RESEARCH STUDY

Trade and Competition Policy
Has Past WTO Work Stood the Test of Time?

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Abbreviations

ANZCERTA	Australia New Zealand Closer Economic Agreement
ATA	Agency-to-Agency Agreement
CARICOM	Caribbean Community
CARIFORUM	Caribbean Forum
COMESA	Common Market of Eastern and Southern Africa
CUTS	Consumer Unity & Trust Society
DSM	Dispute Settlement Mechanism
EC	European Community and its Member States
EFTA	European Free Trade Association
EPA	Economic Partnership Agreement
EU	European Union
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GPA	Government Procurement Agreement
ICN	International Competition Network
ICPAC	International Competition Policy Advisory Committee
IPRs	Intellectual Property Rights
ITO	International Trade Organization
LDCs	Least Developed Countries
MERCOSUR	Mercado Común del Sur
MFN	Most Favoured Nation
MLAT	Mutual Legal Assistance Treaty

NAFTA	North-American Free Trade Agreement
OECD	Organization for Economic Cooperation and Development
OPEC	Organization of the Petroleum Exporting Countries
PTA	Preferential Treatment Agreement
RTA	Regional Trade Agreement
SDT	Special and Differential Treatment
SoE	State-owned Enterprise
TFA	Trade Facilitation Agreement
TFEU	Treaty on the Functioning of the European Union
TNC	Trans-National Corporation
TPP	Trans-Pacific Partnership
TRIMS	Trade-Related Investment Measures
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UNCTAD	United Nations Conference on Trade and Development
US	United States
WGTCP	Working Group on Trade and Competition Policy
WTO	World Trade Organization

Introduction

Competition Policy and Law aims to ensure a level playing field among firms competing on the market, and prevent anti-competitive behaviour which can affect consumer welfare though higher prices as well as reduced choice, quality, and innovation. 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 the standards for determining their legality.

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.

In practice however, 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. A major concern is the selective enforcement of competition law by competition authorities, who may not prioritise cases where anti-competitive activities are operated by or 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 tackle anti-competitive practices affecting their market but originating from other countries, such as international cartels, sparked the debate about the need for policy convergence and cooperation among competition authorities, e.g. through multilateral competition rules.

Since 1948 and the aborted Havana Charter, international efforts to enhance convergence and cooperation between countries on cross-border competition issues have been undertaken at the bilateral, plurilateral, regional and multilateral levels. At the World Trade Organization (WTO), a working group was established at the first Ministerial Conference in 1996 to study the interaction between trade and competition policy, and explore the possibility of a multilateral competition agreement. After 7 years of debates however, faced with resistance from developing countries and the United States (US), the WTO membership decided not to launch negotiations on a multilateral agreement.

Today, in the absence of a multilaterally-binding competition framework, international cooperation 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 the United Nations

Conference on Trade and Development (UNCTAD) and the International Competition Network (ICN).

Renewed Momentum at the WTO

In 2015, at the 10th WTO Ministerial Conference, trade ministers opened the door to considering the inclusion of "new issues", which were so far not part of the Doha negotiations agenda. Some observers have speculated that some of these "new issues" may include those "Singapore issues" which already have a history at the WTO, such as Trade and Investment or Trade and Competition Policy.

The substantial exploratory work undertaken by the WTO Working Group on Trade and Competition Policy has remained untapped since 2004, and the understanding WTO members had started building has not been nurtured. In fact, WTO delegates who worked on these issues before 2003 are no longer in Geneva, and the weak institutional memory of many missions doesn't enable current delegates to benefit from their predecessors' experience. This is particularly true for developing countries.

Therefore, the vast majority of WTO members are not well prepared to engage in constructive, even exploratory, discussions on Trade and Competition Policy which has not been on their plate for almost 15 years. Today, they need to look back at where the WTO left its work on these issues, and assess to what extent this work is still relevant nowadays. In fact, world trade has changed significantly over the past decade; and Competition Policy is now covered in many trade agreements (and PTAs) signed by developing countries.

Study Objectives

This research study aims to raise awareness and understanding among WTO delegates – particularly from developing countries – about relevant aspects of past WTO work on Trade and Competition Policy to help them better prepare for possible upcoming debates on this issue at the WTO. It provides a historical recollection and state of relevant past WTO work, identifies which were the sticky issues at that time, and assess to what extent these concerns have remained sticky given the changing context.

SECTION 1

The Bumpy Road to a Multilateral Framework

1.1 Early Efforts

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 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, the UN and later at UNCTAD, to remedy the absence of rules on anticompetitive practices.

For instance, the United Nations (UN) General Assembly adopted in 1980 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", yet invoked only three times in the context of the US-Japan photographic case. Later on, the issue regained momentum in the run up to the Uruguay Round negotiations, leading to the incorporation of competition-related aspects in a number of WTO agreements.

1.2 Uruguay Round: Competition Aspects in WTO Agreements

During the Uruguay Round, although no explicit agreement was reached on Competition Policy, measures towards addressing anti-competitive practices made their way into different WTO agreements. These testify of the relevance of competition issues to international trade, and created

[1] CUTS (2005). Multilateral competition framework: in need of a fresh approach. Discussion Paper n°0506. CUTS Centre for Competition, Investment & Economic Regulation. Jaipur, India.

a basis for future discussions on the matter at the WTO.

The General Agreement on Trade in Services (GATS)

One of the first relevant WTO agreements is the GATS (1995) and the related Reference Paper on Basic Telecommunications Services (1996). Article VIII of the GATS, addresses monopoly suppliers in relation to national treatment, while Article IX specifically recognizes that, "certain business practices of service suppliers ... may restrain competition and thereby restrict trade in services" (GATS Art. IX). Article IX also encourages Members to cooperate with each other to alleviate these practices, which aligned with WTO aims to promote cooperation in resolving competition policy concerns (Anderson and Müller). The Reference Paper generally addresses anti-competitive practices of major firms in the telecommunications sector, since the sector satisfies an essential need of telecommunications, which is provided by a limited number of suppliers that have few substitutes, if any.[2] Therefore, the Paper establishes some rules related to anti-trust and regulatory policy that facilitated better practices in the telecommunications sector.

GATT 1994

Article XVII of GATT 1994 concerns state trading enterprises and other enterprises which benefit, formally or in effect, from exclusive or special privileges. In Para 3 of the Article, the Members recognise that enterprises of this kind might be operated so as to create a serious obstacle to trade. The Para further recognises that negotiations on a reciprocal and mutually advantageous basis, designed to reduce such obstacles, are important to the expansion of international trade.

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

Another relevant WTO agreement is the 1995 TRIPS Agreement which refers to competition in both a broad understanding and more specifically regarding licensing practices. Broadly, Article 8.2 aims to prevent anti-competitive practices that abuse intellectual property rights and international technology transfer. Article 40.1 echoes the aim of Article 8.2 but specifically addresses licensing practices or conditions of intellectual property rights that inhibit competition, trade, and technology transfer. Article 40.2 allows Member governments to counteract these hindrances by taking measures to address anti-competitive abuses of intellectual property rights.[3] Article 40.3 allows for a sort of negative comity regarding intellectual property rights, where one Member considering action against a firm of another Member, can seek consultation with that other Member. The responding Member must then provide relevant and publicly available information that would assist in resolving the issue.[4]

The Government Procurement Agreement

A relevant plurilateral agreement is the Government Procurement Agreement (GPA) of 1996, which broadly aims to protect consumers through transparency in government procurement regimes, foster competition, and provide market access to foreign suppliers.[5] As a trade liberalization agreement, the GPA works indirectly, but relevantly to increase the number and diversity of competitors for procurements, which in turn alleviates supplier collusion and market confining schemes.[6] This agreement provides a basis for further development of competition policy; there are connections to competition, however the agreement leaves room for practices like bid rigging to occur, which could be prevented with competition policy.

[2] Anderson, Robert D. and Müller, Anna Caroline (2015). 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.

[3] Anderson and Müller, 2015

[4] Ibid.

[5] Ibid.

[6] Ibid.

1.3 The WTO Working Group on Trade and Competition Policy

The Uruguay Round, through a built-in agenda under the WTO 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. 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 Trade and Competition Policy (WGTCP) was established by paragraph 20 of the Singapore 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"*[7] . A similar working group was also established on trade and investment. 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; (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.[8]

As the WGTCP proceeded in its work from 1999-2001, there arose a necessity to more specifically identify what the WGTCP should focus on in terms of moving forward in the WTO, and the next stage of work was in preparation for the Doha Ministerial Conference in November 2001. The group further explored competition-related thematic issues, such as the role competition policy played within the WTO, the relevance of WTO core principles (e.g. transparency, non-discrimination) and the enforcement of competition law. The result was recognizing the impact of core principles on competition policy implementation and public support, and the benefits of cooperation between competition agencies and capacity building in a modern and increasingly globalised world.[9]

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."*[10]

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;

[7] WTO (1996). WT/MIN(96)/DEC/1. Ministerial Conference - Singapore, 9-13 December 1996 - Ministerial Declaration - Adopted on 13 December 1996

[8] WTO (1998). WT/WGTCP/2. Report (1998) of the Working Group on the Interaction between Trade and Competition Policy to the General Council, Checklist of Issues for Study

[9] Anderson and Müller, 2015

[10] WTO (2001). WT/MIN(01)/DEC/1. Ministerial Conference - Fourth Session - Doha, 9 - 14 November 2001 - Ministerial Declaration - Adopted on 14 November 2001

(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.[11]

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[12], backed by Canada, Hungary, Norway, and Australia among others.[13] They emphasized that multilateral rules would be better suited than Free Trade Agreements (FTAs) to tackle international cartels, which could operate worldwide across a wide range of markets of different development levels.[14] In particular, the EU sought: (i) a general commitment to a competition law by every WTO member, featuring the core principles of non-discrimination and transparency; (ii) Member's commitment to take measures against hardcore cartels; (iii) the development of modalities for voluntary cooperation on competition enforcement; (iii) support for the strengthening of competition institutions in developing countries; and (iv) establishment of a WTO Committee on Competition Policy, as the platform for administering the multilateral agreement, sharing experiences and identifying technical assistance needs.

