de jure* structure of competition law should not be controversial. Most if not all countries publish their competition laws and procedures. In addition to publication, transparency may mean notification of laws to the relevant WTO Committee. This could be more resource intensive. Inevitably there are costs entailed in producing and collating all information, but much of this basic information already exists in a series of inventories or data-bases.⁷

Transparency concerning the procedures for implementing national laws or *de facto* transparency represents a greater level of obligation. This concerns information on the decisions and guidelines handed down by courts or competition authorities on the interpretation of competition provisions. Given the nature of competition policy, in which each case is different, such ‘case law’ is at least as important as the statutory provisions, but providing all relevant decisions to other WTO members would be a complex and costly process. This raises important questions concerning the scope of transparency provisions. Perhaps only those competition cases that have an impact on trade be notified, as has been the case for technical regulations under the WTO’s Technical Barriers to Trade Agreement, if so who decide what affects trade?

A second core principle included in all WTO agreements is **non-discrimination**. In the case of competition policy it involves treating foreign companies the same as national companies. Most favoured national status is not difficult in the sense that, for example, restrictive business practices by any group of foreign suppliers is likely to be treated the same by national competition policies. But should bilateral competition agreements and perhaps the competition provisions in RTAs be reconciled with an MFN obligation for competition policy?

The extension of national treatment is more controversial. First of all, national competition policies whether in developed or developing countries often make use of

the discretion provided by national laws when deciding whether to act against a restrictive practice or not. For example, competition authorities may find that the potential productivity or economies of scale gains from a restrictive agreement outweighs the negative effects on welfare. In the past in developed WTO members and in many developing countries today, discretionary powers have also been used in order to allow concentration/rationalisation of the domestic industry in the hope that this will contribute to the international competitiveness. In such cases it would be difficult to reconcile the exercise of such discretion with national treatment obligations. Again the case specific nature of competition policy raises difficulties when it comes to applying general principles.

Substantive provisions

A key substantive element would be the requirement to have an (effective) national competition or anti-trust policy. This is for example, provided for in the North American Free Trade Agreement (NAFTA) and a number of other regional agreements. Simply having competition laws may mean little since there have been a number of cases of countries having sophisticated anti-trust legislation, which have never effectively applied. So a possible central purpose of an agreement on competition, whether in the WTO or anywhere else would be to ensure effective compliance.

One area in which there is growing evidence (see below) in support- of the need to act is that of **'hard-core' cartels** (or cartels which significantly influence prices or output and thus trade, without having any beneficial effects in terms of improved productivity). If private cartels restrict trade or result in increased prices this is clearly detrimental to welfare for all countries. Recent evidence suggests that countries without effective competition policies might be disproportionately affected by such restrictive practices. When cartels have no effects on the domestic market, they may be excluded from national competition jurisdictions. This provides a loop-hole for **export cartels** to exist, which can be especially distorting to trade. Any agreement might also cover other forms of horizontal agreements. The difficulty here is in deciding when agreements are damaging. National competition regimes have developed rather different rules on horizontal agreements.

If there is a reasonable measure of agreement on the need to deal with cartels and other horizontal agreements, national approaches to **vertical agreements**, or those between suppliers at different levels of the production or distribution process, vary quite significantly. Some national policies favour vertical integration as a means of promoting productivity improvements, others see them as equally damaging to competition as horizontal agreements. Furthermore national policies have changed over time, with changes in markets and competition theory, so that finding an agreement on substantive measures governing vertical agreements is more challenging.

Another possible element in an international agreement would be provisions on **mergers and acquisitions** (possibly including strategic alliances). The growth in cross border mergers and acquisitions could be seen as a threat to international competition. But national policies on mergers have varied even more than those on vertical agreements. Until recently many governments used merger policy as an instrument in national industrial strategy by blocking foreign acquisitions in 'sensitive' or strategic sectors. Many developing countries still see a need for control mergers as a means of ensuring foreign multinational companies do not control strategic sectors for development. Agreement on substantive provisions in this field is therefore very difficult and probably beyond the ambition of the current negotiations. Indeed, the only agreement that has been reached on mergers has been in the EU and even this came only thirty years after the original Treaty of Rome was signed. The prevalence of international merger and acquisition activity has however meant that there have been procedural measures agreed in the OECD and bilateral agreements to help avert conflicts between national merger policies.

Many national competition policies, as well as bilateral and regional policies, **exclude specific** sectors, such as air and sea transport, or specific types of agreements, such as co-operation in research and development, franchising or restrictive distribution agreements, from competition obligations. Some national competition laws also formally exclude regulated sectors (such as utilities) from the scope of competition policies. Any WTO provision would therefore need to address the exclusions issue. Some continued use of exclusions seems most likely, perhaps subject to effective transparency provisions (i.e. a listing of exclusions), but should there be an

expectation that such exclusions should be reduced? Should this be done through peer pressure or through (reciprocal) negotiations based on (negative) listing?

WTO provisions on competition could also cover intrusions by the public sector into competitive markets. Public distortions to competition take various forms, such as the provision of **subsidies**, the cross-subsidisation of competitive market activities through rents from **public monopolies** or through the activities of private companies granted **special or exclusive rights** by governments or regulators. Provisions aimed at controlling such public or private monopolies have been included in most agreements between developed countries. There are also provisions in the GATT and GATS on most of these issues. The issue is therefore perhaps one of whether there should be tighter more effective disciplines within the WTO. Here there may be some developing countries that wish to retain the option of using such instruments in their development/industrial strategies.

Procedural provisions

Generally speaking procedural measures in (deep integration) trade agreements are less controversial than substantive commitments, because they often seek to facilitate voluntary co-operation rather than compliance with common binding rules. However the combination of procedural measures with an obligation to have an 'effective' national competition regime can have profound implications for national policies.

Most agreements covering competition include some form of **policy co-operation**. This generally takes the form of the establishment of a committee to discuss developments in competition policy, provide peer review or technical assistance. The impact of such committees is difficult to assess, but if there is a genuine belief that there needs to be more co-operation in the field of competition policy, such 'soft' flexible instruments may be advantageous when there are differences between national policies and levels of development. A WTO Competition Committee could, for example, discuss best practice in policy formulation and implementation and enforcement. Such a Committee could also provide for peer review of national competition policies and co-ordinate technical assistance to developing countries in this area. One question that would need to be answered is why there is a need for a

WTO Competition Committee when there are already similar bodies in the UNCTAD and other plurilateral and regional organisations?

As much of competition policy is case specific, agreements may also provide for **co-operation on implementation of laws**, either by providing information to competition authorities in other jurisdictions or by agreement to co-operate on enforcement. Developed countries do this through bilateral agreements. Developing countries are also keen to co-operate in cases because action against RBPs of MNCs, which operate in developed markets, would not be possible without information on the market behaviour of such firms. As with transparency and non-discrimination, co-operation in specific cases (*de facto* application) implies a greater level of obligation and correspondingly higher compliance costs than for the co-operation on (de jure) policy formulation discussed in the preceding paragraph.

Agreements may include co-operation in the form of negative or positive comity provisions. Negative (or traditional) comity means that a national competition authority takes account of the interests of third parties in any investigation. Positive comity means that the relevant authority in a country 'A' can request the competition authority in another country 'B' to investigate anti-competitive practices within its jurisdiction that affect the market conditions in 'A'. Co-operation means exchanging information so commercial confidentiality is a major factor. In addition to the costs of collecting and analysing market information, there is also the problem that certain information is commercially sensitive. Nearly all provisions on co-operation between competition authorities have exclusions for commercial confidentiality unless the companies involved in any investigation are willing waive their right to secrecy. But not all market information is confidential, so may be scope for exchange of information on such things as market structures and behaviour.

