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**‘COMPETITION POLICY’
AND THE
DOHA DEVELOPMENT AGENDA**

A Position Paper for the Foundation for Research, Science, and Technology

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NZ Trade Consortium Working Paper No. 19

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I. INTRODUCTION AND CONTEXT

History is likely to confirm the failure of WTO Ministers at their Seattle meeting to agree on a way forward, as a significant turning point in the evolution of the World Trade Organization. The success of Ministers at Doha in launching both a new negotiating round and a Development Agenda reflects the institutional learning process that ensued after Seattle. In large part, the ‘development’ focus is a product of the new-found activism being exerted by developing countries for the purpose of influencing the multilateral agenda. New coalitions of interest have formed, including the so-called ‘Like-Minded Group’ of fifteen countries¹ and the so-called but differently constituted ‘Reform Group’ of fourteen countries.² The first group, which includes two APEC members (Indonesia and Malaysia) is targeting procedural issues, especially transparency, which might well give leverage on negotiating issues, including competition policy. The second group, which includes a diverse collection of eight APEC economies, is targeting anti-dumping and subsidies – two trade-related issues of considerable significance for the competitive process in globalizing markets.

The Development Agenda, which includes technical assistance and institutional capacity building, gives weight to coalitions of interest amongst (the growing number of) developing Members. But it would be a mistake to assume that divisions of interest are predictable, either between or within developed and developing country groups, especially when it comes to the four so-called Singapore issues. Competition is one of these.

Inclusion of ‘Competition Policy’ in the Doha Agenda was from all accounts hard fought amongst developed countries, although the result³ was not without ambiguity in respect of the single undertaking requirement for negotiations. Either way, bringing Competition Policy onto the agenda of a multilateral rules-based trade organization is both a complex and controversial issue, especially when the starting

¹ Cuba, Dominican Republic, Egypt, Honduras, India, Indonesia, Jamaica, Kenya, Malaysia, Mauritius, Pakistan, Sri Lanka, Tanzania, Uganda, and Zimbabwe.

² Brazil, Chile, Colombia, Costa Rica, Hong Kong, Israel, Japan, Korea, Mexico, Norway, Singapore, Switzerland, Thailand and Turkey.

points for Members – in terms of conceptual thinking, practical experience and institutional surrounds – are so different.

This position paper identifies a range of elements in the international debate on ‘Competition Policy’ that preceded the 2001 Doha Declaration. It is intended as a ‘scene-setter’, as the WTO moves towards its pivotal fifth Ministerial meeting in Mexico in September 2003.

The Doha Declaration of WTO Ministers

In their Doha Declaration, WTO Ministers agreed that

‘negotiations [in relation to international trade and ‘Competition Policy’] will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations’.

This agreement was based on the explicit recognition by Ministers of both:

- (i) *the case for* a multilateral framework to enhance the contribution of competition policy to international trade and development, and
- (ii) *the need for* enhanced technical assistance and capacity building in the area of trade and competition policy.⁴

Post-Doha, debate has focused on two aspects. First: What exactly is to be the subject of ‘explicit consensus’? Is it whether or not negotiations will proceed? There are grounds for accepting that the negotiation decision has already been taken: The agreement states that negotiations *will take place* and that the decision *to be taken*, by explicit consensus, relates to the *negotiation modalities* (i.e. the framework for how negotiations will proceed). Further, a comparison can usefully be made with the wording contained in the Singapore Ministerial Declaration five years earlier, which stated that

‘future negotiations, if any, regarding multilateral disciplines [in respect of the interaction between trade and competition policy], will take place only

³ See Annex to this paper.

⁴ Box 1 in Annex, para 23.

after an explicit consensus decision is taken among WTO Members regarding such negotiations'.⁵

If, however, such consensus cannot be reached next year on the modalities, then this debate over interpretation may prove somewhat academic.

The second focus of post-Doha debate relates to the delivery of technical assistance and capacity building to developing and least-developed Member countries. This appears to be a pre-requisite for any decision on negotiation modalities, noting that Ministers in their Doha Declaration cited assistance with policy analysis and development, in particular, so that recipients would be better able to evaluate the implications of multilateral cooperation in the area of competition policy for their development policies and objectives (a key issue for developing economies). Human and institutional development was also specifically mentioned.⁶ Given the stipulated timeframe, a concentrated period and level of assistance could now follow. The EU in particular, being the principal advocate for a multilateral framework for competition policy, is likely to be strongly incentivized to promote the necessary cooperation with appropriate inter-governmental providers, including UNCTAD.

In describing competition and the other Singapore issues as 'development issues', the WTO Director-General is playing up the connection between the agreement to negotiate and the commitment to facilitate the requisite assistance for developing and least-developed countries. But there is still scepticism that poor countries will benefit from multilateral negotiations on the Singapore issues, as well as concern that the multiplicity of issues will overload the negotiations and put the WTO's organizational effectiveness at risk.