The positions of WTO Members towards the end of WGTCP discussions can be roughly categorised into four groups:[15]

- Countries supporting the EU proposal, including Switzerland, Canada, Australia, Korea, Chinese Taipei, Morocco, Costa Rica, and most Eastern European countries.
- Those members conditioning their support to a multilateral framework, emphasising that it should be sufficiently balanced by negotiations in other areas where they had more interest, e.g. agriculture. These included most South American members, including Brazil, Argentina and Chile.
- Those objecting to the EU proposal either because: (i) they did not have a competition law at the time and did not want to commit to adopting one; or (ii) opposed the application of WTO dispute settlement in the area of competition policy. These included inter alia Hong Kong, the United States, Malaysia, India, and Indonesia.
- Those who opposed the EU proposal on grounds that they could not afford a competition law because of their low level of development, which required them to have a strong industrial policy rather than promoting competition. These included most small developing and Least Developed Countries (LDCs).

Those opposed to the 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 had enacted national competition laws, and the limited number of developing countries' competition regimes often lacked features like investigative and enforcement bodies and measures.[16] These countries were reluctant to agree on multilateral rules without properly understanding the implications at stake. Nevertheless, some of them like Kenya and Morocco expressed interest in a multilateral agreement that could facilitate capacity building in creating a strong competition regime through exchange of knowledge.[17]

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[11] WT/MIN(01)/DEC/1

[12] CUTS (2000). Trade, Competition & Multilateral Competition Policy. Briefing Paper n°9/2000. CUTS Centre for Competition, Investment & Economic Regulation. Jaipur, India.

[13] WTO (2000). WT/WGTCP/M/12. Working Group on the Interaction between Trade and Competition Policy - Report on the Meeting of 2-3 October 2000 - Note by the Secretariat. Paragraph 23

[14] WT/WGTCP/M/12, Paragraph 54

[15] Jenny, F. (2004). "Competition, Trade and Development Before and After Cancun" in Huang, Z. and Chen, J. (eds.) The Future Development of Competition Framework. The Hague: Kluwer Law International.

[16] WT/WGTCP/M/12 , Paragraph 32

[17] WTO (2002). WT/WGTCP/M/19. Working Group on the Interaction between Trade and Competition Policy - Report on the Meeting of 26 - 27 September 2002, Paragraph 29, 49 ; WT/WGTCP/M/12, Paragraph 60

Developing countries and LDCs emphasized the absolute necessity of flexibility in the agreement so that it could be fair to both developing and developed countries [18], and were generally concerned that multilateral rules could be burdensome for them.[19] This sentiment is summarized by Pakistan's explanation that a *"cost-benefit analysis was needed individually and collectively to determine whether what Members were being asked to give up in the realm of flexibility was indeed outweighed by what would be gained from such a framework"*.[20] 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 to policy objectives other than promoting competition.[21]

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.[22]

1.4 Reasons for a Standstill

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."*[23]

Since then, despite being no longer discussed at the WTO, competition policy has remained part of the international trade debate through UNCTAD, the Organization for Economic Cooperation and Development (OECD), ICN, as well as FTAs. Exploring how sticky issues at the WGTCP have since been addressed in these agreements outside the WTO can provide an indication as to whether some of them may have become less problematic today. Some of the main sticky points and concerns that prevented consensus at the working group are summarised below, and will be further elaborated in the next section.

Skepticism of the South

Developing countries had been skeptical owing to their unsatisfactory experience so far with the functioning of the WTO. They 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. They also anticipated that inclusion of non-discrimination principles would prevent them from protecting their industries from foreign competitors. Some members like Thailand pointed out the potential conflict between non-discrimination and Special and Differential Treatment (SDT).[24]

Market concentration risk

There would likely be a concentration of market power with TNCs and simultaneously the inability of domestic competition authorities to deal with explicit and implicit anticompetitive practices arising out of capital account liberalisation. This inability could either stem from a sheer lack of understanding of cartel intricacies,

[18] WT/WGTCP/M/12

[19] WTO (2000). WT/WGTCP/M/11. Working Group on the Interaction between Trade and Competition Policy - Report on the Meeting of 15 - 16 June 2000 - Note by the Secretariat, Paragraph 85

[20] WTO (1998). WT/WGTCP/4. Report (1998) of the Working Group on the Interaction between Trade and Competition Policy to the General Council, Paragraph 23

[21] Dawar and Holmes (2012). Trade and Competition Policy. In: The Ashgate Research Companion to International Trade Policy.

[22] Anderson and Müller, 2015

[23] WTO (2004). WT/L/579. Doha Work Programme - Decision Adopted by the General Council on 1 August 2004

[24] WT/WGTCP/M/22, Paragraph 56

or lack of authority and power in terms of pursuing charges against powerful cartels. 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".*[25]

Implementation cost

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".*[26]

Commitment to Competition Law

Many members were opposed to the EU proposal seeking their commitment to adopt national competition laws, arguing that a country can have an effective competition policy without necessarily adopting a comprehensive competition law or have a dedicated competition authority.[27] They 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.[28]

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.[29]

Interests favouring anti-dumping

The establishment of multilateral competition rules has long been resisted by powerful lobbies, who fear that such rules could effectively discipline the use of anti-dumping measures which are often used to shield domestic firms from foreign competition.[30] 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.

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

[25] WT/WGTCP/M/11, Paragraph 8

[26] WTO (2001). WT/WGTCP/M/14. Working Group on the Interaction between Trade and Competition Policy - Report on the Meeting of 22 - 23 March 2001 - Note by the Secretariat, Paragraph 41

[27] WT/WGTCP/W/191. Working Group on the Interaction between Trade and Competition Policy - Provisions on Hardcore Cartels - Background Note by the Secretariat, Paragraph 19

[28] Dawar, K and Holmes, P. (2012). "Trade and Competition Policy". In Heydon, K and Woodlock, S (eds.) The Ashgate Research Companion to International Trade Policy. London and New York: Routledge, 2016.

[29] WT/WGTCP/M/14, Paragraph 45

[30] Hoekman, B. and Holmes, P. (1999). "Competition policy, developing countries, and the World Trade Organization". Policy, Research working paper; no. WPS 2211. Washington, DC: World Bank.

sustainable development.[31] 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, sometimes referred to as "World Competition Forum", 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.[32]

[31] CUTS, 2005

[32] CUTS, 2000

SECTION 2

Competition Policy at the WTO: Where Was It Left?

After seven years of discussions at the WGTCP, WTO members were not able to reach a consensus for launching negotiations on a multilateral competition framework. Nevertheless, debates contributed to advance understanding about the potential role of the WTO with regard to international trade and competition policy. Besides the core principles of transparency, non-discrimination and procedural fairness, the working group acknowledged the harmful nature of hardcore cartels, and considered possible elements for voluntary cooperation, capacity-building and special and differential treatment. This may provide a basis for any renewed discussion at the WTO. This section will provide an overview of the state of play and members' positions at the WGTCP with regard to the aforementioned aspects.

2.1 Relevance of the WTO

During the course of the WGTCP's work, there was some contention on both whether and how to establish multilateral rules on competition, and whether these should be placed under the auspices of the WTO. As the main proponent, the EU argued that the existing patchwork of bilateral and regional cooperation arrangements, while valuable, did not suffice to coherently respond to cross-border competition problems.

Among the identified limitations of bilateral/regional cooperation agreements were: (i) letting them become the only basis for enforcement cooperation would result in a complex network of arrangements, whose administration costs would be prohibitive for all competition authorities; (ii) international cartels are unlikely to be confined to the parties of a particular agreement; and (iii) cooperation on capacity building is likely to be more effective if it can draw from experiences of countries from different regions and levels of development.[33]

The EU proposal argued that a multilateral approach would tend to ensure that the needs for cooperation of countries at all levels of development would be addressed, while consideration would be given to all forms of anti-competitive practices with an international dimension. In addition, multilateral competition commitments would reinforce the domestic role of competition authorities, and contribute to the spread of a "competition culture". The provision of technical assistance to developing countries would also be most effective in a multilateral setting, allowing for synergies among different modalities of cooperation and avoiding duplication of efforts. [34]

Those who were in general opposition to establishing multilateral rules argued that no formal organization or institution was necessary, with the United States advocating instead for a "soft" convergence of competition policy between countries through exchange of experiences. It is in this spirit that the ICN was established in 2001, based on the recommendations of the US Attorney General's International Competition Policy Advisory Committee

[33] WTO (2000). WT/WGTCP/W/152. Working Group on the Interaction between Trade and Competition Policy - Communication from the European Community and its Member States - A Multilateral Framwork Agreement on Competition Policy

[34] WT/WGTCP/W/152

(ICPAC). [35] Developing countries also argued that their priority was to strengthen their national competition regimes before committing to multilateral rules for which they were not ready.[36] The view was also held that bilateral and plurilateral cooperation agreements may be better suited to resolve anti-competitive practices.

