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Briefing Paper

Competition Policy and the WTO: A Historical Perspective

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Summary

Historically, competition and international trade laws have evolved separately. In the wake of globalization, the inability of national authorities to efficiently tackle anti-competitive practices affecting their market but originating from other countries sparked the debate about the need for policy convergence and cooperation among competition authorities, e.g. through international competition rules. From the stillborn Havana Charter to the Cancun Ministerial, this briefing paper reviews the bumpy history of the aborted efforts for a WTO Competition Framework.

Background

Historically, competition and international trade laws have evolved separately. While international trade agreements have focused on removing barriers to the free flow of products across borders, competition policy has existed primarily at the national level to prevent the anti-competitive behaviour of firms affecting consumers and businesses on the domestic market.

Such anti-competitive practices may include the abuse of market power by monopolies and dominant firms, horizontal business practices (e.g. price-fixing, bid-rigging, market allocation between competitors), vertical business practices between suppliers and distributors (e.g. exclusive dealing, refusal to deal, tied selling etc.), and mergers and acquisitions which harm competition. However, different countries apply different rules as to which practices are considered illegal, and different standards for determining their legality.

Globalisation has given rise to a set of issues at the interface of trade and competition policy, which affect each other. For instance, trade rules like anti-dumping and Intellectual Property Rights (IPRs) may lead to anti-competitive situations, while national competition authorities may allow certain export cartels which distort international trade to the benefit of their national firms.

Some of the main cross-border competition issues with linkages to international trade include: (i) Import cartels formed by domestic buyers, against which domestic competition enforcement is ineffective; (ii) State-trading Enterprises granted special and monopolistic rights, which can limit market access for foreign firms; (iii) Export cartels, perceived as a beggar-thy-neighbour policy when they are state-sponsored and exempted from competition law; (iv) International cartels, which national authorities struggle to detect and break given their international nature, can acquire and abuse significant market power globally; and (v) Mergers and Acquisitions, which can lead firms to acquire dominant positions, and whose regulation can fall under multiple jurisdictions as exemplified by the Gillette-Wilkinson merger which had to be cleared by 14 separate competition authorities.

The inability of national authorities to efficiently tackle anti-competitive practices affecting their market but originating from other countries sparked the debate about the need for policy convergence and cooperation among competition authorities, e.g. through international competition rules.

The Stillborn Havana Charter

Multilateral efforts to address the interface between trade and competition policy date as far back as 1948 and the Havana Charter, which aimed to set up an International Trade Organisation (ITO) just after the Second World War. Through signing the Charter, over 50 countries undertook to take appropriate measures and cooperate on tackling Restrictive Business Practices (RBPs), including those affecting international trade which restrain competition, limit access to markets or foster monopolistic control whenever such practices have harmful effects on the expansion of production or trade.

Eventually however, the Charter could not be ratified by the United States (US) Congress, whose legislators were concerned about the sovereignty implications of the proposed ITO, particularly in regulating business practices. As a result, the General Agreement on Tariffs and Trade (GATT) which emerged soon after drew substantially from the Havana Charter but ignored the issue of Restrictive Business Practices. Since then, efforts were made at the GATT, UNCTAD, OECD and the ICN to remedy the absence of rules on anti-competitive practices.

The Road to Singapore

While cross-border competition issues attracted little interest until the 1980s, increased integration of global markets and privatisation posed the question of private trade restraints in more concrete terms. Concerns emerged over the capacity of firms to

block access of their foreign competitors to domestic markets, and cooperation among competition authorities became increasingly necessary (e.g. on merger control).

In 1980, the UN General Assembly adopted the "Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices" (the UN Set), as the first-ever multilateral agreement addressing competition policy. Early on, developing countries actively supported the idea of upgrading the Set to a binding instrument on international rules on restrictive practices, which was repeatedly resisted by developed countries who distanced themselves from the instrument.[1]

At the GATT, members appointed a Group of Experts in 1958 to study and make recommendations as to whether and to what extent they should undertake to address the issue of restrictive business practices in international trade. This led to a "Decision on Arrangements for Consultations on Restrictive Business Practices", which was never invoked until the 1990's and the US-Japan photographic case.

It was only during the Uruguay Round that, although no explicit agreement was reached on Competition Policy, measures towards addressing anti-competitive practices made their way into different WTO agreements.

