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**Seminário Regional Pós Doha dos Países da América Latina e Caribe sobre os Temas
de Concorrência na OMC
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Section IV
Reflexions on the options and implications of a possible
multilateral
framework on Competition

4.1 Política de Concorrência no Mercosul: Uma Agenda Mínima

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1. Introdução²

Este artigo discute as perspectivas da política de concorrência no Mercosul a partir de dois elementos principais. O primeiro diz respeito aos poderes extraterritoriais das leis antitruste da Argentina e do Brasil, que são os únicos países da América Latina e do Caribe cujas leis possuem tal peculiaridade.³ A inovação foi introduzida no Brasil em 1994 através da lei 8.884 e na Argentina em 1999 através da lei 25.156, seguindo uma tendência internacional já adotada por diversas economias industrializadas, como Austrália, Canadá, Estados Unidos, Nova Zelândia e União Européia. De acordo com o princípio da extraterritorialidade o âmbito de aplicação da lei não está restrito às fronteiras nacionais, mas inclui também qualquer atividade econômica ocorrida no exterior cujos efeitos alterem as condições de concorrência no mercado doméstico. A utilidade básica desse estatuto é a de prover os fundamentos jurídicos para a ação conjunta das autoridades antitruste no tratamento de casos com dimensão internacional.

O segundo elemento implícito no argumento desenvolvido adiante é o de que embora a política de concorrência só tenha adquirido relevância na região a partir dos anos 90, o debate público sobre esse tema esteve presente na Argentina e no Brasil desde as primeiras décadas do século vinte. Conforme indica a próxima seção deste artigo, em ambos países o assunto atraiu a atenção de juristas, economistas e políticos experientes. Durante várias gerações, as condutas anticompetitivas eram tratadas na imprensa e nos textos legais brasileiros sob o rótulo de “crimes contra a economia popular”, enquanto que na Argentina o instrumento jurídico que regulava a matéria intitulava-se “lei anti-monopólios”. Além de haver estimulado a formação de profissionais familiarizados com os detalhes técnicos e políticos do problema, o longo processo de elaboração das leis antitruste na região permitiu amadurecer a consciência social sobre o alcance e as limitações dessas leis. Assim, hoje em dia, as autoridades dos dois países contam com um marco institucional relativamente sólido para enfrentar a tarefa não trivial de regular as condições internacionais de concorrência dessas economias.

O texto está organizado da seguinte forma: A seção 2 contém um breve relato da evolução das leis antitruste na Argentina e no Brasil durante o século vinte. A seção 3 discute a dimensão regional do processo de concorrência no Mercosul, revendo não só os fluxos de investimento direto bem como um conjunto de casos recentes que já poderiam ter sido objeto de cooperação bilateral entre as autoridades antitruste. A seção 4 examina as potencialidades e limitações do Protocolo de Fortaleza, assinado em dezembro de 1996 com o objetivo de criar um marco regional para a política de concorrência no Mercosul. O

¹ Atualmente Secretário de Acompanhamento Econômico do Ministério da Fazenda. O texto foi escrito em 2001, quando o autor era consultor da Unidade de Comércio da OEA e membro do Comitê Acadêmico da Red Mercosur. Este artigo é parte de um livro cujo título provisório é **Mercosul: Balanço e Perspectivas**, que está sendo organizado por Daniel Chudnovsky e José M. Fanelli para a Red Mercosur.

² Consegui coletar rapidamente grande parte do material aqui utilizado devido à colaboração de vários amigos na Argentina e no Brasil. Sou grato especialmente a Aloísio Barboza de Araujo, Carlos Vinograd, Juan Pablo Rud, Mauricio Butera, Paulo Guilherme Correa, Lucia Helena Salgado, Ricardo Rozemberg e Uziel Nogueira. Agradeço também aos comentários e sugestões de Daniel Chudnovsky, Nelson Noya e Rubens Ricupero.

³ As leis antitruste vigentes no hemisfério estão disponíveis em www.sice.oas.org. Para uma discussão sobre os efeitos extraterritoriais do direito da concorrência, vide Borges da Fonseca (1997), e Assis de Almeida (2001).

principal ponto levantado ali é o de que o protocolo trata as questões antitruste como se fossem disputas mercantilistas. Além disso, aquela seção aborda rapidamente as relações entre antitruste e antidumping, arguindo que embora a eliminação de medidas antidumping seja uma providência importante para consolidar o processo de integração no Mercosul, a contribuição das autoridades antitruste nesta tarefa é, na melhor das hipóteses, apenas indireta. A seção 5 mostra que existem alternativas para superar as limitações do protocolo, ao comentar a experiência internacional nos anos noventa daqueles países cujas leis possuem efeitos extraterritoriais e, conseqüentemente, têm servido de base para uma cooperação bilateral baseada no princípio de “cortesia positiva”. Por fim, a seção 6 conclui o argumento, indicando o perfil de uma agenda mínima que permitiria a aplicação imediata do direito da concorrência no Mercosul.

2. Antecedentes

O tema de política de concorrência tem sido objeto de debate público na Argentina desde 1909, quando dois deputados apresentaram um projeto de lei para coibir condutas monopolistas no mercado de carnes e derivados. Outros projetos mais abrangentes foram debatidos na Câmara em 1913 e 1917, preparando o caminho para a aprovação da primeira lei antitruste (ou anti-monopólios, como era chamada a lei 11.210) em 1919.⁴ Naquele momento, apenas quatro outros países possuíam leis desse tipo: Canadá (desde 1889), Estados Unidos (1890), Austrália (1906) e Nova Zelândia (1908). Na Europa, por exemplo, o direito da concorrência só começou a ser aplicado após a Segunda Guerra Mundial. Tal como ocorria no resto do mundo, à exceção dos Estados Unidos, a lei argentina permaneceu inútil por várias décadas, não obstante as mudanças introduzidas no início do governo Perón (lei 12.906, de dezembro de 1946), que não tiveram qualquer consequência prática, como notou Cabanellas (1983). Em 1980, quando a política de concorrência já havia adquirido relevância entre os países industrializados, uma nova lei foi aprovada na Argentina, procurando incorporar alguns avanços da experiência internacional nessa área. A principal inovação introduzida pela lei 22.262, de 1.8.80, foi a de eliminar o excesso de rigor da legislação anterior, que ao considerar crime todos os tipos de conduta anti-competitiva tornava inviável uma aplicação sensata da lei. Além de enunciar uma tipologia ampla das condutas a serem reprimidas, a nova lei criou a Comissão Nacional de Defesa da Concorrência (CNDC), um órgão vinculado à Secretaria de Indústria e Comércio do Ministério da Economia. A comissão tinha cinco membros nomeados pelo Ministro da Economia. O presidente era um dos Subsecretários da Secretaria de Indústria e Comércio, e os demais membros, dois advogados e dois economistas, possuíam mandato de quatro anos.

A lei 22.262 inaugurou uma nova etapa da experiência argentina, na qual a política de concorrência passou a cumprir funções cuja importância iria crescer ao longo dos anos 80 e 90, apesar de duas limitações do novo marco institucional. Por um lado, a lei cuidava apenas de condutas, abdicando de uma das atribuições centrais da política de concorrência em diversos países, que é a regulação dos atos de concentração econômica. Por outro, o Secretário de Indústria e Comércio era a autoridade máxima nas questões relativas à política de concorrência. Assim, sempre que a atuação da CNDC entrasse em conflito com outras políticas governamentais, como é usual em qualquer país, uma solução conveniente ao Secretário seria a de ignorar a substância do conflito e simplesmente demitir o presidente

⁴ Vide Cabanellas, 1983, pp. 58-74. A característica mais notável da lei 11.210 foi a de tentar enfrentar um problema que até hoje preocupa as autoridades antitruste no mundo inteiro: os cartéis do setor de transportes. O artigo primeiro dizia o seguinte: “Declárase delito todo convenio, pacto, combinación, amalgama o fusión de capitales tendientes a establecer o sostener el monopolio y lucrar con él, en una o más ramas de la producción, del tráfico terrestre, fluvial o marítimo, o del comercio interior o exterior, en una localidad o en varias, o en todo el territorio nacional.” (Cf. Cabanellas, 1983, p. 59).

da CNDC. Estas limitações tornaram-se cada vez mais evidentes na segunda metade da década de noventa, à medida em que evoluía o processo de reformas econômicas no plano doméstico, e a agenda externa do país passava a incluir negociações simultâneas envolvendo política de concorrência em distintos foros, como o Mercosul, a Área de Livre Comércio das Américas (ALCA) e a Organização Mundial do Comércio (OMC).

Essas limitações foram finalmente superadas em 1999, com a aprovação da lei 25.156, que além de regular os atos de concentração e estabelecer o Tribunal de Defesa da Concorrência, expandiu o âmbito de aplicação da lei, que passou a ter efeitos extraterritoriais, conforme definido no seu artigo terceiro. O Tribunal é integrado por sete membros, dos quais pelo menos dois serão advogados e os demais economistas, que exercerão suas funções com dedicação exclusiva (exceto atividades docentes) durante seis anos, sendo permitida a recondução. A cada três anos o Tribunal é renovado parcialmente, abrindo-se três vagas na primeira oportunidade, e quatro vagas na segunda, cujo preenchimento é feito segundo normas que visam fortalecer a autoridade de seus ocupantes, conforme descreve o artigo 19: “Los miembros del Tribunal serán designados por el Poder Ejecutivo nacional previo concurso público de antecedentes y oposición ante un Jurado integrado por el Procurador del Tesoro de la Nación, el secretario de Industria, Comercio y Minería del Ministerio de Economía y Obras y Servicios Públicos de la Nación, los presidentes de las comisiones de Comercio de ambas Cámaras del Poder Legislativo de la Nación, el presidente de la Cámara Nacional de Apelaciones en lo Comercial y los presidentes de la Academia Nacional de Derecho y de la Academia Nacional de Ciencias Económicas.”

No Brasil a experiência foi similar. Em 1938 o governo ditatorial de Getúlio Vargas editou o decreto-lei 839, que regulava as condições de concorrência através do direito penal, tal como ocorreu na Argentina até 1980.⁵ Segundo aquele decreto, seria considerado crime contra a economia popular todo fato que representasse um dano efetivo ou potencial ao patrimônio de um número indefinido de pessoas (cf. Hungria, 1939; Vaz, 1993). Estavam incluídos nesta categoria os acordos de exclusividade, as tentativas de dominar mercados, a prática de *dumping*, a gerência comum de mais de uma empresa, além de outras condutas como as seguintes: “promover ou participar de consórcio, ajuste, aliaça ou fusão de capitais, com o fim de impedir ou dificultar, para o efeito de aumento arbitrário de lucros, a concorrência em matéria de produção, transporte ou comércio” (cf. Borges da Fonseca, 1997, p. 125). Tais crimes eram inafiançáveis, e estavam sujeitos a penas que poderiam variar de dois a dez anos de prisão, além de pesadas multas.

Segundo Shieber (1966), o decreto-lei 839 foi usado uma única vez, num caso envolvendo a subsidiária brasileira da *Standard Oil Co.*, que estaria impondo cláusulas abusivas em contratos firmados com postos de gasolina. Visando esclarecer o assunto, a *Standard Oil* solicitou que Consutor-Geral da República opinasse sobre a legalidade das cláusulas. O Consultor-Geral, Dr. Anibal Freire, deu razão aos proprietários de postos de gasolina e submeteu o parecer ao presidente Vargas, que redigiu o seguinte despacho: “Aprovado. A consulente deve modificar seus contratos e instruções no sentido de submeter-se à lei que define os crimes contra a economia popular” (cf. Vaz, 1993, pp.247-8). Entretanto, nenhuma penalidade foi aplicada.

⁵ O decreto foi redigido pelo jurista Nelson Hungria, que utilizou explicitamente o Código Penal argentino vigente à época, além de outras fontes, como a jurisprudência norte-americana e o Direito Penal alemão (cf. Hungria, 1939; Vaz, 1993).

O direito da concorrência foi introduzido na Constituição brasileira em 1946, graças à atuação do deputado Agamenon Magalhães,⁶ que conseguiu aprovar a seguinte redação para o artigo 148: “A lei reprimirá toda e qualquer forma de abuso do poder econômico, inclusive as uniões ou agrupamentos de empresas individuais ou sociais, seja qual for a sua natureza, que tenham por fim dominar os mercados nacionais, eliminar a concorrência e aumentar arbitrariamente os lucros.” Para regulamentar este artigo, ele submeteu ao congresso o projeto de lei no. 122 em abril de 1948, dando origem a um debate parlamentar que iria se estender até setembro de 1962, quando foi aprovada a lei 4.137, que aboliu a legislação sobre crimes contra a economia popular e procurou aproximar os instrumentos jurídicos brasileiros ao estilo antitruste norte-americano. Dentre as diversas inovações introduzidas naquele momento, destaca-se a criação do Conselho Administrativo de Defesa Econômica (CADE), “com a incumbência de apurar e reprimir os abusos do poder econômico, nos termos desta Lei.” (Artigo 8)

A lei 4.137 cumpriu no Brasil um papel similar àquele desempenhado pela lei 22.262 na Argentina. Por um lado, significou um avanço institucional importante e manteve presente na agenda pública o debate sobre as condições de concorrência da economia. Por outro lado, os objetivos enunciados em setembro de 1962 só iriam ser efetivamente alcançados trinta anos depois, com a lei 8.884 que em 1994 reformulou, uma vez mais, o marco institucional brasileiro.⁷ Desde então o CADE, atuando em articulação com Secretaria de Direito Econômico (SDE) do Ministério da Justiça e a Secretaria de Acompanhamento Econômico (SEAE), vem exercendo todas as funções que hoje em dia são atribuídas a um tribunal da concorrência nas economias abertas.

3. A dimensão regional do processo de concorrência

Após 20 anos de governos militares e cinco décadas de estratégias industriais baseadas na substituição de importações, as relações econômicas entre Argentina e Brasil eram quase nulas em meados dos anos 80. A situação começou a mudar rapidamente a partir da assinatura dos protocolos bilaterais em 1986, adquirindo um ritmo ainda mais intenso depois que o Tratado de Assunção lançou o Mercosul em março de 1991. Entre 1990 e 1998 os fluxos anuais de comércio bilateral saltaram de 3.3 para 19.1 bilhões de dólares, enquanto que os investimentos diretos transfronteiriços alcançaram o montante de U\$ 9.1 bilhões durante a década (ver Kosacoff e Porta, 1997; Bonelli, 2001; Chudnovsky, 2001). Esta cifra parece modesta quando comparada, por exemplo, com o total mundial de investimento direto estrangeiro, que em 1999 foi de U\$ 800 bilhões (cf. UNCTAD, 2001). De fato, a expansão empresarial intra-Mercosul tem se concentrado preponderantemente em iniciativas de médio porte (cf. Bonelli, 2001), em contraste com as mega-fusões que se tornaram frequentes no passado recente entre corporações dos países industrializados. No entanto, é inequívoco que o processo de integração no Mercosul já alcançou um estágio em que as condições de concorrência nos mercados domésticos dos países membros se tornaram interdependentes e só podem ser avaliadas corretamente a partir de uma perspectiva regional.

⁶ Agamenon Magalhães (1893-1952) foi um político influente ao longo de várias décadas. Participou da Revolução de 1930, foi autor do primeiro projeto de previdência social no Brasil, e durante o período Vargas (1930-1945) foi Ministro do Trabalho, interventor federal em Pernambuco e Ministro da Justiça.

⁷ “Em sua primeira fase, de 1963 até 1990, o CADE cuidou de 337 procedimentos ingressados, dos quais foram instaurados 117 processos e apenas 16 foram condenados. Destes, todos tiveram a condenação suspensa pelo Poder Judiciário, após recursos das partes inconformadas. Ademais, nenhum dos processos com base na lei antitruste vigente teve repercussão significativa, no sentido de ter chegado a condenar empresa de grande porte no país.” (Salgado, 1997, p. 176) O papel marginal do CADE nesse período também é apontado por Farina (1990).

Do ponto de vista das autoridades antitruste, as mudanças acima implicam um número crescente de casos nos quais a dimensão geográfica do mercado relevante abrange todos os membros do Mercosul. Entretanto, apesar do destaque alcançado pela política de concorrência na Argentina e no Brasil na segunda metade dos anos 90, não houve até o momento um único caso que tivesse sido objeto de cooperação entre as autoridades desses países. Isto decorre em parte das inconsistências do Protocolo de Fortaleza, apontadas na próxima seção, que poderiam ser contornadas a curto prazo pelo menos no âmbito bilateral, conforme argumenta a seção 5. Mas antes de abordar estes dois temas, é conveniente indicar, ainda que de forma anedótica, a natureza dos problemas que as autoridades argentinas e brasileiras provavelmente enfrentarão no futuro próximo, através de uma rápida revisão de alguns casos de dimensão regional examinados por aquelas autoridades nos últimos anos.

