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TRADE AND COMPETITION POLICY IN THE WTO SYSTEM

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ABSTRACT

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This paper surveys the major options that have been proposed concerning a possible agreement on trade-related anti-trust principles and evaluates both their desirability and feasibility. Three criteria are used to evaluate the options: (i) the extent to which they enhance the contestability of markets for foreign firms; (ii) whether they will enhance the national economic welfare of WTO members; and (iii) their effect on the functioning and integrity of the existing trading system.

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NON-TECHNICAL SUMMARY

For over 40 years policy-makers have discussed the need for – and the possible modalities of – multilateral disciplines pertaining to market conduct by enterprises. Interest in this subject has resurfaced in recent years, and it appears likely that the topic will be on the agenda of the first Ministerial meeting of the World Trade Organization (WTO) to be held in Singapore in December 1996. Despite the large number of papers that have been written on the feasibility and desirability of multilateral agreement on competition/anti-trust rules, great differences of opinion continue to exist, both among the academic community and among policy-makers. Some question the rationale for putting the issue on the multilateral negotiating agenda or doubt the feasibility of achieving meaningful agreements; others favour seeking the adoption of uniform, minimum standards and are relatively optimistic about attaining this. In part, the disagreements reflect widely differing objectives by the various stakeholders – both within and across countries. These include not only importers, exporters and trade policy officials, but also competition (anti-trust) authorities and the anti-dumping lobby. To a significant extent differences in opinions do not concern competition law issues *per se* as much as the relationship between trade and competition policies.

This paper asks what can be learned from recent trade negotiations regarding the feasibility of alternative types of international agreement on trade-related anti-trust principles (TRAPs). It starts with a survey of the major options that have been proposed concerning a possible agreement on TRAPs. This is followed by an analysis of the desirability of these various options. As in any such analysis, much depends on the yardsticks employed. Three criteria are useful in evaluating the options in the anti-trust area: (i) the extent to which the various options help address the purported rationale that underlie the recent interest by proponents of anti-trust to pursue multilateral disciplines – enhance the contestability of markets for foreign firms; (ii) the likely impact of the alternatives on national economic welfare of WTO members; and (iii) their effect on the functioning and integrity of the existing trading system.

From a trade-policy-related perspective a key challenge is to apply competition law principles to the traditional domain of the WTO – namely, its trade policy rules. To be relevant to the WTO and the multilateral trading system, anti-trust or competition law agreements should support the objective of the WTO – liberalization of trade. A tentative start was made in this direction during the Uruguay Round of multilateral trade negotiations with the prohibition on private practices that are equivalent in effect to quantitative import or export

restrictions. The opposition to further linkages between anti-trust and trade policy is substantial, however. Regional integration agreements illustrate that the linkage to trade policy, especially anti-dumping and similar 'unfair trade' instruments, may be difficult to achieve.

Recent regional integration agreements also suggest that agreement on minimum competition law standards may be more feasible than is often supposed. There is therefore potential scope for agreement on minimum anti-trust principles. In many areas where government policies significantly restrict competition, agreement on minimum standards of anti-trust will do little to enhance contestability of markets, however. Conversely, in relatively open economies minimum standards will do little to further enhance market access for foreign firms. While a TRAPs agreement on minimum standards may do little to directly supplement and enhance trade and investment liberalization, from a welfare perspective an agreement on minimum standards for anti-trust could be beneficial, especially in developing countries that currently do not enforce any competition norms. In so far as the multilateral negotiating process helps overcome resistance in domestic political markets against anti-trust, there may be a positive pay-off to putting the subject on the agenda. There may also be benefits to the trading system, as the reach of WTO non-violation dispute settlement could then become more relevant as its reach depends in part on the existence of anti-trust legislation

I. Introduction

Despite the many papers that have been written on the feasibility, desirability, and possible modalities of negotiating a multilateral agreement on competition/antitrust rules, no consensus has yet emerged. Some question the rationale for putting the issue on the multilateral negotiating agenda or doubt the feasibility of achieving meaningful agreements; others favor seeking the adoption of uniform, minimum standards and are relatively optimistic about attaining this. In part the disagreements reflect widely differing objectives by the various stakeholders--both within and across countries. These include not only importers, exporters and trade policy officials, but also competition (antitrust) authorities and proponents of "unfair trade" laws such as antidumping. To a significant extent differences in opinions do not concern competition law issues *per se* as much as the relationship between trade and competition policies.