Procedural measures in an agreement may also be intended to ensure the process of investigating and enforcing national competition rules is fair and transparent. Such **due process** provisions are very similar to transparency measures. Their aim is to ensure that all procedures are transparent so that third countries or companies involved in any investigation are aware of all stages of the process. Due process provisions can also include requirements that parties to any case have a right to

participate in any decisions and/or have recourse to a judicial or administrative review of competition authority decisions. This can be very costly in terms of the resources of national administrations.

Special and differential treatment or technical assistance

As noted above procedural provisions may provide a channel through which to promote the use of best practice in competition policy and provide for technical assistance for developing countries or countries that have not yet or are still developing national competences in the field. Technical assistance may take the form of exchanges of personnel, the provision of model competition rules/law, or assistance in dealing with specific cases.

Dispute settlement

Few international agreements, with the notable exception of the European Union and European Economic Area provisions, subject competition policy rules to dispute settlement. The NAFTA, which otherwise has quite strong dispute settlement rules, explicitly excludes the competition provisions from NAFTA dispute settlement. Again the question of *de jure* and *de facto* compliance is important. Dispute settlement that covers *de jure* compliance, i.e. the introduction of competition law and procedures in the country concerned, is one thing. But dispute settlement with regard to the *de facto* application of these national laws is a quite different kettle of fish. Provisions to ensure *de facto* implementation are likely to be intrusive and expensive, although arguably necessary unless the parties can rely on good will when it comes to implementation. These difficulties may mean that 'softer' rules will find application in any WTO framework agreement on competition, at least at the outset, such as the use of peer review of national competition policies within a WTO Competition Committee.

4.0 The evolution of international competition policy

This section discusses the growth of international initiatives in competition policy and shows that there is a dense network of co-operative agreements, which touch upon important aspects of competition policy. These agreements increasingly include

developing countries. It also shows that various WTO agreements already include important elements of competition policy.

The ITO and the GATT

The experience with international cartels during the 1930s provided the incentive to include restrictive business practices (RBPs) in the draft ITO. Chapter V of the ITO devoted nine articles to the subject with the aim of;

‘prevent(ing), on the part of private or commercial public enterprises, business practices affecting international trade which constrain competition, limit access to markets, or foster monopolistic control, whenever such practices have harmful effects on the expansion of production or trade and interfere with the achievement of any of the other objectives set forth in Article 1 [of the charter]’⁸

The ITO provisions listed six practices that were considered harmful to trade.⁹ The ITO was to investigate any complaint brought by a member and if upheld the country concerned would have to do everything possible to remedy the situation. As the ITO was never ratified one can only speculate on how these comprehensive provisions might have been implemented in practice. At the time, differences over the substance of policy were not a major problem, since only the US really had a competition policy. The US Congress was, however, concerned about loss of regulatory sovereignty over this important policy and indeed the lack of support for the ITO in the US Congress resulted in it never being ratified.

In 1954 and 1955 a number of Contracting Parties to the GATT pressed for the inclusion of RBPs in GATT rules. A Group of Experts on RBPs reported in 1961, after considering the subject for a number of years, and although it found .. ‘that the [GATT] should now be regarded as the appropriate and competent body to initiate action in this field,’ there was no consensus on the what the substance of GATT rules might be.¹⁰ This lack of consensus was due, in part, to a perception that cartels were not a major problem at the time and, in part, to opposition to loss of national policy autonomy in such as sensitive policy area. There was agreement on notification procedures on RBPs,¹¹ but these provisions were never been used.¹²

Competition provisions in Existing WTO agreements

There are a number of provisions under GATT 1994 and other WTO agreements, such as TRIPs and GATS that have possible application in cases where anti-competitive practices restrict trade, especially market access. Article II of the GATT requires that if a monopoly is retained by a WTO member, such a monopoly shall not 'operate so as to afford protection in excess of that provided for in schedules.' Article III (*national treatment*) is fundamentally about the maintenance of competitive conditions for imported products compared to domestically produced goods. A number of cases in the GATT have sought to show that national competition laws and procedures are covered by Article III, but without much success.¹³ There is also a possible application of Articles XI (quantitative restrictions) and XVII (state trading enterprises) against anti-competitive practices, although here the focus is on government actions or the application of non-commercial criteria by state owned companies or companies that benefit from exclusive or special rights granted by government.

The use of so-called *non-violation cases* under Article XXIII of the GATT provides the option of using existing GATT rules to address anti-competitive practices.¹⁴ This provision can be used when a WTO Member believes that benefits accruing to it under the agreement are being nullified or impaired by measures that do not violate any part of the GATT.¹⁵ Article XXII can, for example, be used when the benefits of market access for a WTO Member(s) are nullified by the absence of competition in a target market. Although this Article is held up as a possible alternative to a framework agreement on competition in the WTO, there are a number of drawbacks with it. Perhaps the most important is that nullification is, in practice, very difficult to prove and as a result there have been few attempts (none successful) to use this provision.¹⁶ Another difficulty is that in the absence of any agreed framework of rules WTO Panels would have to judge what national competition laws are acceptable and what are not. Such an activist approach to WTO jurisprudence would be based on trade considerations, predominantly market access, rather than the rather broader competition policy criteria. This would not result in an integration of trade and competition policies, but the dominance of market access considerations and would fit uneasily with the general desire to bolster the WTO's legitimacy.

The *GATS agreement* by its very nature is concerned with regulatory issues, many of which touch upon questions of competition. This is clear in the treatment of dominant or monopoly suppliers of services, such as in networked services (e.g. basic telecommunications, utility companies and transport operators). Article II of the GATS therefore obliges monopolies not to abuse their market power when competing in services outside their monopoly rights. The sector agreements in the GATS also include important elements of competition policy. The Understanding on Commitments in Financial Services, requires monopoly rights to be listed and efforts to be made to reduce them. The Reference Paper on Basic Telecommunications negotiated in 1997 also prohibits cross subsidisation (of non-monopoly operations with monopoly services). Any further sector agreements, such as on transport or the 'liberal' professions are also likely to include elements of competition policy.

The issue arises as to whether competition criteria should be applied in general across all such sectors, rather than being the substance of specific sector agreements. In general the efforts to apply general horizontal criteria to all services sectors have not made much progress. The general application of competition criteria to (the regulation) of all services, would be a significant extension of WTO commitments that many WTO members would have difficulty accepting. As a consequence the current proposals for a framework agreement on competition in the WTO would limit commitments to the application of core principles (see below) in competition policy as such and not to regulatory policy across the board.

The *TRIPs agreement* also contains elements of competition policy. WTO Members may take 'appropriate measures .. to prevent abuse of intellectual property rights having an adverse effect on competition in the relevant market.' The scope for the use of competition policies in this field is, however, as in all existing GATT/WTO provisions quite tightly constrained.¹⁷ The TRIPs Agreement (in article 40) also allows competition authorities in WTO members to control certain licensing agreements on competition grounds. Finally, article 31 provides for compulsory licensing as a remedy in cases where anti-competitive practices have been based on intellectual property rights.

Other WTO agreements also include elements of competition, for example, the Agreement on Technical Barriers to Trade requires standards be no more restrictive on trade than is necessary. These provisions (in Articles 3,4 and 8) could be used to challenge the use of proprietary standards to restrict competition, such as in cases where standards limit essential access to networked services. Provisions in the plurilateral Government Purchasing Agreement might also be used to challenge bid rigging, which is probably an important (and largely unmeasured) form of RBP.