As a result, the General Agreement on Trade in Services (GATS), 1995 obliges members to ensure that any monopoly supplier of a service in its territory does not act in a manner inconsistent with its GATS obligations, including in relation to national treatment. It also acknowledges that certain business practices may restrain competition, and encourages members to cooperate in eliminating such practices. Special attention was also given to the telecommunications sector, where private monopolies are often authorised and may abuse their dominant position to prevent new competitors from entering the market.

Besides this, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), 1994 allows members to take appropriate actions in order to prevent abuse of intellectual property rights which unreasonably restrain trade. Article 40 also integrates elements of voluntary cooperation, when a member suspects an infringement of its laws by a foreign IPR owner.

In addition, the Agreement on Safeguards prohibits measures such as voluntary export restraints and orderly marketing arrangements, which had been extensively used by many developed countries in the past.[2] The GATT, 1994 also recognises that state-trading enterprises and enterprises granted exclusive or special privileges may create a serious obstacle to trade. Although plurilateral in scope, it is worth noting that the Government Procurement Agreement (GPA), 1996 works to foster competition through increased transparency and access of foreign suppliers.

Finally, a built-in agenda under the Agreement on Trade-Related Investment Measures (TRIMS) provided for the consideration of complementary provisions on investment policy and competition policy no later than five years after the entry into force of the WTO Agreement.

The WTO Working Group on the Interaction between Trade and Competition Policy

At the first WTO Ministerial Conference held in Singapore in 1996, Ministers decided to further examine the relationship between trade and competition policy before committing to negotiate any agreement on the matter.

The Working Group on the Interaction between Trade and Competition Policy (WGTCP) was established by paragraph 20 of the Singapore

[1] CUTS (2005). Multilateral Competition Framework: In Need of a Fresh Approach.

[2] Bhattacharjea, A (2004). Trade and Competition Policy. Working Paper No. 146.

Declaration, mainly as an exploratory and analytical body with the mission "to study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework"[3].

The declaration further instructs the General Council to determine after two years how the work of the group should proceed, and makes clear that launching any future negotiations regarding multilateral disciplines in these areas would be subject to an explicit consensus decision among WTO Members.

Scoping Work

During 1997-1998, the WGTCP formed a theoretical basis for discussion and clarified the understanding of fundamental relationships related to trade and competition by exploring the following competition-related issues as they related to trade and development: (i) state monopolies and regulation; (ii) intellectual property rights (IPRs); (iii) investment; and (iv) the impact of trade policy on competition. They also examined the relationship between the objectives, principles, concepts, scope and instruments of trade and competition policy.[4]

From 1999 to 2001, the WGTCP's work in the run-up to Doha explored the contribution of competition policy to WTO objectives, acknowledging the relevance of its core principles (e.g. transparency, non-discrimination), as well as the importance of cooperation between competition agencies and capacity building.[5]

The Doha Mandate: Exploring a Multilateral Competition Framework

At the Doha Ministerial Conference in 2001, Ministers recognized the case for a multilateral framework to enhance the contribution of competition policy to international trade and development, and therefore agreed in Paragraph 23 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."[6]

Towards starting negotiations on a multilateral framework in 2003, Ministers instructed the WGTCP to focus on the clarification of: (i) core principles, including transparency, non-discrimination and procedural fairness; (ii) provisions on hardcore cartels; (iii) modalities for voluntary cooperation; (iv) capacity building to developing countries for the progressive reinforcement of competition institutions; and (v) special and differential treatment for developing and least-developed countries.[7]

In the Post-Doha period, members' engagement was high as the working group explored the possible contours of a multilateral framework on the above topics, with the European Union (EU) being the most vocal proponent for multilateral rules on competition[8], backed by Canada and Australia among others.[9] They emphasized that multilateral rules would be better suited than FTAs to tackle international cartels, which could operate worldwide across a wide range of markets of different development levels.[10] In particular, the EU sought a general commitment to a competition law by every WTO member, featuring the core principles of non-discrimination and transparency.