This paper asks what can be learned from recent trade negotiations regarding the desirability and feasibility of alternative types of international agreement on trade-related antitrust principles (TRAPs).[1] Section II reviews the major options concerning a possible agreement on TRAPs. Given the vast literature that has emerged, the discussion is necessarily selective. The desirability of these various options is analyzed in Section III. Three criteria are used: (i) the extent to which the contestability of markets increases; (ii) the likely impact on the welfare of WTO members; and (iii) the possible effect on the trading system. Section IV turns to the feasibility question, drawing upon the experience of recent regional and sectoral negotiations. Section V concludes.

The argument of the paper can be summarized as follows. Agreement on minimum competition law standards may be more feasible than is often supposed, but a TRAPs agreement on minimum antitrust disciplines is likely to do relatively little to enhance the contestability of markets

[1] TRAPs could also be defined as trade-related antitrust practices. The term practices implies agreement will (should) be reached on specific measures. An agreement on principles allows for a wider scope, in particular scrutiny of and disciplines on trade-related government policies that restrict competition.

for foreign firms in economies where other government policies inhibit entry/competition. In relatively open economies minimum standards will do little to change the status quo. However, an agreement on minimum standards may well be welfare enhancing in (developing) countries that currently do not enforce such norms. If the multilateral negotiating process helps overcome resistance in domestic political markets against antitrust, there may be a welfare payoff to putting the subject on the agenda. From a trade-policy-related perspective the key challenge is to apply competition law principles to the traditional domain of the WTO: its trade policy rules. Without such a linkage the relevance of a TRAPs agreement for the multilateral trading system and the WTO as an institution would be much reduced. The opposition to such linkage is substantial, however, and there is therefore some danger that feasible TRAPs agreements will do relatively little to directly supplement and enhance trade and investment liberalization.

II. A Selective Survey of the Literature

As noted above, the literature on trade and competition policy has become extensive. This section is limited to a brief overview of the main policy suggestions that have been made. Often concepts such as competition policy, competition law, competition principles, antitrust law, and contestability are used interchangeably with another; and sometimes terms are not defined clearly. It is important to distinguish competition law from competition policy. In this paper competition *law* comprises antitrust disciplines in the US sense--rules on anticompetitive practices by firms, such as collusion, the abuse of dominant market positions, or the creation of dominance through mergers and acquisitions. Competition *policy* is a much broader and less well-defined notion that is best described as a set of measures employed by a government in a pro-active way in order to ensure/enhance competition. Competition or antitrust laws are one component of competition policies.

In GATT/WTO terms, competition *policies* have always been on the agenda, as trade

liberalization, transparency, nondiscrimination and notification requirements all have greater competition as an objective (in large part through a prohibition on discrimination against foreign products). Over time, the GATT increasingly began to address a variety of trade-related domestic policies. The various policy-specific agreements that are embodied in the WTO (e.g., on subsidies, standards, procurement) pertain to such government regulations and measures. As such it is quite reasonable and completely in line with GATT history to suggest that antitrust disciplines--another type of government regulation--be put on the negotiating agenda. The question is therefore not whether it "fits" into the WTO--in principle it does--but to identify the set of possible agreements, determine which of these are feasible, and, assuming the latter set is non-empty, ascertain which results in the greatest gain for the trading system.

Many options have been identified in the literature, ranging from a global competition code (harmonization) to doing nothing (competition between competition regimes).[2] Five will be mentioned here; some could be pursued simultaneously.

Option 1. Minimum Common Antitrust Standards

In 1993, the so-called Munich group of competition law experts created a Draft International Antitrust Code (Fikentscher and Immenga, 1995). The establishment of an International Antitrust Authority is envisaged, which would have the task of enforcing a set of common, harmonized antitrust rules in all contracting parties (through the offices of national competition authorities). It would have the power to request domestic competition authorities to initiate an investigation and to

[2] The subject of competition or antitrust disciplines is of course not a new issue for the multilateral trading system (see, e.g., Lloyd and Sampson, 1995). It was on the agenda of the ITO (Chapter V of the Havana Charter). Since then developing countries have pursued the topic in the UN context and have attempted to place the subject on the agenda of multilateral trade negotiations; the OECD has been dealing with the issue for many years in the context of its Competition Law and Policy Committee. These efforts have resulted in various "codes of conduct," none of which is legally enforceable. There is nonetheless a significant amount of experience regarding the issue, which could facilitate the negotiation of a TRAPs agreement.

challenge implementation of the Code before an International Antitrust Panel. The rules proposed are detailed, and include *per se* prohibitions for specified horizontal and vertical restraints. They would have direct effect. The Code would be an Annex IV agreement under the WTO, i.e., a plurilateral treaty applying only to those WTO members that sign it.