Whilst the WTO contains a fair number of elements of competition law, most of the provisions are weak, have seldom been used and even more seldom used with success, and are geared to serving specific narrow needs. There is no over-arching set of principles or interpretation of the WTO rules as they apply to competition.

The OECD

As in other 'Singapore' issues the OECD has played an important role in developing approaches to international co-operation/regimes in competition policy and the interaction between trade and competition policy. The OECD first made recommendations, drawn up by the Competition Law and Policy Committee, on co-operation as early as 1967. The 1967 OECD Recommendation and subsequent revisions in 1973 and 1979 filled the vacuum left by the failure to agree on competition principles in the GATT. The OECD Recommendation included transparency provisions, voluntary provisions on notification, exchange of information and voluntary provisions on co-ordination in cases when investigation of RBPs in one country had implications for another. An OECD Committee of Experts on Restrictive Business Practices was to provide for conciliation and to assist in settling any dispute. The OECD approach therefore covered transparency and co-operation on policy formulation and introduced elements of 'positive comity', but did little to make co-operation in specific cases more effective. There was a steady increase in the number of notifications (of investigations) from an average of 37 notifications each year initially to over 100 a year after 1985, mostly involving the United States and the European Communities. The conciliation provisions have never been used.

The OECD work continued throughout the 1980s with work on the interaction between trade and competition,¹⁸ and co-operation on enforcement between competition authorities.¹⁹ The latter elaborated the previous recommendations and developed more extensive guidelines on notification, exchanges of information and consultations between national competition authorities. The main impact of the OECD provisions appears to have been in promoting transparency and facilitating a dialogue on policy development. The OECD rules were not seen as the beginning of a multilateral competition regime, but were explicitly seen as providing the model for bilateral co-operation between OECD members.

The bilateral agreements that have indeed been agreed have, however, not resulted in a cessation of efforts to develop OECD wide principles. In 1995 a further revision of the Recommendation extended the guidelines on co-operation. This OECD Recommendation now states that Member competition authorities should:

- inform each other possible violations of the other's law;
- forewarn each other of cases which may affect the other's interests;
- request the other's agencies to act against practices which affect the requesting country's interests (positive comity);
- collect and share information to the extent permitted under national confidentiality laws;
- co-ordinate investigations and remedial actions.

In addition to developing guidelines for procedural co-operation the OECD has undertaken considerable work on substantive policy issues. The first product of this work was the 1998 Recommendation on hard-core cartels. A series of reports have also been produced on other issues.

The UNCTAD Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices

The UNCTAD Set was adopted in 1980 and was the rather limited product of earlier efforts by developing countries to get some control over potential RBPs of multinational companies. Compared with some of the current provisions in regional

and bilateral agreements, the UNCTAD Set contained few concrete provisions and did not commit national governments to any binding provisions. What it provided was an early model for both international and national competition policies. This, combined with the establishment of UNCTAD based technical assistance and support, has helped a range of developing countries in drafting their national competition rules.

5 Competition law and practice in regional and bilateral agreements

This section discusses how regional and bilateral agreements have incorporated competition provisions. Readers familiar with these may wish to skip this section and go straight to the discussion of the current debate in the WTO in the following section. However, precedents set in regional and bilateral agreements are likely to have a significant bearing on the multilateral discussions. Furthermore, if no multilateral approach is agreed in the DDA, there is likely to be a continued growth of such regional and bilateral agreements.

The European Union

The EC has extensive provisions on competition policy covering RBPs (vertical and horizontal agreements and abuse of market dominance), mergers, public enterprise, controls on some public monopolies and provisions on state aid/subsidies. These emanate from powers granted to the European Communities and the European Commission in the Treaty of Rome and were intended to ensure that private restrictive practices or subsidies were not used to countermand the effects of market liberalisation within Europe. Article 85 and 86 (now 81 and 82) granted the European Commission powers to intervene, subject to review by the European Court of Justice, in cases of restrictive agreements or the abuse of market dominance. Over a period of forty years EC legislation, Commission guidelines and case law has developed a body of European law, which has been implemented in national courts and progressively adopted by the national governments in their national law. The EC has therefore succeeded in bringing about a convergence in national competition policies, with implementation shared between the European Commission and national competition authorities. The European Commission has made use of EU competition law (in the shape of Article 90), to help bring about liberalisation of sectors in which national public monopolies were dominant.²⁰ European competition policy is also increasingly

seen as a 'horizontal' alternative to detailed sector-by-sector EU Directives aimed at creating a single European market. This can, for example, be seen in recent EU policy on energy and telecommunications liberalisation.

The EU's experience with its own approach to the interaction between trade and competition policy has clearly shaped its thinking on international policy. This is particularly pronounced in the belief, which permeates European competition policy, that the removal of controls on trade and investment has to be complemented by competition policy in order to ensure that private restraints do not replace the public restraints on business. As a result the EU has been the main proponent of more co-operation in competition policy to complement market liberalisation, including the inclusion of competition in the WTO's agenda.²¹

The European Economic Area (EEA)

The EU (and increasingly the US) also influence international competition policy through a network of bilateral and regional agreements. In the case of the EEA, the entire EU *acquis* (law and case law) on competition policy is applied to the EFTA Members of the EEA. Whilst the EFTA countries accepted a common set of competition rules, they were not ready to accept the jurisdiction of the European Commission, so the EFTA Surveillance Body (ESB) was established along with an EFTA court to implement the common European provisions on competition in the EFTA EEA states.

Whilst the importance of the EEA decreased with the accession of Sweden, Austria and Finland to the EU, the competition provisions are of interest because they accommodated different national competition jurisdictions within a progressively integrated single market, by using a 'one-law-two-implementing-authorities solution.' The European Commission has responsibility in 'pure EC cases' when a RBP or abuse of market dominance only affects trade between member states of the EC. In 'mixed' cases involving trade within the EU and trade between the EU and EFTA is affected, the European Commission has sole jurisdiction with review to the ECJ, as long as no more than 33% of the turn over of the companies concerned is within EFTA EEA members. The EFTA Surveillance Body has jurisdiction in (rare) 'pure' EFTA cases, which is when there is no effect on EFTA-EC trade or in so-called 'specific mixed

cases' in which trade between EU member states and between the EU and EFTA EEA members is affected and when greater than 33% of the turnover of the companies concerned is within EFTA. There are equivalent divisions of labour for merger control policy. In the EEA common competition provisions have replaced other remedies against 'unfair' competition, such as anti-dumping and countervailing duty measures.

The Europe Agreements

The Europe Agreements of the early 1990s between the EU and the central and east European countries included provisions aimed at bringing about a progressive extension of the EU's competition regime to the central and east European countries. Restrictive practices, abuse of market dominance and any public subsidies that distort or threaten to distort competition were incompatible with the Europe Agreements.²² Procedural measures in the shape of Joint Committees were established to implement these measures. In practice the prospect of access to the EU has stimulated the introduction of EU-conform competition provisions and the development of independent competition authorities in the accession states. EU technical assistance (finance and secondments) have helped deal with the resource implications of this. Because of the relatively weak competition provisions in the Europe Agreements, the EU retained the right to use instruments of commercial defence (i.e. anti-dumping or countervailing duty measures at the border).

Other EU bilateral agreements

Provisions on competition have also been included in other agreements the EU has negotiated. The Euro-med agreements with countries in North Africa and the Middle East, include significant provisions on competition policy according to which the EU's partners are expected to progressively adopt the EU *acquis* on RBPs, subsidies and public enterprises.²³ But implementing legislation in the Euro-med partners is still to be adopted.