Divergent views

Another on-going issue, of particular concern to economists, is the rationale for and scope of any multilateral competition framework. The considerable divergence of views amongst the three major players - the EU, Japan and the United States - on the

⁵ The Singapore Ministerial Declaration (WT/MIN(96)/DEC), para 20.

⁶ Box 1 in Annex, para 24.

nature of any multilateral approach to competition policy, largely originates from different approaches in the following three areas:

(a) *the primary objective of 'Competition Policy' in an international setting*

Is the aim of 'Competition Policy' to promote competition and efficiency in all markets or is it simply to increase international trade and prevent nullification of potential gains from trade?

(b) *the scope of 'Competition Policy' in a multilateral framework*

In particular, does 'Competition Policy' go beyond competition law and cover government measures as well as business actions? Is competition law necessarily included? Where does anti-dumping fit, and export cartels, parallel importing and subsidized trade, all of which can distort trade *and* competition?

(c) *the appropriate multi-national level(s) for pursuing objectives of 'Competition Policy'*

Is the appropriate level bilateral, regional, plurilateral or multilateral, or all four? What are the distinguishing features of these different levels and to what extent are they complementary?

The Doha Declaration does not place competition policy (as economists would) in a competition-efficiency-consumer welfare paradigm. Rather, it is specifically linked to international trade. This trade-based approach is not surprising in the context of GATT's international trade law. The WTO has no formal objective relating to the *promotion of competition* as distinct from *liberalising trade*; it has no substantive rules explicitly relating to competition; and no obligations on Members relating to domestic competition law. The specific trade-related competition provisions that have been agreed (in the GATS, for example) rely on inter-government consultation and cooperation and are far from comprehensive in their coverage. With its focus on

government measures, the WTO has limited scope to intervene in respect of private business conduct.

As far as future multilateral outcomes are concerned, much will depend on how WTO Members deal with the objectives and reach of ‘Competition Policy’; how they assess the pros and cons of a multilateral competition framework; and the nature and enforcement of any proposed obligations.

So what do we know about the substantive elements in the international debate? Section II addresses that question.

II. THE WTO WORKING GROUP ON THE INTERACTION BETWEEN TRADE AND COMPETITION POLICY

The WTO Working Group on the interaction between trade and competition policy, including anti-competitive practices (the Working Group), was established at the Singapore Ministerial Conference in 1996 ‘in order to identify any areas that may merit further consideration in the WTO framework’. The Working Group was expressly guided to ensure that the ‘development dimension’ was taken fully into account.

The Working Group’s deliberations, over five and a half years, provide a rich resource of Members’ Communications and of various Secretariat reports. The annual overview of the Working Group’s activities does not purport to determine areas of consensus but, rather, aims to capture the essence of the various (unattributed) arguments and information put forward in individual country papers and in the exchanges that ensue. Clearly, Members have not felt constrained in discussing *inter alia* the objectives and scope of ‘Competition Policy’, its interaction with trade and trade policy, its implications for development, and the appropriate multi-national level(s) of response.

The initial two-year work programme of the Working Group focused on the relationship between the objectives, principles, concepts, scope and instruments of trade and competition policy. It also included stock-taking and analysis of national competition policies and laws as they related to trade; the impact on international trade of anti-competitive practices, state monopolies, exclusive rights and regulatory policies; and the impact of trade policy on competition.

During 1999, pursuant to a General Council decision,⁷ substantive work in the Working Group covered:

- (1) the relevance of fundamental WTO principles of national treatment, transparency and most-favoured-nation treatment to competition policy and *vice versa*⁸
- (2) approaches to promoting cooperation and communication among Members, including in the field of technical cooperation, and
- (3) the contribution of competition policy to achieving the objectives of the WTO, including the promotion of international trade.

Work on this identical agenda continued during 2000 and 2001. Throughout, Members were also able to raise other issues relevant to the Group's mandate to study the interaction between trade and competition policy.

The following four parts of this paper derive from a review of each of the Working Group's annual reports, 1998-2001, to the WTO's General Council.⁹

(1) The 1998 Report

The Working Group was comfortable with competition advocacy aimed at promoting a national competition culture, removal of specific impediments to competition, and

⁷ WT/GC/M/32, p.52.

⁸ The meaning of '*vice versa*' in this context is far from clear.

⁹ World Trade Organization, Reports of the Working Group on the Interaction between Trade and Competition Policy to the General Council, WT/WGTCP/2, 8 December 1998; WT/WGTCP/3, 11 October, 1999; WT/WGTCP/4, 30 November 2000; WT/WGTCP/5, 8 October 2001.

pro-competitive regulations. While it showed considerable interest in anti-competitive private practices, the view was also advanced that these should not deflect attention from the anti-competitive policies and measures of governments, and the way in which governmental restraints and distortions facilitate anti-competitive private conduct. Notwithstanding, ‘Competition Policy’ was more often than not interpreted narrowly as the legislative approach (typically competition law) for dealing with ‘anti-competitive’ private business behaviour. Typically, concerns about private anti-competitive practices related to their ability to affect/distort/restrain *international trade* (which raises the question of whether the practices are deemed anti-competitive for that reason).