O tipo mais frequente de caso é aquele relacionado com atos de concentração que não alteram significativamente as condições de concorrência do mercado regional, ou cujos efeitos principais se concentram num só país.⁸ A análise conjunta de operações desse tipo não é inócua, já que ela permite que o mercado relevante seja definido de forma rigorosa, com consequências positivas sobre a qualidade técnica da decisão final. Um bom exemplo neste sentido é o caso AMBEV, julgado pelo CADE em março de 2000, permitindo a fusão das empresas Brahma e Antártica que passaram a controlar cerca de 75% do mercado brasileiro de cervejas. Dado que a Brahma possui participação acionária em empresas da Argentina, Paraguai e Uruguai, não há dúvidas quanto à dimensão regional do caso, embora seja também evidente que os efeitos mais importantes se concentram no mercado brasileiro. Contudo, a criação da AMBEV resultou no seguinte paradoxo: o preço ex-fábrica da cerveja no Brasil é um dos mais baixos do mundo, o mercado é dominado por uma só empresa, mas mesmo assim a produção nacional conta com uma proteção nominal de 23% conferida pela Tarifa Externa Comum (TEC) do Mercosul. É razoável supor que uma análise conjunta do caso teria ajudado a eliminar essa distorção da TEC.⁹

Nos casos de conduta, às vezes a cooperação poderá se restringir a uma simples notificação aos demais parceiros por parte da agência que estiver conduzindo a investigação, enquanto que em outras oportunidades a natureza do caso poderá requerer investigações simultâneas em mais de um país. Um exemplo do primeiro tipo foi a multa de \$109 milhões imposta pela CNDC à YPF em março de 1999, em consequência dos preços discriminatórios praticados por aquela empresa nos distintos mercados do Mercosul durante o período compreendido entre janeiro de 1996 e outubro de 1997. Neste caso, todas as informações necessárias para caracterizar a conduta e os seus efeitos puderam ser coletadas pela CNDC em território argentino. Um exemplo que se enquadraria no segundo tipo seria a denúncia que estava sendo investigada pela CNDC no primeiro semestre de 2001 a respeito de um possível conluio entre a Cámara de la Industria del Calzado (Argentina) e a Abicalçados (Brasil) visando limitar as exportações brasileiras de calçados

⁸ Alguns exemplos recentes deste tipo: a permuta de ativos entre a Petrobrás e a YPF Repsol; a compra de empresas brasileiras no ramo de alimentos por parte do grupo Socma, um conglomerado industrial argentino; os investimentos do grupo Bestfoods em empresas brasileiras (Arisco) e argentinas (Refinerías de Maíz S.A.); a permuta de ativos entre empresas argentinas e brasileiras no setor de polipropileno (Vitopel e Arcor); os acordos firmados pela Cia. Petroquímica do Sul (Copesul) para fornecer eteno e propeno aos seus clientes no Mercosul; etc.

⁹ Devido aos custos de distribuição e transporte, o poder de competição dos produtos importados é muito limitado no mercado de cervejas, mesmo em economias pequenas como Uruguai e Paraguai. Entretanto, ainda que a proteção aduaneira seja em grande medida supérflua, qualquer alíquota diferente de zero serve apenas para reforçar o poder da AMBEV diante dos demais concorrentes locais. Este aspecto, que não foi considerado pelo CADE ao aprovar a fusão, poderia ter sido objeto de um debate regional, caso a CNDC tivesse participado da análise.

para a Argentina. Neste caso, a investigação seria obviamente mais eficaz se conduzida simultaneamente em ambos países.

A experiência internacional, notadamente a do acordo Estados Unidos–União Européia, já demonstrou que a cooperação entre autoridades antitruste envolve não apenas dificuldades técnicas e operacionais, como o uso de metodologias comuns para definir mercados relevantes, a confiança recíproca no trato de informações confidenciais e agilidade nos processos decisórios; mas também eventuais conflitos de interesse entre grupos nacionais poderosos, acarretando elevada sensibilidade política. O Mercosul certamente não será uma exceção a essa norma. Por exemplo, em 20 de junho de 2001, o CADE decidiu arquivar o processo que a Direct TV (uma rede de televisão por assinatura via satélite) estava movendo contra a Rede Globo de Televisão, arguindo abuso de posição dominante por parte desta. Desde 1996 a Direct TV estava tentando conseguir o direito de transmitir o sinal da TV Globo em igualdade de condições com a Sky, uma subsidiária da Rede Globo que opera em cinco capitais brasileiras (Porto Alegre, São Paulo, Rio de Janeiro, Recife e Salvador). Na Argentina, a Direct TV é controlada pelo Grupo Clarín, e ali também o seu principal competidor é a Sky. Assim, não é improvável que a disputa venha a se repetir brevemente no âmbito do Mercosul, gerando um confronto explícito entre os dois mais influentes grupos econômicos da região. As duas próximas seções deste artigo discutem os instrumentos disponíveis pelos países do Mercosul para lidar com problemas deste tipo.

4. Escopo e limitações do Protocolo de Fortaleza

Para enfrentar de forma abrangente as questões acima referidas, os países do Mercosul assinaram em dezembro de 1996 o Protocolo de Fortaleza, que definiu um conjunto de procedimentos, *a ser implementado num período de dois anos* (sic), dirigido à harmonização das condições de concorrência nos mercados domésticos dos países membros. Tal como fizeram outros acordos regionais nas últimas duas décadas (vide Lloyd e Vautier, 1999; Tavares, 2001), o objetivo fundamental do protocolo é impedir que os benefícios do processo de integração sejam erodidos por barreiras advindas de condutas empresariais ou políticas públicas. Com relação às ações governamentais, o protocolo destaca os dois tópicos relevantes para o Mercosul: subsídios e medidas antidumping; quanto ao setor privado, contém instrumentos para reprimir práticas anticompetitivas de escopo regional e para controlar fusões e aquisições que alterem as condições de concorrência em mais de um país.

Apesar de identificar os principais problemas a serem tratados, de propor soluções ajustadas às peculiaridades do Mercosul (evitando, por exemplo, a criação de instâncias supra-nacionais), e de enfatizar a urgência das medidas ali acordadas, o protocolo não foi aplicado até o presente. A origem deste paradoxo pode ser explicada a partir do relato apresentado nas seções anteriores. Por um lado, as providências anunciadas em Fortaleza constituem um desdobramento natural dos compromissos firmados no Tratado de Assunção, cujo artigo primeiro estabeleceu metas ambiciosas para o processo de integração regional, envolvendo a coordenação de políticas macroeconômicas e setoriais entre os países membros nas áreas fiscal e monetária, de comércio exterior, agricultura, indústria e serviços; ao lado da harmonização de legislações nacionais nas matérias que se fizerem necessárias. Portanto, a preparação de normas comuns para a defesa da concorrência está diretamente associada à agenda de implantação do Mecosul (cf. Tavares e Tineo, 1998; Peña, 2001). Mas, por outro lado, os signatários do protocolo de Fortaleza não revelaram qualquer preocupação quanto ao estado das instituições antitruste na região. No momento da assinatura do protocolo, o Brasil era o único país do Mercosul que possuía os instrumentos mínimos indispensáveis à implementação dos compromissos ali firmados.

Paraguai e Uruguai até hoje não têm instituições antitruste,¹⁰ e a lei argentina só passou a tratar de fusões e aquisições depois de 1999. Entretanto, os procedimentos descritos no protocolo presumem a existência de agências antitruste em todos os Estados Membros, ainda que, de fato, aqueles procedimentos sejam conflitantes com a natureza das funções cumpridas por tais agências.

Esta dicotomia entre o escopo normativo do protocolo e o estado das instituições nacionais implicou uma série de inconsistências que estão retardando a execução das metas definidas em Fortaleza. A limitação fundamental reside no processo decisório estabelecido para tratar os casos de dimensão regional, onde as autoridades nacionais antitruste ficaram reduzidas à condição de conselheiras da Comissão de Comércio do Mercosul (CCM) (vide capítulo V do protocolo). Ao transferir o poder decisório à CCM, o protocolo trata os conflitos oriundos do processo de concorrência como se fossem disputas mercantilistas. Não por acaso, o artigo 2 estabelece que o âmbito de aplicação das normas abrange apenas eventos que tenham impacto sobre o comércio entre as partes. Desta maneira, permanecem impunes várias práticas comuns no setor de serviços, por exemplo, onde o poder monopolista de uma empresa estabelecida num país pode ser suficiente para impor restrições à qualidade dos serviços oferecidos no país vizinho, ou influir na estrutura de preços domésticos, sem provocar consequências evidentes nos fluxos de comércio. Além disso, o protocolo impede que as autoridades antitruste cumpram uma função estratégica no processo de integração, que é a de cooperar com as contrapartes dos países vizinhos na promoção da eficiência produtiva e do interesse do consumidor em âmbito regional. De fato, são usuais conflitos transfronteiriços em que, de um lado, as autoridades antitruste da região encontram-se unidas no combate a uma determinada prática; e, de outro, órgãos de governo, empresas ou associações privadas dos respectivos países estão aliados na defesa dos privilégios advindos daquela prática. O protocolo não contempla este tipo de conflito.

Uma das expectativas geradas pelo protocolo foi a de que ele iria permitir a abolição de medidas antidumping entre os membros do Mercosul. O principal usuário deste instrumento tem sido a Argentina que, entre março de 1991 e junho de 2000, abriu 41 investigações envolvendo os seus parceiros na região, das quais 38 afetaram o Brasil. Neste período, o Brasil iniciou dois processos contra a Argentina e dois contra o Paraguai que, tal como o Uruguai, não usou este tipo de medida até o momento (vide Tavares e outros, 2001). No vocabulário antitruste, dumping é sinônimo de preço predatório, um tipo de conduta que costuma ser mais frequente nos livros de microeconomia do que no cotidiano da política de concorrência. Por outro lado, é sabido que a principal função das medidas antidumping é a de conceder proteção temporária às indústrias que não estão preparadas para enfrentar a concorrência de produtos importados. Assim, para abolir tais instrumentos, o obstáculo relevante a ser enfrentado pelos governos dos países do Mercosul é o de corrigir os desníveis de eficiência produtiva no interior da região. A contribuição potencial das autoridades antitruste nesta tarefa é apenas indireta, ao estimular a coerência das políticas domésticas que afetam as condições de concorrência e ao tratar o interesse nacional de forma abrangente.

Em artigo recente, Felix Peña (2001) apresentou uma ampla lista de providências voltadas à implantação do protocolo e à correção de suas falhas. Uma parte da lista relembra os compromissos que os governos já deveriam ter cumprido desde dezembro de 1998, como a edição de normas regionais para controlar fusões e aquisições (art. 7) e as

¹⁰ No Uruguai, algumas normas gerais sobre defesa da concorrência foram introduzidas recentemente através das leis 17.243 (capítulo IV), de 29.06.2000, e 17.296 (artigos 157 e 158), de 21.02.2001. Em 15 de março de 2001, um decreto presidencial deu início à regulamentação desses instrumentos, estabelecendo que a Dirección General de Comércio (DGC), será a autoridade responsável nesta matéria. A DGC é subordinada ao Ministro de Economia e Finanzas.

disciplinas sobre ajudas estatais (art. 32); e outros que pelo menos já deveriam estar em andamento, como o programa de cooperação entre as agências antitruste do Mercosul (art. 30). A lista também contém sugestões para melhorar a qualidade do processo decisório definido no capítulo V, como a nomeação de painéis de peritos independentes para julgar os casos de dimensão regional, e de instâncias de apelação. Além disso, Peña aponta a necessidade de programas de cooperação técnica internacional, sobretudo para apoiar o processo de formulação de leis e de criação de agências antitruste no Paraguai e Uruguai. Por fim, ele destaca a importância da cooperação bilateral entre Argentina e Brasil.

A proposta esquematizada adiante na seção 6 aborda apenas o último ponto da lista acima e, por motivos práticos e estratégicos, posterga os demais. A razão prática é que a cooperação entre Argentina e Brasil independe, de fato, do Protocolo de Fortaleza, já que os poderes extraterritoriais de ambas leis nacionais fornecem amparo jurídico suficiente para qualquer tipo de ação conjunta em matéria antitruste, conforme vimos anteriormente. A razão estratégica é que, uma vez iniciada a cooperação, novas dimensões do processo de integração no Mercosul começarão a atrair a atenção da imprensa, dos governantes e da opinião pública. Ao lado do noticiário usual sobre saldos comerciais, política cambial e conflitos setoriais, gradualmente novos temas ganharão relevância, onde os aspectos proeminentes estarão relacionados com poder econômico, eficiência produtiva, oportunidades de investimento, emprego e bem estar do consumidor. Esta mudança no foco do debate público poderá criar as condições políticas para a realização de objetivos meritórios do protocolo, como a abolição das medidas antidumping e a racionalização dos incentivos fiscais, além gerar evidências na direção de um marco alternativo para regular as condições de concorrência na região. A próxima seção discute os fundamentos deste marco alternativo.

5. Os acordos de cortesia positiva

Na década de noventa, diante do número crescente de casos de mega-fusões entre empresas transnacionais e de condutas anticompetitivas com dimensão internacional, ao lado da ausência de instrumentos multilaterais para lidar com esses problemas, os governos dos países industrializados foram levados a introduzir uma inovação em suas relações bilaterais, através da assinatura de acordos de cooperação antitruste baseados no princípio de “cortesia positiva”. Tais acordos costumam ter o seguinte conteúdo: [a] Mútua notificação das investigações iniciadas em cada país, desde que afetem os interesses do outro signatário, tanto na área de fusões e aquisições quanto na de práticas anticompetitivas. As notificações devem ser suficientemente detalhadas, a fim de permitir que o outro signatário possa avaliar a relevância dos impactos (efetivos ou potenciais) de cada caso sobre a sua economia doméstica, e devem incluir a natureza das atividades sob investigação e penalidades previstas. Sempre que possível, as notificações incluem também os nomes e a localização das pessoas envolvidas. [b] Os funcionários das agências de cada país podem visitar o outro país durante o curso das investigações. [c] Cada país pode solicitar que o outro inicie uma investigação sobre condutas anticompetitivas ali vigentes, ainda que os danos ocorram exclusivamente no primeiro país. [d] Assistência recíproca na localização de testemunhas, coleta de evidências e depoimentos no território do outro signatário. [e] Encontros regulares das autoridades para discutir a evolução das respectivas políticas domésticas e intercambiar informações sobre setores econômicos de interesse mútuo.

Cortesia positiva é um neologismo que foi incorporado ao vocabulário antitruste para descrever situações em que dois países decidem aplicar de forma recíproca as normas de extraterritorialidade contidas em suas respectivas legislações. Assim, os acordos de cooperação acima descritos não implicam qualquer alteração nas leis nacionais e, de fato,

todas as providências ali estabelecidas poderiam ser realizadas independentemente da assinatura de qualquer protocolo, já que o instrumento que confere poder jurídico àquelas ações não é o acordo de cortesia positiva, mas a lei nacional.¹¹ Entretanto, acordos deste tipo cumprem importantes funções operacionais e políticas, como a de facilitar as investigações sobre eventos ocorridos no exterior, fortalecer a confiança mútua entre as autoridades antitruste e alertar o setor privado sobre a efetividade das novas disciplinas.

O acordo assinado pelos Estados Unidos e a União Européia em 1991 tornou-se rapidamente o exemplo mais notável de cortesia positiva da atualidade. Como mostra a tabela 1, desde 1992 este acordo vem originando um fluxo de notificações sempre superior a 100 casos por ano, tendo acumulado o total de 1.162 ao final da década, dos quais 689 foram referentes a condutas anticompetitivas e 473 a fusões e aquisições. Um dos relatórios recentes da Comissão Européia descreve alguns aspectos da rotina operacional dessa cooperação: *"In all cases of mutual interest it has become the norm to establish contacts at the outset in order to exchange views and, when appropriate, to coordinate enforcement activities. The two sides, where appropriate, seek to coordinate their respective approaches on the definition of relevant markets, on possible remedies in order to ensure that they do not conflict, as well as on points of foreign law relevant to the interpretation of an agreement or to the effectiveness of a remedy. Cooperation under this heading has involved the synchronization of investigations and searches. This is designed to make fact-finding action more effective and helps prevent companies suspected of cartel activity from destroying evidence located in the territory of the agency investigating the same conduct after its counterpart on the other side of the Atlantic has acted."* (Comissão Européia, 1998, p. 339)

Tabela 1
Acordo de Cooperação Estados Unidos—União Européia: Casos Notificados, 1991-1999

Ano	Práticas Anti-Competitivas		Fusões		Total
	UE	USA	UE	USA	
1991	5	12	3	9	29
1992	26	40	11	31	108
1993	44	40	20	20	124
1994	29	35	18	20	102
1995	42	35	31	18	126
1996	48	38	35	27	148
1997	42	36	30	20	128
1998	52	46	43	39	180
1999	70	49	59	39	217
Total	358	331	250	223	1.162

Fonte: Comissão Européia, Relatórios sobre Política de Concorrência (1998, 1999).

¹¹ A rigor, um acordo de cortesia positiva só adquire funções efetivas de um tratado internacional quando a lei nacional de algum dos signatários não tiver alcance extraterritorial. Por exemplo, em abril de 2001, Canadá e Costa Rica assinaram um tratado de livre comércio que contém um capítulo regulando a cooperação bilateral sobre política de concorrência. Do ponto de vista da Costa Rica, o tratado amplia o alcance de sua lei 7472, de dezembro de 1994, que agora passou a ter efeitos extraterritoriais, mas restritos apenas a eventos ocorridos no Canadá.