The EU has also included provisions on competition in the bilateral agreements between the European Communities and its Member States on the one hand and Mexico and South Africa on the other. These include elements of negative and positive comity with regard to cooperation on cases as well as technical assistance and

support in developing the competition culture and institutions in the countries concerned.²⁴ The Cotonou Agreement between the EU and the ACP countries also provides for reinforced co-operation in policy formulation and efforts to progressively promote the effective enforcement of policies.

The North American Free Trade Agreement (NAFTA)

In contrast to the extension of the EC *acquis* to the EU's partners, the NAFTA merely calls for each party to adopt or maintain measures to proscribe anti-competitive business conduct (Article 1501). It also urges co-operation between the respective competition authorities and mutual assistance in enforcing national competition laws. There are provisions covering monopolies and state enterprises but these are considerably weaker than the Article 90 (EEC). The right to maintain a state monopoly or public enterprise is safeguarded, but the national authorities must ensure that state monopolies comply with the provisions of the Agreement and are not used as surrogate means of providing a national preference or to restrict competition and trade in non-monopoly sectors.

As with virtually all provisions of the NAFTA, the competition provisions were shaped by the precedent of the Canada-US negotiations on the CUSFTA. In these Canada sought common criteria for competition policy in the hope that these could replace (US) anti-dumping and countervailing duties. Similar efforts also failed in the NAFTA, and the NAFTA Working Group on Trade and Competition does not seem to have moved any closer to this aim. It would seem the only way Canada can succeed in replacing anti-dumping with competition provisions is to do so when the US is not at the negotiating table, as in the Canada-Chile Free Trade Agreement. The hope is perhaps that this will set a precedent for the FTAA. The Canada – Costa Rica Free Trade Agreement, however, does not dispense with anti-dumping provisions even though it includes most of the elements of competition policy currently under discussion in the WTO (i.e. requirement to have national competition provisions on RBPs, an independent competition authority and application of the core principles for competition discussed in the WTO WGCTP.²⁵

NAFTA does, however, promote co-operation between the US and Canadian competition authorities on the one hand and the Mexican authorities on the other.

Unusually for an agreement that stresses effective enforcement, the competition provisions of the NAFTA agreement are not subject to the general bilateral dispute settlement provisions. This may reflect the difficulties of applying dispute settlement to the application of competition policies.

As in the WTO and other regional agreements, provisions that touch upon elements of competition can be found in other parts of the NAFTA. This is especially the case with regard to the market access implications of any (non) application of competition or anti-trust policy, such as the provisions on investment and services. These, like the GATS sector agreements, oblige the parties to ensure that monopoly operators of basic telecommunications services do not use their market power to distort competition in other telecommunications markets.

The Free Trade Agreement for the Americas (FTAA)

Mechanisms for co-operation in the field of competition policy/anti-trust also figure in the current negotiations on the Free Trade Area for the Americas (FTAA). In 1998 an Anti-Trust Summit of the Americas was held at which most countries in the hemisphere agreed to co-operate to improve enforcement of national competition laws, disseminate best practice, especially with respect to due process in competition proceedings, to assist small countries to develop competition policy capacity, and to advance competition principles in the FTAA negotiations.

A second draft chapter of the FTAA on competition was produced in November 2002. Although this is still a negotiating text it provides some indication of the likely shape of the FTAA provisions. Signatories to the FTAA seem likely to be asked to establish national competition policies and national authorities to implement them. The draft covers RBPs, including abuse of market dominance, but merger provisions are still in square brackets. There are also likely to be articles on pro-competitive regulatory practices, public monopolies and state enterprises, which seek to prevent cross subsidisation. The latest draft suggests that there will only be an undertaking to study state subsidies. Institutional provisions will involve measures to ensure due process and transparency in competition investigations. With regard to co-operation on enforcement measures the draft includes provisions on exchange of information, notification and negative comity. The treatment of confidential information is treated

as in the US – EU bilateral, namely confidential information cannot be divulged unless the parties waive their right to such protection. Positive comity proposals remain in square brackets. The FTAA dispute settlement provisions would apply to the implementation of the chapter in national law (de jure), but not to how competition laws are implemented (de facto). As will be shown below this is likely to be a precedent that will shape any WTO negotiations. There are some rather vague provisions on technical assistance. Finally, there is an extensive inventory of national anti-trust provisions available on the FTAA website.²⁶

*The Australian-New Zealand Closer Economic Co-operation Agreement
(ANZCERTA)*

In 1990 a Protocol on the Acceleration of Free Trade in Goods was agreed by Australia and New Zealand brought forward the deadline for completing the removal of tariff and other restrictions on trans-Tasman trade. Article 4.4 of the Protocol requires the Member States to revise competition law in order to address anti-competitive conduct affecting trans-Tasman trade in goods, without recourse to anti-dumping actions.

The approach adopted in implementing this agreement was to extend existing extra-territorial application of competition law to include actions taken in the other country and to remove immunity from the application of competition law in the other country. In effect the agreement constitutes mutual recognition that the competition law of the other country can be applied extra-territorially. New Zealand actions may be taken against companies operating in Australia, which have an impact on trans-Tasman markets and vice-verse. The courts in each country can require companies in the other country to provide information necessarily in any case.

The CER therefore offers an interesting alternative to common competition policies or the straight-forward imposition of extra-territorial or effects doctrines in competition policy. The approach may have lessons for other regional agreements or perhaps even wider international agreements on competition policy. It may be also be relevant to the debate about the relationship between anti-dumping and competition policies in that it replaces anti-dumping actions with competition policies without going as far as

the EC in adopting common competition policy regimes. Having said this the Australian and New Zealand competition regimes are similar and are converging. Indeed, a 1988 CER review called for a harmonisation of business laws, especially competition law as it relates to redress against predatory trade between both countries. The changes to competition law introduced in 1990 have taken the two countries closer still to common policies.

Regional competition arrangements involving only developing countries

While the more advanced forms of regional and bilateral agreements in competition policy involve developed economies, there are also significant initiatives involving regional agreements among developing countries. The Common Market of Eastern and Southern Africa (COMESA) includes provisions relating to competition policy as such as well as other measures, such as on telecommunications, which relate to competition in key sectors. The COMESA agreement of 1993 includes a provision, in Article 55 (similar to Article 81 EEC) that prohibits RBPs that distort trade within the future common market. There is scope for exceptions to this provided the COMESA Council agrees. Work is underway on studies of how to apply this provision and develop a common competition policy within the region. It is expected that the COMESA Court would play a role in interpreting the competition as well as other provisions of the agreement.²⁷

In the 2000 Protocol VIII of the CARICOM Treaty members of CARICOM agreed to establish norms and institutional arrangements to prohibit and penalize anti-competitive conduct within the region. National governments are to adopt competition legislation, establish competition authorities and ensure access to enforcement measures for the nationals of other Member States of CARICOM. Furthermore a Competition Commission is established at the regional level to apply competition policy rules with regard to cross border business conduct. The Commission will have responsibilities relating to the abuse of market dominance, subsidies and anti-dumping actions. The Competition Commission will also have the role of promoting the development of national provisions in competition. The development of competition policy in the CARICOM is still relatively underdeveloped, as in COMESA, but the adoption of Protocol VIII illustrates the

spread of competition policies to more and more developing countries including some fairly small WTO Members.

