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International institutions in providing fair competition

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Міжнародні інституції у забезпеченні чесної конкуренції

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Annotation. *This paper seeks to provide a balanced discussion of the issues involved in the conclusion of a framework agreement on competition within the WTO. It argues that the issue is not whether there should be international rules on competition, but what role the WTO should play. The paper shows that bilateral, regional and plurilateral provisions on competition policy are effectively shaping the current agenda and will most likely fill any vacuum left should no agree-*

ment on competition be reached in the WTO. The current proposals for a framework agreement on competition are found to be relatively modest. They would not require extensive harmonisation of national policies. Obligations on core principles such as transparency, non-discrimination and co-operation seem likely to be limited to the legal (de jure) measures establishing national competition regimes and not extended to (de facto) implementation of policies, which would be more controversial and costly. Whilst there are likely to requirements to introduce national competition regimes and substantive obligations on so called hard-core cartels, there is also a broad measure of support for the flexible application of WTO disciplines. This flexibility should limit the obligations and costs imposed on developing countries, at least for the foreseeable future, should competition be included on the WTO agenda. The aim of this paper is to provide a balanced assessment of the issues involved in the current policy debate on the inclusion of competition policy provisions in the World Trade Organisation (WTO). The paper discusses the context within which the current debate is taking place. It points out, in particular, that there are already elements of competition policy in a range of WTO agreements. Perhaps more importantly, a growing number of bilateral, regional and plurilateral agreements now address the topic. In other words the topic of international co-operation in competition policy is already on the trade agenda.

Keywords: *international institutions, national regime, competition law, antimonopoly legislation, WTO, 'hard-core' cartels*

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Анотація. *Ця стаття має на меті забезпечити збалансоване обговорення питань, пов'язаних з укладанням рамкової угоди про конкуренцію в рамках Світової організації торгівлі (надалі – СОТ). У статті стверджується, що питання полягає не в тому, чи повинні існувати міжнародні правила щодо конкуренції, а в тому, яку роль повинна відігравати СОТ. У статті висвітлено, що двосторонні, регіональні та багатосторонні положення щодо конкурентної політики ефективно окреслюють поточний порядок денний і, швидше за все, заповнять будь-який вакуум, якщо не буде досягнуто згоди щодо конкуренції в межах СОТ. Поточні пропозиції щодо рамкової угоди про конкуренцію вважаються відносно амбітними, адже не потребуватимуть широкої гармонізації національної політики. Зобов'язання щодо основних принципів, таких як прозорість, недискримінація та співробітництво, мабуть, обмежуються правовими (де-юре) заходами, що встановлюють національні режими конкуренції, а не поширюються на (де-факто) реалізацію політики, що була б більш суперечливо і дорого. Незважаючи на те, що існує ймовірність запровадження національного режиму конкуренції та істотних зобов'язань щодо так званих жорстких картелів, існують також широкі засоби підтримки гнучкого застосування режимів СОТ. Ця гнучкість повинна обмежувати зобов'язання та витрати, що покладаються на країни, що розвиваються, принаймні на найближче майбутнє, якщо конкуренція буде включена до порядку денного СОТ.*

Мета даного дослідження – забезпечити збалансований аналіз питань, які є предметом поточної дискусії щодо включення положень політики конкуренції до системи права СОТ. У статті досліджується контекст, в якому відбуваються поточні дебати. Він, зокрема, вказує, що низка угод СОТ вже містить елементи конкурентної політики. Актуальність дослідження посилює те, що ця тема зараз стосується все більшої кількості двосторонніх, регіональних та багатосторонніх угод. Іншими словами, тема міжнародного співробітництва у конкурентній політиці вже стоїть на порядку денному міжнародної торгівлі.

Ключові слова: *міжнародні інституції, національний режим, конкурентне право, антимонопольне законодавство, СОТ, «агресивні картелі»*

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Formulation of the issue

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

Analysis of recent research and publications

International cooperation is generally driven by a desire to offset a negative spillover imposed by other countries or to help governments to overcome domestic political economy constraints that impede the adoption of welfare enhancing policy changes. In principle, both conditions are satisfied in the competition policy. This then raises the question why no agreement could be reached in the WTO to launch negotiations on competition law. Such issues have become central to scientific research of well-known researchers of law and economics – Bernard Hoekman, Brian Hindley, Tomas Baert, Ernst-Ullrich Petersmann, Catherine Distler.