Three broad analytical categories of anti-competitive practices were adopted and foreshadowed the increasing attention of the Working Group to cartel arrangements:

- (i) practices affecting market access for imports (e.g. domestic import cartels; market allocations within international cartels; unreasonable obstruction of parallel imports; exclusionary abuses of a dominant position; vertical restraints that foreclosed markets to competitors)
- (ii) practices affecting international markets, where different countries were affected in largely the same way (e.g. price and output policies of international cartels, including in service sectors such as maritime shipping and financial), and
- (iii) practices having a differential impact on the national markets of countries (e.g. export cartels).

Whether or not a comprehensive competition law is a necessary feature of (national) competition policy, was the subject of debate. At the multilateral level, it was argued that a more cautious approach was warranted, although possible ‘basic standards’ for incorporation in Members’ competition legislation (assuming this exists) could be considered.

There was interest in looking at the impact of trade policy on competition and in singling out trade remedies, as well as some interest in exploring how a better balance

could be achieved between producer and consumer interests. One suggestion was to identify and concentrate on those trade policy measures that had the greatest adverse impact on global economic welfare. Tension was evident in respect of how anti-dumping should be treated in future, especially since the United States is wedded to the position that anti-dumping laws should neither be replaced by competition laws nor modified to reflect competition policy and principles. This is on grounds that anti-dumping laws and competition laws have and should maintain their different objectives; that they are founded on different principles; and that they seek to remedy different problems.

Comments

The Working Group discussions suggested that competition policy was being valued primarily for the role it could play in maximizing a country's trade or the potential benefits from trade. But as long as competition policy, and competition law in particular, is seen as an instrument of trade policy and trade maximization, its focus will be skewed towards attempting to eliminate actual or perceived (private) 'impediments' to trade and country access, rather than attempting to eliminate significant distortions to the competitive process and global welfare.

The debate on whether or not competition policy should be directed at government as well as private measures gives rise to a core proposition that a wide range of government measures, including but not confined to trade liberalisation, can be invoked to reduce market entry barriers and to foster market structures and behaviours that are conducive to competition, efficiency and welfare. Thus it is necessary for governments to focus on promoting competition in all (economic) markets, and to employ the array of policies and instruments at their disposal which, together, can foster conditions for efficient competitive endeavour.

(2) The 1999 Report

The 1999 Report reflects a considerable amount of conceptual thinking, but responses to the question of how to proceed with the competition issue in the WTO were basically driven by the promotion of competition law and inter-agency cooperation

(notwithstanding the far from universal consensus on the role or need for national competition laws).

(i) The WTO Principles

It was claimed that there was a very large degree of agreement that effectively applied competition law both complemented and reinforced the trade liberalisation process. But the point was made that the fundamental WTO principles did not apply to restrictive or discriminatory private practices which lay beyond the reach of existing WTO instruments. Reference to a ‘competition-oriented principle’ suggested a proactive response to anti-competitive practices in all sectors, with minimum exemptions from competition laws, and with government regulations and industries also being the subject of a competition policy perspective.

The *APEC Principles to Enhance Competition and Regulatory Reform* were referred to as the basis for policy development, in preference to a stringent set of specific rules. But the view remained that, because anti-competitive practices can reduce market (meaning country) access and distort trade, rules were needed. Practices seen to have the most significance for international trade were anti-competitive horizontal restraints, vertical restraints and abuses of a dominant position that negatively impacted on competition. Export cartels also received much mention.

The point was made that competition law/policy was being discussed in the WTO precisely because anti-competitive practices could significantly impact international trade. Thus the focus of any discussion on multilateral rules should be in relation to those practices that impacted trade. This did not mean that an individual country would introduce competition law provisions applying only to those practices that had an impact on international trade.

A multilateral framework should be considered because of the problems associated with unilateral and bilateral approaches. But any multilateral approach would need to be responsive to different levels of economic and institutional development, which raised *inter alia* the question of the appropriate breadth of exemptions and matters

such as transition periods, progressivity of commitments and technical cooperation. But also, there is the diversity of legal systems.

Even amongst those countries with competition laws, a high degree of disparity existed, which would in turn make consensus on any possible multilateral disciplines more difficult. There were options, however, in respect of any mandatory requirement for (national) competition legislation:

- (i) a sectoral approach as distinct from a comprehensive law approach
- (ii) a framework that merely prescribed principles *if* a Member chose to introduce a competition law, and
- (iii) a plurilateral framework.

At the end of the 1999 discussions, it was said that the Working Group was in an exploratory and educative process and was ‘still a long way off from the point where it could be in a position to gauge the need for multilateral rules’.¹⁰

(ii) Cooperation and Communication

Members spoke easily about the growing need for cooperation and communication. A common view was that the purpose of cooperation on competition matters is to ensure that anti-competitive practices do not adversely affect the commercial advantages resulting from removing tariff and non-tariff barriers, i.e. the nullification argument. The underlying theme was that dealing with ‘anti-competitive’ private practices or regulatory structures will extend market access opportunities; and coordination of national enforcement is relevant to the ‘market access problem’. The distinction was made between global welfare and national welfare as a basis for evaluating ‘anti-competitive practices’.