Besides this, many questioned the relevance of the WTO itself for hosting a multilateral competition framework. [37] Indeed, while competition authorities see themselves as "promoting competition, not competitors", the mercantilist nature of the WTO may lead to negotiations focusing on the commercial interests of producers rather than consumer welfare.[38] It was also argued that the WTO membership, half of which lacking a competition regime, was too diverse. Should multilateral rules be considered, the lowest common denominator would prevail which could end up legitimating weak and ineffective rules.[39]

Importantly, many members expressed concerns that such multilateral rules would be subject to the WTO Dispute Settlement instrument which could review the judicial decisions of countries on competition cases. This would pose a number of problems related not only to members' sovereignty, but also to the required degree of specificity in the agreed rules, as well as the ability of a WTO panel to conduct the kind of complex and intensive fact-finding required in the enforcement of competition law. Moreover, national competition enforcement often relies on confidential business information which could never be obtained if they risked to be shared with a WTO panel.

2.2 Transparency

Transparency is one of the driving principles of the WTO, requiring members to publicly disclose their relevant policy measures to allow more clarity and predictability for other members. With regard to competition, observing transparency principles may entail the publication of public laws, regulations and guidelines on competition enforcement, as well as disclosing enforcement priorities, notifying exemptions and exceptions granted to particular players etc.

At the WGTCP, proponents of multilateral rules were generally in favour of members' committing to transparency, which they considered as intrinsic to effective competition policy as international competitive conditions can be strongly influenced by government policies. These countries included *inter alia* the EU, Australia, Hong Kong, Chinese Taipei, Japan, Mexico, Morocco, New Zealand, Switzerland, Thailand, India, Canada, Nigeria, Tunisia, Venezuela and Brazil.

As suggested by the EU, a commitment to transparency would entail disclosing to the WTO and its members *de jure* information related to laws, regulations, guidelines of general application, sectoral exclusions, and exceptions. [40] Australia advocated along the same lines that "transparency should permeate all aspects – both *de jure* and *de facto* - of a country's competition regime, including legislation, policies, institutional structures, decision-making processes, enforcement priorities, policy and procedural guidelines, case selection criteria, exemption criteria, appeal processes, and details of all relevant outcomes and decisions made."[41] Similarly, Switzerland wondered if the scope of transparency provisions should be extended to case decisions as well as advocacy programs. [42]

While also acknowledging the importance of transparency, other countries like the US, Malaysia, Kenya, Cuba and Hong Kong cautioned about the potential burden on countries: (i) who already have implemented competition regimes and would be required to adapt them to a new multilaterally-adopted format; and (ii) developing countries who lack adequate resources to establish transparency

[35] ICPAC Final Report, 2000

[36] e.g. Malaysia. WT/WGTCP/M/12, Paragraph 29

[37] e.g. Hong Kong, the Philippines, India, Pakistan. WT/WGTCP/M/12, Paragraph 66

[38] Hoakman and Holmes, 1999

[39] "The WTO and Competition Policy: the Need to Consider Negotiations". Speech by Karel Van Miert Member of the European Commission responsible for Competition. 1998.

[40] WT/WGTCP/6, Paragraph 17

[41] WT/WGTCP/M/19, Paragraph 5

[42] e.g. Switzerland. WT/WGTCP/W/89

mechanisms.[43] Some countries were also concerned that they might be pressured to change their legislations, enforcement practices or even the scope of exemptions within their domestic laws, on grounds of enforcing the transparency principle. They therefore stressed the importance of flexibility and necessary time when incorporating transparency into their competition regimes.[44]

The need to strike a balance between transparency and maintaining confidentiality in anti-trust enforcement was also raised by countries like Brazil.[45] Indeed, a competition authority's decision to pursue an individual enforcement action may rely on confidential information that cannot be disclosed.

2.3 Non-Discrimination

Non-discrimination is another core principle of the WTO, encompassing the National Treatment and Most-Favoured-Nation (MFN) principles. While MFN aims to prevent discrimination among trading partners by granting them the same terms of trade, National Treatment ensures that imported products enjoy the same treatment as domestically-produced ones regardless of their origin. Exceptions to these principles exist, such as special and differential treatment for developing countries.

While the theoretical benefits of non-discrimination as a basic principle for a multilateral competition agreement was widely acknowledged[46], issues arose in the practical application of non-discrimination.

National Treatment

National treatment applies to all laws, regulations, and requirements that "might adversely modify the conditions of competition between domestic and imported products on the internal market".[47] Concerns were expressed that integrating this principle in a competition agreement could limit members' ability to pursue industrial policies[48], and could give large TNCs unlimited access to developing countries' domestic markets to the detriment of local firms.[49] In response to this concern, proponents pointed out that members would remain free to establish exceptions or exemptions from competition law, provided they are transparent.[50]

Most Favoured Nation

Possible contradictions were identified between the MFN principle and the voluntary nature of cooperation. In this regard, the United States raised a number of questions related to the practical application of the principle, concluding that the possibility of being subjected to MFN disciplines in relation to a supposedly voluntary exercise could eventually discourage cooperation. [51] In order to avoid such implications, the suggestion was made that non-discrimination provisions should not be extended to cover existing or future bilateral cooperation agreements.[52]

2.4 Procedural Fairness

Procedural fairness, or due process, aims to ensure that all procedures for investigating and enforcing national competition rules are transparent and fair. Such provisions can include the right for parties to a fair hearing in competition authorities' decisions, and to appeal such decisions.

Being heavily dependent on the specificities of every jurisdiction, proponents of procedural fairness aspects in WGTCP discussions were mainly concerned with ensuring adherence to certain basic elements. Australia depicted the concept of procedural fairness as encompassing "due process, transparency, accountability, predictability and independence, all of which were similarly important to the credibility and

[43] WT/WGTCP/M/19, Paragraph 23-24,27,29,54

[44] WT/WGTCP/M/19, Paragraph 24,39,61

[45] WT/WGTCP/M/5, Paragraph 64

[46] e.g. EU, Canada, Czech Republic, Guatemala, Russia, South Africa etc.

[47] WT/WGTCP/W/114

[48] e.g. India (WT/WGTCP/M/11, Paragraph 3), Malaysia (WT/WGTCP/M/12, Paragraph 39)

[49] WT/WGTCP/M/22

[50] WT/WGTCP/M21, paragraph 30

[51] WT/WGTCP/M/14, Paragraph 43

[52] WT/WGTCP/7

effectiveness of a competition agency".[53] Korea also added that due notice of charges, fair and equitable administrative proceedings, and an appeal process were required to provide appropriate checks and balances.[54]

Other members like the United States, South Africa, India, Hong Kong and Canada however noted the lack of consensus regarding its practical application in the context of a multilateral agreement. [55] Some warned that proposed terminologies like "should be fair" may have different meanings in different countries, which may lead to misunderstandings.[56] Overall, consensus seemed difficult regarding the implementation of this principle.

Some members emphasised that, while most developed countries should unilaterally commit to these principles, developing countries should do so on a voluntary basis only.[57] Such flexibility was required for the one-fourth of WTO members with young or non-existent competition regimes, who lacked the experience and resources to establish adequate mechanisms. [58]

2.5 Hardcore Cartels

In the WGTCP, discussions on substantive provisions mainly focused on harcore cartels as per the Doha mandate. In particular the working group discussed elements of a possible definition for the purpose of a multilateral agreement, and proposed provisions to be included in such an agreement to tackle them.

In a background note, the WTO Secretariat defined hardcore cartels as agreements between firms that would otherwise be in competition with each other (i.e., "horizontal agreements") that aim to fix prices, reduce output or allocate markets or that involve the submission of collusive tenders. The term "hardcore" underscores the harm caused by such arrangements and distinguishes them from joint ventures or other inter-firm arrangements that involve active collaboration among firms and potentially enhance social welfare. International cartels generally fix prices, outputs or other dimensions of competition across a number of national markets, often including but not limited to the home countries of the participating firms. [59] While some members suggested a broad definition of cartels in a multilateral framework, which would include both domestic and international cartels, others advocated for focusing on international rather than domestic cartels.[60]

It was generally agreed upon that hardcore cartels significantly stifled competition in all markets and needed to be addressed. In particular, cartels had devastating effects on developing countries due to their relatively weak antitrust laws and enforcement capabilities that seem to invite more intense price-fixing activities. Evidence suggested that cartels caused direct economic losses to developing countries equivalent to 15 per cent of the foreign aid they received.[61] It was also suggested that cartels were increasingly blocking technology transfers, especially to developing countries, as a way of impeding progress and simultaneously maintaining their grasp on the market. [62] Nevertheless, some developing countries pointed out that international hardcore cartels largely originated from developed countries, and that the burden of tackling them should not fall on developing ones. In addition, the view was expressed that addressing the abuse of dominant position would be of greater priority to developing countries, where they were perceived as being even more harmful than hardcore cartels.