Part of the general issue that has not been solved before

The debate on what role the WTO should play in international cooperation in competition policy must be seen against the historical background of discussions on the topic and the developments in the international economy. When in 1947 the draft provisions of the International Trade Organization (ITO) included measures on restrictive business practices (RBPs), it did so against the background of the experience of the 1930s, when international cartels had been widespread and damaging to the world economy. Discussions within the GATT in the 1960s on whether there was a need to include provisions on RBPs, made little headway because perceptions had changed by that time and cartels were no longer seen to be a major problem or priority.[1]The progressive trend towards the globalisation of markets in the 1980s and 1990s, and in particular the growth of cross border merger and acquisition activity, which now accounts for a considerable share of all FDI flows, must now be factored into the debate. [2] In response to the 'globalisation' of the 1980s and 90s a growing number of national competition authorities are seeking to cooperate internationally, whether through regional, bilateral, plurilateral or multilateral means. The 1990s also saw a growing awareness of the relative importance of competition policy, or the absence of effective competition, as a factor in market access, such as in the discussions on the Structural Impediments Initiative (SII) in US Japanese relations. The progressive liberalisation of public/government restraints on trade (tariffs as well as non-tariff border and domestic regulatory measures) also raised the question of whether public restraints on trade might not be in danger of being replaced by private restraints on trade. This was especially the case when widespread privatisation and deregulation in many economies increased the scope for private monopolies or market dominance. Policy reform therefore led to a need for more effective competition policies, but in an increasingly global economy. It was against this background that proposals were made to establish an international regime for competition policy and include competition in the work of the WTO. These proposals ran into opposition on the grounds

that national competition policies among the developed economies were diverse and many small or developing country members of the WTO had no competition policy at all. It was also argued that introducing national competition policies was not in the interests of many developing countries, which either did not wish to pursue competition based policies in preference to industrial or development strategies, or lacked the resources to implement effective competition policies. At the Singapore WTO Ministerial in 1996 a compromise was reached to begin work on competition (as well as investment), and a WTO Working Group on Trade and Competition Policy was established. During the course of the next six years a good deal of work has been done within the WGTCP. This has helped clarify the issues and identify a number of areas in which there might be scope for agreement. [3]

Formulating the objectives of the article

This paper first indicates the nature of the existing provisions on competition in both existing multilateral agreements (GATT, GATS, TRIMs and TRIPs in the WTO and UNCTAD); as well as in plurilateral agreements (OECD), regional trade/integration agreements (28 at one recent count included competition provisions) and in bilateral competition agreements (of which there are currently more than 20). Although the regional and bilateral agreements are mainly between countries with well-established domestic competition policies, developing countries are progressively becoming more engaged. In order to provide a rounded view of the debate, a range of general arguments for and against including competition rules in the WTO are covered. But the main aim of the paper is to inform readers of the real issues at stake in the decision in Cancun and beyond on competition in the WTO. The paper then discusses the universe of potential competition related provisions that could figure in the current or future debate, drawing on the experience that has been gained from the various provisions in existing rules.

Outline of the main research material

As noted above, the work the Working Group on Trade and Competition Policy of the WTO, which was set up after the Singapore WTO Ministerial, and in particular the work since the Doha Ministerial has focused on a number of modest proposals. These will form the substance of any decision in Cancun, although any decision to include competition may of course be seen by some as the first step down a slippery slope to more comprehensive provisions. These modest proposals include the establishment of national competition authorities, core principles on competition policy, nondiscrimination, hard-core cartels, 'modalities' for international co-operation in enforcement of competition laws, and the progressive strengthening of competition policies in smaller WTO Members. This list may not be exhaustive, and ideas of proposals for what measures should be included in the WTO may still emerge in negotiations.

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

tions to tackle a few specific RBPs, such as hard-core cartels.