Bilateral Agreements

There have been a number of bilateral co-operation agreements in the field of competition policy. These have mainly involved the United States, which has concluded agreements with: Germany (1976) reflecting the close links between US and German authorities,²⁸ Australia (1982) as a means of resolving disputes over raw materials exports, and Canada (1984). In 1991 the US also concluded an agreement with the European Communities. This is designed to promote cooperation between the European Commission and the US authorities in order to minimise potential conflicts over the application of the effects doctrine or extraterritoriality by both parties. The agreement covered anti-cartel, merger control and, in the case of the EC, actions under Art 90, 92 and 93 (EEC). Article V of the US-EC agreement provided for 'positive comity'. Requests under positive comity must be seriously considered, but the responses to such requests are still voluntary. Conversely the requesting party retains the right to initiate or re-institute its own enforcement actions.²⁹ The agreement also expressly envisages parallel investigation of the same restrictive practices.

In 1998 the US and the European Commission complemented the earlier agreement and introduced an 'enhanced positive comity' mechanism, in which there is a presumption that competition investigations will be deferred or suspended when the RBPs concerned mainly affect the other party's territory. Both sides also undertake to devote adequate resources and their best efforts to investigations. The 1998 agreement provides for officials from the other competition authority to attend hearings, subject to consent by all parties concerned.

The experience with the US – EU bilateral is that such agreements can promote considerable co-operation between national competition authorities. But there are limitations. For example, the positive comity provisions had by 2002 only been activated once. There also remain difficulties regarding confidential business information and to date no companies involved in bilateral investigations have been willing to waive their right to protection of commercially sensitive information. Co-

operation also does not appear enough to overcome difficulties flowing from underlying differences in policy, such as in the GE-Honeywell case. This suggests that something will also have to be done about the policy differences if there is to be closer transatlantic co-operation in implementation.

6.0 The current debate

Unlike the rather generalised argument in the academic literature on the pros and cons of including competition in the WTO summarized at the beginning of section three, the current debate is pragmatic and reflects lower expectations of what is likely to be possible in the multilateral context.

The current debate in the Working Group on Trade and Competition Policies (WGTCP) provides an indication of the policy areas in which agreement is thought to be most likely. Indeed the work programme of the WGTCP was set out in paragraph 25 of the Doha Declaration. This programme/agenda includes the following issues; core principles (i.e. transparency, non-discrimination and procedural fairness); hard-core cartels; the modalities for co-operation; and support for the progressive reinforcement of competition institutions in developing countries. The debate since Doha, which has drawn on a large number of position papers presented by developed and many developing countries, as well as the work of the Working Group since Singapore,³⁰ forms the basis of the recent report of the WGTCP.³¹

The expectation of those promoting the inclusion of a framework agreement on competition within the WTO is that each country will have *a competition authority endowed with sufficient powers* to enable it to act effectively against RBPs. The trend in most countries is also to have an independent competition authority, rather than one subordinated to a government department. This is not an issue for most developed WTO members, or for a growing number of developing countries, which already have such authorities. But many developing countries may find that the establishment of national competition authorities is not at the top of current national priorities. Equally some small WTO members may argue that the size of their national markets may not require national competition authorities, or that competition policy can be prosecuted without a competition authority as such.

There is clearly a question as to how WTO members without existing competition authorities, or those that have only recently established such bodies should be accommodated within any WTO rules. As stressed at the beginning of this paper there appears to be a broad consensus on the need for flexibility in the application of any WTO provisions and for effective and co-ordinated support for developing

countries. See the discussion below on the progressive Reinforcement of Competition Institutions in Developing Countries. In some cases, such as in CARICOM, regional competition authorities may be able to carry out policy.

Core Principles

Transparency is one of the first elements in any international trade or investment agreement. The principle is established in the GATT, in the GATS and in Article 63 of the TRIPs Agreement. Transparency provisions on competition are likely to involve national governments publishing and possibly notifying the WTO of national laws (and measures?) on competition (*de jure* transparency). Although this would clearly involve some costs, many WTO members that currently have competition laws already have to provide such information. There are also a number of inventories of competition law and procedures already in existence.

All national competition laws provide for the exclusion of certain sectors and or activities. Transparency provisions are therefore likely to call for listing or scheduling of such exceptions and exclusions. The purpose of scheduling exclusions would be to ensure full information is available, but would also focus attention on those areas in which national competition policies were not being applied.

Transparency with regard to how competition laws are implemented (*de facto* transparency), such as the decisions of competition authorities and or courts of law, is rather more complicated. These decisions can set precedents and therefore form an integral part of national competition laws. For an understanding of developments in national competition enforcement, knowledge of case decisions is usually important. For example, companies operating in different countries will need to know how each country's competition authority interprets the national rules. If there are a large number of cases the resource implications and costs of such transparency could be significant. On the other hand, competition authorities in smaller or developing countries are likely to deal with fewer cases. So most of the burden of such transparency would fall on the larger WTO members that have more cases. Nevertheless, it will be necessary to find some way of limiting the scope of transparency provisions relating to *de facto* implementation especially for developing countries.

Another difficulty with transparency is the question of how to deal with commercial confidentiality. From the 2002 Report of the WGTCP there would appear to be a consensus on the need to exclude confidential information from any transparency rules. This is not surprising as all the major existing agreements, such as the EU – US bilateral agreement, exclude confidential information. This is mainly due to pressure from business to do so and the concern on the part of national competition authorities that business will stop supplying them with information if confidentiality rules are not respected. Nevertheless there may be scope for competition authorities to exchange internal studies and market analyses, which are neither public nor include commercially sensitive information.

Non-discrimination

The WTO is based on non-discrimination in the shape of MFN and national treatment. If applied to competition law (*de jure*) there do not seem to be major difficulties with WTO provisions that required non-discrimination. National rules are geared at controlling restrictive business practices and do not discriminate between the sources of market restrictions. Any WTO agreement would, however, need to address the question of competition law in regional or bilateral agreements. Broadly speaking such agreements tend to promote transparency, best practice in competition policy, the development of national competition authorities and co-operation in enforcement. So their impact may well be benign. Nevertheless, bilateral agreements have concrete provisions, such as positive comity, which do not provide rights for third parties. An MFN obligation would, however, require the provision of information or co-operation to be extended to all WTO members. There may therefore need to be some general exemption from MFN obligations for bilateral and regional agreements on competition. Regional trade and integration agreements notified to the WTO that include competition provisions, could perhaps be subject to the (currently largely ineffective) rules on RTAs in GATT Article XXIV and GATS Article V. But non-signatories to a regional or bilateral agreement may well have a legitimate interest also gaining access to information or co-operation procedures. Bilateral co-operation agreements in competition policy are currently assumed to be outside the scope of the WTO, so there is no obligation on parties to such agreements to share information or co-operate with third country competition authorities that might be affected. But integrating competition into the WTO would affect this position. Perhaps there could be some means of ensuring that, on request from a third party competition authority with a legitimate interest, the information circulating in bilateral or regional co-operation procedures might be made available.³²

As for transparency, (*de facto*) non-discrimination with regard to the implementation of national competition laws is a far trickier issue. Competition policy is by its nature case dependent. Many national competition policies are also based on a 'rule of reason'. In other words, a competition authority or court will judge whether a given business practice is a restraint on trade based on the circumstances of the case. Some competition policies are based more on *per se* prohibitions, with quantitative measures of what is, for example, market dominance. But for enforcement that uses

rule of reason each case will be different. There is therefore no analogy with the 'like product' concept in the GATT. For this reason the proponents of competition policy in the WTO appear to have conceded that non-discrimination will have to be limited to *de jure* competition law.³³

The issue of special and differential treatment for developing country members of the WTO has been raised with respect to non-discrimination. Developing countries have argued that they need to be able to discriminate in the application of competition law, in order, for example, to block foreign acquisitions but allow consolidation of national companies in order to promote national competitiveness through 'national champions.' Developing countries have also pointed out that they are likely to have few companies large enough to acquire companies in developed markets. Consequently the benefits of national treatment are likely to accrue more to investors from developed economies.