On the proponents' side, key suggested provisions of a multilateral competition agreement for tackling international cartels included: (i) a clear prohibition of hardcore cartels in Members' national legislation; and

[53] WT/WGTCP/M/19, Paragraph 6
[54] WT/WGTCP/M/19, Paragraph 10
[55] WT/WGTCP/M/19, Paragraph 18-21
[56] WT/WGTCP/M/19, Paragraph 79
[57] WT/WGTCP/7
[58] Mehta, 1997. p27-28
[59] WT/WGTCP/W/191
[60] WT/WGTCP/7
[61] M. Levenstein, L. Oswald and V. Suslow, International Price-fixing Cartels and Developing Countries: A Discussion of Effects and Policy Remedies, Working Paper no. 53 (Amherst, MA: Political Economy Research Institute, University of Massachusetts, 2003).
[62] WT/WGTCP/M/18, Paragraph 4

(ii) provision for cooperation between Members in relevant investigations.[63]

With regard to their prohibition in national competition legislation, the debate went back to the absence of competition regimes in many developing countries, who should not be forced to adopt one before they were ready. Proponents however assured that they were not proposing a one-size-fits-all approach, but at least all countries should have sufficient powers to actually implement and enforce the law. As an alternative approach, Thailand suggested the adoption of a multilateral rule banning hardcore cartels engaging in bid-rigging and price-fixing, which were considered as the two most blatant unfair trade practices, and should be subject to the WTO's DSM.[64]

Some members of the Organization of the Petroleum Exporting Countries (OPEC) suggested that some restrictive business practices implemented pursuant to the implementation of certain state-to-state agreements should be explicitly excluded from the ambit of any multilateral competition framework. In particular, reference was made to commodity markets, where such agreements exist to ensure stable prices.[65]

Finally, international cooperation in relevant investigations was identified as a key avenue in tackling international hardcore cartels. This aspect is discussed in the next section.

2.6 Cooperation

Cooperation among competition authorities is maybe the most important tool for tackling transnational cartels and other anti-competitive practices. In the case of export cartels for instance, which may be tolerated in their countries of origin, competition authorities in the victimised countries may lack statutory powers (lack of extra-territorial jurisdiction) or the means to gather the evidence towards enforcement against the cartel. At the WGTCP, discussions focused on modalities for voluntary cooperation, which may include general sharing of information and experience, consultations, technical assistance and case-specific cooperation.

Both developing and developed countries expressed support for cooperation, acknowledging its necessity in addressing hardcore cartels, and emphasised that it should be both voluntary and flexible. It was also anticipated that cooperation would serve as a means of collectively improving interwoven systems, while simultaneously assisting developing countries in bolstering up their competition policies and enforcement practices. For instance, the Czech Republic cited how beneficial the support of other countries was during its transition into a market economy, a feature that could be relevant to developing countries.[66]

Nevertheless, some countries like Canada and Guatemala strove to make the distinction between cooperation on the one hand, and capacity building and technical assistance on the other. On behalf of the Common Market of Eastern and Southern Africa (COMESA), Zimbabwe explained that for effective cooperation, proper institutional capacities and a fundamental understanding of the issues at stake still remained to be acquired at the time.[67]

Overarching discussion points regarding modalities for voluntary cooperation included: (i) its use as a law enforcement tool that allowed cross-border anti-competitive activities to be addressed; (ii) increased communication between competition authorities that would promote a desirable "soft convergence" of best practices among Members while alleviating judicial conflicts; and (iii) incorporating general or specific forms of cooperation into national systems to further institution-building processes, especially in developing countries.[68]

Although interest for case-specific cooperation was particularly high, it was anticipated that most of the cooperation under a WTO framework would mainly involve more general exchanges of information and experiences, possibly within a WTO Committee on Competition Policy. Besides information-sharing, this

[63] WT/WGTCP/7
[64] WT/WGTCP/M/21, paragraph 43.
[65] WT/WGTCP/M/22, paragraph 66.
[66] WT/WGTCP/M/11, Paragraph 45
[67] WT/WGTCP/M/15, Paragraph 74
[68] WT/WGTCP/W/192

committee could also coordinate activities like voluntary peer reviews, technical assistance etc.

Finally, there seemed to be consensus on that the information to be exchanged would remain non-confidential in nature. This was in response to concerns expressed that agreeing to share confidential business information with all other jurisdictions would be counter-productive. For instance, this could discourage firms to apply for leniency programmes if they feared that the information they provided could be shared with other jurisdictions, who could use it against them. Members willing to engage in exchange of confidential information would still be able to do so through other types of agreements outside the WTO.

2.7 Capacity Building and Technical Assistance

Capacity building is particularly important to developing countries as it serves as a tool for bolstering their recently implemented or future competition regimes, with the experience of other countries who have already implemented theirs. The Doha Ministerial declaration explicitly mandated the working group to focus on "support for progressive reinforcement of competition institutions in developing countries through capacity building".[69]

At the WGTCP, discussions on capacity building and technical assistance related to "assistance with the drafting of legislation, the implementation of competition laws, the training of staff and other activities aimed at the creation and reinforcement of effective competition institutions". [70] Trinidad and Tobago, on behalf of CARICOM, submitted a paper detailing the challenges that small island economies face, and suggested that capacity building measures could include, inter alia: (i) scholarships for academic/professional training; (ii) internships at competition authorities to gain experience; (iii) visiting staff from experienced agencies to guide and assist, particularly in procedural matters in the early years of new competition agencies; (iv) resource persons/financial assistance for training workshops targeted at specific groups, such as lawyers, economists, and judges; (v) assistance in the facilitation of workshops for producers and consumers; and (vi) guidance in the development of an information database system in new competition agencies.[71]

These suggestions have been echoed in similar fashion by other Members, like Japan.[72] Other countries, like the US, showed interest in aiding the development of solid domestic competition regimes and agencies, while Canada proposed economic efficiency, and the protection of competition and the competitive process, as two principles of technical assistance. However, many countries including the US, Japan, and Egypt have also recognised that capacity building and technical assistance should be tailored according to the diversity of needs and distinct national conditions, and be specifically requested to efficiently manage resources while addressing relevant needs.[73]

It was also suggested that peer reviews could be seen as a primarily capacity building tool that would to improve the effectiveness and soft convergence of competition regimes, and should be voluntary and non-adversarial. While this "soft law" and capacity building approach was supported by *inter alia* the EU and the US, others like Korea favoured peer reviews as an integrant part of a possible compliance mechanism.[74]

2.8 Special and Differential Treatment

As an exception to the non-discrimination principle, and a complement to cooperation and technical assistance, SDT allows more favourable provisions for developing countries. Such provisions typically include flexibilities, exemptions, more time to implement certain provisions, capacity building etc. Acknowledging this need, the Doha declaration stated that "Full account shall be taken of the needs of

[69] WT/MIN(01)/DEC/1, Paragraph 23-25
[70] WT/WGTCP/W182
[71] WT/WGTCP/W/143
[72] WT/WGTCP/M/11, Paragraph 16
[73] WT/WGTCP/W/2
[74] WT/GGTCP/M/21

developing and least-developed country participants and appropriate flexibility provided to address them."

In the WGTCP, Switzerland synthesised various suggestions from other members, like Japan, South Africa, and the EU, and concluded that SDT should be discussed as a means of maintaining flexibility.[75] As work progressed in the WGTCP, countries like Japan, Korea, Switzerland, Ecuador, Hong Kong Malaysia, Thailand, Indonesia, Cuba, Egypt, India, and the Philippines increasingly emphasized the importance of SDT, and requested discussion on how it would be implemented into a multilateral agreement.[76]

Venezuela specified that in establishing a new multilateral framework, special and differential provisions that are not only time-based should be implemented, while Malaysia concurred that time-based provisions would suffice.[77] In this regard, Thailand suggested that, "Competition authorities in developing countries with limited financial resources should be financially compensated for delivering requested assistance but be allowed to seek assistance to the extent needed, subject to technical and financial constraints" and that "developing countries should be allowed to exempt national and international export cartels, since most developing countries' exporters or importers were mainly small scale and might need to bind together to counter the bargaining power of larger buyers or sellers from industrialized countries".[78] As another SDT measure, Cuba also proposed more severe punishments on cartels that specifically targeted and harmed developing countries.[79]

Japan noted that developing countries seemed to feel a real need for cooperation on the one hand and had some concerns associated with the establishment of a multilateral framework on the other hand. However, those concerns should not be overblown, and could be addressed through a more focused discussion, in concrete terms, on the special and differential treatment for developing countries and the scope of the dispute settlement system of the WTO.[80]

Discussions on SDT also turned to exceptions and exemptions and what this would entail for participating Members. Most members thought that if exceptions or exemptions were used, they should be transparent, in limited number, and phased out over time, while others, including India, suggested that they should not be phased out.[81] However, discussions eventually considered allowing all Members to apply exemptions and exceptions, which some developing countries disapproved on grounds that SDT would need to involve non-reciprocity. According to Thailand, "In reality, this was "equal treatment" rather than "special treatment" since developed members would continue to exempt certain sectors, such as export or shipping cartels."[82]

2.9 Dispute settlement

The role of the WTO Dispute Settlement mechanism in a possible multilateral framework was a hotly debated topic. Whereas the EU first advocated for the application of the DSM, this did not lend support from the majority of Members who favoured a non-binding, soft law approach. Indeed, some feared that DSM application could impinge on national sovereignty (e.g. prosecution of individual cases), while smaller developing countries were concerned about the use of DSM vis-à-vis a potential requirement for a national competition law.