Uma limitação óbvia dos acordos de cooperação bilateral é a sua reduzida eficácia para coibir práticas originadas em terceiros países, e este problema continuará existindo enquanto não houver um marco multilateral para regular o processo de competição internacional. Outra dificuldade diz respeito à troca de dados confidenciais nos casos de cartéis, sobretudo quando as informações foram obtidas através de acordos de leniência.¹² Além disso, determinados casos de fusões e aquisições podem gerar consequências assimétricas, quando os ganhos de eficiência se concentram nas empresas de um país e as distorções advindas da concentração econômica se concentram no outro. Por exemplo, em 1997, a Comissão Européia exigiu uma série de condições para aprovar a fusão Boeing/McDonnell Douglas, enquanto que a intenção original das autoridades americanas era a de aprovar sem restrições aquela operação. Entretanto, após dez anos de experiência e mais de 1200 eventos, só houve um caso em que as duas partes não conseguiram superar as divergências, quando em 3 de julho de 2001 a Comissão decidiu proibir a compra da Honeywell pela General Electric, que os americanos gostariam de ter aprovado.

Assim, cortesia positiva não é uma panacéia, mas uma solução transitória para remediar parcialmente um problema de âmbito multilateral. Sua principal virtude é a de evitar que interesses nacionais conflitantes sejam abordados sob a perspectiva estreita das negociações mercantilistas setoriais. Ao invés proteger apenas os interesses dos exportadores e das empresas que competem com importações, os governos são levados a considerar outras dimensões do interesse nacional, como a eficiência agregada da indústria doméstica e o bem estar do consumidor. A experiência transatlântica, e outras como as da Austrália/Nova Zelândia e Canadá/Estados Unidos vem fornecendo ilustrações eloquentes dos benefícios que esta mudança de enfoque promove.

6. Conclusão

Em outros trabalhos sobre política de concorrência no Mercosul, como os de Tavares e Tineo (1998), Flores (2001) e Peña (2001), o tema central é o Protocolo de Fortaleza, que é analisado sob a ótica dos compromissos estabelecidos pelo Tratado de Assunção, particularmente aqueles relativos ao controle de subsídios e à eliminação de medidas antidumping na região. O presente artigo procurou mostrar, entretanto, que o ponto de partida relevante para tratar as questões da concorrência no Mercosul não é aquele protocolo, mas as leis antitruste da Argentina e do Brasil, que fornecem o amparo jurídico adequado para a cooperação regional nesta matéria. Além disso, conforme indicou a seção 3, tal cooperação continuará sendo necessária independentemente da evolução institucional do Mercosul nos próximos anos, e proverá evidências que eventualmente ajudarão a superar a principal limitação do protocolo, que é o seu viés mercantilista, como vimos na seção 4.

Assim, em contraste com a ampla lista de providências indicadas por Felix Peña, a discussão anterior sugere ignorar temporariamente o Protocolo de Fortaleza, e aguardar o momento oportuno para reescrevê-lo. Neste ínterim, a seguinte agenda mínima poderia ser implementada pelas autoridades antitruste argentinas e brasileiras:

- Anunciar que, em virtude dos efeitos extraterritoriais das leis de ambos países, as condutas anticompetitivas e os atos de concentração com impacto regional

¹² As leis de diversos países contêm cláusulas de leniência que concedem imunidades aos membros de um cartel que decidam cooperar com as autoridades. Entretanto, até o momento, a Comissão Européia e o governo americano não conseguiram encontrar uma solução que permitisse unificar a aplicação daquelas cláusulas no âmbito da cooperação bilateral. Para uma discussão sobre a eficácia dos programas de leniência e suas consequências internacionais, vide OECD (2001) e Corrêa e Guanaes (2001).

passariam a ser investigados conjuntamente pelas autoridades. Os procedimentos da cooperação bilateral seriam de conhecimento público e compreenderiam as rotinas usuais nos acordos de cortesia positiva, conforme comentado na seção 5.

- Tal como faz regularmente a Comissão Européia, as autoridades divulgariam não só os casos resolvidos, destacando os critérios que orientaram as decisões, como também os eventuais conflitos de interesses nacionais e seus respectivos fundamentos.
- Similar publicidade seria conferida aos impactos que os casos examinados estariam provocando nos mercados domésticos do Paraguai e Uruguai, com o objetivo explícito de provocar o debate público sobre questões da concorrência, e eventualmente estimular o progresso do direito antitruste naqueles países.
- Com base na experiência acumulada após haver resolvido um número razoável de casos importantes, as autoridades antitruste apresentariam aos seus respectivos governos uma redação alternativa para o Protocolo de Fortaleza, que finalmente conteria as normas adequadas para regular a concorrência no Mercosul.

Por fim, cabe registrar algumas consequências adicionais do argumento desenvolvido neste artigo. A primeira é a de que embora a agenda acima seja independente dos rumos do Mercosul, a recíproca não é verdadeira, posto que as transformações recentes da economia mundial conferiram um papel central à política de concorrência em todos os processos contemporâneos de integração regional, como bem ilustram exemplos tão distintos como a União Européia e Austrália-Nova Zelândia. De fato, as evidências apresentadas nas seções anteriores mostram que, no caso do Mercosul, o dilema relevante não reside na opção *área de livre comércio versus união aduaneira*, mas na escolha dos instrumentos que permitam unificar as condições regionais de concorrência sem criar instituições supranacionais. A agenda acima significa um passo inicial na direção de tais instrumentos, que poderá criar as condições adequadas para outras medidas mais abrangentes, como aquelas sugeridas por Peña, visando harmonizar a política de concorrência com outras políticas discutidas neste volume.¹³

Outra consequência relevante diz respeito à Área de Livre Comércio das Américas (ALCA), cuja agenda também inclui política de concorrência, não obstante o fato de que vários de seus membros não tenham leis sobre essa matéria. Como mostrei em outro trabalho (Tavares, 2001), devido às disparidades existentes entre as 34 economias que participam deste empreendimento, os mecanismos de cooperação antitruste em âmbito hemisférico só serão efetivos a longo prazo, e seu formato será influenciado pelos eventos em curso nas sub-regiões. Portanto, ao contrário de outros aspectos do processo de integração, a política de concorrência constitui uma área na qual o Mercosul pode, sem dúvida, avançar mais rapidamente do que a ALCA.

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4.2 THE ROLE OF PEER REVIEW IN A MULTILATERAL FRAMEWORK ON COMPETITION POLICY

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Introduction

Thank you for inviting me to speak at this UNCTAD event. I would like to take this opportunity to share with you some of Canada's views on peer review in a potential Multilateral Framework on Competition Policy (MFC). My presentation will begin by briefly presenting the benefits of an MFC, though previous speakers have already highlighted most of these issues. Then the presentation is divided into three parts: 1) core principles, 2) capacity building, and 3) peer review.

In Canada's view, peer review at the WTO will reinforce the core principles and other elements in an MFC, and contribute to building institutional capacity of Members in the implementation and enforcement of competition law and policy.

An MFC would provide a number of important benefits to Members.

- First, since competition elements are currently scattered throughout the WTO agreements, an MFC would establish a coherent set of principles for sound competition policy.
- Second, private anti-competitive conduct can restrict trade, so an MFC would ensure open and competitive markets for international trade and investment.
- Third, an MFC will promote the development of competition law and build institutional capacity in all WTO Members.
- Fourth, it will reduce the cost global anti-competitive conduct, such as hard core cartels, which we know can have a detrimental impact on the economies of Member States and on international trade.
- Finally, an MFC will encourage cooperation among Members, which is increasingly important with the prevalence of cross-border anti-competitive activities that can affect the interests of more than one country.

Core Principles

The core principles of non-discrimination, transparency and procedural fairness should be a fundament part of an MFC. These principles are flexible. They have been adapted to specific subject matter at the WTO, and can be tailored to a "new issue" like competition policy, which should be largely congruent with these core principles.

The adherence to the three core principles in the application of competition law and policy is likely to stimulate trade and investment. First, the non-discrimination principle would ensure equal opportunities for all entrants to conduct business. As such, it promotes competitive markets. Second, the transparency principle promotes the rules-based approach of the WTO, and provides information to all economic actors, which fosters confidence in an economy. Third, procedural fairness would ensure fair and equitable procedures, for example the right to be heard, right to appeal and the protection of confidential information.

An illustration of how the core principles are applied to competition law and policy is the Canada Costa Rica Free Trade Agreement. The Chapter on Competition Policy outlines commitments for each of the core principles to:

- ensure that measures to proscribe anti-competitive activities and enforcement actions are applicable without regard for the nationality of the business involved;
- ensure that such measures are published or otherwise made publicly available; and
- ensure a number of procedural fairness guarantees for persons directly affected by competition proceedings, such as the opportunity to make submissions, the protection of confidential information, and access to a review process for final decisions.

It is worth noting that the Chapter is not subject to dispute settlement. Instead, consultation and cooperation provisions can be used to resolve disagreements arising from the interpretation of the Chapter.

Capacity Building

Canada believes that each country should have the capacity and tools to maintain and foster open and competitive markets. This includes the implementation of a sound competition law and the establishment of an independent enforcement authority with adequate powers and resources to effectively remedy anti-competitive practices. Sound competition law facilitates business activity, promotes economic growth and development, and ensures economic efficiency.

Many WTO Members do not have competition laws or lack enforcement capabilities. Therefore, a key objective of an MFC will be to encourage and promote the development of competition laws and institutions in all Member countries.

For competition law to be sound, it needs to be developed to meet each countries' national interests and specific needs. The implementation of competition law is an ongoing process however, and takes experience and expertise. Thus, an MFC must reflect these capacity building needs.

Finally, related to capacity building, it is worth noting that competition policy is an important component of the trade and investment policy dialogue, and the overall Trade Related Technical Assistance efforts, such as the Hemispheric Cooperation Program that is currently being developed in the Free Trade Area of the Americas (FTAA) process. Greater international dialogue can lead to a greater compatibility of approaches and encourage voluntary cooperation, which is beneficial in reducing the likelihood of frictions among Members, as well as duplication of enforcement efforts.

Peer Review

Canada views peer review as an integral part of the overall capacity building strategy for competition policy. In Canada's view, a peer review mechanism in an MFC would have two objectives.

- 1) First, as an ongoing, educative and information sharing mechanism, and
- 2) Second, as non-binding compliance mechanism, for an alternative to binding dispute settlement.

First, peer review would provide an opportunity for ongoing learning and information sharing to allow Members to better understand each other's competition policies and their enforcement.

Peer review has the advantage of being an open and non-confrontational forum for Members to transfer knowledge and share experiences.

Peer review will also contribute to institution building. For countries with recently established competition regimes, a peer review dialogue can provide guidance on applying a new competition law and building competition institutions. For countries without a competition law, it would provide an opportunity to evaluate different approaches for developing an appropriate competition system and to better understand how competition policy can contribute to regulatory reform and development objectives.

Peer review has a number of benefits, such as fostering dialogue and cooperation among Members. It also provides an opportunity for Members to evaluate processes and develop recommendations to improve them. In this respect, peer review can encourage the identification of best practices with respect to enforcement and policy issues. Finally, peer review at the WTO would provide an opportunity for Members to discuss anti-competitive activities that impact trade and investment.

Second, Canada believes that peer view offers a non-binding approach to compliance to encourage implementation of commitments in any MFC. Following this approach, obligations in an MFC would not be subject to formal binding dispute settlement. Competition policy introduces new concepts, and is an area where there is little international consensus on a number of issues, such as the appropriate national policy, enforcement procedures or analytical tools. In this respect, a non-binding approach is preferable in order to foster open discussion and dialogue. This would also ensure that enforcement decisions could not be reviewed by dispute settlement panels.

A peer review alternative promotes compliance based on assessing competition regimes against agreed principles and standards. Finally, consultations between Members would also be a component of this non-binding compliance approach.

Canada has recently been the subject of peer review exercises in the WTO, the Asia-Pacific Economic Cooperation (APEC), and the Organization for Economic Cooperation and Development (OECD). Each of these peer review mechanisms have different objectives.

The WTO Trade Policy Review is designed to enhance the transparency of Members' trade policies and practices and to contribute to improved adherence by all Members to WTO rules and disciplines.

In APEC, the peer review is set up to review Members' Individual Action Plans (IAPs), where competition policy is one of 14 issues. The review is also intended to evaluate the efficacy of the IAP with respect to achieving free and open trade among Members.

The OECD review of national competition policies, which is part of a larger project on Regulatory Reform, is the most comprehensive review related to competition law. It is based on the premise that effective competition institutions and enforcement have been effective tools for regulatory reform. The goal of the OECD review process is to promote more efficient markets and better, more cost-effective regulation and regulatory processes. The review examines the effectiveness of competition institutions, including the adequacy of the basic legislation, enforcement structures and practices, human and financial resources, legislative and regulatory exclusions and advocacy functions.

We can learn from these different experiences in considering an appropriate design for a competition review mechanism in the WTO. First, it is important to define the objectives. As mentioned, in Canada's view there would be two clear objectives: 1) to enhance learning and information sharing and 2) to encourage implementation of commitments. Then, it will be useful to compare existing mechanisms to identify design issues that would be valuable for an MFC. For example, a valuable aspect of the OECD reviews are the non-binding and forward-looking policy recommendations, while at the WTO, identifying technical assistance priorities is an important component for Least Developed Countries.

Conclusion

Canada believes that peer review of the elements in a WTO framework is the most appropriate way forward.

First, peer review provides an opportunity for Members to share experiences, evaluate their policy framework and identify ways for improvement. The ongoing learning and information sharing enhances transparency of competition law and enforcement, promotes cooperation, and contributes to capacity building for those Members with no competition law or newly established regimes.

Second, the international dialogue fostered through peer review would reinforce the core principles of non-discrimination, transparency and procedural fairness that will be embedded in an MFC.

Finally, peer review would also reinforce compliance with the elements in an MFC, but through a non-binding approach. Peer review embraces a cooperative versus adversarial approach to the international development of competition policy norms.

4.3 MULTILATERAL COMPETITION AGREEMENT: TO WTO OR NOT TO WTO?

*(A Wanton Insight Of The Queries Worrying The Much Troubled Mind Of A WTO Negotiator:
A Decision Making Saga.)*

Romel Adames¹⁴

Why Do We Even Need To Ask This Question?

- a) The Mandate (Doha paragraphs 23-25) :
- i. (Paragraph 23):
 - Recognises that a multilateral framework can enhance the contribution of competition policy to international trade and development.
 - A consensus decision on modalities of negotiations taken during the Fifth Ministerial Conference will trigger future negotiations on an agreement at the multilateral framework level.
 - ii. (Paragraph 24): Recognises need for enhanced support for technical assistance and capacity building so that developing and least developing countries can evaluate implications of closer multilateral co-operation in this area to their policy and development objectives. A call for co-operation with other institutions including UNCTAD is made.
 - iii. (Paragraph 25): A mandate to the Working Group on the Interaction between Trade and Competition Policy is given to address specific issues and that full account be taken in this discussions of the needs of developing and least developed country participants and appropriate flexibility be provided to address them. The work must be undertaken between the time of the mandate and the Fifth Ministerial Conference. The work realised in fulfilment of this mandate has been reflected by the Report (2002) of the Working Group on the Interaction Between Trade and Competition To The General Council and is identified as document WT/WGT/6 of 9 December 2002.
- b) The Question: The question intends to bring into consideration a diversity of thoughts that can span the mind of the negotiators at the WTO. We are quite aware of the tremendous contributions made by many talented academics and very capable technical capital based officials to this discussion. Without them this initiative would be deprived of the coherence it has now reached. Political will rather than technical capabilities will determine if there is to be a way forward after Cancun. As always, the technical side will probably be left with a far from perfect scenario within which only their already and

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frequently abused abilities can triumph. This paper attempts to dwell on some of those political issues.

Why Not To WTO.

- a) In God we trust, all others we Distrust: Many developing countries have a natural distrust or uneasiness towards a set of rules perceived to be the creation of developed countries. Developed countries are regarded as keen on preserving and furthering their powerful business interests abroad. This distrust has fed mainly on :
 - i. Perceptions (Old habits die hard): (Arising since the time of the Uruguay Round but still the subject of debate today) The multilateral trading system advances rapidly in areas of interest to developed countries (TRIPS, Antidumping or Services), whilst not advancing enough in sectors of vital interest to developing countries like Agriculture, Textiles or modalities for the reduction and subsequent elimination of subsidies and domestic support.
 - ii. Fear (Be afraid be very afraid): A very clear and present consciousness that potential set of multilateral rules could result on a one sided exercise, ignoring the needs of developing countries. Lack of any considerable experience in the field of competition at the local level, brings acknowledgement of limitations on participation and adequate contribution for certain developing countries to a multilateral debate. Indeed, the final multilateral framework negotiated could be agreed upon without the benefit of the experiences some countries have yet to undergo. After all, sitting at the negotiating table will be countries with a culture of competition law enforcement dating back to the XIX century and those which are yet to adopt such a statute as of the XXI century.
- b) Far Horizons: WTO Plus Market Access Agenda (developing countries view):
It can generally be said the focus of the WTO centres in market access and not necessarily in the fairness of a particular market from the perspective of competition policy. Whereas, it must be acknowledged that certain core principles as well as recognition of the importance of competition are reflected throughout the different agreements¹⁵, these are rather limited mentions and do not override the general market access nature of the agreements.

Introduction of a competition agreement at WTO level would then require a careful balancing act that would reconcile these two interests that as of today have been serving different masters. Whereas the WTO agreement has in general entertained the view of "fairness" in market access to all its members; competition policies have only been concerned with the "efficiency" of their own domestic markets.

Developing countries in general, pose no threat of exercising significant monopolistic practices outside their borders. Since competition is not part of the WTO Agreements, developed countries advocating for a multilateral agreement at the WTO are really engaged in using competition policy to gain additional market access concessions from developing countries. The benefits of additional market access caused by concessions in the area of competition policy would then fall on developed countries, whereas developing countries would bear the burden of compliance and of additional market access.