Some thought was given to how a multilateral initiative through the WTO might augment and reinforce bilateral and regional cooperation initiatives, especially since it provides a forum for ‘comprehensive discussion of competition issues’. But again, the purpose of agreement on competition policy was to ‘solidify the gains from trade

¹⁰ Para 37.

liberalisation by disciplining private barriers to trade'.¹¹ Other views on multilateral rules contemplated:

- Member commitment to adoption of domestic competition rules
- these rules to be based upon common principles
- rules for cooperation (meaning convergence), noting that cooperation should not be delayed by lack of convergence.

At the same time, it was argued that positive comity (a feature of some bilateral cooperation agreements) should not enter the multilateral framework as a binding tool.

However, it was argued that proposals were not sufficiently clear in many respects, e.g. would they be limited to cooperation rules and would these be binding or non-binding; would they involve dispute settlement provisions? (Dispute settlement was recognized as a very complex issue, but there was a view that it should not involve the review of individual decisions of national competition authorities.)

An important distinction was made between how to construct a WTO agreement on competition policy and why such an agreement was necessary. None of the suggestions should pre-suppose consensus that development of a multilateral agreement on competition matters was warranted; and, in view of the emphasis on competition law, it would be premature to set up a multilateral agreement given that only half of the WTO membership had adopted such law. Also, did the benefits of multilateral cooperation outweigh the considerable costs associated with the degree of commonality of approach assumed to be required to ensure the success of such cooperation? A shared perception of common interest and mutual benefit was a pre-requisite for any cooperation.

The 'case for' a multilateral framework on competition policy was put as follows:¹²

- a major contribution towards the promotion of international trade
- instigate a mechanism for addressing anti-competitive business practices

¹¹ Para 52.

- cooperation to complement bilateral and regional efforts
- spread a competition culture
- reduce business compliance costs in multi-jurisdictional cases.

Elements of a multilateral framework could include common principles; common rules on competition law; measures to address anti-competitive practices that had a significant impact on international trade and investment, including hardcore cartels; commitments by Members to adopt a competition law and establish a competition authority, e.g. for better competition law enforcement.

On the other hand, multilateral cooperation could be approached with an educational purpose rather than a results-oriented agenda. Such purpose was important, given the ‘political market failure’ leading to inadequate constituency support.

Also in question was the actual prevalence of anti-competitive practices with cross-border effects; a few well-publicised multi-jurisdictional cases did not justify a global solution. In response, it was suggested that anti-competitive practices increasingly had an international dimension and investigations of practices with cross-country effects were a frequent occurrence. Against the perceived advantage of multilateral rules, was the proposition that multilateral cooperation did not have to be based on such a formal framework.

(iii) Contribution of Competition Policy to achieving WTO Objectives

It was postulated that certain WTO rules benefit import-competing producers as distinct from promoting competition and consumer welfare. A ‘competition-oriented reform’ of the WTO system was needed for linking WTO rules to the broad competition principles of open markets, non-discriminatory conditions of competition, and consumer welfare. Government measures which restricted import and export competition and which exempted export cartels, for example, from competition rules, were covered by this reform proposal.

‘It would be unproductive to introduce into the WTO system a multilateral framework for competition policy, without first addressing the

¹² Para 74.

anti-competitive elements built into the current WTO disciplines [especially trade remedies and trade cartels].¹³

Not unexpectedly, this proposal for a more comprehensive and coherent multilateral approach to competition prompted a response to the effect that such reforming of existing WTO rules was inconsistent with the Working Group's mandate to examine the 'contribution' of competition policy to the objectives of the WTO. Trade remedies in particular were seen to fulfil

'a particular role in the balance of concessions offered by Members and ... any attempt to philosophically refashion those rules would fundamentally disrupt the existing balance in the WTO system'.¹⁴

Further, the convergence of trade policy and competition policy was an 'over-simplification' in that one was not necessarily superior to the other.

The diversity of the WTO membership called for 'the adoption of a broad competition perspective rather than for harmonisation'. Further: 'convergence should occur only where convergence mattered'.

'A WTO framework imposing rigid requirements would not only hinder meeting the specific development needs of developing countries, but could also undermine the more sophisticated competition policies/rules of developed economies.'¹⁵

It was also suggested that the progressivity of gradually limiting exclusions from competition law would have to take into account different development levels. And 'scrupulous assessment' would be required of the expected outcomes of multilateral competition rules and their implications for developing countries.

Regarding implementation of a WTO framework, it was suggested that this would need to address transitional arrangements and priorities in respect of anti-competitive practices; appropriateness of exemptions; regular reviews of competition policy, including the handling of individual cases by Members; technical cooperation; and policies to minimize adverse effects of competition policy implementation. Applying

¹³ Paras 66 and 67.