Addressing these concerns, the EU and other proponents suggested that dispute settlement would: (i) under no circumstances apply to individual decisions of national competition authorities; (ii) be limited only to *de jure* (rather than *de facto*) violations of non-discrimination and other principles set in a potential agreement; (iii) not apply to voluntary cooperation.[83] Proponents also argued that parties to the agreement would be able to exempt certain sectors,

[75] WT/WGTCP/M/11, Paragraph 41

[76] WT/WGTCP/M/12, Paragraph 71,87; WT/WGTCP/M/19, Paragraph 27

[77] WT/WGTCP/M/11, Paragraph 41, WT/WGTCP/M/15, Paragraph 78

[78] WT/WGTCP/M/18, Paragraph 54; WT/WGTCP/M/19, Paragraph 12

[79] WT/WGTCP/M/21, Paragraph 33

[80] WT/WGTCP/M/12, Paragraph 71

[81] WT/WGTCP/M/18, Paragraph 83; WT/WGTCP/M/19, Paragraph 78

[82] WT/WGTCP/M/22, Paragraph 56

[83] WT/WGTCP/5, paragraph 87

actors or practices from their domestic competition law as long as these exceptions are non-discriminatory and remained transparent.

This however failed to convince other members that there should be nothing to fear from the DSM, especially as proponents continued to advocate for binding commitments subject to it. As a result, most other members were not in favour of binding commitments, with some saying they could only sign for a non-binding, "soft law" approach (e.g. Hong Kong, United States, Malaysia). Based on these suggestions, the chair of the working group put forward an intermediary proposal consisting of setting up a WTO Competition Committee where members could exchange experiences, conduct peer reviews, study cooperative mechanisms and oversee a technical assistance programme.[84]

The proposed soft approach attracted more support, including a system of voluntary peer review which might provide a more appropriate (non-confrontational) compliance mechanism in addition to being an effective cooperation and capacity building tool.

[84] Jenny, F. (2004). "Competition, Trade and Development Before and After Cancun" in Huang, Z. and Chen, J. (eds.) The Future Development of Competition Framework. The Hague: Kluwer Law International.

SECTION 3

Competition Rule-Making in Free Trade Agreements

Since the conclusion of the work at the WGTCP, competition provisions have increasingly been included in FTAs and RTAs, both North-South and South-South. According to some estimates, 87% of South-South FTAs included competition-specific provisions as of 2015. [85] More generally, the share of RTAs and FTAs with competition-related provisions increased from 60% in the 1990s to 88% as of 2015. In absence of a multilateral framework, these provisions have contributed to shaping international relations on competition matters, including on issues previously addressed at the WTO.

Gaur (2015) analyses that, in developing countries, competition chapters in FTAs may act as a catalyst to bolster domestic support for adopting a competition regime which domestic interest groups might otherwise resist. In addition, they are also incorporated in many RTAs to create region-wide competition policies and institutions towards greater levels of integration, e.g. common markets. It is also observed that competition elements in many recent FTAs go well beyond the degree of cooperation that was envisioned in the proposals for a multilateral framework on competition policy in the WTO.[86]

A study conducted by Laprévote et al. (2015), which evaluated 216 FTAs and RTAs with explicit competition provisions, identified 3 main model approaches usually adopted to address competition matters in FTAs: (i) the European Approach; (ii) the NAFTA approach; and (iii) the Oceania approach.[87]

The European approach, with either the EU or European Free Trade Association (EFTA) as parties, typically includes detailed provisions prohibiting specific anti-competitive practices, and regulates state aid and state enterprises. It also provides competition-specific exemptions for public services, as well as other sensitive sectors such as agriculture and fisheries. However, these FTAs tend to adopt a more generic and unsystematic approach to competition enforcement principles, or coordination and cooperation.

The NAFTA approach, which includes FTAs to which the US or Canada are parties, typically contain a wide-range of specific competition provisions on cooperation and coordination, as well as State-owned Enterprises (SoEs), designated monopolies, and procedural fairness. This approach uses a more generic reference to "anti-competitive business conduct" without elaborating on specific components of this. The exceptions included in this approach are indicative of sensitive areas and policy issues to the parties, often including public procurement and financial services.

The Oceania approach, embodied by the Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA), was identified as the most advanced model which establishes highly harmonised

[85] Laprévote, François-Charles, Sven Frisch, and Burcu Can. Competition Policy within the Context of Free Trade Agreements. E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, 2015.

[86] Gaur, Seema (2015). "Competition Provisions in Trade Agreements: How to Realise their Potential?" in Sengupta, R. (ed.) "Pursuing Competition and Regulatory Reforms for Achieving Sustainable Development Goals". CUTS Centre for Competition, Investment & Economic Regulation. Jaipur, India.

[87] Laprévote et al., 2015.

competition regimes in both parties in pursuance of unconditional free trade, and removal of trade defences. Such degree of convergence, with New Zealand having largely adopted the Australian competition regime, is a result of a pre-existing high level of economic integration.

The approaches detailed above should not be considered exhaustive, rather they are useful as a frame of reference to which overarching competition provisions are used, by whom, and in which context. This exercise also works to indicate which issues each community places emphasis on, and serves to guide the further exploration of what other competition provisions are included in FTAs and why that might be.

In trade agreements, competition-related provisions may relate to, *inter alia*: (i) defining anticompetitive practices, and measures to be taken against them; (ii) non-discrimination, due process, and transparency in the application of competition law; (iii) adopting or maintaining competition laws; (iv) disciplining recourse to trade remedies (e.g., anti-dumping measures, countervailing duties, and safeguards); (v) application of dispute settlement procedures in competition matters; (vi) regulating designated monopolies and state-owned enterprises; (vii) regulating state aid and subsidies; (viii) laying down competition-specific exemptions; (ix) cooperation and coordination mechanisms; and (x) special and differential treatment.[88] Not only are there specific provisions dedicated to competition in these agreements, but competition language is also being increasingly incorporated into other chapters and provisions that are not explicitly related to competition.[89] The application of these provisions can either be quite specific or rather general with best endeavour language depending on the parties to the agreement and their priorities.

Analysing how issues previously discussed at the WTO have been addressed in bilateral, regional and plurilateral agreements can provide useful indications as to whether the divergent positions and work undertaken at the WGTCP remain relevant today.

3.1 Adoption of Competition Law

At the WGTCP, a multilateral requirement to adopt a competition law and competition authority was controversial and did not attract consensus. Today, it features in some free trade agreements, although provisions in this regard are particularly broad and diverse. Among the FTAs sampled by Laprévote et al. (2015), 37 percent included provisions requiring the parties to adopt, maintain, or apply laws, legislation, or measures regulating anti-competitive conduct.

The less committing type of provisions leave it to the parties' discretion how to develop and enforce competition law, or contain vague obligations to adopt "measures" or "laws" against anticompetitive practices without defining their content in more details. Examples of such provisions can be found in Chile-Japan, and Japan-Indonesia FTAs.[90]

Other provisions are more specific, particularly in some FTAs signed by the US where provisions may exist to ensure that the parties maintain an authority entrusted with enforcing competition laws or event require setting up such an authority when it does not exist. This was for instance the case in the US-Singapore FTA, which stipulated that Singapore should enact competition legislation by January 2005.[91] On the other hand, FTAs signed by the EU often commit potential accession candidates to align their legislation with EU competition law. These also emphasise the need for independence of the competition authority, which is otherwise rare in other FTAs.

[88] Dawar and Holmes, 2012

[89] Anderson and Müller, 2015

[90] Laprévote et al., 2015

[91] Sahu, S. and Gupta, N. (2007). Competition Clauses in Bilateral Trade Treaties: Analysing the Issues in the Context of India's Future Negotiating Strategy. Report Prepared for the Competition Commission of India.

3.2 Core Principles of Competition Enforcement

While most FTAs incorporate the core principles of non-discrimination, transparency, and procedural fairness which were discussed at the WGTCP, few such provisions are specifically directed to competition enforcement. When included, these provisions call for the transparent and non-discriminatory application of competition laws and policies, especially regarding state-owned enterprises.[92]

Transparency provisions in FTAs are very similar to existing provisions in WTO agreements, particularly specified by the GATT Article X. They require the parties to promptly publish laws, regulations, judicial decisions and administrative rulings in a consistent, impartial and reasonable manner.[93] Transparency provisions are often linked to due process and cooperation considerations.

Procedural fairness, or due process, was one of the sticking points during WGTCP discussions owing to the diversity of Members' competition regimes, administrative and judicial systems, as well as the limited capacities of developing countries to maintain stringent due process measures at the time.

Today, there are relatively few trade agreements which include specific due process provisions in the context of competition enforcement. These include the Andean Community, Australia-Singapore, Australia-Thailand, Australia-US, Canada-Costa Rica, CARICOM, Chile-US, Japan-Mexico, and Singapore-US, which have integrated provisions on equitable judicial or quasi-judicial processes, notification of proceedings etc.[94] Some NAFTA-inspired agreements and FTAs that Canada is party to (Canada-Costa Rica, Canada-Colombia), have adopted more specific due process standards that ensure fair judicial proceedings.[95] It is also noteworthy that the Trans-Pacific Partnership (TPP) adopted detailed provisions on procedural fairness for the protection of foreign firms under domestic competition laws.

PROCEDURAL FAIRNESS IN THE TRANS-PACIFIC PARTNERSHIP

The Trans-Pacific Partnership, through Articles 16.2 and 16.7, adopted a set of explicit rules on transparency and procedural fairness in competition enforcement which some have dubbed the most comprehensive of any FTA to date.[96] These provisions grant firms the right to counsel, a reasonable opportunity to be heard and to present evidence, the right to offer expert analysis, the right to cross-examine any testifying witness, and the right to appeal or seek review from a court or independent tribunal.