¹⁵ GATT (Article X regarding publication and administration of trade regulations), GATS (Article III regarding transparency) and TRIPS (Article 63 also regarding transparency) or Article VIII of GATS (abuse of a monopolistic position), Article IX of GATS (Recognition of the existence of restrictive business practices), Article 40 of the TRIPS (Licensing practices).

Many developing countries are concerned that the additional market access and rules will benefit larger more efficient foreign firms, versus local less efficient firms. In this sense it is argued that the relatively small size of the developing markets forces monopolisation in order to reach the necessary economies of scale in order to compete with imports.

Another drawback mentioned and which arises from the additional market access gained through competition, is that elimination of local competition leaves the foreign firms in a dominant position which they are prone to abuse. Moreover, to add insult to injury the elimination of local economic operators results in additional welfare loss as a significant amount of local resources will be extracted from those economies as gains by foreign firms are repatriated.

c) Is This For Me? Some Frequently Asked Questions.

- i. Small Thin Cows. In light of the small size of developing country markets, is competition policy desired in every single country and market? Where do we draw the line between costs and benefits of implementing a competition regime? Should a “de minimis” provision preclude competition from being applied to certain countries or sectors? Could the same “de minimis” threshold preclude the provisions of a multilateral agreement from being invoked and / or enforced in some given cases.
- ii. Bad Christians Or In Any Event Recent Converts. Civil societies in developing countries are uninformed or unaware of the potential benefits brought about by competition. Society might not have a culture of competition or having recently acquired such habits, frequently repudiate their new beliefs easily. In Panama, for example, after more than seven years most of the civil society still thinks the current competition authority is responsible for price control. The civil society frequently claims for the competition authority to set prices> Those with a bit more information will claim that when price controls existed everything was cheaper and better. Without wanting to respond logically to those unwarranted perceptions, one thing remains clear: That the so called globalisation process has not been perceived as delivering the welfare benefits it promised to the consumers. Accordingly, while this perception persists, new converts in favour of competition in developing countries shall be meagre, the existing may easily repudiate their beliefs and martyrdom is certain for its few advocates.
- iii. Will They Dance With Me? Will undertaking multilateral commitments to a competition agreement result in effective international co-operation? Will a developed country really provide assistance against one of their firms, even though the behaviour has no negative effects in the developed country? Will the amount of the issue at stake be enough to entice a developed country's competition authority to co-operate?

d) Is The Bar High Enough? Global Standards To National Competition Rules Vs Competition Rules On A World Wide Basis (A Developed Country View): For some countries the multilateral agreement would centre on advocating an agenda which converges on the setting of global standards to national competition rules on a world wide basis, whereas for others the emphasis would be on creating a set of world wide minimum competition rules for all.

Those countries advocating for the setting of global standards to national competition rules on a world wide basis, could argue that the “consensus” procedure of decision making at the WTO would require a great deal of compromise (even amongst developed members) and thus yield meagre multilateral standards. Meagre standards would justify

the very existence of feeble competition regimes, inhibit their need for reform and allow them to extract negotiated concessions for bringing their competition regimes to what should otherwise have been the norm.

- e) Will I Have My Day in Court? A multilateral agreement under the WTO could be subject to the provisions of the dispute settlement mechanism. After all one of the advantages of a rules based system is recourse to settlement of dispute between Members. Dispute settlement however should be barred from undertaking a specific review of the actions by courts or competition authorities. What should it review then? Will it review the instructions and regulations interpreting or applying the multilateral agreement? Will it review alleged breaches of obligations by members? In any event access to the dispute settlement mechanism is quite out of reach to most developing countries. Legal fees associated with panels are frequently prohibitive. To most developing countries then the benefit of a dispute settlement body to uphold their rights will be out of reach, and if no dispute settlement is present then why have this competition multilateral agreement within an organisation whose principle asset has always been precisely the dispute settlement body.

Why To WTO.

- a) The Gates To The House are Open. The privatisation process undergone by many countries has to be adequately monitored so that State enterprises and monopolies are not merely replaced by private ones. Guaranteeing a competitive market after a privatisation process is the only way to assure that the benefits of competition are passed on to consumers and / or industrial users.

The liberalisation of imports ensuing from WTO membership can, and eventually will, relax or eliminate the hold of local cartels over the local markets. However desirable this situation may be, provisions must be taken so local cartels are not replaced by foreign ones, and thus deprive the benefits of competition to be accrued by consumers and / or industrial users.

Membership to the WTO has created market access openings in local markets making them prone to be the target of incoming restrictive competitive business practices. A multilateral agreement would be a response to a situation which is currently ongoing, and which many countries (mostly developing) are unable to address either by lack of competition infrastructure or sufficient leverage to tackle the ways and means of multinational corporations.

- b) A House With No Dog. Absence of competition law and or infrastructure attracts anti-competitive business practices. Absence of an enforceable standard in a jurisdiction is unlikely to concern foreign competition authorities let alone provoke enforcement involving the conduct of one of their companies in any such jurisdiction. Establishment of a multilateral agreement would then grant an enforceable international standard of conduct which should concern all competition authorities irrespective of the existence or not of an enforceable standard in any given jurisdiction. A multilateral standard would encourage compliance with minimum international standards and would entice some sort of co-operation in spite of the existence or not of competition law / infrastructure. Likewise a multilateral agreement would naturally encourage co-operation when there is in fact a competition law / infrastructure in place. In those developing countries where competition law / infrastructure does exist co-operation could involve assistance in addressing restrictive practices affecting market access of economic operators from developing countries into developed countries.

- c) Wanna Buy a Dog Cheap? A multinational agreement will create free watchdogs. Multinational corporations abiding by the multilateral standards would be encouraged to monitor the behaviour of their peers in the international markets. Operating outside the agreed standards would be considered unfair competition Vis a Vis the abiding companies. Today, no company would dare point the finger at another if there are no standards to be upheld at a particular jurisdiction. Nobody really wants to be a tattler, unless it is the law.
- d) The Boat Is Leaving. Many countries have already concluded¹⁶ and are currently involved in further concluding bilateral and regional agreements regarding competition. The agreement framework centres around two axis of competition, mainly the US and the EU. Many countries are yet to conclude agreements with either one of the axis of competition or with both. The EU in particular seems to be committed to a parallel approach entertaining a bilateral and a multilateral agenda simultaneously. The US on the other hand has in the past expressed scepticism on a multilateral competition agreement at the WTO. Concurrently, progress and agreements continue to be made at a bilateral level while debate continues and agreement seems elusive at the multilateral WTO level. Postponing the start of negotiations beyond the Fifth Ministerial Conference at Cancun, could eventually lead to:
- i. A myriad of bilateral agreements concluded on different conditions and limited to traditional trading partners of the axis of competition (US-EU). Bilateral Competition agreements will then create different levels of playing fields between countries having concluded an agreement and those not having done so. There would be no multilateral framework to uphold at least a minimum standard.
 - ii. Smaller countries finding it harder to negotiate at a bilateral level. There are obvious advantages in negotiating in numbers rather than alone. Furthermore, smaller countries might find it hard even to negotiate at all. The relative small sizes of developing markets do not make them attractive candidates for negotiations with developed countries. Smaller countries by themselves are not known to be a priority in the negotiating agendas of developed countries.
 - iii. If and when a multilateral agreement is finally concluded in the future, it will resemble the commitments made at the bilateral level and negotiated on a one on one basis. As pointed out above, the “critical mass” of standards reached at bilateral level is growing every day. The faster of the blocks an into the negotiations of a multilateral agreement, the smaller the “critical mass” of standards reached at the bilateral level will be. The longer we take the bigger the “mass. Hence, if we do not partake of the multilateral negotiations fast enough the negotiations will be factually concluded without the benefit of our joint endeavours.
- e) Protection From Our Noble Selves. The existence of a multilateral competition framework will assist local competition authorities to resist the pressure arising from domestic sources. A clear lesson from experiences drawn from the multilateral WTO framework has been that domestic groups with a powerful lobby can be deterred or held at bay if they can be convinced that repercussions at an international level will ensue.

¹⁶ Some examples are US-Germany (1976), US-Australia (1982), US-EU (1991), EU-Canada (1992), US-Canada (1995), US-Brazil (1999), US-Japan (1999) US-Israel (1999).

Many A River to Cross: Is There A Way Forward? If we are to launch a multilateral round of negotiations at the Fifth Ministerial in Cancun certain issues will have to be addressed, mainly:

(a) Overcoming Distrust:

- i. Progress Of The Negotiations: Sufficient progress must be achieved in areas of negotiation that are keen to developing countries, mainly Agriculture. Achieving a degree of progress in this area will counter perceptions that that the round of negotiation is only fulfilling the agenda of developed countries. Achieving progress would indeed return the “development” nature to the Doha Agenda. In spite of what is commonly reported in the media, there is still time and plenty of space to accommodate common grounds for an understanding in Agriculture. Progress in Agriculture as it may be defined at Cancun, would avoid the making of negative linkages between Agriculture and the Singapore issues.
 - ii. Chairmanship of the Working Group on the Interaction Between Trade and Competition The chair of the future negotiations should be offered to a developing country. A positive perception that developing countries are interested in the negotiations and are capable of exercising leadership in this area, is not only prime to secure much needed trust but would also render much needed recognition to the existing capacity of certain developed countries on the subject.
- (b) WTO Plus: A multilateral negotiation on competition should not be viewed as being a “WTO Plus” commitment. Whereas, there is a certain element of truth to the assertion that competition is a market access tool, it would be hard to determine to what degree lack of competition law / infrastructure or lack of multilateral agreement, would preclude market access from occurring, when confronted with market access gains made mainly through tariff reduction modalities (Agriculture, Industrial Goods) or through market access commitments (Services).
- (c) One Size Does Not Fit All: A multilateral negotiation should take into account that “one sizes does not fill all”. Provision should be made of the relative small size of developing markets. In this sense, Special and differential treatment should be granted to developing countries. Special and differential treatment should not however be granted automatically and in a blanket fashion to every single country classifying as a developing country, nor to all their markets. Negotiations could grant special and differential treatment in the form of a “de minimis” threshold. Said threshold could be set on the basis of product / service market size. Special and differential treatment would not be available to developed countries.
- (d) Do Unto Others As You Wish Others Do To You: A multilateral negotiation should take into account that significant market distortions such as export subsidies and domestic supports are not only still in place, but will remain with us for quite some time. By the same token exemptions and exceptions continue to adorn the competition laws of many countries. A multilateral competition framework should not grant the right to invoke its provisions and or co-operation mechanism over those product/service markets subject to distortions or over sectors covered by exceptions or exemptions from competition laws. No coherence or fairness are to be found if we allow to demand of others a standard of competition we are not willing to abide by ourselves. So the old adage “do unto others as you wish others do to you” should oversee the provisions of a possible multilateral framework, when it comes to granting the right to invoke the agreement.

- (e) Assurances And Access to Justice: A multilateral negotiation should provide the necessary assurances that significant co-operation amongst competition authorities (developed and developing) will ensue. Developed and developing countries should agree on the extension and limits of co-operation. Resources are of limited nature irrespective of the degree of development of a country. Any dispute settlement mechanism would have to consider ways to make the process more accessible to developing countries from an economic standpoint.
- (f) Setting the Bar, How High Should We Or Can We Jump?: A multilateral negotiation should take into account the level of our ambitions at this particular point in time and at a multilateral level. Negotiations should reckon the value of genuinely attracting and interesting the active participation of as many as possible. A Multilateral Agreement should be thought of as setting a minimum level of standards. This minimum level should not be thought of, or portrayed as justifying the existence of feeble competition regimes. A multilateral minimum standard only recognises differences of development, and should afford a minimum of guarantees to all. In this it does not differ from any of the WTO agreements. WTO agreements in general have exceptions or mechanisms to secure waivers. The issue of higher standards could be accommodated by either. Bilateral rights and obligations entered upon or to be entered upon by members in the future and which are in excess of the multilateral provisions, could enjoy exception from MFN treatment as is already done, for example, by article XIV E) of the GATS Agreement.

V. It Had To Be You: Why WTO?

The WTO is an institution with a glorious past in dealing with obligatory commitments made by Members to regulate their trade relations. The institution has shown for over 50 years, that it is able to foster progress in rather difficult negotiations, and has overseen compliance with multilateral agreements. Its broad membership currently reaches 146 countries and is comparable in coverage to that of the United Nations. There is a generally well respected dispute settlement mechanism; and some of its agreements already contain elements inherent to competition. From the outset the Havana Charter (1947) which eventually gave rise to the multilateral trading system we enjoy today, rationally included a chapter on restrictive business practices. The existence of agreement on this matter was considered to be an integral part of an open trading system. Successive failures to incorporate competition into the multilateral framework have resulted in a bilateral competition agreement network lacking effective coverage or consistency. Moreover, it has dodged most of the developing world.

A basic maxim of our legal system declares “ the public sector can only do what the laws order, the private sector thus can do everything the laws do not forbid”. I think ladies and gentlemen, the time has come for the public sector, to take required actions so as to preclude in the future that the private sector be able to tie down the very markets we are ordered by law to unleash. There is a lot of unfinished business in this area, showdown will be in Cancun and I will be there.

4.4 Relevant Aspects of a Multilateral Agreement on Competition

*Gesner Oliveira*¹⁷

Introduction

The objective of this paper is to argue that the dissemination of competition laws is positive for the world economy. However, the benefits derived depend crucially on adequate enforcement and institutional building in the various jurisdictions for which international cooperation within WTO and in other fora is crucial.

The paper addresses two issues. Section 1 underlines a few aspects of the increasing importance of competition policy in the developing world. The second section provides a few suggestions for the international cooperation agenda.

1. The Increasing Importance of Competition Policy for the Developing World

1.1 The Dissemination of National Competition Laws

The last decade has been characterized by the dissemination of competition laws throughout various jurisdictions, specially in developing countries, as Table 1 shows. According to the 1997 Unctad World Investment Report, more than seventy nations have now competition laws, in contrast with less than forty in the eighties. In the second quarter of 1999, 83 countries had competition laws in force and 23 were developing new laws in the area¹⁸.

Table 2 illustrates that a new wave of competition laws is taking place in the nineties, involving a larger number of countries than in the previous ones of the turn of the last century and of the immediate postwar period.

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¹⁸ This information has been kindly provided by a US competition enforcer based on various sources and direct contact with the countries involved.

Table 1: Number of Countries with Competition Laws

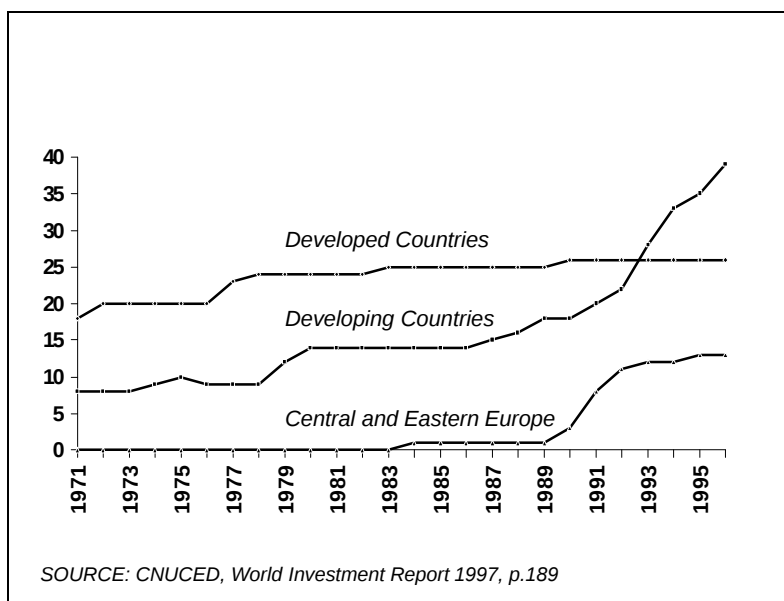


Table 2: National Competition Laws

PERIOD	COUNTRIES
1890-II World War	United States, Canada and Australia.
After II World War	Germany, European Union, United Kingdom, Japan, Sweden, France, Brazil (1962), Argentina, Spain, Chile, Colombia, Thailand, India, South Africa and Pakistan.
1980...	Kenya, Sri Lanka and Korea.
1990...	Russian Federation, Peru, Venezuela, Mexico, Jamaica, Czech Republic, Slovakia, Côte d'Ivoire, Bulgaria, Kazakhstan, Poland and initiatives in many other countries.

SOURCE: Information from Khemani and Dutz (1994), Boner and Krueger (1992), Boner (1995) and Rowat (1995).

1.2 Different Stages of Institutional Development of the National Competition Policies

The implementation of competition policy requires time, cultural change and investment in adequate institutions. Therefore it is not surprising that competition laws and enforcement vary widely across countries.

Despite this historical nature of competition policy, it is useful, for analytical purposes, to identify a sequence of evolutionary stages which could serve as a reference for comparisons among different countries.

The above considerations show the importance of defining priorities and setting a plan for institutional building. Table 3 contains a useful timetable to serve as a reference for governments.