¹⁴ Para 69.

¹⁵ Para 75.

competition policy in a non-discriminatory way would need to be reconciled with the ‘development caveat’.

A ‘spectrum of possibilities existed for nurturing the existence of effective competition policies’.¹⁶

(iv) Other Issues

In view of the differences in underlying assumptions and perspectives on the competition policy and trade policy disciplines, it was suggested that their contrasting approaches could usefully be considered in relation to several issues that had a bearing on both trade policy and competition policy, notably export cartels, extra-territorial enforcement of competition laws and anti-dumping. The topic of anti-dumping was again controversial; and the proposition that anti-dumping and competition rules had different objectives, were founded on different principles and sought to address different problems, was reiterated. Also, the fact that Article VI of the GATT had never had anything to do with the issue of predatory pricing, was considered decisive.

Comments

Permeating the 1999 Report is the developing notion of ‘a multilateral framework’ for capturing policy discussions, rules, and various cooperative and educative initiatives. This framework was variously described as a multilateral framework on competition; a multilateral framework in the area of competition law and policy; a multilateral agreement for competition issues; and a multilateral framework agreement. It paved the way for the Ministerial Declaration in Doha which recognized ‘the case for a multilateral framework to enhance the contribution of competition policy to international trade and development’. Ministers did not go so far as to recognize *the need for* such a framework.

In any event, by the end of the Working Group’s 1999 deliberations, the ‘framework’ was extremely sketchy and its rationale far from agreed. Certainly, various elements of a multilateral framework were put forward, although some of these were extremely

¹⁶ Para 84.

controversial. And a number of requirements were stipulated, notably in respect of the flexibility and progressivity necessitated by different levels of economic development and the interests of developing and smaller economies in particular.

Notwithstanding the lack of clarity in the rationale for and elements of any multilateral framework, considerable discussion was devoted to implementation and institutional issues.

(3) The 2000 Report

Prior to the commencement of the 2000 work programme, the Chair with input from Members encouraged delegations to support their arguments and proposals with greater use of more concrete examples; to engage in a more concrete discussion of the development dimension; to consider ways of creating and maintaining a culture of competition; and to give greater consideration to the practical aspects of competition policy, including the role of competition advocacy in market reform, deregulation and privatization processes and competition law enforcement. In addition, delegations were invited to focus on the interaction between trade and competition policy and not merely on competition policy *per se*.

Perhaps as a result of these suggestions, the bulk of the 2000 Report is devoted to approaches to promoting cooperation and communication, although discussion of the relevance of fundamental WTO principles and the contribution of competition policy to achieving the objectives of the WTO, also continued.

Approaches to Promoting Cooperation and Communication

Much of this discussion saw cooperation as the objective function, with considerable focus on anti-competitive practices of firms and competition law. Notwithstanding, the question continued to be posed on the extent to which such practices were in fact having a significant and demonstrable impact on world trade and investment or affecting a broad cross-section of WTO Members. In particular, there was increased reference to hardcore cartels – characterized as the most pernicious type of anti-competitive practice from the point of view of trade and development, as well as of

competition law enforcement – and export cartels in particular. Cooperation was a means to a deepening of international anti-trust relationships.

The complex issue of the relationship between inter-country cooperation and convergence (in Members' substantive competition rules), was raised. It was then suggested that the relevant issue was identifying common background principles rather than harmonising specific aspects of competition law. More attention was given to the subordination of competition policy to industrial policy in individual countries and the concern that a multilateral framework on competition policy might limit developing countries' development policy options.

Members continued to give some consideration to bilateral and regional cooperation initiatives and to query where the WTO's relative advantage might lie. Amongst questions asked were:

- If the focus was on international practices, how could these be addressed effectively through the application of national legislation?
- What would be the implications of different analytical methods in relation to cooperation?
- Would the authorities of participating countries need to be convinced of the validity of other countries' analyses and, if so, would this not amount to a new review procedure?
- How would the proposed cooperation instruments be integrated into the WTO provisions relating to government actions?

Proponents of a multilateral framework agreement responded by saying that the proposed cooperation was voluntary and not subject to dispute settlement. But integral to the proposed framework was a commitment by countries to consult and 'to seek mutually acceptable solutions on a range of areas relating to anti-competitive

practices with an international dimension'.¹⁷ A culture of cooperation and of competition would be promoted by such a multilateral agreement.

Despite acknowledgements of the diversity of and asymmetries in Members' economic situations, competition regimes, legal traditions and cultural contexts, developing countries continued to voice their concerns about additional burdens arising from any multilateral rules on competition policy. More generally, it was not clear to some Members why elements of a cooperation agenda, while unobjectionable in themselves, were sufficient to engage the WTO, especially as it would not be the primary provider of technical assistance on competition policy.