[92] Sahu, and Gupta, 2007

[93] Sahu and Gupta, 2007

[94] Solano, O. and A. Sennekamp (2006), "Competition Provisions in Regional Trade Agreements", OECD Trade Policy Papers, No. 31, OECD Publishing, Paris.

[95] Laprévote et al.

[96] Sahu and Gupta, 2007

3.3 Cooperation and Coordination

As discussed before, the transnational nature of many anticompetitive practices spurred the need for national competition agencies to coordinate and cooperate, in order to: (i) ensure effective transnational investigations; (ii) reduce the costs of overlapping jurisdictions for both businesses and public authorities; (iii) avoid conflicting outcomes of competition enforcement in different jurisdictions; (iv) bring about coherent application of substantive rules and enforcement standards across jurisdictions. Since discussions at the WGTCP, it has been widely acknowledged that engaging in such cooperation is in the interest of developing countries, who suffer most from anti-competitive practices by powerful firms based in other countries.[97]

Almost half of the FTAs sampled by Laprévote et al. (2015) contained provisions on cooperation and coordination, which may entail *inter alia* voluntary collaboration, mutual legal and technical assistance, consultation, notification of enforcement activities, and exchange of non-confidential information towards tackling anti-competitive practices originating in one party's jurisdiction.[98]

The need to exclude confidential information from FTA cooperation provisions continues to make consensus since WGTCP discussions. Indeed, sharing confidential information could be counter-productive by potentially discouraging leniency applications.

Comity provisions are also among the least frequent cooperation mechanisms included in FTAs.[99] In WGTCP discussions, such provisions were described as follows: (i) *negative comity*: requires a party to take into consideration the important interests of other affected party when taking a decision on a case; and (ii) *positive comity*: requires a party to take enforcement action upon a request from another party affected by anti-competitive practices originating in the territory of the requested party.[100] Such provisions, particularly on positive comity, did not attract much support by WTO Members at the time.

However, comity provisions as well as other more advanced cooperation mechanisms exist in the numerous stand-alone Competition Enforcement Agreements (CEAs) signed by both developing and developed countries. Such agreements include Agency-to-Agency Agreements (ATA) and Mutual Legal Assistance Treaties (MLAT) between governments such as the EU-US Competition Cooperation Agreement, the US-Australian Mutual Antitrust Enforcement Assistance Agreement, etc. Some of these agreements provide for exchange of confidential information through confidentiality waivers and information gateways.

Petrie (2016), analysing the level of cooperation under 69 CEAs and 59 FTA competition policy chapters, noted the steady increase of North-South CEAs, from none in 1999 to 52% today. It was suggested that international enforcement cooperation increasingly and predominantly takes place between economies at different levels of development. It was however noted that North-South cooperation provisions have a shallower level of cooperation than North-North ones, possibly because enforcement cooperation is more likely to be invoked by the less developed partner on the activity of northern firms in their market, than vice versa.[101]

Alvarez et al. (2005) found that a key motivation of developing countries for signing CEAs was the dissatisfaction of their competition authority about the trade focus of existing FTA competition provisions. This was exemplified by a survey respondent from Uruguay,

[97] see Levenstein et al., 2003
[98] Laprévote et al., 2015
[99] Solano and Sennekamp, 2006
[100] WT/WGTCP/M/18, Paragraph 22
[101] Petrie, M. (2016) Jurisdictional integration: A framework for measuring and predicting the depth of international regulatory cooperation in competition policy. Regulation & Governance, 10: 75–92.

who commented that the MERCOSUR Protocol for the Defence of Competition was too trade-centred and ill-suited to solve issues of competition policy.[102]

There is evidence that some competition agency staff in developing countries find informal cooperation with their counterparts particularly effective, suggesting that trust and personal relationships may matter at least as much as official agreements. [103] It practice, the framework created by FTAs and particularly RTAs may create enabling conditions for closer personal relationships and trust. This was noted by competition officials on both sides of the Canada-Costa Rica FTA, saying that, "cooperation agreement works best when it is approached in an informal way and the FTA provides for a formal framework for informal contact means".[104]

3.4 Special and Differential Treatment, Capacity Building and Technical Assistance

During WGTCP discussions, developing countries emphasized the importance of Special and Differential Treatment (SDT), capacity building and technical assistance so as to be able to implement effective competition regimes.

Brusick and Clarke (2005), which reviewed 157 FTAs involving at least one developing country, found that only 13 percent included SDT treatment within their competition clauses. In the rare cases where they existed, flexibilities pertained to: (i) provisions safeguarding the interests of the developing partner, e.g. domestic industry; (ii) exceptions and exemptions, e.g. state aid; (iii) transitional time periods, e.g. in setting up a competition authority and adopting a competition law; and (iv) technical assistance.[105] The authors remarked that such degree of flexibility, mainly found in agreements with the EU, may have been easier to accept due to the limited number of beneficiaries as compared to a multilateral agreement.

With regard to technical assistance, FTA provisions may include the exchange of information, seminars and workshops, staff training, exchange of experts etc. [106] While provisions on technical assistance seldom mention non-reciprocity, Alvarez et al. (2005) showed that competition authorities in developed countries are usually eager to offer such assistance, even when not mandated by an FTA, since they want the other party to be sufficiently competent to assist in case handling and prosecutions. For instance, the US and the EU provided technical assistance to Brazil and Jordan respectively, outside any FTA or ATA obligation.[107]

The box below provides an example of technical assistance provisions in the Competition chapter of the EC-CARIFORUM EPA. Similar provisions can be found in, *inter alia*, Canada-Costa Rica, Chile-EC, Chile-Korea, EC-South Africa, EC-Mexico, Japan-Mexico, and Japan-Singapore agreements.

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[102] Alvarez et al. (2005). "Lessons from the negotiation and enforcement of competition provisions in South-South and North-South RTAs". In Brusick et al. (eds.) Competition Provisions in Regional Trade Agreements: How to Assure Development Gains, UNCTAD Document. UNCTAD/DITC/CLP/2005/1, New York and Geneva: United Nations.

[103] Alvarez et al., 2005

[104] Holmes et al. (2005). "Trade and competition in RTAs: A missed opportunity?" in Brusick et al. (eds.) Competition Provisions in Regional Trade Agreements: How to Assure Development Gains, UNCTAD Document. UNCTAD/DITC/CLP/2005/1, New York and Geneva: United Nations.

[105] Brusick and Clarke (2005). "Operationalizing special and differential treatment in cooperation agreements on competition law and policy" in Brusick et al. (eds.) Competition Provisions in Regional Trade Agreements: How to Assure Development Gains, UNCTAD Document. UNCTAD/DITC/CLP/2005/1, New York and Geneva: United Nations.

[106] Alvarez et al., 2005

[107] Alvarez et al. , 2005

TECHNICAL ASSISTANCE IN THE COMPETITION CHAPTER OF THE EC-CARIFORUM EPA

Article 130

Cooperation

1. The Parties agree on the importance of technical assistance and capacity-building to facilitate the implementation of the commitments and achieve the objectives of this Chapter and in particular to ensure effective and sound competition policies and rule enforcement, especially during the confidence-building period referred to in Article 127.

2. Subject to the provisions of Article 7 the Parties agree to cooperate, including by facilitating support, in the following areas:

(a) the efficient functioning of the CARIFORUM Competition Authorities;

(b) assistance in drafting guidelines, manuals and, where necessary, legislation;

(c) the provision of independent experts; and

(d) the provision of training for key personnel involved in the implementation of and enforcement of competition policy

It should be noted that many opportunities for technical assistance are available outside FTAs, which may not be a preferred avenue for seeking capacity building. For instance, international organizations like UNCTAD, OECD and ICN provide technical assistance to competition authorities in the form of, inter alia: (i) draft model laws; (ii) seminars and workshops; (iii) training of judges, legal professionals and authority staff; (iv) voluntary peer reviews; (v) financial assistance; (vi) best practices and operational guidelines etc. Importantly, cooperation itself, as discussed above, is often viewed by competition authorities as an effective type of capacity building and technical assistance.[108]

3.5 Dispute Settlement

Interestingly, competition provisions have to a large extent been expressly excluded from their FTA's dispute settlement mechanism. However, this exclusion is sometimes partial. For instance, it may only exempt provisions on designated monopolies and SoEs from disputes (e.g. Canada-Panama), or limit its application to state aid (e.g. EU-Republic of Moldova).[109] It can also be noted that Ukraine's obligation to align its competition laws and enforcement practices to EU law is subject to dispute settlement under the UE-Ukraine FTA.

On the other hand, Laprevote et al (2015) noted that 47 percent of their sampled FTAs established competition-specific dispute settlement mechanisms, usually in the form of consultation procedures. Parties are thereby required to consult with each other to settle competition-related disputes, either by default or upon another party's request, sometimes within a specific committee or in an inter-agency setting. Such competition-specific DSMs can be found, *inter alia*, in EFTA-Singapore, Republic of Korea-Chile, Canada-

[108] Alvarez et al., 2005

[109] Laprévote et al., 2005

Colombia, EU-Republic of Korea etc.[110] Typically, FTAs with the EU or EFTA as party set up a supranational administrative committee, which oversees the enforcement of the agreement.[111]

In regional settings, many RTAs established a supra-national authority that can directly enforce competition law on private entities (e.g. EU, COMESA, CARICOM, the Andean Community, and Mercosur).