Table 3: Timetable for Implementation of Competition Policy

STAGES	I	II  III	Institutional Maturity IV	
NATIONAL	1. Competition Advocacy + 2.Repression of Horizontal Agreements + 3. Technical Assistance	I + 4. Merger Control + 5. Vertical Agreements	II + 6. Regulation + 7. International Cooperation Agreements	III + 8. Second-Generation International Agreements + 9. Pro-Active Competition Advocacy
MERCOSUR	Harmonization Agenda	Competition perspective into antidumping analysis		
WTO	General Guidelines			

The sequencing proposed is based on a simple idea inspired by Khemani and Dutz (1995). Given its limited resources, the agency should start with the actions which most likely benefit the market. Gradually it would introduce measures which require more sophisticated cost/benefit analysis. Merger review comes after conduct control due to the fact that the welfare effect of a merger might be less clear than that of a price cartel, the latter being unequivocally welfare reducing.

The stages suggested are organized according to the degree of difficulty authorities face in undertaking cost/benefit analysis of the impact of competition measures on social welfare. However, it might well be the case that legally sound repression of price cartels turns out to be more difficult than the implementation of a merger review system. In fact, it is generally easy to assess the microeconomic impact of a cartel but it is hard to fulfill the requirements for an acceptable standard of proof for the courts. Therefore, the actual plan should take into account not only the difficulty in assessing the welfare impact of a particular

antitrust illicit, but also the expected return on each dollar spent on the particular line of action, given the relative probabilities of success of alternative public policies.

2. The International Cooperation Agenda

Although only preliminary, the above evidence suggests the need to focus on the quality of competition law enforcement rather than on the mere enactment of the legislation. This implies that effective international cooperation in the area of competition policy has to go beyond standard forms coping with the challenge of institutional building.

2.1 The Major Lines of Action for International Cooperation

There are three major areas for which international cooperation is needed and they are all of great interest for developed and developing countries:

- combat hard-core cartels;
- reduce the transaction costs of merger control;
- promote institutional building and disseminate competition culture.

2.2 The Need for Coordination among Competition Agencies

As pointed out in BRAZIL (1998), two factors explain the importance of international cooperation for the first two areas:

i) different from the jurisprudence of the sixties and seventies, there are more and more cases which not only present the same characteristics in several markets; they constitute in reality cross-border mergers or generalized conducts. Therefore, the potential for inconsistent decisions among different national agencies is high.

ii) the frequency of cross-border transactions poses the problem of transaction costs firms incur when they have to comply with so many applications and bureaucratic timetables. Efforts to harmonize particular requirements (e.g., for merger review) could be useful even without a more profound convergence in the legislation.

Brazil provides a good illustration. 17% of the merger cases analysed in 1998 represent transactions which were generated by global strategies on the part of foreign groups. In many instances the operations were reviewed by several other national agencies besides CADE.

2.3 Institutional Underinvestment and Lack of Competition Culture

Although it is hard to overstate the importance of the first two areas indicated above, it is the third area that merits particular attention when one is concerned about international cooperation.

Indeed, there is a central problem of political market failure. In each national jurisdiction there will be a tendency for institutional underinvestment. There are not necessarily enough national constituencies who will support independent competition law enforcement. Although the problem is not peculiar to developing countries, it becomes more acute in jurisdiction which are at very early stages of institutional development and where competition culture is not widespread.

Developing countries start implementing competition laws under very unfavorable circumstances. Kovacic (1997) contains a list of factors which make the task all more difficult for developing countries' authorities, to which one could add a few more elements in order to get the following set of obstacles:

- resources are extremely scarce

Section IV. Reflexions on the options and implications of a possible multilateral framework on Competition

- lack of professional expertise
- lack of jurisprudence
- frail academic infrastructure
- weak professional associations and consumer groups
- inadequate judicial systems
- bad reputation of the public sector: excessive bureaucracy, lack of transparency and corruption
- political and bureaucratic resistance

The competition official in the mature jurisdictions has to apply competition principles given a stable and adequate pre-existing environment. The competition official in a developing country has to help create such an environment for effective application of competition law.

Moreover, note that there are economies of scale and economies of learning for the implementation of competition laws; at earlier stages one would need more resources and not less. The problem is attenuated by the fact that learning from the pioneers in the field has been made a lot easier and less costly due to Internet and other media. The telecommunications revolution has made available technical papers and decisions which are very useful for the competition official, as well as the possibility for fast exchange of ideas and opinions.

Therefore, there should be a permanent concern to incorporate the world best practices in competition policy, for which benchmarking exercises are particularly important.

The increasing globalization of firms is also changing the private sector's view on the matter. At times, international firms have put pressure on local governments to set stable and transparent rules. National firms are also changing their views on the usefulness of a modern regulatory framework.

2.4 The Cooperation Agenda and the Stages of Institutional Development

The focus of international cooperation will depend upon the stage of institutional development of each national jurisdiction, as summarized in Table 4.

Table 4 : Stages of Institutional Development and the Cooperation Agenda

Stages	Cooperation Agenda	Content
I and II	Technical assistance	Training and drafting of legislation and procedures in line with due process
III	Simple cooperation agreements	Cooperation in selected cases with exchange of public information
IV	Advanced Cooperation Agreements	Systematic cooperation with exchange of confidential information

At Stages I and II of Table 3, technical assistance seems to be more appropriate. It will occur most likely between a developed country and a developing one. Technical assistance from countries in intermediary positions should be stimulated since the institutional environments might be similar and useful in terms of adopting new strategies for the implementation of competition law.

At Stage III, when the agency has already built in some internal experience, simple cooperation agreements including exchange of public information can be helpful. However, one should be realistic regarding two aspects: i) the limited resource endowment would not permit joint action in all cases; ii) sharing of confidential information would face serious legal constraints.

More advanced agreements, including exchange of confidential information, would require institutional maturity and greater homogeneity and integration among the participants.

2.5 The Cooperation Agenda at the Regional and Multilateral Levels

The Regional Level

The agenda of the regional blocks have usually dealt with two issues. First, the harmonization of the national competition laws, which includes the creation of a new legal framework in certain countries as in the case of some of the Eastern European nations.

Second, the member states have to negotiate the convergence of the antidumping rules into competition ones. This is not trivial theoretically or politically, but it is a question of which has to be coped with in order to stimulate trade within the block.

The Multilateral Level

Before discussing the agenda, one should add to the factors that create the need for a multilateral agreement discussed above the question of the limitations and problems that sectoral agreements (such as TRIPs and TRIMs) create while a multilateral framework for competition isn't implemented. In this condition, the usefulness of sectoral agreements is limited by:

- lack of common understanding on competition concepts;
- possible contradiction between antidumping and competition rules;
- lack of support for national competition coalitions.

Having this factor in mind, it is very unfortunate to see that a worldwide transformation of the antidumping rules into competition rules does not seem to be realistic in the near future. Any kind of international code or legislation in competition seems to be premature given the great diversity of experiences and stages of development of the members of WTO.

The definition of general principles in regard to the prerequisites that a national law has to have to provide legal certainty to private agents seems to be the relevant agenda at the multilateral level. Although not comprehensive, the WTO principles of most-favored nation, national treatment and transparency are of particular relevance for the building of solid competition institutions in the developing world¹⁹.

In addition to such definition, a number of actions could be undertaken:

¹⁹ The importance of the last two has been emphasized in BRAZIL (1998).

- elaboration of standards for bilateral and plurilateral agreements;
- incentive for benchmarking exercises such as voluntary country reviews;
- greater coordination and funding for technical assistance;
- regular reports on world competition policy.

Conclusion

Technical assistance and technical cooperation are crucial for institutional building in competition policy. Of course one has to be very careful in order to select from the foreign experience the appropriate lessons for one's own legal and cultural environment. But the important point is that cooperation has to be understood in the context of the educational role of multilateral organizations more than in a result-oriented approach.

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4.5. Pros and Cons of a Sectoral Approach without a Comprehensive Multilateral Competition Framework

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Initial points

1. A sectoral approach can happen without an explicit consensus in Cancun on a further 'competition' mandate but to do so alone would be dangerous.
2. The multilateral approach, regrettably, may not happen just yet, due to both the lack of commitment to CAP reform and the veto granted to every member in Doha to block the requisite explicit consensus on modalities.
3. So what do we do? We need to benefit from the practical contributions of both approaches. We must combine the expertise of both trade and competition officials, involving particularly the experts at the WTO WGTCP and the various GATS sectoral negotiators responsible for the 'built-in agenda'.

Most importantly, we must focus our minds on exclusionary business practices, particularly those caused by abuses of dominant positions.

I. Problems with the sectoral approach

Over the past few years, several commentators and trade experts have trumpeted the great success of the Telecoms *Reference Paper*, and its putative relevance to the development of further disciplines to address anti-competitive and exclusionary business practices. There is no doubting the *Reference Paper's* contribution to preventing anti-competitive practices in this sector (a 'competition law approach') and to ensuring that competition itself is promoted, through the provision of non-discriminatory access to key points on the networks and essential facilities of major suppliers (a regulatory / liberalisation approach). Since it was negotiated, the *Reference Paper* has been repeatedly pointed to as a template for similar disciplines and commitments in other sectors, notably: energy, air transport, postal and courier, broadcasting and distribution services. The relevance of the *Reference Paper's* 'pro-competitive regulatory principles' to these sectors is based on their putative similarity with telecoms, ie a sector moving from government monopoly to a competitive market.

This is a sound basis for application of such principles, but there is still an important problem with this 'template' approach. The *Reference Paper* itself was (necessarily) negotiated in only as detailed a fashion as was susceptible to multilateral agreement. As such, it contains much intentional ambiguity, which presumably is to be clarified and interpreted through dispute settlement proceedings. There is nothing wrong with this per se – most competition laws have substantive standards which offer a very great deal of ambiguity and opportunity for interpretation (ie 'substantial lessening of competition' 'abuse of dominance' 'monopolisation' etc). When you allow vague principles that apply to the private sector to be interpreted by a 'trade' panel though – even one that can call on competition policy expertise – there is a concern that panels will err on the side of opening a market by breaking up

efficient business arrangements, rather than allowing the arrangements to be maintained and the market thereby to remain 'closed'.

Let's examine how the standards in the *Reference Paper* were negotiated, and how this problem might arise by reference to actual use of the *Reference Paper* to open up the Mexican telecoms market²⁰

The *Reference Paper* confirmed the hopes and fears of both of the camps in the trade and competition debates. As the trade side had hoped, a binding set of commitments was forged, which could help WTO Members to discipline each other's large incumbent telecoms suppliers and thereby help foreign competitors to break into new markets. As the competition side feared, however, the process of achieving agreement on the text of the *Reference Paper* demonstrated how the dynamic of international trade negotiations necessarily involves a descent to the lowest common denominator. One of the WTO negotiators - Laura Sherman - has explained how the text came together:

The process of drafting the *Reference Paper* began with the United States distributing a paper entitled, 'Pro competitive Regulatory and Other Measures for Effective Market Access in Basic Telecommunications Services'...

Based on contributions from Canada, Australia, and the European Union, Japan developed a *composite set of regulatory principles*... To accommodate the different political and legal structures of WTO Members, negotiators agreed... that the principles needed to be *sufficiently flexible to accommodate differences in market structures and regulatory philosophies* among the various participants. No single uniform regulatory system should be imposed... Some countries may rely on antitrust law, while others may develop a complicated set of regulatory principles. The objective was to ensure certain results, a level playing field for new entrants, not to determine the means by which the results would be achieved.²¹

Of course, negotiators also had to agree on what 'level' that playing field should start at. There were obvious dangers in aiming too low. Various telecoms experts have argued that 'it is "very important that the playing field should be levelled upwards, not downwards" because "rules that forbid a firm from exploiting efficiencies just because its rivals cannot do likewise" do nothing but harm, rather than improve, consumer welfare'.²² At WTO negotiations, however, it is impossible - as a purely practical matter - for so many Members to agree to follow the highest standard available. The best that can be hoped for is the text most amenable to agreement. At the WTO telecoms negotiations, in particular, the pressure was on to find a happy medium - or minimum - among considerably different approaches. The Members accepted that the result would not necessarily be the ideal, let alone best, practice. Indeed, as Sherman has explained, in the search for a 'composite' approach the aspects of the original American proposal - which dealt with the crucial issue of the types of companies that would have to help their competitors into their markets - had to be watered down considerably:

The US regulatory principles had referred to a '*dominant operator*', defined as an operator with market power. However, this was a US term of art not used elsewhere. Australia proposed that each WTO Member would *identify the relevant carriers* in its Schedule, but this idea was rejected.

²⁰ The following section draws from P Marsden, *A Competition Policy for the WTO* (London: Cameron May, 2003)

²¹ L Sherman, 'Wildly Enthusiastic About the Multilateral Agreement on Trade in Telecommunications Services' 51/1 Federal Communications Law (1998) 61, (hereinafter, 'Sherman') at 71-73 (emphasis added).

²² M Naftel and L Spiwak, *The Telecoms Trade War* (Oxford: Hart Publishing, 2000) at 63, n. 55 citing J Farrell, 'Creating Local Competition' 49 Fed Comm, Law. J. 201 (1996) at 202.

Everyone agreed that the definition could not be limited to a single supplier, that is, solely to a monopoly provider, because the disciplines would cease as soon as there was a new entrant. *Negotiators decided to focus on the control of facilities as the operative way of defining the relevant carriers.*

The Canadian delegation offered a definition of 'essential facilities' as facilities that 'are available only on a monopoly basis (*de facto* or *de jure*); cannot be economically or technically substituted; and are required by a competitor for the supply of a service'. Some thought this definition was too narrow and would not cover former monopolies now subject to some competition. [So] the reference to *de facto* or *de jure* monopoly was replaced by 'exclusively or predominantly provided by a single or limited number of suppliers'.²³

The European Union argued that it was *not control over essential facilities* that should define interconnection obligations or competitive safeguards, but rather market power. The European Union suggested assigning interconnection responsibilities to *suppliers with significant market power*. This is a term of art in EU directives where it is defined as carriers with more than 25 per cent market share.

Others believed that such a definition was overbroad and would impose obligations on carriers that could not act anti-competitively.

There was agreement that some carriers that did not control essential facilities . . . could still act anti-competitively and hinder market access by new entrants.

Therefore, negotiators agreed to include a concept of market power, applying the interconnection obligations and competitive safeguards to incumbent carriers . . . referred to as '*major suppliers*'.²⁴

As this final compromise was lower than any one Member's competition law standard, the result was clearly to impose a regulatory requirement on such suppliers. Competition law in America, Australia, Canada and even the EU only imposes obligations on firms when at least two conditions have been satisfied: they have been found to be 'dominant' – as opposed to being merely 'major' – and to have been proven to be abusing their dominant position by, for example, refusing to deal with their competitors.²⁵ In addition, with the exception of the EU, the competition laws of each of these jurisdictions would require evidence that such a refusal was lessening competition substantially.

It is more than a little unfortunate that the *Reference Paper* set a regulatory approach that is so different from current practice, particularly as this comes at a time when the American and European approaches to essential facilities have been converging towards one another and when governments generally have been favouring the use of competition law disciplines rather than regulation. Indeed, the preferred model in both Europe and the US appears to be one where governments only intervene to order the owner of an essential facility to provide its competitors with access to it if – in addition to the above conditions – it is not possible (or at least not economically feasible) for them to develop a competing facility.²⁶ Any one of these conditions is far more rigorous than what Members have committed themselves to in the *Reference Paper*. Since the *Reference Paper* influences how Members intervene in their markets, this divergence needs to be sorted out sooner rather than later.

This is particularly the case since the *Reference Paper's* provisions are already being relied upon in dispute settlement proceedings. The US has used the *Reference Paper* already to

²³ Sherman at 74-75.

²⁴ Sherman at 75 (emphasis added).

²⁵ US *Sherman Act*, 15 U.S.C., Section 2; Australian *Trade Practices Act* 1974 (consolidated), Section 46; Canadian *Competition Act*, R.S.C. 1985, c. C-34, as amended.; Sections 78 and 79; EC *Treaty of Rome*, Article 82.

²⁶ *MCI Communications Corp v AT&T*, 464 U.S. 891(1983); *Oscar Bronner*.

effect considerable changes to the business environment in Mexico. The case in question arose after an American telecoms provider, Sprint, had partnered with Mexico's largest supplier of telecommunications services, Telmex, to provide mobile telecommunication services in the US and Mexico. AT&T and MCI had to settle for deals with lesser Mexican players and could not benefit from Telmex's considerably larger network. They called upon the US Trade Representative to help them get the kind of access that Sprint had. The resulting American WTO complaint requested that Telmex be required to provide these US firms with non-discriminatory access as provided for under the *Reference Paper*.²⁷ After only a few months of the pressure of strained trade relations with the US, the Mexican telecoms regulator COFETEL issued a set of 'Asymmetric Regulations for Telmex'. These ordered Telmex to provide its long distance competitors with access to its network at cost.²⁸ The US then withdrew its WTO complaint.²⁹

It is interesting to note that at no point did AT&T, MCI or the USTR make a public request for the Mexican competition authority to investigate Telmex's activities. They had no incentive to, though. Their allegations would have had to survive a rigorous market analysis and satisfy a competition law standard - that competition in the relevant market had been proven to have been 'diminished, impaired or prevented'³⁰ - before the Mexican competition authority would have intervened. The complainants and the USTR obviously thought that they stood a much better chance of success if Geneva-based trade panellists reviewed their complaint under the pro-competitive rules of the *Reference Paper*. They would not have to find evidence of 'harm to competition' but simply a failure by Mexico to honour its commitment to *promote* competition by increasing foreign entry. From the point of view of international trade policy, the use of this standard, combined with the threat that Mexican products would be barred from the vast American market, Mexico's capitulation and imposition of 'asymmetric regulations' on its 'major supplier' was not at all surprising.