One suggestion was that future work could:

- (1) seek agreement on the scope of competition policy, focusing on its objectives and functions rather than on the means of achieving these
- (2) identify specific competition problems that had direct relevance to international trade and the fulfilment of WTO objectives, and
- (3) explore the feasibility of possible multilateral options to address the competition problems identified.

Comments

By the end of 2000, 'the case for' a multilateral framework on competition policy was still lacking in clarity and coherence. While the discussions were constructive, there seemed not to be a sufficient demarcation between (1) the rationale for a multilateral competition framework, (2) the elements of such a framework, and (3) implementation modalities, including protections for developing and least-developed countries.

Certainly there was widespread recognition of the diversity of national circumstances; the importance attached to the development dimension; the need for flexibility, technical assistance and capacity building; and of the divergence of views on the

¹⁷ Para 60.

objectives and scope of competition policy in a multilateral context. However, much of the discussion was directed at the goals and elements of cooperation, and was thus at the softer end of the various issues raised.

The scale of the perceived problem(s) remained elusive. However, given the frequency with which hardcore cartels, and export cartels in particular, were cited – for their impact on *international trade* – further work could usefully focus in this area. On the face of it, the attention to export cartels fits well with the Working Group’s mandate – the interaction between trade and competition policy – and with the interest of some Members in focusing on those practices that are likely to be most pervasive for WTO Members and of most significance for the WTO’s *trade objectives*.

The principal proponents of a multilateral framework were very much focused on the need for competition rules to apply to all, and the desirability of all Members having a competition law and appropriate enforcement capacity. In the Asia Pacific Region, and beyond, there is however no consensus in this regard. It is one thing to suggest that a multilateral initiative could complement bilateral and regional initiatives; it is another to reach agreement on what the most appropriate and effective role for the WTO might be.

(4) The 2001 Report

Once again, at the outset, the Chair presented a set of suggestions, with input from Members, which could be addressed by delegations to the extent they desired. First: continuing emphasis on addressing developing Member concerns, both in respect of the general impact of competition policy on their national economies and in terms of the particular implications for development-related policies and programmes of a multilateral framework on competition policy. Second: continuing exploration of the implications, modalities and potential benefits of international cooperation on trade and competition policy, noting the distinction between (a) cooperation between national competition agencies, and (b) cooperation between trade and competition agencies. Third: a continuing focus on capacity building in respect of competition law and policy, specifically in respect of competition law enforcement and remedies.

Much more attention was devoted by the Working Group in its 2001 meetings and Report to the relevance of fundamental WTO principles to competition policy which some Members saw as contributing to both consumer welfare and development-related objectives. According to reported national experiences, legislation could be tailored to meet specific needs and circumstances, e.g. promoting small businesses through certain exemptions or exclusions.

Proponents of a multilateral framework seemed keen to point out that they were not calling for a one-size-fits-all or harmonised approach and, apart from hardcore cartels, were not calling for the adoption of common principles relating to substantive competition laws or enforcement policies. Thus a large amount of flexibility would remain for most aspects of a substantive competition law regime.

But not all were convinced by such attempts to appease developing country concerns; and not all found the case for a multilateral framework on competition policy persuasive, particularly in that it was predicated on the need for a comprehensive domestic competition law. To what extent, it was asked, could competition problems identified be addressed through existing WTO Agreements or activities? If government policies, measures and regulations were largely covered by existing WTO agreements and if, as had been confirmed, existing domestic competition laws did not contain discriminatory provisions (in the WTO sense), then the need for a framework to bring WTO principles to bear on competition law and policy was unclear. Proponents had not supplied evidence of net benefits to developing countries flowing from a multilateral framework.

The following quotes encapsulate the proponents' response:

[N]one of the existing WTO Agreements dealt in a systematic way with issues that arose in the field of competition law and policy. The need for action in the WTO was clear, given the mounting evidence that anti-competitive practices were undermining both the gains from trade and the development prospects of Members. At the same time, it was not the intention of the proponents that an agreement on competition law and policy would have implications that went beyond the domain of such law/policies. Therefore, there was no reason to expect, *a priori*, any conflict with other WTO agreements. [para 18] ... [T]he intent of the proposed WTO framework was to support the application of competition law and policy as such, and not to encroach upon the domain of industrial,

development or social policy. [para 20] ... [W]ith respect to non-discrimination, the principles would be intended solely to ensure that [domestic competition laws/policy] did not include provisions that discriminated on grounds of [corporate] nationality. Specifically, it was not proposed that these principles would be binding with respect to the question of how a competition law was actually applied, as opposed to the content of relevant statutes. [para 20] ... [T]he application of the principle of non-discrimination in the field of competition law and policy was separate and distinct from the question of sector exceptions, exemptions and exclusions from national competition regimes. ... [The proponents' approach] was simply to permit them, subject to appropriate transparency requirements. [Such] provision for exceptions would further help to ensure that a commitment to non-discrimination in the application of domestic competition law would not conflict with the pursuit of other domestic policy objectives, such as, for instance, the promotion of small and medium sized enterprises.' [para 21] ...