There is therefore an issue as to whether developing countries should be permitted to retain specific scope for national consolidation and concentration. One way of dealing with this issue would be for developing countries to list more exclusions from any non-discrimination provision in a competition agreement.

Procedural fairness (or due process)

Procedural fairness provisions might include, for example, requirements that competition authorities notify investigations and provide adequate opportunity for the parties concerned to make representations. Procedure fairness provisions may also provide companies or others involved in a case with the right to a review of decisions taken by competition authorities, perhaps by an independent body. This again involves considerable resources to maintain a qualified court or tribunal to undertake such reviews. There is also the question of which parties should be able to make representations. Should all parties who feel themselves affected by the investigation (such as consumers) be allowed to make representations, if so would the competition authority be required to make a reasoned response?

Other principles

There have been other proposals for core principles, which do not appear to have enough support to get them included in any framework agreement. These include for example; (a) enabling small firms to co-operate in order to enhance competition (a point that would be relevant for developing countries in the WTO, given that their companies are more likely to have to co-operate in order to be able to compete with larger companies in the developed WTO members); (b) the integration of anti-dumping under general competition criteria (a point championed by some WTO members, but one which has been opposed by the US in particular; (c) provisions on restrictive practices resulting from the protection of intellectual property rights (which would presumably entail an elaboration of the existing provisions in the TRIPs agreement and has been favoured by some developing countries); and (d) comprehensiveness or the application of pro-competitive practices in all policy areas, such as regulatory policies (which has been aired by developed WTO members such as the US, but which would represent a potentially open-ended commitment that is unacceptable to developing countries).

Hard Core Cartels

Also mentioned in the Doha text is the issue of hard-core cartels. This is an area in which there is a broad measure on consensus, compared, for example, to vertical integration agreements. Work done by, among others the OECD, suggests that hard-core cartels can have a considerable impact. The evidence on the presence of cartels³⁴ is a subject of some controversy, and the private sector and some commentators have argued that the main problem lies with public trade protection rather than private restraints on trade.

The OECD reports on 116 international cartels that have been challenged by national competition authorities, mainly in the OECD countries.³⁵ These are the cartels that have been identified thanks to investigatory powers of competition authorities and laws in the USA that encourage 'whistle-blowing'. By definition there may well be other cartels that have not yet been brought to light. The OECD work suggests that many cartels have not come about by a coincidental convergence of interest on the part of the producers, but as a result of the active intent of the companies concerned. Nor have they been loosely organized arrangements agreed over business breakfasts

(Fruestuckskartelle), but have been professionally run. Cost estimates of such RBPs are not without their difficulties. The OECD work suggests that the median mark-up in terms of prices is about 10%, with mark-ups ranging from 5% to 65%. A US estimate of business affected by just 10 recently investigated cartels suggests that there were costs to consumers of \$100s of millions. Studies on the impact of hard-core cartels on developing countries also suggest that here too the costs can be considerable. For example, one study estimates that between 6 and 7% of all developing country imports could be affected by international cartels, with price mark-ups in a range between a few percent and 50%.³⁶ It has been estimated that these known cartels represent probably about half of the level of cartel activity.

At issue is whether WTO members would be required to adopt legislation banning such cartels, the scope of any penalties and the scope for WTO Member governments not to act against such cartels on the grounds of more important national interest, such as promoting productivity or technical advance. Countries in the OECD have already committed themselves to co-operate on hard-core cartels, and non-OECD countries have been invited to associate themselves with the OECD Recommendation on hard-core cartels, although to date few have taken up the offer.³⁷ Even within the OECD there remains an issue of what scope there should be for national governments to exercise discretion in acting against a hard-core cartel.

One way of providing flexibility in the treatment of cartels would be to allow for a certain limited number of exceptions from any prohibition, such as in the case of small or medium sized companies or companies in developing countries, which co-operate in order to compete with large international companies. Such exceptions might then be notified and thus transparent and subject to some form of regular review within a WTO committee on competition policy. But it should not be forgotten that even in developing countries competition may be a more reliable means of promoting international competitiveness.

Modalities for co-operation (in policy enforcement)

The idea of co-operation in drafting laws and helping to promote the establishment of effective national competition authorities, is largely uncontroversial. Here the interests of developing countries that choose to introduce national authorities might

well be served by (effective) provisions on technical assistance. Co-operating in enforcement is more controversial because it touches on the autonomy of competition authorities, can involve considerable resources and thus costs and touch upon sensitive issues such as commercial confidentiality.

General exchange of views on the evolution of competition policy has been discussed in the WGTCP. This has, of course, already been taking place in the Working Group. Any framework agreement on competition within the WTO is likely to establish a WTO Committee on Competition, which could include a regular exchange of views on developments in competition policy. This is not controversial. But what would be the value-added given that such exchanges already occur in the UNCTAD, OECD and in a growing number of regional and bilateral agreements? It has been argued that discussions within the WTO would be more effective because of the intrinsic link between trade, investment and competition policy.³⁸ Discussions within a multilateral setting could help to identify any divergent trends in the different regional and bilateral agreements that might otherwise lead to policy divergence. A WTO Committee might also provide a means of peer review of national competition policies. Such peer review might then be used as a 'soft' alternative to the application of the WTO Dispute Settlement Understanding (DSU) to the competition obligations. Given the growth of bilateral agreements, another possibility would be to use such a committee to review the bilateral and regional agreements, although this point does not seem to have been discussed in the WGTCP.

In terms of co-operation on enforcement or investigations, the issue is what sort of standard or obligation should be set. Should there simply be a voluntary exchange of information, should a WTO agreement provide for negative or positive comity? Should a competition authority or government be able to decline a request for co-operation, perhaps with a reasoned justification, or should there be an obligation to co-operate?

There is a desire on the part of the proponents of a framework agreement within the WTO to get something more than best endeavours otherwise there would be little value-added from a WTO agreement. But the ability to co-operate is clearly linked to the capacity and resources of the countries concerned. There would therefore seem to

be a clear link between the desire on the part of the proponents of active co-operation within the WTO (i.e. the EU) and the question of technical assistance and possibly financial assistance for developing countries. Indeed, this is a point that has been already accepted by the developed members of the WTO. There is also the issue of whether the provisions on co-operation should be covered by dispute settlement. In other words, would refusal to co-operate be subject to dispute settlement cases. The precedent set in recent regional/bilateral trade agreements such as US-Chile and Canada-Costa Rica suggests that competition provisions will not generally be subject to binding dispute settlement, although it is conceivable that parts of an agreement on competition, such as transparency might be.

Progressive Reinforcement of Competition Institutions in Developing Countries

The final topic identified in the Doha text was how to deal with the fact that WTO members have different levels of development and some have sophisticated competition regimes while others have either no regime at all or have only just begun to develop domestic capacity in the field. Currently 87 WTO Members have some form of competition policy. Furthermore, what a country needs from a competition policy differs. For example, small open economies are likely to need a different kind of competition regime (if they need one at all) to large relatively closed economies. It is clearly not a question of one size fits all, and this point has been accepted by the proponents of competition in the WTO.³⁹ There will be some case in which countries really need a more effective national competition regime, but do not have a 'competition culture', have weak enforcement mechanisms, inadequate legal systems or retain a tradition of state intervention that favours the discretionary use of competition policy instruments.