As the initial Mexican case was settled through bilateral 'negotiation', WTO dispute settlement panels have not yet had an opportunity to explain what the *Reference Paper's* pro-competitive regulatory principles actually mean. Given the vagueness of its terms, however, problems of interpretation are likely to arise in any dispute settlement proceeding. To minimise the possibility of regulation being introduced when it is not appropriate, the meaning, application and even the propriety of pro-competitive regulation are matters that have to be decided as a matter of urgency.

Where are such 'common principles' to come from, though?

Being part of the GATS, it is natural for the *Reference Paper* to have more to do with promoting 'market access' than with protecting the competitive process. It is closer to entrant-friendly *ex ante* regulation than to competition law, which disciplines anti-competitive behaviour after it has been proven likely to harm competitors or consumers. Of course, a bias towards entry is to be expected in any trade agreement, and should not necessarily be condemned, particularly when it applies to sectors that are controlled by former public monopolies and which are crying out for entry. The question most relevant to the development of further 'competition' rules at the WTO, though, is how appropriate the

²⁷ *Mexico - Measures Affecting Telecommunications Services - Request for Consultations by the United States*, WT/DS204/2 (17 August 2000).

²⁸ Inside Trade 'USTR backs off Mexico WTO threat in wake of telecom company deal' (www.insidetrade.com) (1 June 2001).

²⁹ The battle continues, however. A recent WTO update of dispute settlement cases (WT/DS/OV/7, www.wto.org) reports that '[o]n 13 February 2002, the United States requested the establishment of a new panel. In particular, the United States [is claiming] that Mexico's measures... did not prevent Telmex from engaging in anti-competitive practices'. WT/DS204/3. At the time of writing, the Panel report is still pending.

³⁰ *Ley Federal de Competencia Económica*, Diario oficial de la federacion (24 December 1992) Article 8 and 10.

Reference Paper is as a template for opening other sectors. This is particularly the case for those sectors where the role and effect of government regulation is minimal or has long since ceased to operate.

The Problems with Pro-Competitive Regulation in the Private Sector

In any sector that is lacking effective competition, pro-competitive regulation may be necessary to introduce it. It is less clear that there is a place for such regulation, however, where the market is functioning - even if the practices of dominant incumbents meant that it is functioning at a less than optimal level. When a market is functioning, more competition can only be introduced if the market share of the existing players is bid away by new entrants. If the incumbents have acquired their position through anti-competitive behaviour, then competition law measures are needed to effect the required readjustment. If the incumbents' positions have been earned through competitive activity, however, and a policy decision has nevertheless still been made to introduce more competition, then government intervention is required. The only way that a government can 'share' the success of the existing players with the entrants, though, is if they first expropriate it. However, when such cases arise in the private sector, such an expropriation can distort the incentives of existing players to compete, and offer an unearned reward to the benefiting rival.

Reduced incentives to compete

The Canadian Competition Bureau has explained, '[u]nder the *Telecommunications Act*, the Canadian Radio-Television and Telecommunications Commission (CRTC) is required to *forbear from regulation* where it finds that a service or class of service is or will be subject to "sufficient competition" to protect the interests of users and where doing so will not impair unduly the establishment or creation of competitive markets'.³¹ There is a reason for this. As Valentine has explained, '[f]orcing an owner of a "facility"... to share its assets with others may reduce the owner's returns on its successful investment and thus reduce its incentives: 1.) to engage in further innovation and investment, or 2.) to remain in the jurisdiction where its assets are subject to mandated sharing'.³² This is no more than common sense. Why should an incumbent invest any time or effort in developing a product or in cultivating customer relationships, if it is likely to see them taken away and handed to whichever rival complains the loudest to the government? In an environment where the threat of regulatory intervention is high, competitors can be expected to compete less fiercely than they normally might. This means that there is less competition in the market as a whole. In addition to incumbents competing less vigorously - which means that they will not attain the levels of success that they might otherwise do - there is also likely to be a negative effect on the entrant benefiting from the regulation. Ordering the incumbent to help the entrant into the market, after all, does nothing to help the latter to compete. Indeed, 'granting access... may reduce the benefiting entity's incentives to invest, since free-riding is often less expensive and risky than investment. Mandating access for late-comers and free-riders tends to reward the less energetic and entrepreneurial firms at the expense of the pioneers'.³³ This can make the beneficiaries themselves less competitive. Anderson and Holmes have noted, '[f]or example, [that] unduly sweeping use of the essential facilities doctrine may undermine the incentive for firms to "invent around" existing bottlenecks'.³⁴ With the incumbents and entrants all being subject to reduced incentives to compete, competition in the market as a

³¹ Competition Bureau, 'Competition Policy Considerations in the GATS Negotiations' July 2001 (<http://strategis.ic.gc.ca/SSG/ct02192e.html>), at n. 57.

³² D Valentine, 'Competition Policy, Essential Facilities and Market Access', Notes for the Third Symposium on Competition Policy and the Multilateral Trading System' (17 April, 1999) (hereinafter 'Valentine') at 7-8.

³³ Valentine at 7.

³⁴ R Anderson and P Holmes, 'Competition Policy and the Future of the Multilateral Trading System', 5/2 J of Int Eco Law (2001) 531 (hereinafter 'Anderson and Holmes'), at 19.

whole cannot be anything but lessened. In contrast, 'denying access may generate incentives for others to set up their own competing network or facility, or join smaller rival networks or facilities that could challenge the dominant firm.'³⁵ Surely governments should be fostering the competitive spirit, not suppressing it. It would be a disturbing development if governments viewed the sharing of the network, facility or distribution channel of the true entrepreneur as being preferable to innovation and true competition.

These are problems that must be addressed directly, and which I believe the sectoral GATS negotiators and experts do not even care about. Competition policy expertise must be applied to these problems to come up with a workable solution and commitments that are helpful rather than harmful.

II. Some problems with the current multilateral approach

What is the problem with restrictive business practices that a multilateral competition agreement at the WTO is supposed to solve? The problem is that, following trade liberalisation, there is a fear that governments will tolerate exclusionary business practices to replace public tariff and non-tariff barriers. The solution, one would think, then is to ensure that governments make commitments to have and to enforce a comp law that will address such exclusionary business practices.

However, when you look at the proposals on the table, nothing could be farther from the case. First I'll examine the problem of exclusionary business practices in a bit more detail, by reference to the 2 main trade and competition cases in the area. Next, I'll examine the main proposals that have been put forth by the EU to solve this problem. Then, I'll show how those solutions are *absolutely irrelevant* to the problem at hand. Finally I'll conclude with a few suggestions about what *might* work.

What are the exclusionary business practices that are such a problem for competition and trade? We need look no further than the two main cases in the area: Trade side - *Kodak-Fuji Film*; Competition side: *Boeing/MDD* – both involved the same problem though.

Kodak-Fuji

- exclusive purchasing commitments between Fuji and Japanese film distributors
- tolerated or approved by the JFTC because they did not harm competition, but complained about by Kodak because they excluded it from the market (and arguably also excluded Konica and Agfa as well)

Boeing/MDD

- a merger case, but at its crux, was about Boeing's exclusive purchasing commitments with various American airlines
- tolerated by the FTC, but complained about by Airbus because they excluded it from the US market

The issue here is what to do about the exquisite problem when arrangements that are viewed as exclusionary by complainant competitors and trade authorities, but are viewed as efficient by the parties and domestic competition authorities. Which should prevail?: the foreign competitor's demand for market access, or the domestic competitor's demand to let efficient arrangements be, unless they are proved to lessen competition substantially? Which should prevail: foreign competitors or competition?

³⁵ Valentine at 7.

Now, what is the grand solution that has been proposed to this conundrum? The EU proposals are for governments to enact competition laws that are not discriminatory on their face, that prohibit hard-core cartels and which provide for voluntary enforcement co-operation with other agencies. Do these address the problem? Of course they don't.

Take discrimination, first of all. A ban on discrimination would only prohibit discriminatory conduct. To the extent that they exclude anyone at all, the business arrangements in question exclude all-comers: the Kodak's the Agfas and the Konicas. A ban on discrimination is not going to do anything. Furthermore, not that many business practices actually exclude only foreign competitors, if they did, they wouldn't stop effective competition from domestic rivals. Finally, the EU's proposal is actually only for non-discriminatory competition laws – i.e. the text of the statutes – discrimination in fact is supposedly still allowed. This is far less a commitment than that which already exists in GATT Article III:4 and GATS Article XVII, which both provide that all of a government's laws or measures be non-discriminatory both on their face and in fact. The EU's non-discrimination commitment thus adds nothing and actually takes much away from the WTO legal order.

Now look at the proposed commitment to ban hard-core cartels. First, no competition law would be worth its name without one of these, so it is not obvious that the WTO is needed to get one. More importantly though, a cartel ban would do nothing to address the exclusionary business practices, which are, after all, vertical arrangements between suppliers and distributors or downstream purchasers. No one at Kodak, after all, was alleging some vast conspiracy among thousands of Japanese film distributors to keep Kodak off their shelves.

Look at the proposals for voluntary enforcement co-operation. Again, it is difficult to see what this would add to the status quo. We have such non-binding commitments at the OECD, UNCTAD and even in the GATT (1960 recommendation) already. Even if it contained a positive comity clause, which allowed one country to trigger an investigation in another, nothing would come of it, especially regarding an investigation of exclusive purchasing commitments, if the domestic law did not prohibit them, or did not prohibit them absent a finding of substantial lessening of competition. Look, if Airbus or the European Commission had tried to make a positive comity request to the US FTC after the Boeing/MDD merger, does anyone seriously think that the FTC would have banned purchasing agreements that is had already allowed?

Now, would these three proposals even do what they state they can do? For example, would a *de jure* non-discrimination commitment prevent discrimination? Well no, not in fact – as it is limited only to discrimination in the text of the law.

Would a 'cartel ban' ban cartels? No, the lesson of the OECD Hard-Core Cartel Recommendation – a deal agreed amongst countries with developed competition law regimes, and at a non-binding level of commitment, took years to agree and even then was riddled with carve-outs. Such would be almost impossible to agree on at the WTO without scores of exceptions, exemptions and defences.

Would a commitment to voluntarily co-operate in enforcement induce co-operation? No, or not anymore than existing non-binding commitments do so. Co-operation tends to evolve naturally, through trust, not through some multilaterally agreed framework.

III. *So what might help?*

I think governments should grasp the nettle. I think they should stop pussyfooting around with banal and hortatory wording that adds nothing. If they are going to earn their keep, our trade negotiators and diplomats should take a long look at the practices that are causing the most friction in world trade, and are calling out for a solution, and then sit down and work out a common approach. If this needs to be done at the ICN, or another 'competition' forum first – where the experts are – then so be it; but trade knowledge will be needed too. After all, a common rule on vertical restraints is Panglossian at best.

What is needed though is an effective study of what constitutes a market access barrier. What does it mean to say that a competitor is being 'significantly foreclosed' from a market? And when should we care about that? I think we should only care about that when competition itself is substantially lessened, but there will be other views on this.

The sooner we start airing these views, and trying to aim for a solution that benefits from both trade and competition policy, the sooner our policy-makers can move on from debate to action.

I really do hope that a mandate at Cancun allows the formation, at least, of a WTO Competition Policy Committee. I would hope that this Committee would engage as many of the experts from the WGTCP as possible as well as the GATS sectoral experts (some of whom from smaller economies may also wear the WGTCP hat anyway!). Get these people together and begin talking: not about cartel bans, not about non-discrimination commitments and not about voluntary enforcement co-operation though. They should address two other topics right away:

First Topic: they need to begin developing greater trade and competition policy guidance on the meaning and application of the pro-competitive regulatory principles in the *Reference Paper*. One thing that I hope they would be able to agree on at an early stage, though, is that Members will only intervene in a market to address business practices when they have found clear evidence of an anti-competitive effect, and not just a possible exclusion of a foreign entrant.

Second topic: the various experts need to focus on exclusionary business practices that significantly foreclose access to a Member's market, and which substantially lessen competition in a relevant product and geographic market. In my view, they should examine, first, exclusionary practices of dominant companies that amount to an abuse of such dominance.

These efforts need to begin as soon as possible, and I would be happy and honoured to participate in them! The guiding principle I would offer to both such workplans, though, is this:

One breaks down trade barriers to increase the efficient operation of markets.
One does not break apart efficient business arrangements just to increase trade flows.

Aspectos positivos y negativos de un enfoque sectorial de competencia sin un marco multilateral

María Inés Rodríguez(*)

Introducción

Las reglas del sistema comercial multilateral favorecen la competencia en los mercados. En efecto, dichas reglas están diseñadas para reducir o eliminar las medidas tomadas por los gobiernos en la frontera con respecto al ingreso de importaciones de bienes o servicios que tienen por efecto excluir esas importaciones o encarecerlas. A ello hay que agregar que las disposiciones sobre trato nacional contenidas en el GATT de 1994 y en el Acuerdo General sobre el Comercio de Servicios (AGCS) tienen por objeto eliminar las regulaciones que discriminan los bienes y servicios importados a favor de los nacionales. En términos generales puede decirse que los principios fundamentales de la OMC, a saber, la cláusula de la nación más favorecida (NMF), el trato nacional y la consolidación de compromisos van en la dirección de aumentar la competencia en los mercados.

Por otra parte, la cuestión de la competencia está presente en casi todos los acuerdos sectoriales resultantes de la Ronda Uruguay y posteriores a ella. El Acuerdo sobre Salvaguardias prohíbe a los Miembros adoptar o mantener limitaciones voluntarias de las exportaciones, acuerdos de comercialización ordenada u otras medidas similares respecto de las exportaciones o las importaciones, así como alentar o apoyar medidas equivalentes por empresas públicas o privadas. El Acuerdo sobre Obstáculos Técnicos al Comercio y el Acuerdo sobre la Aplicación de Medidas Sanitarias y Fitosanitarias requieren que los Miembros adopten las medidas menos restrictivas del comercio cuando persiguen objetivos regulatorios. También prohíben a los Miembros tomar medidas que obliguen o alienten a las instituciones no gubernamentales a actuar de manera incompatible con sus disposiciones. Estas normas tienen por objeto evitar que se restrinja el acceso al mercado de las importaciones, promoviendo así la competencia en los mercados domésticos.

En síntesis, la vinculación entre la liberalización comercial y la política de competencia ya ha sido reconocida en el contexto de la OMC y diversas disposiciones de los Acuerdos de la OMC afectan las medidas o instrumentos usados por los gobiernos que determinan las condiciones de competencia imperantes en sus mercados.

Distinta es la situación cuando se considera la ley de competencia, concepto más limitado que abarca las reglas y disciplinas establecidas por un gobierno relativas a acuerdos entre empresas privadas que restringen la competencia o al abuso de posición dominante. La ley de competencia es necesaria para asegurar que los mercados sean competitivos, especialmente en sectores no transables, y para controlar las prácticas anticompetitivas. Si bien ciertas barreras privadas al acceso a mercados detrás de la frontera erosionan los beneficios que los gobiernos esperan lograr de la liberalización comercial, muchos países no tienen leyes de competencia o agencias de competencia para luchar contra esas prácticas. Por otra parte, aun cuando exista una ley de competencia o una agencia de competencia, muchas veces esa agencia tiene poderes insuficientes para abrir los mercados domésticos a la competencia.

Existen en el marco de la OMC ciertas obligaciones para los Miembros en relación con la regulación de las prácticas privadas. En particular, revisten interés las disposiciones

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contenidas en el Acuerdo General sobre el Comercio de Servicios –AGCS– y los resultados de las negociaciones sobre los servicios de telecomunicaciones básicas y el Acuerdo ADPIC.

Disposiciones existentes en la OMC relativas a prácticas privadas restrictivas de la competencia

El Acuerdo General sobre el Comercio de Servicios

La preocupación por las repercusiones que los monopolios pueden tener en el acceso de las importaciones a los mercados se ha puesto de manifiesto en el artículo VIII del AGCS que se ocupa de los proveedores monopolistas de servicios (párrafos 1 a 4) y de los proveedores exclusivos de servicios sustancialmente aislados de la competencia (párrafo 5). La obligación fundamental es velar por que el proveedor no abuse de su posición monopolista para actuar en su territorio de manera incompatible con las obligaciones básicas de la cláusula de la nación más favorecida y los compromisos específicos asumidos por el Miembro de que se trate en relación con ese servicio.

Así, cada Miembro debe garantizar que cualquier proveedor monopolista de un servicio cuando proporcione el servicio monopolizado en un mercado relevante en su territorio no actúe de manera inconsistente con sus obligaciones relacionadas con el trato de la nación más favorecida bajo el artículo II y los compromisos específicos. El AGCS también especifica que cuando un proveedor monopolista compite, sea directamente o a través de una empresa afiliada, en el suministro de un servicio que no esté incluido en el ámbito de sus derechos de monopolio, el Miembro deberá asegurarse de que el proveedor en cuestión no abuse de su posición de monopolista para actuar en su territorio de una forma inconsistente con sus compromisos. Estas disposiciones también se aplican al caso de proveedores de servicios exclusivos en los que un país miembro formalmente o de facto autoriza o establece un número reducido de oferentes de servicios y controla sustancialmente la competencia entre los proveedores en su territorio.