In turn, it was recognized that the WTO principle of non-discrimination came from international trade principles, whereas competition policy was intended to promote a competitive environment. And one Member commented that increasing competition among domestic companies would be more conducive to international competitiveness than limiting competition through exemption systems.

Hardcore cartels were the only anti-competitive practices which the framework proponents considered desirable or feasible to be the subject of a common principle. The 'principle' being envisaged here was in effect a rule prohibiting hardcore cartels, on the basis that there was much evidence to show that these cartels were frequently international in scope; unambiguously harmed trade and development as well as the welfare of consumers; and imposed heavy costs on developing as well as developed economies. Further, because parties could be located in several countries, there was a need for countries to cooperate and respond collectively.

However, it was asked, what practical contribution could a limited level of voluntary cooperation make to dealing with international/export cartels in the foreseeable future? The voluntary nature of any cooperation initiative was considered to be an important protection for competition authorities in developing countries, faced with inadequate resources to respond to requesting countries.

Proponents stressed that other substantive competition law provisions would be left to the discretion of national legislatures. Practices other than hardcore cartels were not

amenable to the adoption of a common principle (meaning a *per se* prohibition), since either there were substantial differences in national approaches, or a rule of reason approach to each case was more appropriate.

The view was expressed that proponents had glossed over the complicated political, socio-economic and legal considerations relating to whether or not to adopt a competition law in a domestic context. The elements of flexibility and progressivity did not adequately address the concerns of sceptical delegations on this matter. The view was expressed that Members were far from a consensus on negotiations proceeding, let alone on a binding commitment to adopt a competition law. In response:

‘[D]elegations were *not* necessarily insisting that all Members would be required in every case to adopt a comprehensive domestic law. Rather, considerable flexibility would be provided in terms of exceptions and with regard to the scope and coverage of the law.’¹⁸

This led to the suggestion that any obligations contained in a multilateral framework would only apply to those Members with, or choosing to introduce, a national competition law. Only by opting in would they be eligible for technical assistance. In response, the concern was raised that the prospect of additional obligations could itself act as a disincentive to the adoption of competition law.

Proponents did not consider that framework negotiations would be impracticable in the absence of domestic competition law in so many Member countries. In resisting the ‘top-down’ description of their approach, they said a key purpose of the framework would be to assist these countries gradually to implement appropriate laws. Indeed, some Members indicated that enhanced cooperation would better enable them to deal with the major difficulties they were experiencing in implementing effective competition laws. And the point was made that a competition regime, comprising a domestic competition law and a domestic competition authority with sufficient enforcement powers, was a prerequisite for inter-country cooperation on competition matters.

¹⁸ Para 37.

In response to concerns that a multilateral framework would lead to ‘excessive harmonisation of national approaches to competition law’ the distinction was made between ‘harmonisation’ and ‘certain common elements’. Convergence in respect of principles was the important issue. Harmonisation of substantive competition law was manifestly not the objective of the exercise. And, as far as the idea of ‘minimum standards’ was concerned, many developing countries would find it difficult to accept these as they would tend to reflect international best practice of developed countries.

Returning to the issue of greater coherence between trade and competition policies, one delegation listed the challenges for all governments as a result of the paradigm shift in international commerce that has accompanied globalization. This paradigm shift involved a common goal of global *welfare* maximization; assessment of market conditions across, and not simply within, national borders; avoiding the compartmentalization of trade and competition policies; and the promotion of market contestability world wide. Further exploratory work on the trade and competition interface should, it was suggested, look at:

- (1) how trade policies or measures could impede the free play of market forces, and
- (2) how the lack of a sound competition policy could obstruct the flow of international trade.

This second element was concerned with both anti-competitive government actions and private restrictive business practices. Greater policy coherence both within and across borders was required in the interests of both consumers and producers.

A further suggestion was that future work on competition policy in the WTO could be divided into domestic and international competition policy, with the latter focusing on the application of competition criteria to existing WTO rules.

Comments

Evident in the 2001 Report was a more solid discourse on the relevance of fundamental WTO principles to competition policy (noting that these are *trade* principles with a heavy emphasis on ‘equalizing competitive opportunities’ between Member countries); on the impact of hardcore cartels on international trade; and on

the role of competition law and cooperation amongst national competition authorities for combating such cartels.

The 2001 Report also revealed a narrowing of focus onto national competition law and anti-cartel provisions in particular. Associated with this was an emphasis on the key elements of any multilateral framework on competition policy. Numerous concerns were again raised over, *inter alia*, the rationale for such a multilateral approach to cooperation; whether or not the evidence of ‘the problem’ justified negotiations on a multilateral framework; whether or not the development dimension, including flexibility, was being adequately accounted for; and the pressure for harmonisation that might accompany the multilateral framework as envisaged.