In the past many developing countries have resisted introducing competition policies because their national markets were seen to be too small or because there was a desire to discriminate in favour of national producers in order to gain international competitiveness. Competition policies were also seen as a threat to state owned or run enterprises and even the tax base.⁴⁰

A number of possible forms of special and differential treatment for developing countries could be incorporated into any agreement. First, there could be flexibility in

the commitments made by developing countries. Such flexibility might come in the form of a GATS type approach to competition. In other words, there could be a general framework agreement on competition within the WTO, but countries would be able to schedule those sectors or activities which would (positive listing) or would not (negative listing) be covered by the general commitments. Whilst economists will argue that domestic competition is likely to be the best means of promoting international competitiveness, even for developing countries, negotiations may be influenced by the fact that developed economies have, to a greater or lesser degree, pursued national champion policies in the past, even if the trend today is clearly towards competition based policies.

An alternative form of special and differential treatment would be to provide for longer transition periods for developing countries when it comes to implementing commitments under the WTO. This is the approach that has been used in the TRIPs and TRIMs agreements in the Uruguay Round.

Rather than variable speed one might also envisage another variant on the variable geometry approach that would entail developing countries opting out of part (or indeed all) of the commitments on competition. This plurilateral approach is one that the EU has always envisaged for international competition policy and which it appears to continue to support.⁴¹ Those developing countries that did not feel ready to adopt general commitments on competition policy would be free to opt out, but unlike the OECD-type of approach, they would still be involved in the negotiations and thus have some say in the shape of the agreement. This should help to ensure that more developing countries would ultimately sign up, than has, for example, been the case with 1993 agreement on Government Purchasing. Given WTO rules, however, all countries would have to support the creation of a plurilateral framework agreement on competition within the WTO.

Finally, special and differential treatment for developing countries could take the form of technical assistance. Surveys conducted within the framework of the OECD's Global Competition Forum suggest that there is wide spread recognition of the need to provide more technical assistance in the development of competition policies in developing and transition economies.⁴² At issue is how to ensure that commitments

on technical assistance can be made more concrete. In the past many such provisions in WTO agreements have been more rhetorical than real. There are also a number of detailed issues that would need to be addressed to ensure that technical assistance is effective. For example, the type of assistance will vary depending upon the level of sophistication of the national competition policy. In the earlier phases assistance may be needed for drafting legislation, then with institution building and then with enforcement. The WGTCP as well as UNCTAD and other bodies have been discussing these issues in very concrete terms.

7.0 Conclusions

This paper has shown that there is a growing network of agreements, both bilateral or regional and multilateral - including the existing WTO agreements - that cover aspects of competition policy. These agreements, especially the regional agreements, are now including a significant number of smaller and developing country WTO Members. The issue is therefore not whether there should be international rules governing co-operation in competition policy but what role, if any should the WTO play.

From the discussion of the work in the WGTCP of the WTO it should be clear that what is likely to be on the negotiating table is not a far reaching harmonisation of national competition regimes, or obligations on developing countries to adopt comprehensive national legislation. The current negotiations do appear to assume that WTO members will be required to have national competition policies, although even here there is recognition of the need for flexibility. From a developing country perspective the obligations on core principles, such as transparency, non-discrimination and co-operation, whilst not without their difficulties, do not in themselves represent far reaching obligations. For example, the transparency and non-discrimination obligations that are likely to appear in any proposed framework agreement seem likely to be limited to *de jure* policies and not extend to how policies are implemented *de facto*.

The emphasis on the role of competition policy in market opening that characterised the debate on trade and competition in the early and mid 1990s, has also changed. Although the proponents of competition in the WTO envisage some market access benefits from competition, this no longer seems to be (an explicit) policy priority. The

emphasis is rather on the progressive improvement of competition regimes in all WTO members. This is reflected in the apparent willingness to consider 'soft' enforcement mechanisms, such as peer review, rather than an insistence on the full application of WTO dispute settlement provisions in all cases. The main substantive provisions are likely to take the form of obligations to prohibit hard-core cartels. The effective implementation of these provisions will mean compliance costs for developing countries, but the argument has been made that such cartels may well have been disproportionately costly for developing countries.

Furthermore the parallel discussion of special and differential treatment for developing countries and measures to help reinforce the development of national competition policies in smaller WTO members, suggests that developing countries will be faced with a progressive rather than immediate obligations. This should enable the WTO members concerned to ensure that compliance costs are in line with what is considered appropriate for the competition policy needs of the country concerned. There also seems to be some acceptance that developing countries, indeed all WTO members, may wish to exclude certain sectors. This may provide scope for countries to continue to pursue development/industrial policies, although the scope for exclusions is likely to be a sensitive issue in negotiations.

If this presents a benign view of the likely impact of a framework agreement on competition in the WTO, there remain a number of real concerns, especially from the point of view of developing countries.

The first issue is why co-operation needs to occur in the WTO? As has been shown above the UNCTAD already provides a forum for co-operation on competition policies. The relatively modest proposals for a WTO framework agreement go some way, but not very far beyond what already happens in the UNCTAD and developed WTO members can also have recourse to the OECD machinery. One answer to this question is that trade and competition are becoming more and more linked, so that it makes sense to integrate both within the WTO. The more rules-based WTO also offers 'harder' rules than are available in the perpetually 'soft' UNCTAD approach. This could mean more obligations on WTO members, if not now then perhaps in the future when they are ready to accept greater bindings. The case may also be made

that a rules based system may protect the smaller WTO members from the abuse of extraterritorial or effects doctrines by the US or EU, and provide a multilateral framework for bilateral agreements.

The desire to bring competition into the WTO may be seen as the thin end of the wedge that leads to pressure for ever-increasing commitments by developing countries that will result in domestic companies being shut down or taken over by more powerful (but possibly more efficient) companies in the developed WTO members. GATT and WTO agendas are developed in an iterative fashion over many years, so pressure to build on a modest framework agreement is quite likely to occur in the future. All that can be said is that the current proposals do not emphasis market access. Nor is there the same unified support for extensive WTO disciplines in competition policy among developed country WTO members as in the case of intellectual property in the Uruguay Round, for example. Some developing/middle income countries are also likely to be asked to accept obligations on competition policy in regional/bilateral agreements whatever happens, so that multilateral rules negotiated on the basis of one country one vote is likely to provide a more balanced outcome than in bilateral negotiations with the EU or US.

If one accepts that increased competition is likely to benefit developed and developing countries alike, there is still the issue of compliance costs. The costs of implementing WTO provisions, especially with regard to hard-core cartels, transparency provisions regarding decisions implementing competition laws and possibly the provisions on co-operation, could be significant for developing countries. On the other hand, a growing number of developing countries are introducing national competition regimes in any case. So provided the obligations under the WTO are in line with what countries national policies would aim to do in any case, there would be limited additional cost and some benefit from the external discipline of WTO rules. Developing countries may indeed be able to get serious technical and financial assistance for developing their national policies, by linking acceptance of a framework agreement in the WTO to real commitments on the part of the EU and possibly other countries.

If there are inevitably risks associated with accepting a framework agreement on competition, it is worth mentioning that there may also be risks in not going down the WTO route. In the absence of agreed international principles on competition, the policy vacuum is likely to be filled by plurilateral, regional and bilateral agreements. On the one hand, the commitments expected of developing countries in these agreements could well be higher than those included in any WTO agreement. On the other hand, the regional arrangements may provide for even more technical and financial assistance in developing national policies. From the point of view of third countries not participating in such regional or bilateral agreements, there may be difficulties gaining access to the information their competition authorities need to address international RBPs. This could mean that the damage of cartelisation may (continue) to fall disproportionately on non-participating (developing) countries. From a private sector point of view there is a risk, in the long term, that the absence of agreed WTO principles and norms will result in double or multiple jeopardy and increased compliance costs whenever they wish to conclude international mergers or agreements.