El artículo IX del AGCS, reconociendo que ciertas prácticas comerciales de los proveedores de servicios pueden limitar la competencia y, por ende, restringir el comercio de servicios, dispone que cada Miembro, a petición de cualquier otro Miembro, entablará consultas con miras a eliminar tales prácticas. También impone la obligación de cooperar facilitando la información no confidencial que esté al alcance del público y que guarde relación con el asunto de que se trate, así como otras informaciones de que disponga, con sujeción a su legislación nacional y a reserva de la conclusión de un acuerdo satisfactorio sobre la salvaguardia del carácter confidencial de esas informaciones.

El Anexo del AGCS sobre Telecomunicaciones ha considerado la cuestión de la utilización de instalaciones controladas por empresas que gozan de un monopolio o una posición dominante en el mercado. Ello refleja la especial importancia que esta consideración tiene en el sector de las telecomunicaciones, en el que las redes nacionales suelen estar controladas por un proveedor importante y constituyen unas instalaciones esenciales para los competidores a fin de poder prestar servicios más complejos. Sin embargo, la cuestión puede revestir interés en una serie de ramas de la producción y actividades de servicios, sobre todo las redes de servicios públicos (por ejemplo, gas, electricidad, agua y transporte).

El referido Anexo establece, por ejemplo, que cada Miembro se asegurará que esté a disposición del público la información pertinente sobre las condiciones que afecten al

acceso a las redes y servicios públicos de transporte de telecomunicaciones y a la utilización de los mismos, y que ese acceso y esa utilización comporten términos y condiciones razonables y no discriminatorias.

Las cuestiones vinculadas a la interconexión se abordan con más profundidad en el llamado “documento de referencia” que forma parte de los compromisos asumidos por muchos Miembros de la OMC como consecuencia de las negociaciones básicas concluidas en febrero de 1997. El documento de referencia también incluye disposiciones relativas al posible uso indebido de información. Es importante señalar que estas disposiciones son obligatorias sólo para aquellos Miembros que han asumido compromisos en el sector de telecomunicaciones.

En el Anexo sobre servicios financieros se adaptan las disposiciones básicas del AGCS a las características específicas del sector financiero. El Anexo excluye las medidas cautelares adoptadas por los Miembros de la aplicación de las disposiciones básicas del Acuerdo. Entre las disposiciones contenidas en el Anexo, algunas se refieren a cuestiones vinculadas a la competencia. Así, a título de ejemplo, se puede mencionar que el Anexo dispone que los Miembros indiquen en sus listas de compromisos los derechos de monopolio existentes y que se comprometan a eliminar o reducir el alcance de tales derechos.

El Acuerdo ADPIC

A diferencia del AGCS que sólo contiene normas para prevenir ciertas prácticas empresariales, el Acuerdo ADPIC autoriza expresamente a adoptar medidas para hacer frente a un comportamiento de empresas que se considere que tiene efectos desfavorables sobre el comercio internacional. Ello se vincularía con el interés de algunos países, sobre todo países en desarrollo, manifestado en la negociación del Acuerdo de la OMC sobre los ADPIC, de que los compromisos para proteger la propiedad intelectual se compensaran con el reconocimiento del derecho de los Miembros a impedir prácticas anticompetitivas que comportaran el ejercicio de derechos de propiedad intelectual. Ese interés se tuvo en cuenta en el párrafo 2 del artículo 8 y en el artículo 40.

El párrafo 2 del artículo 8 reconoce que “podrá ser necesario aplicar medidas apropiadas, siempre que sean compatibles con lo dispuesto en el presente Acuerdo, para prevenir el abuso de los derechos de propiedad intelectual por sus titulares o el recurso a prácticas que limiten de manera injustificada el comercio o redunden en detrimento de la transferencia internacional de tecnología”.

El artículo 40 se refiere al control de las prácticas anticompetitivas en las licencias contractuales. En él se afirma el derecho de los Miembros a especificar en su legislación las prácticas o condiciones relativas a la concesión de licencias que puedan constituir en determinados casos un abuso de los derechos de propiedad intelectual que tenga un efecto negativo sobre la competencia en el mercado correspondiente y a adoptar, de forma compatible con las restantes disposiciones del Acuerdo, medidas apropiadas para impedir o controlar dichas prácticas. No hay ningún acuerdo explícito sobre las prácticas que habrá que considerar que corresponden a esta categoría, ni, de hecho, sobre las que no debe considerarse que corresponden. Sin embargo, el Acuerdo contiene una breve enumeración ilustrativa de prácticas que pueden tratarse como abusos, a saber: las condiciones exclusivas de retrocesión, las condiciones que impidan la impugnación de la validez y las licencias conjuntas obligatorias.

Las medidas para poner remedio a prácticas anticompetitivas que comporten el ejercicio de derechos de propiedad intelectual tienen que ser compatibles con las disposiciones del Acuerdo sobre los ADPIC. Un tipo de medida explícitamente previsto es la concesión obligatoria de licencias en materia de patentes. El artículo 31 establece condiciones detalladas encaminadas a proteger los intereses legítimos del titular de los derechos con respecto a la concesión de licencias obligatorias, pero varias de esas condiciones se atenúan cuando las licencias se conceden para “poner remedio a prácticas que, a resultas de un proceso judicial o administrativo, se haya determinado que son anticompetitivas” (por ejemplo, las condiciones relativas a tratar de obtener en primer lugar una licencia de carácter voluntario, a la cuantía de la remuneración que deba pagarse al titular de los derechos y a la limitación del abastecimiento del mercado interno con el producto de que se trate).

De manera similar al AGCS, el Acuerdo sobre los ADPIC contiene una disposición en el artículo 40 en virtud de la cual un Miembro que esté considerando la posibilidad de entablar una acción contra una empresa de otro Miembro puede solicitar la celebración de consultas con este Miembro, el cual deberá cooperar facilitando la información públicamente disponible y no confidencial pertinente, así como otras informaciones de que disponga, con arreglo a la ley nacional y a reserva de que se concluyan acuerdos mutuamente satisfactorios sobre la protección de su carácter confidencial. Asimismo, un país cuyas empresas sean objeto de esa acción en otro país Miembro podrá también solicitar la celebración de consultas.

Ventajas y limitaciones del enfoque sectorial

Los Acuerdos de la OMC representan una apertura para discutir cuestiones vinculadas a la política de competencia. Asimismo, contienen disciplinas sobre ciertas prácticas privadas que pueden crear distorsiones sin imponer costos de aplicación significativos. Esas disciplinas pueden ser ampliadas en futuras negociaciones, en particular, en el caso de las negociaciones en materia de servicios.

Por otra parte, el enfoque sectorial deja bastante margen de maniobra a los Miembros, que pueden adoptar las leyes de competencia más adecuadas a sus necesidades con la única condición de respetar el trato nacional para los productos o servicios. Esto es importante, en particular, para los países en desarrollo que no ven restringida su capacidad para aplicar ciertas políticas que ellos juzguen convenientes a sus intereses de desarrollo, como por ejemplo permitir un monopolio de manera que su empresa doméstica logre economías de escala y pueda competir globalmente.

El enfoque sectorial presenta limitaciones, siendo una de ellas que la dispersión de las normas que abordan el tema de la competencia no permite definir conceptos complejos generalmente recogidos en las legislaciones de competencia de la mayoría de los países que cuentan con este tipo de legislación. Consecuentemente, las referencias a la competencia contenidas en los acuerdos existentes al no estar ligadas por ningún consenso o entendimiento común son objeto de variadas interpretaciones en los diversos acuerdos de la OMC. Por otra parte, para muchos países en desarrollo, donde no existe cultura de la competencia o donde ésta es una novedad, las nociones como posición dominante en el mercado o intentos de monopolización son poco familiares y, por consiguiente, difíciles de interpretar cuando se trata de defender los propios intereses de conformidad con las reglas de la OMC vigentes.

El enfoque exclusivamente sectorial sobre prácticas anticompetitivas puede llevar a cierta incoherencia entre ciertas medidas comerciales autorizadas en la OMC y los objetivos de la política de competencia. En este sentido, el Acuerdo relativo a la aplicación del Artículo VI del GATT de 1994 (Acuerdo Antidumping) plantea problemas particulares. En virtud del Acuerdo Antidumping los Miembros pueden, bajo ciertas condiciones, imponer derechos antidumping o acordar compromisos relativos a los precios para responder a ciertas prácticas de fijación de precios de las empresas. Las medidas antidumping constituyen una categoría de medidas comerciales con repercusiones inmediatas sobre la competencia.

En el caso del dumping predatorio los procedimientos antidumping pueden considerarse como una prolongación internacional de las leyes nacionales sobre la competencia, que tienen por finalidad impedir los abusos de las posiciones dominantes. En principio, por consiguiente, las reglamentaciones antidumping pueden tener un efecto favorable a la competencia. Sin embargo, dadas las características del Acuerdo Antidumping que no exige la verificación de las razones por las que se produce el dumping se ha sostenido que los procedimientos antidumping se utilizan frecuentemente para reducir la competencia en el mercado. La acción antidumping contradeciría, así, los principios fundamentales de la competencia al proteger a los competidores y no a la competencia y proporcionaría a las compañías un instrumento propicio para restringir la que se ejerce desde el extranjero. Muchos asuntos antidumping se habrían considerado “prácticas leales” con arreglo a las leyes nacionales sobre competencia.

Otra limitación del enfoque sectorial existente es que sólo se ocupa de algunas prácticas privadas anticompetitivas y no aborda cuestiones como los cárteles intrínsecamente nocivos, considerados el tipo más pernicioso de práctica anticompetitiva desde el punto de vista del comercio y el desarrollo, que pueden obrar en detrimento de los beneficios que deben dimanar de la liberalización del comercio internacional.

En particular, los cárteles internacionales constituyen un claro ejemplo de prácticas competitivas transfronterizas que pueden incidir claramente en el acceso a los mercados cuando reparten los mercados nacionales entre las empresas participantes. Además, aun cuando ello no ocurra, los cárteles internacionales distorsionan el funcionamiento eficaz de los mercados internacionales, entre otras razones porque encarecen artificialmente las importaciones de los países. Asimismo, ciertos cárteles que operan en determinados sectores de servicios, como el del transporte marítimo internacional o los servicios financieros pueden resultar particularmente perjudiciales para el comercio, ya que no sólo restringen el comercio del servicio de que se trate, sino que también elevan el precio que los exportadores pagan por ese servicio, introduciendo otro nivel de distorsión.

Dado que las partes involucradas en cárteles internacionales se encuentran en diferentes países es difícil para cualquier país aun cuando cuente con legislación de competencia responder adecuadamente a esa conducta si falta un marco de cooperación con la autoridad encargada de la competencia del país de origen de la empresa causante del daño.

También en el caso de los cárteles de exportación que se originan en un país pero tienen efectos anticompetitivos en otros países la cooperación es un elemento fundamental para tomar medidas eficaces contra esas prácticas. Los cárteles de exportación no entran en el ámbito de las leyes sobre la competencia en la mayoría de los países porque se estima que caen fuera de la jurisdicción de estas leyes; también suele ocurrir que están explícitamente excluidos de la aplicación de esas leyes. A pesar de no representar problemas de acceso a los mercados, pueden quitar a algunos países que han liberalizado su comercio los beneficios de la liberalización comercial. En principio, la legislación sobre la

competencia de los países importadores será aplicable en general a los cárteles de exportación; sin embargo, suele ser difícil iniciar las acciones apropiadas ya que las pruebas necesarias para demostrar la existencia de los cárteles se encuentra normalmente fuera de la jurisdicción del país importador.

Las normas de la OMC no prevén ninguna medida específica contra los cárteles. Para algunos autores el artículo XI del GATT, que prohíbe el uso de restricciones cuantitativas y prohibiciones a la exportación, podría ser usado para atacar los cárteles de exportación, dado que dichos cárteles restringen la exportación. Sin embargo, esta disposición podría desempeñar un papel reducido con respecto a los cárteles de exportación privados ya que habría que demostrar que una medida gubernamental apoya el cártel a la exportación.

Comentarios finales

La política comercial complementa y refuerza la política de competencia. En ese sentido, cabe subrayar que la liberalización de las medidas gubernamentales que restringen el comercio así como otras formas de desreglamentación pueden ser los medios más eficaces para prevenir o rectificar las prácticas comerciales anticompetitivas, al introducir una mayor competencia en el mercado.

No obstante, incluso cuando haya una amplia liberalización comercial, se necesitará una política de competencia. Ello se debe, entre otras razones, a la existencia de barreras comerciales tales como costos de transporte, idioma, que permiten segmentar mercados y a crear nichos donde las empresas pueden ejercer su poder de mercado; también, a la existencia de razones tecnológicas por las que los mercados pueden ser imperfectamente competitivos y a la posibilidad que tienen las empresas de tomar medidas para limitar la competencia relacionadas con el diseño de los productos, distribución, publicidad, etc. La aplicación de tal política en el plano nacional afectará a los interlocutores comerciales. Muchos de esos efectos serán positivos pero también es probable que algunas decisiones afecten negativamente a los interlocutores comerciales, pudiendo crear tensiones en las relaciones internacionales.

Por otra parte, los beneficios potenciales de la liberalización comercial no se aprovecharán plenamente si prevalecen prácticas anticompetitivas de las empresas en los mercados nacionales o internacionales. Los acuerdos de la OMC, reconociendo este hecho, han incorporado diversas dimensiones de la política de competencia. Así, se ha adoptado una serie de disposiciones y mecanismos de interés con relación a esta cuestión: las disposiciones sobre consulta y cooperación incluidas en cada uno de los principales acuerdos de la OMC, las normas en determinadas esferas que los gobiernos deben cumplir para combatir o regular las prácticas empresariales restrictivas de la competencia (en particular, en la esfera de las telecomunicaciones básicas). Sin embargo, el enfoque sectorial existente en la OMC es insuficiente para resolver algunos problemas de comercio internacional vinculados a la competencia. Si bien se podría pensar en reforzar algunas disposiciones y establecer reglas de aplicación a determinados sectores o campos en los que surjan aquellos problemas, quedaría pendiente la cuestión de la coherencia de un enfoque de esas características.

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4.5. POSITIVE AND NEGATIVE ASPECTS OF A SECTORAL APPROACH, WITHOUT A MULTILATERAL COMPETITION FRAMEWORK AND DEVELOPING COUNTRIES PERSPECTIVE ON A MCF

by Homero Aníbal Larrea Monard*

I. Introduction.-

In 1890 with the passage of the Sherman Act the United States of America became the first country in the world to attempt general statutory control of the power wielded by large business enterprises³⁶. During the II post-war era many developed nations, some economic integration agreements and some developing nation's also enacted laws that regulated restrictive or anti-competitive business practices. A clear example being the European Community's³⁷ as an umbrella to its members national competition laws it enacted supranational competition laws, i.e. communitarian laws, applicable on all its Member States.

The further liberalization of the international economic order through the establishment of rules based on a multilateral trading system that began with the General Agreement on Trade and Tariffs (GATT/47) has continued with the World Trade Organization (WTO) today. This has allowed for an increased market access to Member nations and costumes territories worldwide. Due to this system a worldwide augmentation of bound tariff reductions and an elimination of governmental barriers in trade have and are taking place. In order to strengthen the multilateral trading system whose objective is to create the conditions for an increase in overall global welfare –mainly through trade liberalization- it is argued by some that international competition policy and law would be one of the mechanism's that would support and guard the principles enshrined in it³⁸. Thus, the establishment of an international competition policy and law would allow for the expansion of the coverage of the multilateral trading system's objectives and rules through the prevention of potentially restrictive private business practices. So, it seems that today those practices are slowly replacing governmental barriers to trade from being pursued.

With the adoption of such policies and laws countries would be provided with the tools to reduce and prevent actual or future restrictive business practices that might hinder trade and competition on a worldwide scale. Thus, further reinforces trade liberalization, guarantees a level playing field for all economic agents and increases worldwide social welfare.

The apparent need to ratify and initiate discussions on the modalities for negotiation of Multilateral Competition Framework (MCF) –i.e. Policy and law- in this ninth round of trade negotiations is not likely to be easily agreed to by all concerned parties³⁹, i.e., by all WTO

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³⁶ Jackson, Davy and Sykes, Legal Problems of International Economic Relations, 1995, at p. 1062.

³⁷ More commonly known as the European Union (EU), as of now comprised of 15 Member States.

³⁸ Vid. Par. 7, p. 5, TD(X)/PC/1, Report of the Pre-UNCTAD X Seminar on the Role of Competition Policy for Development in Globalizing World Markets (Geneva, 14-15 June 1999), UNCTAD.

³⁹ During the discussions related to paragraph 23 of the "Doha Programme for Development", at the IV WTO Ministerial Conference, India, threatened to walk out if the Singapore issues were included in negotiations without a manifest consensus being previously ascertained regarding the initiation, or not, of negotiations on the subject. Furthermore, in a statement made prior to the adoption of the Doha Declaration, the Chairman of the Conference, Mr. Youssef Hussain Kamel (Qatar), expressed his understanding that the requirement in paragraph 23 for a decision to be taken, by explicit consensus, on the modalities for negotiations before negotiations on competition

members. It is argued that a just distribution of the wealth created by trade liberalization has not occurred. Most of it and its positive side effects have mainly benefited the developed countries, while developing countries social and economic realities and interests have not been adequately addressed or benefited⁴⁰. This points out the difficulties that have risen in the ongoing discussions on the establishment or not of a Multilateral Competition Framework.