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

What might WTO provisions on competition include? It is not the aim of this paper to rehearse the general debate on whether international co-operation in competition policy is required, but for completeness some of the main arguments for and against integrating competition and trade regimes are given in the table below. It is not so much a question of whether but what type of coverage there should be of competition in the WTO. It is therefore important to look at the substance of a WTO agreement might be. This section of the paper therefore summarizes the universe of possible provisions that could come into consideration, either now or at some time in the future. These take the form of core principles, substantive provisions, procedural measures, means of accommodating countries at different levels of development (and more or less developed competition policies and 'cultures') and dispute settlement provisions.

Core principles. One of the core principles in any international agreement is transparency, or the provision of information on national competition laws and their implementation and enforcement. Providing information on the *de jure* structure of competition law should not be controversial. Most if not all countries publish their competition laws and procedures. In addition to publication, transparency may mean notification of laws to the relevant WTO Committee. This could be more resource intensive. Inevitably there are costs entailed in producing and collating all information, but much of this basic information already exists in a series of inventories or data-bases. Transparency concerning the procedures for implementing national laws or *de facto* transparency represents a greater level of obligation. This concerns information on the decisions and guidelines handed down by courts or competition authorities on the interpretation of competition provisions. Given the nature of competition policy, in which each case is different, such 'case law' is at least as important as the statutory provisions, but providing all relevant decisions to other WTO members would be a complex and costly process. This raises important questions concerning the scope of transparency provisions. Perhaps only those competition cases that have an impact on trade be notified, as has been the case for technical regulations under the WTO's Technical Barriers to Trade Agreement, if so who decide what affects trade?

A second core principle included in all WTO agreements is non-discrimination. In the case of competition policy, it involves treating foreign companies the same as national companies. Most favoured national status is not difficult in the sense that, for example, restrictive business practices by any group of foreign suppliers is likely to be treated the same by national competition policies. Nevertheless, should bilateral competition agreements and perhaps the competition provisions in RTAs be reconciled with an MFN obligation for competition policy? The extension of national treatment is more controversial. First of all, national competition policies whether in developed or developing countries often make use of the discretion provided by national laws when deciding whether to act against a restrictive practice or not. For example, competition authorities may find that the potential productivity or economies

of scale gains from a restrictive agreement outweighs the negative effects on welfare. In the past in developed WTO members and in many developing countries today, discretionary powers have also been used in order to allow concentration/rationalisation of the domestic industry in the hope that this will contribute to the international competitiveness. In such cases it would be difficult to reconcile the exercise of such discretion with national treatment obligations. Again the case specific nature of competition policy raises difficulties when it comes to applying general principles.

Substantive provisions. A key substantive element would be the requirement to have an (effective) national competition or anti-trust policy. This is for example, provided for in the North American Free Trade Agreement (NAFTA) and a number of other regional agreements. Simply having competition laws may mean little since there have been a number of cases of countries having sophisticated anti-trust legislation, which have never effectively applied. Therefore, a possible central purpose of an agreement on competition, whether in the WTO or anywhere else would be to ensure effective compliance. One area in which there is growing evidence (see below) in support- of the need to act is that of 'hard-core' cartels (or cartels which significantly influence prices or output and thus trade, without having any beneficial effects in terms of improved productivity). If private cartels restrict trade or result in increased prices this is clearly detrimental to welfare for all countries. Recent evidence suggests that countries without effective competition policies might be disproportionately affected by such restrictive practices. When cartels have no effects on the domestic market, they may be excluded from national competition jurisdictions. This provides a loophole for export cartels to exist, which can be especially distorting to trade. Any agreement might also cover other forms of horizontal agreements. The difficulty here is in deciding when agreements are damaging. National competition regimes have developed rather different rules on horizontal agreements.

If there is a reasonable measure of agreement on the need to deal with cartels and other horizontal agreements, national approaches to vertical agreements, or those between suppliers at different levels of the production or distribution process, vary quite significantly. Some national policies favour vertical integration as a means of promoting productivity improvements, others see them as equally damaging to competition as horizontal agreements. Furthermore national policies have changed over time, with changes in markets and competition theory, so that finding an agreement on substantive measures governing vertical agreements is more challenging. Another possible element in an international agreement would be provisions on mergers and acquisitions (possibly including strategic alliances). The growth in cross border mergers and acquisitions could be seen as a threat to international competition. However, national policies on mergers have varied even more than those on vertical agreements. Until recently, many governments used merger policy as an instrument in national industrial strategy by blocking foreign acquisitions in 'sensitive' or strategic sectors. Many developing countries still see a need for control mergers as a means of ensuring foreign multinational companies do not control strategic sectors for development. Agreement on substantive provisions in this field is therefore very difficult and probably beyond the ambition of the current negotiations. Indeed, the only agreement that has been reached on mergers has been in the EU and even this came only thirty years after the original Treaty of Rome was signed. The prevalence of international merger and acquisition activity

has however meant that there have been procedural measures agreed in the OECD and bilateral agreements to help avert conflicts between national merger policies.