Those opposed to multilateral rules highlighted the constraints that would then be put on developing countries who were not nearly close to the economic or competitive level that developed countries were at. At the time, only 80 out of 130 WTO members

[3] WTO (1996). Singapore Ministerial Declaration. WT/MIN(96)/DEC
[4] WT/WGTCP/2. Checklist of Issues for Study
[5] Anderson, Robert D. and Anna Caroline Müller. Competition Law/Policy and the Multilateral Trading System: A Possible Agenda for the Future. E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, 2015. www.e15initiative.org/
[6] WT/MIN(01)/DEC/1. Doha Ministerial Declaration
[7] WT/MIN(01)/DEC/1. Doha Ministerial Declaration
[8] CUTS (2000).
[9] WT/WGTCP/M/12§23
[10] WT/WGTCP/M/12§54

had enacted national competition laws, and the limited number of developing countries' competition regimes often lacked features like investigative and enforcement bodies and measures.[11] These countries were reluctant to agree on multilateral rules without properly understanding the implications at stake.

Developing and Least Developed Countries (LDCs) emphasized the absolute necessity of flexibility in the agreement so that it could be fair to both developing and developed countries[12], and were generally concerned that multilateral rules could be burdensome for them.[13] Other factors contributing to developing countries' opposition included, inter alia: (i) reluctance to transplant a foreign competition policy framework that may not be best suited to their limited expertise and resources; (ii) a suspected hidden market access agenda; and (iii) priority given by them to policy objectives other than promoting competition.[14]

While developing countries became the major opponents to a multilateral framework on trade and competition policy, it is noteworthy that the US were also hesitant as they wanted to retain their independence in investigative and prosecutorial processes.[15]

Against this backdrop, at the 2003 Cancun Ministerial Conference, no consensus was reached among members on modalities for negotiating a multilateral framework on competition policy. Although the topic was initially set to continue its course, the continued lack of consensus within the working group combined with wider negotiating priorities at the WTO led to the WGTCP being declared inactive soon after by the General Council as part of the 2004 "July Package". The decision states that competition policy "will not form part of the Work Programme set out in [the Doha] Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round."[16]

Since then, despite being no longer discussed at the WTO, competition policy has remained part of the international trade debate through UNCTAD, OECD, ICN, as well as Free Trade Agreements (FTAs). Some of the main sticky points and concerns that prevented consensus at the working group are summarised below.

Reasons for a Standstill

Commitment to Competition Law

Many members were opposed to the EU proposal seeking their commitment to adopt national competition laws and agencies, with a view to better harmonise competition regimes through setting some core features. Opponents argued that national competition regimes are very diverse, coming from different legal traditions, and that no consensus exists on substantive issues to be covered. Many countries were reluctant to transplant a foreign competition policy framework in a one-size-fits-all fashion, which may not be suited to their national specificities, experience and resources.[17] It was also argued that a country can have an effective competition policy without necessarily adopting a comprehensive competition law or have a dedicated competition authority.[18]

Policy space

Concerns were expressed that the inclusion of non-discrimination principles may reduce policy space and prevent countries from protecting their industries from foreign competitors, e.g. through industrial policy, investment screening or even

[11] WT/WGTCP/M/12 §32, WT/WGTCP/W/128R3
[12] WT/WGTCP/M/12
[13] WT/WGTCP/M/11§85
[14] Dawar and Holmes (2012). Trade and Competition Policy. In: The Ashgate Research Companion to International Trade Policy.
[15] Anderson, Robert D. and Anna Caroline Müller. Competition Law/Policy and the Multilateral Trading System: A Possible Agenda for the Future. E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, 2015. www.e15initiative.org/
[16] WT/L/579
[17] Dawar and Holmes (2012). Trade and Competition Policy. In: The Ashgate Research Companion to International Trade Policy.
[18] WT/WGTCP/W/191§19

export cartels. Some members like Thailand also pointed out the potential conflict between non-discrimination and Special and Differential Treatment (SDT).[19]

Cost of compliance

The resource-scarce developing countries were apprehensive of the potential additional burden that meeting new multilateral obligations would mean for their national budgets and resources. It was felt that such adaptation costs may turn out to be larger than the expected benefits. This was for instance raised by Hong Kong, saying "given that many developing countries had had bitter experiences in dealing with the various obligations that emerged from the Uruguay Round, there was a need to examine thoroughly and objectively the pros and cons of any multilateral rule-making proposal".[20]

Market concentration risk

Some countries feared that a multilateral competition framework would enable Trans-National Corporations (TNCs) with significant market power to dominate their economies, possibly taking over their national firms, due to their limited capacities in competition enforcement. For instance, Trinidad and Tobago, on behalf of CARICOM, expressed concern regarding "whether smaller economies would be able to efficiently discipline multinational corporations, given the self-evident asymmetry of power".[21]