Furthermore, the norms and procedures developed in the regional and bilateral agreements will continue to shape the debate on future provisions on competition policy. The risks of engaging in a debate must therefore be set against the risks of disengagement, which could mean that policy will (continue) to be shaped by a small group of WTO members that have well developed competition policies.

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Endnotes

¹ Another reason for the lack of support was that, with the exception of the United States and West Germany few GATT Contracting Parties had national competition or anti-trust policies. Indeed, many countries still saw the need for greater concentration or rationalisation of production in industry in order to promote international competitiveness.

² In the 1970s the growth of investment by multinational companies had created some concern among developing countries, that these companies might abuse their market power. These concerns shaped the discussion in UNCTAD on restrictive business practices.

³ The EU was and remains the main proponent of including competition principles in the WTO, see for example European Commission, *Competition Policy and the New Trade Order: Strengthening International Cooperation Rules*, Group of Experts, 1995.

⁴ See the various annual reports of the WGTCF most recently the *Report (2002) of the Working Group on the Interaction between Trade and Competition Policy*, WTO WT/WGTCF/6 9 December 2002.

⁵ The decision on the 'modalities' for competition may be taken separately or together with the decision on the other 'Singapore issues' on investment, transparency in public procurement and trade facilitation. The decision is to be taken by 'explicit consensus', which appears to mean that all WTO members must make known their acceptance of the decision. Consensus within the WTO can often mean the absence of any dissenting members. In other words consensus in the WTO can often be achieved when a number of WTO members is not present at a General Council meeting that takes the decision.

⁶ See Experiences gained so far on international cooperation on competition policy issues and the mechanisms used revised Report for the Unctad Secretariat, UNCTAD TD/B/COM.2/CLP/21/Rev.1 12 April 2002.

⁷ See for example, OAS inventory of RTA provisions; Taiwan inventory of competition policies in APEC etc.

⁸ Quoted in WTO Annual Report 1997, Chapter 4 Special Study on International Competition Policy

⁹ These were: (a) price fixing or agreements on terms and conditions of supply of a product; (b) agreements to exclude suppliers or allocating markets between suppliers; (c) discrimination against particular enterprises (d) limiting production or fixing production quotas; (e) agreements preventing the development of particular technologies; and (f) unjustified or unlawful extensions of patent or intellectual property rights. See Article 46 bis ITO.

¹⁰ Lloyd and Sampson 'Competition and Trade Policy: identifying the issues after the Uruguay Round' in *World Economy*, Nr 18 1995, pg 687).

¹¹ See BISD 9S/28

¹² See Ernst-Ullrich Petersmann 'Competition Rules for Governments in the GATT/WTO World Trade and Legal System', paper for St Gallen conference on Competition Policy in International Trade, September 1993. This also includes a detailed discussion of the elements of competition policy embedded in the Uruguay Round agreement, or the Dunkel text as it then was.

¹³ The most notable case was that of Japanese Measures Affecting Consumer Photographic Film and Paper, see WTO WT/DS44/R 31 March 1998.

¹⁴ Brian Hindley 'Competition Law and the WTO: Alternative Structures for Agreement' in J Bhagwati and R Hudec (eds) *Fair Trade and Harmonization*, 1996.

¹⁵ Under the GATS the scope for such actions is limited to case in which the benefits accrue from scheduled commitments, not from a rule of general application. See WTO Annual Report 1997 Chapter Four, Special Study on Trade and Competition Policy, pg 51.

¹⁶ One of the most important recent attempts to use article XXIII nullification provisions was in the Kodak – Fuji case where the US lost.

¹⁷ See Article 8 TRIPs Agreement.

¹⁸ Report on Trade and Competition Policy (OECD 1984)

¹⁹ Memorandum on Cooperation Between Competition Authorities. OECD, 1986.

²¹ The basic EU approach was set out in the 1995 paper European Commission, *Competition Policy and the New Trade Order: Strengthening International Cooperation Rules*, Group of Experts, 1995.

²² See for example Article 33 (EA 63) of the Interim Agreement with the CSFR *Official Journal* L 115 30 April 1992.

²³ See Tomas Baert 'The Euromed Agreements' in Gary Sampson and Stephen Woolcock *Regional Integration Agreements and Multilateralism; recent experience* UN University Press, 2003

²⁴ See UNCTAD Experience Gained so Far on International Co-operation on Competition Policy Issues and Mechanisms Used, Intergovernmental Group of Experts on Competition Law and Policy, TD/B/COM.2/CLP/21/REV 1 19 April 2002.

²⁵ See Canada – Costa Rica Free Trade Agreement Chapter XI Competition Policy www.sice.oas/Trade/canrcr/

²⁶ See Second draft Chapter on Competition Policy FTAA.TNC/w/133/Rev2 1 November 2002.

²⁷ See Musonda 'Regional Competition Policy for COMESA countries and implications for the FTA in 2000', in UNCTAD Competition Policy, trade and development in the Common Market of Eastern and Southern Africa (UNCTAD/ITCD/CLP/Misc.18)

²⁸ See Catherine Distler 'Convergence and Conflicts over Competition Law', in *Conflict, Competition and ... Cooperation* Prometheus Vol I No 15 January 1991.

²⁹ In August 1994 the European Court of Justice struck down the agreement on the grounds that the European Commission, in concluding it, had exceeded its competence. This resulted in a revised legal form for the agreement, but the objectives and content were unaffected.

³⁰ See the Annual Reports of the Working Group WT/WGTCP/M 17-20

³¹ See WTO, Report of the Working Group on The Interaction between Trade and Competition Policy to the General Council WT/WGTCP/6

³² OECD countries can of course make such requests within the OECD framework, but there do not seem to be many viable options for non-OECD countries.

³³ See for example Communication from the European Community and its Member States A Multilateral Framework Agreement on Competition Policy, submitted to the WGTCP, WT/WGTCP/W/152 25 September 2000 pg 6

³⁴ The OECD definition of hard-core cartels is agreements that fix prices, rig bids, allocate markets between suppliers and set output restrictions.

³⁵ See OECD *Draft Report on the nature and impact of hard-core cartels and the sanctions under national competition laws*, Paper for the Global Competition Forum, 2001 CCNM/GF/COMP(2001)3 2 October 2001.

³⁶ M Levenstein *Private cartels and their effects on developing countries*, Background Report for the World Development Report 2001

³⁷ See OECD Recommendation on hard-core cartels, 1998

³⁸ See for example UK Government Briefing on the proposed WTO Agreements on Investment and Competition, May 2003.

³⁹ See Communication from the European Community and its Member States *op cit*.

⁴⁰ R Langhammer *Changing Competition Policies in Developing Countries: from policies protecting companies against competition to policies protecting competition*, World Development Report Conference Berlin February 2002.

⁴¹ See for example *Report of a Group of Experts Competition Policy in the New Trade Order: strengthening international co-operation and rules*, European Commission, 1996 and European Commission proposal to the 133 Committee of the EU on modalities for negotiating competition policy in the WTO, Quoted in OECD supra.

⁴² OECD Secretariat Paper for the Global Competition Forum February 2002 *Experiences of OECD outreach and Members Technical Assistance Activities in the 1999-2000 period* CCNM/GF/COMP (2000)4 31 January 2002