Many national competition policies, as well as bilateral and regional policies, exclude specific sectors, such as air and sea transport, or specific types of agreements, such as co-operation in research and development, franchising or restrictive distribution agreements, from competition obligations. Some national competition laws also formally exclude regulated sectors (such as utilities) from the scope of competition policies. Any WTO provision would therefore need to address the exclusions issue. Some continued use of exclusions seems most likely, perhaps subject to effective transparency provisions (i.e. a listing of exclusions), but should there be an expectation that such exclusions should be reduced? Should this be done through peer pressure or through (reciprocal) negotiations based on (negative) listing? WTO provisions on competition could also cover intrusions by the publicsector into competitive markets. Public distortions to competition take various forms, such as the provision of subsidies, the cross-subsidisation of competitive market activities through rents from public monopolies or through the activities of private companies granted special or exclusive rights by governments or regulators. Provisions aimed at controlling such public or private monopolies have been included in most agreements between developed countries. There are also provisions in the GATT and GATS on most of these issues. The issue is therefore perhaps one of whether there should be tighter more effective disciplines within the WTO. Here there may be some developing countries that wish to retain the option of using such instruments in their development/industrial strategies.

Procedural provisions. Generally speaking procedural measures in (deep integration) trade agreements are less controversial than substantive commitments, because they often seek to facilitate voluntary co-operation rather than compliance with common binding rules. However the combination of procedural measures with an obligation to have an 'effective' national competition regime can have profound implications for national policies. Most agreements covering competition include some form of policy co-operation. This generally takes the form of the establishment of a committee to discuss developments in competition policy, provide peer review or technical assistance. The impact of such committees is difficult to assess, but if there is a genuine belief that there needs to be more co-operation in the field of competition policy, such 'soft' flexible instruments may be advantageous when there are differences between national policies and levels of development. A WTO Competition Committee could, for example, discuss best practice in policy formulation and implementation and enforcement. Such a Committee could also provide for peer review of national competition policies and co-ordinate technical assistance to developing countries in this area. One question that would need to be answered is why there is a need for a WTO Competition Committee when there are already similar bodies in the UNCTAD and other plurilateral and regional organisations?

As much of competition policy is case specific, agreements may also provide for cooperation on implementation of laws, either by providing information to competition authorities in other jurisdictions or by agreement to co-operate on enforcement. Developed countries do this through bilateral agreements. Developing countries are also keen to co-operate in cases because action against RBPs of MNCs, which operate in developed markets, would not be possible without information on the market behaviour of such firms. As with trans-

parency and non-discrimination, cooperation in specific cases (*de facto* application) implies a greater level of obligation and correspondingly higher compliance costs than for the co-operation on (de jure) policy formulation discussed in the proceeding paragraph.

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

Procedural measures in an agreement may also be intended to ensure the process of investigating and enforcing national competition rules is fair and transparent. Such due process provisions are very similar to transparency measures. Their aim is to ensure that all procedures are transparent so that third countries or companies involved in any investigation are aware of all stages of the process. Due process provisions can also include requirements that parties to any case have a right to participate in any decisions and/or have recourse to a judicial or administrative review of competition authority decisions. This can be very costly in terms of the resources of national administrations.