Cooperation

Although they acknowledged the merits of cooperation in competition policy and tackling cartels, developing countries pointed out that cooperation is most effective between countries at similar stages of development, and that many countries need to acquire more experience before making multilateral commitments. According to India, such cooperation and information-sharing mechanisms among competition authorities had only started to appear in Regional Trade Agreements (RTAs), and they had not progressed to a stage from which lessons could be drawn for multilateral cooperation.[22]

Interests favouring the anti-dumping approach

The establishment of multilateral competition rules has long been resisted by powerful lobbies, who fear that such rules could effectively discipline the use of antidumping measures which are often used to shield domestic firms from foreign competition.[23] As a result, the issue of predatory pricing was set aside by the working group. Unlike competition law which pursues fair and competitive markets to the interest of the consumer, antidumping measures used as a competition tool is more narrowly concerned with domestic firms' interests and may sometimes undermine competition.

Dispute Resolution

The application of the WTO Dispute Settlement Mechanism (DSM) to members' decisions on individual competition cases was also a concern to a number of countries. Such decisions are often of judicial nature, and subjecting them to the WTO's DSM raises questions about national sovereignty. This was a major reason for the skepticism of the US, who was satisfied with its extra-territorial enforcement capacity. Developing countries also feared becoming vulnerable to trade sanctions in an area where they lacked experience.

Closer to Cancun, some developed and developing countries suggested to make provisions of the potential agreement non-binding, and to establish a non-adversarial peer review mechanism. Skepticism however remained on the part of some developing countries, who saw potential for peer pressure in amending their competition policies.

[19] WT/WGTCP/M/22§56
[20] WT/WGTCP/M/14§41
[21] WT/WGTCP/M/11§8
[22] WT/WGTCP/M/14§45
[23] Holmes and Hoekman (1999)

Alternatives to the WTO

Some members questioned the relevance of the WTO as the right forum for a multilateral competition framework, anticipating that negotiations may focus more on market access rather than curbing abusive practices that affect consumer welfare and long-term sustainable development.[24] In addition, many believed that the problems targeted by such negotiations could be better solved through bilateral and plurilateral cooperation agreements.

Some experts had also been advocating for a multilateral competition regime outside the WTO, geared towards voluntary cooperation and the promotion of a competition culture. Advocates of this forum argued that under a trade body like the WTO, competition law would be likely to focus on protecting producers rather than consumers. This "soft law" approach to international competition cooperation was advocated by the International Competition Policy Advisory Committee (ICPAC), whose report to the US Attorney General and Assistant Attorney General for Antitrust proposed the creation of a Global Competition Initiative. This led to the establishment of the ICN in 2001, where competition authorities have since learnt mutually in isolation from the trade community.

Conclusion

The interface between trade and competition policy has been recognised in a number of forums by developed and developing countries alike. A case in point is the adoption of competition-related provisions in a number of Uruguay Round agreements, including GATS, TRIPS, TRIMS etc.

Yet, efforts by some countries to propose a multilateral competition framework under the auspices of the WTO have so far been resisted. From 1997 to 2004, the WTO Working Group on Trade and Competition Policy explored the possibility of such a framework, before deciding not to launch negotiations for lack of consensus.

While competition authorities around the world have actively sought to cooperate on tackling cross-border restrictive business practices, many WTO Members were reluctant to take new binding commitments on competition. In particular, developing and Least Developed Countries (LDCs) lacked experience in this area, and expressed a number of concerns related to the need for flexibility, policy space, cost of compliance, sovereignty etc.

Today, in the absence of a multilaterally-binding competition framework, international cooperation on competition policy is characterised by a combination of: (i) limited membership binding agreements, typically between countries in a same regional grouping or at similar development stages; (ii) wide membership voluntary frameworks, promoting "soft law" and exchange of experience among competition authorities worldwide, mainly under the auspices of UNCTAD and the ICN.

This raises an important question: Is this patch work of rules to deal with competition issues having cross-border origins and / or implications enough? The question assumes even greater significance in the era of growing digital commerce where competition effects are substantial and on the increase. An objective and evidence-based approach is needed to address this question effectively.

[24] CUTS (2005)

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