This paper begins by briefly describing what is understood to be "International Competition Policy and Law". It goes on to examine the existing competition regulations inferred from the multilateral trading rules, its shortcomings in addressing the systemic problems that arise from them and the viability of a sectoral approach for its establishment. It also emphasizes the developing countries views on the establishment of a Multilateral Competition Framework. The formulation of a Multilateral Competition Framework could allegedly guarantee the existing market access concessions and promote further trade liberalization increasing an overall worldwide welfare.

These objectives could be possibly fulfilled through such a system. However, due to the scope of the differing economic realities in each country involved, and because of the parallel but not necessarily coinciding objectives each policy seeks i.e. market access and free competition. These facts may not allow the benefits of creating a Multilateral Competition Framework to accrue, especially for the developing world.

II. The debate over a Multilateral Competition Framework.-

1. International Competition Policy and Law.-

The drafters of the International Trade Organization (ITO) Charter were by far much more ambitious in the subject matter they intended to regulate than what was finally agreed to in today's WTO. They were particularly keen on the issue of Competition Policy and Law at a multilateral level. It seems that the original drafters of the ITO charter saw the need to not only address the restriction and eventual elimination of governmental barriers to trade, such as high tariffs or non tariff measures, but also believed it wise and necessary to deal with private business barriers to trade (Chapter V of the ITO Charter). Thus, closing the circle and the links in the world economic system they wanted to create.⁴¹

More than fifty years later the debates over the establishment of a Multilateral Competition Framework have begun again. In this regard the conceptual differences between competition policy and competition law must be ascertained. Competition policy comprises a much general series of objectives than does competition law. Fundamentally, it seeks to establish a definite method of action by governments based on the use and application of certain measures and instruments. Such instruments selected to guide and determine the "conditions of competition" that rule on their markets, whereas competition law is one of those instruments. It is an accessory measure. It is an element in competition policy that

policy and other "Singapore issues" could proceed, gave "each Member the right to take a position on modalities that would prevent negotiations from proceeding after the Fifth Session of the Ministerial Conference until that Member is prepared to join a explicit consensus." See WTO Summary Record of the Ninth Meeting, doc. WT/MIN(01)/SR/9.

⁴⁰ See World Economic Situation and Prospects 2003 (New York: United Nations, 2003), p. 18.

⁴¹ After the II World War, the Multilateral security system that was being created comprised a political arm, the United Nations, a financial arm, the IFM and World Bank, and, a trade arm, the ITO, which in the end never came into to existence.

seeks to promote, protect and guarantee, alas with the least minimum intervention possible, market contestability in the market place.

A particular characteristic to competition policy is that while the former deals, regulates and balances out both private and public actions; competition law exclusively regulates the behavior of private enterprise.⁴² Further, it must be noted that competition policy includes structural reforms like: privatization, deregulation, trade liberalization, non- discrimination, etc. A policy that is also definitively affected by the international treaties the country in concern has entered into. In that regard the agreements reached in the Uruguay Round administered by the WTO and the trade negotiations that are now taking place deal with various aspects of competition policy. Thus, for some the question at present is whether to deal or not with competition law from a multilateral perspective. Being the WTO the multilateral trade forum it most exclusively deals with improving market access for its members, i.e. the progressive elimination of border measures. Unlike competition law which specifically seeks to protect competition itself and consumers as well.⁴³

2. The existing multilateral regulations related to competition policy and the arguments for a sectoral approach to Multilateral Competition Framework.-

A number of Uruguay Round and post-Uruguay WTO agreements bear provisions that are linked to competition policy. The Agreements involved are GATT, GATS, TRIPS, the Agreement on Safeguards, and the Telecommunications reference paper⁴⁴. GATT contains provisions like article II:4 that deals to some degree with import monopolies. Other subjects found in the same agreement that are also linked to competition are antidumping (article VI), export subsidies, subsidies, countervailing duties, government procurement and state trading enterprises (article XVII)⁴⁵; the GATS agreement, Articles VIII and IX provisions, ensure that state monopolies do not act in a manner inconsistent with their obligations and commitments and do not abuse their monopoly position. The TRIPS Agreement, articles 8 and 40, authorize Members to take measures against abuses of intellectual property rights and anticompetitive licensing practices. The Agreement on Safeguards, article 11:3 provides that Members can not encourage or support the adoption of non-governmental measures equivalent to voluntary export restraints, orderly market arrangements and/or other governmental arrangements prohibited under article 11.1 of the same Agreement. Finally, the Telecommunications Reference Paper establishes a commitment to adopt appropriate measures to prevent anti-competitive practices by major suppliers of telecomm services.⁴⁶

⁴² Hoekman Bernard and Peter Colmes, Competition Policy, Developing Countries and the WTO, World Bank, April 1999, pp. 2-3.

⁴³ Geneva, Closer Multilateral Cooperation on Competition Policy: The Development Dimension, UNCTAD, Consolidated Report on issues discussed during the Panama, Tunis, Hong Kong and Odessa Regional Post-Doha Seminars on Competition Policy held between 21 March and 26 April 2002, 15 May 2002, p.9.

⁴⁴ As stated by professor J. Mathis "6. WTO law as expressed in the GATT and GATS does not establish general obligations for Members to affirmatively create internally competitive markets, nor require them to take affirmative actions or provide remedies against private operators engaging in restrictive practices that affect the trade of other Members. Only a few exceptions are noted, for example, government sponsored monopolies and cartels; GATS Article IX providing for consultations regarding certain anti-competitive practices; and provisions within the GATS telecommunications reference paper." See James H. Mathis, (WTO) Core Principles and Prohibition: Obligations Relating to Private Practices, National Competition Laws, and Implications for a Competition Policy Framework, (Geneva: United Nations, 2003), p. 9.

⁴⁵ Most of this subject matter is now more strictly regulated through specific agreements, for example, the Agreement on Subsidies and Countervailing Duties, the Agreement on Agriculture, the Agreement on Antidumping, the Agreement on State Trading Enterprises, etc.

⁴⁶ Other trade experts also recognize this, for example, Mr. Ernst-Ulrich Petersmann says: " Competition rules (in the broad sense, relating to governmental and private restraints of competition) are mainly found in the GATT93 and its associated legal instruments, and in the GATS and the TRIPS Agreements." See Ernst-Ulrich Petersmann, International Competition Rules for the GATT-MTO World Trade and Legal System, Journal of World Trade, p. 42.

So, the question to consider as stated by the OECD Joint Group on Trade and Competition is "... whether existing WTO provisions and Agreements can or should be supplemented by new provisions, or even a horizontal agreement on the application of competition policies."

In that regard the arguments in favor of a sectoral approach on international competition policy can be summarized into the following points: a) the possibility that, Members agreeing, it could be easier to begin negotiations towards the enhancement of the already existing competition related rules in the WTO Agreements; b) it might be easier for developing countries to agree on negotiating certain additional sectors, albeit only very few of them, instead of seeking a comprehensive agreement which could be far more difficult to attain⁴⁷; c) such flexibility could also be understood as a type of Special and Differential Treatment (SDT) in developing countries benefit; d) by definition a sectoral approach constitutes the acknowledgment of exceptions which means that since not all sectors are covered some will be automatically left out, this could also be understood as another type of SDT⁴⁸; and e) theoretically speaking a sector specific approach could better deal with sector specific competition problems and the solutions to those problems due to the specialized expertise that could be brought forward.

Consequently such approach could also help address particular problems in specific sectors like for example the uncompetitive use of licensing agreements in intellectual property, etc. Following this line of thought, Members could agree on expanding the scope of the existing operative provisions in GATT and GATS by drafting annexed agreements to be included in the Doha Package. They could also reach an agreement to produce understandings concerning the application of the cited WTO covered provisions. Modalities, which could ease up, the negotiating process in order to attain a Multilateral Competition Framework based on a sectoral approach.⁴⁹

On the other hand, sectoral approach shortcomings are to be found in the fact that it will most surely leave unattended horizontal situations and fragment competition law. Thus, this piecemeal approach runs the risk of causing through its use that various existing competition related provisions found in the different trade agreements might be developed inconsistently amongst each other. Moreover, the sectoral approach will most surely take us through a treacherous road that will cause developing countries -especially those that are not familiar with competition policy and law- to be unable to take advantage of such provisions due to the discrepancies that might take place.⁵⁰

For that reason, it is advisable that **any sector specific competition provisions wich are in place now or that might be negotiated and stablished in the future, should be**

⁴⁷ A sort of positive list approach, so each country would decide on their own rethym for the adoption of commitments on competition laws and in which sectors of the economy they would be willing to agree on applying them.

⁴⁸ A sector specific approach could constitute a sort of positive list approach, a negotiation policy that would allow countries to decide on the pace at which they would be willing to implement a multilateral competition policy framework.

⁴⁹ Coinciding with Professor J. H. Mathis, this sort of sectoral approach, "...would not focus on the elimination of anti-competitive practices as a general objective, nor limit its scope to international cartels. Rather, the attention would be placed on the need to address restrictive practices that are limiting exports or imports of goods or services. Both the import and export dimensions would be treated in equal measure by establishing a Member's obligation to address a request made by other Member states." Ob. Cit. 9, pp.12-13.

⁵⁰ UNCTAD, **CLOSER MULTILATERAL COOPERATION ON COMPETITION POLICY: THE DEVELOPMENT DIMENSION**, Consolidated Report on issues discussed during the Panama, Tunis, Hong Kong and Odessa Regional Post-Doha Seminars on Competition Policy held between 21 March and 26 April 2002, 15 May 2002, PP. 17-20.

broadly consistent with the general principles of a sound multilateral competition policy and law, i.e. of a MCF. So those those provisions complement rather than replace the general framework that might be instituted.

Additionally, as the OECD Joint Group on Trade and Competition stated

“...Sectoral approaches have the advantage of helping to address particular problems in a way that gives Members the confidence to make reciprocal market access commitments in areas that have previously not been open to trade. In doing so, these sectoral agreements might help build confidence in enhanced co-operation, and in more horizontal multilateral rule making in respect of competition policy. However, by their nature, sectoral approaches could lead to the application of fragmented competition policy on an industry basis both domestically and internationally. If such segmentation were to occur, then the sectoral agreements might not lead to the convergence of competition law and policy or further horizontal multilateral rule-making.”⁵¹

A fact that takes us to conclude that there is a need for a more systematic across-the-board coverage of competition law and policy principles in order to avoid the dangers described. Specifically because with a multilateral competition framework the promotion of consistency and fairness in the universal application of competition policy and law policy enhances the ability to take an economic-wide perspective, reduces the risk of government capture by industry, and minimizes duplication, delay, high transaction costs and legal uncertainty.

3. Developing Countries Perspectives on a Multilateral Competition Framework.-

The establishment of a Multilateral Competition Framework is a problem that is now being addressed and discussed by the international community. This framework, be it within the World Trade Organization or outside of it, seems likely to be created in the long-term future. Due to that, any multilateral mechanism on this topic will have to take into account the developing countries points of view, interests, social and economic realities and especially their development needs. If such a framework is to be equitably applied it should be flexible enough to accommodate all its member's valid concerns, and particularly the Developing Countries needs. In the effect that this reality is not adequately considered in the course of the possible negotiations any expectations on a positive outcome for the topic will be, sadly but truly, an illusion of what could have been that was not.

In that regard, it is necessary to remember that the main objective of the multilateral trading system is to raise living standards, ensure full employment and create a large and steadily growing volume of real income as well as an effective demand through the expansion of the production of and trade in goods and services.⁵² Which means the progressive reduction of **border measures**, i.e. governmental restrictions to market access: like prohibitively high tariff barriers and non-tariff barriers. All in all “...The common aim of most GATT rules is to promote non-discriminatory market access and to discourage governmental as well as certain private market distortions, for example, injurious dumping.”⁵³ Conversely, competition policy seeks to achieve a socially efficient allocation of resources and thus pretends to create the adequate conditions for overall consumer welfare and efficiency gains.

⁵¹ See OECD, **Trade and Competition Policies: Options for a greater coherence**, OECD, France, 2001, PP. 24-25.

⁵² See par. 1 of the Preamble to the Agreement Establishing the World Trade Organization.

⁵³ Ibidem. P. 43.

Thus, since the benefits that accrue to society from the consistent and coherent application of a sound competition policy have been theoretically and practically proven for over one hundred years in a domestic setting, such presumption could support those that argue in favor of the application of the same principles on the international level. In any case, the fact is that the merger of the two related policies into the multilateral trading system: market access and free competition, without the real intent to achieve a believable mutually supportive confluence amongst them, may only lead to the unjust establishment of further damaging commitments, i.e. obligations on the Developing Countries.

Moreover, it cannot be forgotten that discussions on this topic are shadowed by the on going multilateral “Doha” trade negotiations. Hence the importance of considering the fact that, inter alia, in these trade negotiations other important topics of much interest for a great number of developing countries, like agriculture, services, SDT, implementation, intellectual property, etc also have to be taken into account.⁵⁴ Topics that are part of a single negotiating process and that are governed by the fundamental negotiating principle of the single undertaking.⁵⁵ As it is well known the negotiation timetables accorded in the Doha WTO Ministerial Declaration for four developing countries topics of interest have not been met: TRIPS and public health, Special and Differential Treatment, implementation issues and, what is most important, the negotiating modalities for a further reduction in tariff bindings and the progressive, but effective, elimination of subsidies, export promotion schemes and state aids in agriculture.

This lack of serious advances in the negotiation table reveals the lack of political will to meet the binding political agreements adopted by all the WTO Members at the launch of the “Doha Developing Programme” i.e. the 9th multilateral trade negotiations round. Consequently, how right would it be to talk about the establishment of a MCF, or any other Singapore issue⁵⁶ for that matter if no real and tangible progress in the other negotiation topics of interest for the developing world is seen?

III. Conclusion

As was stated in the introduction, through out the development of this paper we have shown: a) the main difference between competition policy and competition law; b) examined the existing competition provisions in the WTO covered agreements; c) outlined the policy options that favor and disfavor a sectoral approach for a multilateral competition framework; and, d) stated out the implications such a multilateral competition framework, be it sectoral or general, could have for the developing Members of the WTO.

Specifically, we have affirmed that competition policy is a much broader concept which comprises competition law. The reason for that resides in the fact that competition policy not only does it covers competition law, but also other policy options such as privatization,

⁵⁴ The objective of the present multilateral trade negotiations lunched at the conclusion of the IV Ministerial Conference of WTO Members, at Doha, Qatar, in November 2001, was threefold: a) to give due consideration to the developing countries demands of a more just distribution of the wealth created by trade and the effective implementation of Special and Differential Treatment provisions in the WTO Covered Agreements; b) regain momentum to ensure further and effective trade liberalization on a worldwide scale; and, c) support, on the economic side, the war against terror due to the September 11th tragedy suffered by the United States of America.

⁵⁵ The single undertaking principle states that only if there is consensus and agreement on all the subjects negotiated is there a definitive agreement and thus a successfully concluded trade round.

⁵⁶ Other Singapore Issues are: investment, trade facilitation, government procurement, e-commerce and environment. The name Singapore issues was given due to the fact that this issues were tabled during the II WTO Ministerial Conference at Singapore in 1996.

deregulation, etc. Moreover, competition policy regulates and balances out both private and public actions where as competition law exclusively regulates the behavior of private enterprise. Therefore, any Multilateral Competition Framework must take into account this fundamental difference in order to adequately consider an effective MCF.

Further on, it has been established that trade negotiators did in fact take into account the effects that private restrictive business practices might have on the market access commitments negotiated during the Uruguay Round of trade negotiations. Examples being the provisions found in the GATT (article II:4 import monopolies), antidumping (article VI), export subsidies, subsidies, countervailing duties, government procurement and state trading enterprises (article XVII); TRIPS Agreement (articles 8 and 40, authorize Members to take measures against abuses of intellectual property rights and anticompetitive licensing practices); etc.

In that regard, we were able to ascertain that sectoral approaches have the advantage of helping to address particular problems in a way that could allow Members the confidence to make reciprocal market access commitments in areas that have previously not been open to trade. What's more so, sectoral agreements might help build confidence in enhanced co-operation, and in more horizontal multilateral rule making in respect of competition policy. All in all that same fragmentation could lead to incoherencies and inconsistencies that, in the long run, will affect negatively the objective of the MCF. A horizontal multilateral competition framework on the other hand would enhance the ability to take an economic-wide perspective, reduces the risk of government capture by industry, and minimizes duplication, delay, high transaction costs and legal uncertainty.

Moreover, the developing countries perspectives on this issue were also addressed. In that regard, the arguments in favour of a MCF seem reasonable enough to consider the establishment of such a system. Still, as it is publicly known, the negotiation timetables accorded in the Doha Ministerial Declaration for issues of great importance to the developing world, such as TRIPS and public health, Special and Differential Treatment, Agriculture, etc. have not been met. A truth that can not be denied and that developing country WTO Members will seek it be addressed first, before making an allowance for the conclusion of the on going trade negotiations.

Thus, on the one side, the fact is that the merger of the two related policies into the multilateral trading system, i.e. market access and free competition, without the real intent to achieve a believable mutually supportive confluence amongst them, may only lead to the unjust institution of further damaging commitments and obligations on the WTO Developing Country members; where as, on the other side, if no due consideration of the development perspective such a MCF should have is given, the probability on initiating a negotiations on a MCF are bound to be disastrous. Reason enough to assert that the establishment of a Multilateral Competition Framework or even a series of sectoral agreements would be in serious jeopardy.

Section IV
Reflexions on the options and implications of a possible multilateral
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Power Point presentations

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