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

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

It is necessary to discuss the growth of international initiatives in competition policy and shows that there is a dense network of co-operative agreements, which touch

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

The ITO and the GATT. The experience with international cartels during the 1930s provided the incentive to include restrictive business practices (RBPs) in the draft ITO. Chapter V of the ITO devoted nine articles to the subject with the aim of; *'prevent(ing), on the part of private or commercial public enterprises, business practices affecting international trade which constrain competition, limit access to markets, or foster monopolistic control, whenever such practices have harmful effects on the expansion of production or trade and interfere with the achievement of any of the other objectives set forth in Article 1 [of the charter]* [4]

The ITO provisions listed six practices that were considered harmful to trade. The ITO was to investigate any complaint brought by a member and if upheld the country concerned would have to do everything possible to remedy the situation. As the ITO was never ratified one can only speculate on how these comprehensive provisions might have been implemented in practice. At the time, differences over the substance of policy were not a major problem, since only the US really had a competition policy. The US Congress was, however, concerned about loss of regulatory sovereignty over this important policy and indeed the lack of support for the ITO in the US Congress resulted in it never being ratified. In 1954 and 1955 a number of Contracting Parties to the GATT pressed for the inclusion of RBPs in GATT rules. A Group of Experts on RBPs reported in 1961, after considering the subject for a number of years, and although it found .. 'that the [GATT] should now be regarded as the appropriate and competent body to initiate action in this field,' there was no consensus on the what the substance of GATT rules might be. [5] This lack of consensus was due, in part, to a perception that cartels were not a major problem at the time and, in part, to opposition to loss of national policy autonomy in such as sensitive policy area. There was agreement on notification procedures on RBPs, but these provisions were never been used. [6]

Competition provisions in Existing WTO agreements. There are a number of provisions under GATT 1994 and other WTO agreements, such as TRIPs and GATS that have possible application in cases where anticompetitive practices restrict trade, especially market access. Article II of the GATT requires that if a monopoly is retained by a WTO member, such a monopoly shall not 'operate so as to afford protection in excess of that provided for in schedules.' Article III *(national treatment)* is fundamentally about the maintenance of competitive conditions for imported products compared to domestically produced goods. A number of cases in the GATT have sought to show that national competition laws and procedures are covered by Article III, but without much success. There is also a possible application of Articles XI (quantitative restrictions) and XVII (state trading enterprises) against anti-competitive practices, although here the focus is on government actions or the application of non-commercial criteria by state owned companies or companies that benefit from exclusive or special rights granted by government. The use of so-called *non-violation cases* under Article XXIII of the GATT provides the option of using existing GATT rules to address anti-competitive practices. This provision can be used when a WTO Member believes that benefits accruing to it under the agreement are being nullified or impaired by measures that do not violate any part of the GATT. Article XXII can, for example, be used when the benefits of market access

for a WTO Member(s) are nullified by the absence of competition in a target market. Although this Article is held up as a possible alternative to a framework agreement on competition in the WTO, there a number of drawbacks with it. Perhaps the most important it that nullification is, in practice, very difficult to prove and as a result there have been few attempts (none successful) to use this provision. Another difficulty is that in the absence of any agreed framework of rules WTO Panels would have to judge what national competition laws are acceptable and what are not. Such an activist approach to WTO jurisprudence would be based on trade considerations, predominantly market access, rather than the rather broader competition policy criteria. This would not result in an integration of trade and competition policies, but the dominance of market access considerations and would fit uneasily with the general desire to bolster the WTO's legitimacy.

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

The issue arises as to whether competition criteria should be applied in general across all such sectors, rather than being the substance of specific sector agreements. In general the efforts to apply general horizontal criteria to all services sectors have not made much progress. The general application of competition criteria to (the regulation) of all services, would be a significant extension of WTO commitments that many WTO members would have difficulty accepting. As a consequence the current proposals for a framework agreement on competition in the WTO would limit commitments to the application of core principles in competition policy as such and not to regulatory policy across the board. The *TRIPs agreement* also contains elements of competition policy. WTO Members may take ' appropriate measures .. to prevent abuse of intellectual property rights having an adverse effect on competition in the relevant market.' The scope for the use of competition policies in this field is, however, as in all existing GATT/ WTO provisions quite tightly constrained. [7] The TRIPs Agreement (in article 40) also allows competition authorities in WTO members to control certain licensing agreements on competition grounds. Finally, article 31 provides for compulsory licensing as a remedy in cases where anti-competitive practices have been based on intellectual property rights. Other WTO agreements also include elements of competition, for example, the Agreement on Technical Barriers to Trade requires standards be no more restrictive on trade than is necessary. These provisions (in Articles 3,4 and 8) could be used to challenge the use of proprietary standards to restrict competition, such as in cases where standards limit essential access to networked services. Provisions in the plurilateral Government Purchasing Agreement might also be used to challenge bid rigging, which is probably an important (and large-