3.6 Substantive Scope

While the substantive provisions discussed at the WGTCP mainly focused on prohibiting hardcore cartels, the scope of most FTAs with competition aspects extends to other issues such as mergers and acquisitions (M&A), abuses of dominant position, state aid, state monopolies and enterprises etc. As parties to trade agreements open markets by removing public barriers, they may become more vulnerable to anti-competitive practices originating outside their borders which may act as private trade barriers, thereby undermining the FTA's liberalisation objective. For instance, cross-border mergers and acquisitions may result in a firm's dominant position on the national market, and the ability to abuse its market power to the detriment of competitors.

Cartels and anti-competitive practices

Anti-competitive agreements

The harm of hardcore cartels, particularly on developing countries, was widely acknowledged by the WGTCP, which also recognised the need for cooperation in tackling them. Today, about half of FTAs with competition aspects require parties to prohibit anti-competitive agreements.[112]

However, the scope and level of specificity varies, with many agreements adopting broad and non-binding language without precisely defining what these practices entail. Examples of South-South FTAs with generic approaches to anti-competitive agreements include Singapore-Chinese Taipei, Costa Rica-Singapore, Peru-Chile, Korea-Chile. Some North-South FTAs also adopt a general approach to anti-competitive practices, such as EU-Georgia, EFTA-Singapore, Trans-Pacific Strategic Economic Partnership, and Australia-Chile.

Other FTAs, mainly involving developed countries with extensive experience of international competition enforcement, have more specific definitions including horizontal or sector-specific provisions. For instance, many agreements signed with the EU replicate Article 101 of the Treaty on the Functioning of the European Union (TFEU), defining anti-competitive agreements as *"agreements and concerted practices between undertakings, decisions and practices by associations of undertakings, which have as their object or effect the prevention, restriction or distortion of competition in the territory of either Party"*.[113] This is the case in FTAs between the EFTA-Central America (Costa Rica and Panama), EU-Central America, EU-Ukraine, EU-Tunisia, and EU-Bosnia.[114] It should also be noted that CARICOM extensively borrows from the TFEU article, including in specifying that anti-competitive practices include price-fixing, predatory pricing, price discrimination, exclusionary vertical restrictions, bid-rigging etc.

Abuse of Dominant Position

At the WGTCP, substantive focus lied mainly on the prohibition of hardcore cartels. Although acknowledging the harm of such cartels, many developing countries argued that the working group did not address other anti-competitive practices of greater priority for tem, such as the abuse of market power by dominant firms. Today, a number of FTAs prohibit the abuse of market power, identified under different terms such as "abuses of dominant positions", "unilateral conduct", "misuse of market power" etc. Laprévote et al. (2015) found such provisions in 59 percent of the FTAs studied, including Peru-Chile, Costa Rica-Singapore, Turkey-Morocco, Australia-Chile, Panama-

[110] Laprévote et al., 2005
[111] Laprévote et al., 2005
[112] Laprévote et al., 2015
[113] Laprévote et al., 2015
[114] Laprévote et al., 2015

Singapore, Thailand-New Zealand. [115] Usually horizontal in scope, these provisions are sometimes supplemented by sector-specific provisions, e.g. on telecommunications. It is also noted that some FTAs signed by Canada (e.g. Canada-Costa Rica) treat dominance *per se* as being anti-competitive, regardless of it being abused.

Mergers and acquisitions

Only a few FTAs, typically between developed countries, feature anti-competitive merger provisions. These tend to be rather vague, with only four of them involving the EU or Korea explicitly requiring the existence of a merger control regime with the implementation and maintenance of laws that allow the effective control of concentrations. [116] Oher countries having signed agreements featuring such provisions include Australia, the EFTA, Canada, New Zealand and Singapore. The only exception of a South-South FTA addressing anti-competitive mergers is Turkey-Montenegro.

Designated monopolies, State-owned Enterprises and State aid

Provisions aimed at levelling the playing field between private firms and State-owned Enterprises or designated monopolies are among the most common competition-related provisions found in FTAs. [117] In 2013, the OECD estimated that SoEs represented about 10 percent of the world's 2000 largest companies, many of them based in emerging economies. [118] When operating in markets open to competition, SoEs can become a source of concern as they can benefit from unfair advantages from their governments, such as subsidies which may not always be provided in a transparent manner.

Around 50 percent of the FTAs sampled by Laprévote et al. (2015) required parties to regulate designated monopolies and SoEs, while 41 percent contained provisions regulating subsidies or state aid. Parties usually recognise each other's right to establish and maintain SoEs, while setting certain conditions towards ensuring "competitive neutrality". Typically, NAFTA-inspired FTAs require that SoEs: (i) be subject to regulatory control; (ii) act in accordance with commercial considerations; (iii) act in a non-discriminatory manner; and (iv) refrain from using their monopoly power to engage in anti-competitive conduct". [119] On the other hand, the European FTA model tends to simply require that such companies be subject to competition law, and specifies that the agreement's provisions on abuse of dominance extends to such enterprises.

Exceptions and Exemptions

More often than not, competition-specific exemptions found in some FTAs aim to address parties' sensitivities with regard to their SoEs and designated monopolies. Different approaches have been adopted for such exemptions, ranging from liberal to more stringent conditions. For instance, open-ended exceptions may be allowed provided they meet certain criteria, which may include: (i) transparency; (ii) non-discrimination; (iii) public interest; (iv) being no broader than necessary; (v) pre-existing exemption in domestic law; and (vi) competitive neutrality. More limited, sectoral exemptions feature in FTAs signed by the EU, including on: (i) telecommunications, where parties are allowed to define the kind of universal service obligation to be maintained; (ii) agricultural and fisheries subsidies, on which the prohibition on state aid does not apply; and (iii) public services, where parties can exempt from competition law public enterprises and enterprises entrusted with special or exclusive rights, or with the "operation of services of general economic interest or having the character of a revenue-producing monopoly". [120] In TPP negotiations, where several parties have a high degree

[115] Laprévote et al., 2015

[116] Laprévote et al., 2015

[117] Gaur, Seema (2015). "Competition Provisions in Trade Agreements: How to Realise their Potential?" in Sengupta, R. (ed.) "Pursuing Competition and Regulatory Reforms for Achieving Sustainable Development Goals". CUTS Centre for Competition, Investment & Economic Regulation. Jaipur, India.

[118] Kowalski, P. et al. (2013), "State-Owned Enterprises: Trade Effects and Policy Implications", OECD Trade Policy Papers, No. 147, OECD Publishing, Paris

[119] Laprévote et al., 2015

[120] Laprévote et al., 2015

of state intervention, more stringent conditions require parties to list specific SoEs to be exempted.

Anti-dumping

Although competition policy and anti-dumping are both concerned with evening the playing field on the market, they pursue different and sometimes conflicting objectives. While the former aims to ensure fair competition in the interest of consumer welfare, the latter is essentially concerned with producer welfare. It protects domestic businesses from predatory pricing by foreign firms, who may sometimes benefit from advantages as part of their home country's industrial policy (e.g. subsidies, tax exemptions etc.).[121] On the other hand, anti-dumping can be abused as a protectionist tool to shield domestic firms from foreign competitors, particularly in the absence of effective cross-border competition rules. As observed by Holmes et al. (2005), adopting such rules would not suffice for countries to give up the right to use anti-dumping, until other practices such as state aids rules, special tax regimes, and industry specific regulations are harmonized.[122]

As a result of the continued opposition of many countries to abolishing trade defences, only a very limited number of current FTAs contain provisions to this effect. Laprévote et al. (2015) identified that only the ANZCERTA, EFTA-Chile, EFTA-Singapore, EFTA-Serbia and Canada-Chile have replaced such trade defences with competition provisions. It is further noted that these FTAs were signed between parties who had limited prospects of resorting to trade remedies against each other anyway.[123]

[121] Holmes et al., 2005

[122] Holmes et al., 2005

[123] Laprévote et al., 2015

SECTION 4

Has Past WTO Work Stood the Test of Time?

This study reviewed how some of the concerns expressed at the WGTCP have since been addressed in trade agreements, in order to understand to what extent the concerns expressed at the WTO remain relevant today. As further elaborated below, it can be observed that: (i) some of the key contemporary competition provisions were not covered in former WTO discussions; (ii) FTAs have been adopted despite the presence of issues considered as problematic under the WGTCP; (iii) several concerns expressed in the working group continue to influence provisions in today's trade agreements; (iv) current FTA competition provisions continue to reflect members' preference for "soft convergence" over "hard law" commitments.

4.1 Substantive scope: new priorities

The anti-competitive practices covered in most recent trade agreements go beyond the issue of hardcore cartels, which was the main substantive focus in WTO discussions. Besides cartels, more significant attention is now given to provisions on SoEs and abuse of dominant position. It is noteworthy that in the WGTCP, some developing countries suggested to address the latter, which they viewed as even more harmful to them as hardcore cartels. This sustained interest is also suggested by the fact that almost all FTAs signed by developing countries contain provisions on abuse of dominant position, while provisions on cartels are relatively less.[124]

In addition, cross-border mergers and acquisitions have become central to the competition debate as these can lead large firms to acquire dominant positions on foreign markets while being tolerated in their home jurisdiction when they don't restrict competition domestically. [125] While advanced economies have established complex merger control mechanisms, few developing countries have the legal or economic clout to tackle this issue. As a result, Levenstein et al. (2003) provided evidence that cartelists convicted in a developing country may sometimes be able to continue the same anti-competitive practices through a merger.