In response, the proponents of a role for the WTO were drawn to clarify their proposed agenda. While this appeared to be quite modestly focused on a prohibition of hardcore cartels, voluntary cooperation amongst competition agencies, technical assistance for capacity building, and the application of certain WTO principles to any legal enactments of national competition law, proponents clearly saw the framework as an important stepping stone towards the spread of national competition law regimes. At the same time, they resisted suggestions that one element of the framework would be a requirement for every Member to have a competition law; that harmonisation of competition law was an objective; that the ability of Members to promulgate exceptions and exclusions would be fettered; and that the development dimension would not be adequately accounted for.

III. OVERVIEW

1. In establishing a WTO Working Group on the interaction between trade and competition policy, the Singapore Ministerial Declaration specified the inclusion of anti-competitive practices in the Group’s mandate. Despite considerable conceptual discussion about the scope of this mandate and the potential role of ‘competition policy’ in the WTO, the Working Group - especially in 2001 - appears to have

directed most of its attention to national competition law. In essence, what has emerged is a proposed rule to prohibit so-called hardcore cartels, because of their alleged impact on international trade; and a drive for voluntary cooperation between competition agencies that exist in Member countries. It is clear, however, that some Members are far from satisfied as to the rationale for any such multilateral intervention; and others, particularly developing countries, remain concerned about its costs and other implications. Open to question, is the net advantage of the framework elements if exemptions are prevalent, if cooperation is voluntary, if positive comity provisions are excluded, if there is no recourse to the WTO's dispute settlement procedures and if there is no substantive basis for dealing with inter-jurisdictional conflict (as distinct from cooperation in circumstances of mutual interest).

2. None of the broader representations about the role of competition policy, including in relation to government measures and to existing WTO trade rules, has found expression in the emerging framework. What this suggests is that its proponents are not contemplating a framework that bears any resemblance to a comprehensive multilateral approach to competition issues. Even in relation to competition law alone, they appear quite sanguine about the prospect of sector and other exemptions, provided these are transparent. And, left untouched, are a number of areas within the WTO itself which, as some argued, would benefit from a pro-competition perspective. If the WTO were to proceed on this basis, its credibility for promoting competition advocacy and an international competition culture would be seriously in question.

3. This resistance to the application of competition thinking to existing trade rules arguably goes against the mandate of the Working Group, rather than beyond it. While it may be true that trade policy is gradually giving way to the international aspects of competition policy,¹⁹ the deliberations of the Working Group during its first five years suggest that there are considerable conceptual, practical and political difficulties in making this transition within the WTO.

¹⁹ Gary Hawke & Ralph Lattimore, 'Visionaries, Farmers & Markets, an Economic History of New Zealand Agriculture', NZIER/NZ Trade Consortium Working Paper No.1, January 1999, p.31.

4. As far as any anti-cartel rule is concerned, a wide range of conduct could be contemplated if the OECD's definition were adopted.²⁰ A *per se* rule, i.e. an outright prohibition, means that there is no defence once the cartel is in fact identified. The prohibition being discussed is said to be justified on grounds that cartels prevent or nullify the potential gains from trade between countries - rather than on grounds that they are unacceptably harmful to the competitive process in globalizing markets (defined in economic as distinct from geographic terms). This is a trade objective. And the 'relevant principles' put forward as part of the framework are trade principles.

5. It will be recalled that the Doha Declaration recognized 'the case for a multilateral framework to enhance the contribution of competition policy to international trade and development'. Ministers also directed that the Working Group should now focus on:

- clarifying core principles and hardcore cartel provisions
- modalities for voluntary cooperation, and
- capacity building for progressive reinforcement of competition institutions in developing countries.²¹

Thus the Declaration really picks up from where the Working Group left off. Having reviewed the Working Group Reports, 1998-2001, there are no surprises in the Ministerial statement. But, building explicit consensus on the modalities of negotiations will be arduous and, if the Working Group deliberations are any indication, may lead Members to the softest and narrowest end of the policy spectrum, absent any real agreement on the fundamentals. At the other end of the spectrum, Members could commit to a framework of *principles for competition*, as distinct from *rules for trade*, as a basis for WTO leadership in comprehensively promoting competition in globalizing markets.

²⁰ 'An anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide market by allocating customers, suppliers, territories, or lines of commerce.' OECD (1998), *Recommendations Concerning Effective Action Against Hard Core Cartels*.

¹⁹ Annex, Box 2.

Annex

Box 1

INTERACTION BETWEEN TRADE AND COMPETITION POLICY

23. Recognizing the case for a multilateral framework to enhance the contribution of competition policy to international trade and development, and the need for enhanced technical assistance and capacity building in this area as referred to in paragraph 24, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations.
24. We recognize the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development. To this end, we shall work in cooperation with other relevant intergovernmental organisations, including UNCTAD, and through appropriate regional and bilateral channels, to provide strengthened and adequately resourced assistance to respond to these needs.

*Ministerial Declaration, Ministerial Conference, Fourth Session, Doha
9-14 November 2001*

Box 2

INTERACTION BETWEEN TRADE AND COMPETITION POLICY

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

*Ministerial Declaration, Ministerial Conference, Fourth Session, Doha
9-14 November 2001*