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

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

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

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

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

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

The UNCTAD Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices. The UNCTAD Set was adopted in 1980 and was the rather limited product of earlier efforts by developing countries to get some control over potential RBPs of

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

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

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

The EU's experience with it own approach to the interaction between trade and competition policy has clearly shaped its thinking on international policy. This is particularly pronounced in the belief, which permeates European competition policy, that the removal of controls on trade and investment has to be complemented by competition policy in order to ensure that private restraints do not replace the public restraints on business. As a result the EU has been the main proponent of more cooperation in competition policy to complement market liberalisation, including the inclusion of competition in the WTO's agenda. [7]

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

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

The North American Free Trade Agreement (NAFTA). In contrast to the extension of the EC *acquis* to the EU's partners, the NAFTA merely calls for each party to adopt or maintain measures to proscribe anti-competitive business conduct (Article 1501). It also urges co-operation between the respective competition authorities and mutual assistance in enforcing national competition laws. There are provisions covering monopolies and state enterprises but these are considerably weaker than the Article 90 (EEC). The right to maintain a state monopoly or public enterprise is safeguarded, but the national authorities must ensure that state monopolies comply with the provisions of the Agreement and are not used as surrogate means of providing a national preference or to restrict competition and trade in non-monopoly sectors. As with virtually all provisions of the NAFTA, the competition provisions were shaped by the precedent of the Canada-US negotiations on the CUSFTA. In these Canada sought common criteria for competition policy in the hope that these could replace (US) anti-dumping and countervailing duties. Similar efforts also failed in the NAFTA, and the NAFTA Working Group on Trade and Competition does not seem to have moved any closer to this aim. It would seem the only way Canada can succeed in replacing anti-dumping with competition provisions is to do so when the US is not at the negotiating table, as in the Canada-Chile Free Trade Agreement. The hope is perhaps that this will set a precedent for the FTAA. The Canada – Costa Rica Free Trade Agreement, however, does not dispense with anti-dumping provisions even though it includes most of the elements of competition policy currently under discussion in the WTO (i.e. requirement to have national competition provisions on RBPs, an independent competition authority and application of the core principles for competition discussed in the WTO WGCTP. [11] NAFTA does, however, promote co-operation between the US and Canadian competition authorities on the one hand and the Mexican authorities on the other. Unusually for an agreement that stresses effective enforcement, the competition provisions of the NAFTA agreement are not subject to the general bilateral dispute settlement provisions. This may reflect the difficulties of applying dispute settlement to the application of competition policies. As in the WTO and other regional agreements, provisions that touch upon elements of com-

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

Conclusions. This paper has shown that there is a growing network of agreements, both bilateral or regional and multilateral – including the existing WTO agreements – that cover aspects of competition policy. These agreements, especially the regional agreements, are now including a significant number of smaller and developing country WTO Members. The issue is therefore not whether there should be international rules governing cooperation in competition policy but what role, if any should the WTO play. From the discussion of the work in the WGTCP of the WTO it should be clear that what is likely to be on the negotiating table is not a far reaching harmonisation of national competition regimes, or obligations on developing countries to adopt comprehensive national legislation. The current negotiations do appear to assume that WTO members will be required to have national competition policies, although even here there is recognition of the need for flexibility. From a developing country perspective the obligations on core principles, such as transparency, nondiscrimination and cooperation, whilst not without their difficulties, do not in themselves represent far reaching obligations. For example, the transparency and nondiscrimination obligations that are likely to appear in any proposed framework agreement seem likely to be limited to *de jure* policies and not extend to how policies are implemented *de facto.* The emphasis on the role of competition policy in market opening that characterised the debate on trade and competition in the early and mid-1990s has also changed. Although the proponents of competition in the WTO envisage some market access benefits from competition, this no longer seems to be (an explicit) policy priority. The emphasis is rather on the progressive improvement of competition regimes in all WTO members. This is reflected in the apparent willingness to consider 'soft' enforcement mechanisms, such as peer review, rather than an insistence on the full application of WTO dispute settlement provisions in all cases. The main substantive provisions are likely to take the form of obligations to prohibit hard-core cartels. The effective implementation of these provisions will mean compliance costs for developing countries, but the argument has been made that such cartels may well have be disproportionately costly for developing countries. Furthermore the parallel discussion of special and differential treatment for developing countries and measures to help reinforce the development of national competition policies in smaller WTO members, suggests that developing countries will be faced with a progressive rather than immediate obligations. This should enable the WTO members concerned to ensure that compliance costs are in line with what is considered appropriate for the competition policy needs of the country concerned. There also seems to be some acceptance that developing countries, indeed all WTO members, may wish to exclude certain sectors. This may provide scope for countries to continue to pursue development/industrial policies, although the scope for exclusions is likely to be a sensitive issue in negotiations. If this presents a benign view of the likely impact of a framework agreement on competition in the WTO, there remain a number of real concerns, especially from the point of view of developing countries.