4.2 FTAs signed despite sticky issues

At the WGTCP, many developing countries explained not being ready to take up multilateral commitments on competition due to a number of capacity constraints, including: (i) lack of negotiating capacity; (ii) lack of experience in competition policy enforcement; (iii) expected high cost of compliance. Today, over 130 countries (including developing and LDCs) have now adopted competition regimes, up from 35 countries in 1995.[126] In addition, many developing countries have now negotiated and taken up competition-related commitments in FTAs. Their agreement to adopt such provisions may be partly explained by two factors: (i) these provisions are often excluded from dispute settlement, whereas WGTCP members feared being subjected to the WTO's DSM should they fail to comply; (ii) While many Geneva missions involved in WGTCP discussions remain understaffed today and have to deal with a wide range of complex issues, FTAs were negotiated from the

[124] Holmes et al, 2005
[125] PIIE, 2008
[126] CUTS, 2013

capital where a more diverse range of expertise and resources may be available, including on competition matters.

While insufficient attention to special and differential treatment contributed to developing countries' opposition to the proposed multilateral framework, many of these countries have now engaged in FTAs where non-reciprocity in competition provisions is mainly absent. This may partly reflect the low bargaining power of developing countries when negotiating North-South agreements, which may be more limited than in a multilateral setting. On the other hand, this study however noted that, in the rare FTAs where SDT provisions exist, their adoption may have been possible precisely because they would apply to a limited number of partners rather than the whole diverse range of developing countries.

Furthermore, developing countries doubted the usefulness of the WTO-proposed voluntary cooperation provisions, as developed countries would have little incentive to favourably consider their cooperation requests. Yet, trade agreements signed by them since then usually contain shallow cooperation provisions as well, and seldom include negative or positive comity. However, this study observed that detailed cooperation mechanisms exist in the growing number of CEAs signed by developing countries, suggesting their high interest in competition cooperation. It was also noted that in some cases, CEAs were signed as a result of competition agencies' dissatisfaction with the trade-inspired provisions of the FTA, while in other cases the FTA framework played a catalytic role in building competition relationships.

4.3 Policy space still key

The issue of non-discrimination in competition enforcement continues to be sensitive, as many countries are concerned about securing policy space for undertaking industrial policy, promoting national champions and monitoring incoming investments. As a result, only 26 percent of FTAs sampled by Laprévote et al. (2015) introduced competition-specific enforcement principles, where non-discrimination provisions remained rather broad. On the other hand, particular attention has been given to detailed provisions on SoEs, designated monopolies, state aid, as well as exceptions and exemptions. As discussed above however, SDT provisions for developing countries have rarely been included in FTAs.

4.4 Continued preference for "soft convergence"

The fact that most FTAs have excluded competition provisions from dispute settlement, while sometimes replacing it with consultation mechanisms, suggests that many countries continue to prefer a "soft convergence" approach over the kind of "hard law" commitments proposed at the WTO. This "soft law" approach has long been preferred by the US, whose extensive capacity for unilateral extraterritorial enforcement make dispute settlement mechanisms a lesser priority. However, most developing countries lack the expertise and capacity to pursue such extraterritorial enforcement invoking the effects doctrine.

Nevertheless, the preferred "soft law" approach allows developing countries to adopt elements of competition law at their own pace according to their evolving market circumstances and development level, while promoting experience-sharing to build competition enforcement capacities. As summarised by Evenett (2005), "the so-called North American family of agreements, with their emphasis on cooperation provisions and on fewer substantive provisions, and a tendency to exclude competition provisions from dispute settlement, might be attractive to developing countries in saving them implementation costs and limiting the enforceability of the competition provisions. But such agreements are unlikely to allay any fears about the likelihood of precious little cooperation actually resulting from these RTAs."[127]

[127] Evenett, Simon J. (2005). "What can we really learn from the competition provisions of RTAs?" in Brusick et al. (eds.) Competition Provisions in Regional Trade Agreements: How to Assure Development Gains, UNCTAD Document. UNCTAD/DITC/CLP/2005/1, New York and Geneva: United Nations.

Conclusion

Globalisation has given rise to a set of issues at the interface of trade and competition policy, sparking the debate about the need for policy convergence and cooperation among competition authorities, e.g. through international competition rules. Such efforts would aim to address the inability of national authorities to efficiently tackle anti-competitive practices affecting their market but originating from other countries, such as export and import cartels, unilateral conduct of State-owned Enterprises, cross-border mergers etc.

Multilateral efforts to address the interface between trade and competition policy date as far back as 1948 and the Havana Charter, which eventually failed to set up an International Trade Organisation partly due to controversies about its provisions on restrictive business practices. Under the GATT, it is only during the Uruguay round that competition-related measures made their way into WTO agreements, including GATT, GATS, TRIPS and TRIMS. A built-in agenda provided in the latter led WTO Members to consider complementary provisions on investment policy and competition policy during the 1996 Singapore Ministerial, which established an exploratory Working Group on Trade and Competition Policy. Five years later, ministers in Doha mandated the working group to clarify the contours of possible negotiations on a multilateral agreement on competition to be possibly launched at the next ministerial.

Main proponents led by the EU suggested that a possible framework may entail: (i) a general commitment to a competition law by every WTO member, featuring the core principles of non-discrimination, transparency and procedural fairness; (ii) Member's commitment to take measures against hardcore cartels; (iii) the development of modalities for voluntary cooperation on competition enforcement; (iv) support for the strengthening of competition institutions in developing countries; and (v) establishment of a WTO Committee on Competition Policy, as the platform for administering the multilateral agreement, sharing experiences and identifying technical assistance needs.

However, despite acknowledging the relevance of competition policy for securing the benefits of trade liberalisation, developing countries and other members opposed multilateral negotiations on the matter. Hence, no consensus was reached on modalities for negotiating a multilateral framework by the 2003 Cancun Ministerial Conference, and the WGTCP was declared inactive in July 2004.

Among the main sticky issues that prevented consensus, members expressed concerns related to: (i) commitment to adopting a competition law featuring core principles, which could be burdensome for the majority of developing countries unexperienced in this area; (ii) non-discrimination provisions, particularly their implications on conducting industrial policy and their relation to SDT for developing countries; (iii) fears of a hidden market access agenda, potentially enabling northern TNCs to acquire and abuse their dominant position in developing markets; (iv) insufficient focus on non-reciprocity and other SDT measures for developing countries; (v) Members conditioning their approval to adequate concessions in other areas of WTO negotiations; and (vi) Use of the WTO dispute settlement mechanism, despite proponents eventually agreeing to limit its scope to ensuring conformity of government policies with the agreed principles.

Despite being no longer discussed at the WTO, competition policy has remained part of the international trade debate where competition policy-related rule-making has taken place through numerous FTAs, including signed by developing countries. Two main approaches have been identified as underpinning FTA provisions on competition: (i) the European approach, focusing on detailed provisions on prohibited anti-competitive practices; (ii) the NAFTA approach, which focuses on soft convergence through detailed provisions on cooperation and coordination, SoEs and procedural fairness.

This study reviewed how some of the concerns expressed at the WGTCP have since been addressed in trade agreements, in order to understand to what extent these remain relevant today. While tackling cartels remains a common objective in competition provisions of FTAs, other anti-competitive practices such as SoEs and abuse of dominant position have gained prominence. It was also observed that the presence of some past sticky issues, such as the lack of SDT and the cost of compliance, did not prevent developing countries from signing to a trade agreement. Although the lack of bargaining power may partly explain the absence of non-reciprocity, the fact that most competition provisions are excluded from dispute settlement seems to have made such provisions more acceptable to developing countries.

Nevertheless, some key concerns continue to influence competition provisions in trade agreements. In particular, securing policy space for promoting and protecting domestic industries remains a priority. This is evident from the low prevalence of competition-specific non-discrimination provisions, as opposed to detailed provisions on SoEs, designated monopolies, state aid, as well as exceptions and exemptions. Moreover, many countries continue to prefer a "soft convergence" approach over the kind of "hard law" commitments proposed at the WTO, and have often excluded competition provisions from the ambit of dispute settlement.

In light of the above, and taking into account WTO Members' priorities in other areas of negotiations, appetite for multilaterally-binding commitments on competition policy seems to remain limited. Although rule-making has been sought on state-sponsored competition distortions, the recent trend has favoured experience-sharing and cooperation among competition agencies, with trade agreements sometimes acting as catalysts. As in other areas of WTO negotiations, the emergence of some developing countries as major trading powers is likely to add to the challenge. In particular, the heterogeneity of the developing world has made it difficult to agree on SDT provisions. Yet, this would be a main value-added for the majority of smaller developing countries who could not secure non-reciprocity in FTAs.

Should members decide to renew work at the WTO, inspiration could be drawn from the Trade Facilitation Agreement (TFA) which addressed the above concerns by adopting a multi-tiered approach. This novel framework allows smaller developing countries to categorise how their commitments will be implemented: (i) immediately; (ii) after a certain period of time; (iii) after sufficient capacity has been acquired though technical assistance. The perspective of capacity building may however not be deemed sufficient by developing countries, who can access competition-related technical assistance through other forums such as UNCTAD, ICN, ATAs, MLATs and even FTAs.

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