The first issue is why co-operation needs to occur in the WTO? As has been shown above the UNCTAD already provides a forum for co-operation on competition policies. The relatively modest proposals for a WTO framework agreement go some way, but not very far beyond what already happens in the UNCTAD and developed WTO members can also have recourse to the OECD machinery. One answer to this question is that trade and competition are becoming more and more linked, so that it makes sense to integrate both within the WTO. The more rules-based WTO also offers 'harder' rules than are available in the perpetually 'soft' UNCTAD approach. This could mean more obligations on WTO members, if not now then perhaps in the future when they are ready to accept greater bindings. The case may also be made that a rules based system may protect the smaller WTO members from the abuse of extraterritorial or effects doctrines by the US or EU, and provide a multilateral framework for bilateral agreements. The desire to bring competition into the WTO may be seen as the thin end of the wedge that leads to pressure for ever-increasing commitments by developing countries that will result in domestic companies being shut down or taken over by more powerful (but possibly more efficient) companies in the developed WTO members. GATT and WTO agendas are developed in an iterative fashion over many years, so pressure to build on a modest framework agreement is quite likely to occur in the future. All that can be said is that the current proposals do not emphasis market access. Nor is there the same unified support for extensive WTO disciplines in competition policy among developed country WTO members as in the case of intellectual property in the Uruguay Round, for example. Some developing/middle income countries are also likely to be asked to accept obligations on competition policy in regional/bilateral agreements whatever happens, so that multilateral rules negotiated on the basis of one country one vote is likely to provide a more balanced outcome than in bilateral negotiations with the EU or US. If one accepts that increased competition is likely to benefit developed and developing countries alike, there is still the issue of compliance costs. The costs of implementing WTO provisions, especially with regard to hard-core cartels, transparency provisions regarding decisions implementing competition laws and possibly the provisions on co-operation, could be significant for developing countries. On the other hand, a growing number of developing countries are introducing national competition regimes in any case. So provided the obligations under the WTO are in line with what countries national policies would aim to do in any case, there would be limited additional cost and some benefit from the external discipline of WTO rules. Developing countries may indeed be able to get serious technical and financial assistance for developing their national policies, by linking acceptance of a framework agreement in the WTO to real commitments on the part of the EU and possibly other countries. If there are inevitably risks associated with accepting a framework agreement on competition, it is worth mentioning that there may also be risks in not going down the WTO route. In the absence of agreed international principles on competition, the policy vacuum is likely to be filled by plurilateral, regional and bilateral agreements. On the one hand, the commitments expected of developing countries in these agreements could well be higher than those included in any WTO agreement. On the other hand, the regional arrangements may provide for even more technical and financial assistance in developing national policies. From the point of view of third countries not participating in such regional or bilateral agreements, there may be difficul-

ties gaining access to the information their competition authorities need to address international RBPs. This could mean that the damage of cartelisation may (continue) to fall disproportionately on non-participating (developing) countries. From a private sector point of view there is a risk, in the long term, that the absence of agreed WTO principles and norms will result in double or multiple jeopardy and increased compliance costs whenever they wish to conclude international mergers or agreements. Furthermore, the norms and procedures developed in the regional and bilateral agreements will continue to shape the debate on future provisions on competition policy. The risks of engaging in a debate must therefore be set against the risks of disengagement, which could mean that policy will (continue) to be shaped by a small group of WTO members that have well developed competition policies.

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