Scherer (1995) has made a more modest proposal along similar lines, suggesting that agreement be sought on a number of minimum standards: "the most likely candidates are export and import cartels, serious abuses of dominant positions in the world market, and merger approval procedures" (Scherer, 1996, p. 18). An International Competition Office would start enforcing the agreed standards seven years after its creation, and employ national competition authorities to support its investigations. Participants initially would be allowed to exempt three industries from the ban on export cartels. A difference with the Munich proposal is that the focus is much more on anticompetitive practices that directly affect trade.

An EU Group of Experts has suggested that agreement be sought in the WTO context on specific business practices that impede trade, *without* creating a new international institution (EU Commission, 1995). Enforcement of the common minimum standards would be the responsibility of national antitrust authorities. The agreement again would be plurilateral in nature. In addition to the substantive rules--*per se* prohibitions on horizontal price fixing, supply restrictions, market sharing, and export cartels; a rule of reason approach to other practices--the proposal includes notification requirements, positive and negative comity obligations, and subjecting firms that have been granted special or exclusive privileges to the agreed competition standards. The WTO would enforce the agreement; nullification and impairment provisions would be extended to private anticompetitive practices (see below). Others have made suggestions along similar lines, but are less ambitious with respect to the coverage of the minimum standards. For example, Messerlin (1996) has suggested that attention be limited to a prohibition of pro-cartel provisions of national competition laws (i.e., export

and import cartels).

Option 2. Introduce More Competition Principles Into WTO Rules

A number of suggestions have been made to introduce competition law principles into the WTO by incorporating references to such disciplines into specific WTO Articles. By far the most common proposal is to introduce competition disciplines in the antidumping context. This could involve a provision allowing antidumping actions to be contested on the basis of antitrust considerations (Messerlin, 1994). It could also consist of, for example, making an antidumping investigation conditional upon a finding by the antitrust authorities of the home market of the exporting firms that are alleged to be dumping that these firms are benefitting from significant barriers to entry (Hoekman and Mavroidis, 1996); or introducing competition law-type thresholds and criteria into the antidumping process. Numerous possibilities exist as far as the latter is concerned, e.g., using a "relevant market" instead of "like product" approach to defining the product market in an investigation, including an injury to competition standard, allowing for competition-based defenses by exporters (e.g., "meeting the competition" or absence of market power), imposing maximum market share or concentration criteria on domestic industries that petition for protection, and abolishing provisions allowing for voluntary price "undertakings" (Wood, 1989, 1996; Messerlin, 1996; Hoekman and Mavroidis, 1996).

Some antitrust-related disciplines have already been incorporated into the WTO. Examples include the Agreements on Safeguards (Art. XIX GATT) and Technical Barriers to Trade (product standards). Art. 11 of the Safeguards Agreement prohibits the use of voluntary export restrictions (VERs) and similar measures on either exports or imports, including import surveillance and compulsory import cartels. WTO members are also to refrain from encouraging or supporting the use of measures with equivalent effect by public or private enterprises (Art. 11:3). The Agreement on

standards requires that technical regulations are not more trade-restrictive than necessary to meet legitimate objectives and that relevant international standards be used if these exist. Moreover, the agreement requires that foreign firms be given an opportunity to participate in the standards-setting process. These types of multilateral disciplines are not enforced by competition offices, but come close to constituting competition disciplines of the kind that would be imposed by such authorities. The role of these antitrust-type disciplines in this connection is to not to ensure competition but to enforce negotiated liberalization commitments (i.e., reduce the scope for circumvention).

Option 3. Extend the Reach of WTO Dispute Settlement Mechanisms

Some observers have supported the idea of allowing WTO-consistent trade policy measures to be contested on the basis of competition considerations. This can be done by extending the reach of WTO dispute settlement procedures to cover entry-restricting business practices that are tolerated by a government, whether these are discriminatory or not. This approach would not involve the negotiation of substantive antitrust disciplines. The most obvious option is to build on Art. XXIII:1(b) of the GATT, non-violation. This provision allows WTO members to challenge actions by governments that are not illegal under WTO rules but nonetheless nullify or impair concessions obtained in trade negotiations. For the provision to be applicable a government measure must be involved, and the policy must meet a reasonable expectations test--it should not have been foreseeable at the time the trade concessions were negotiated (Hoekman and Mavroidis, 1994). Until the dispute between Kodak and Fuji was brought to the WTO, the provision had not been used to challenge non-enforcement of antitrust law, although in principle the possibility of doing so existed in at least some cases.[3]

[3] In 1982 the EC requested the establishment of a working party under Art. XXIII:2 on the basis that the benefits of successive negotiations with Japan were not realized because of "a series of factors peculiar to Japan" that inhibited imports. This was a so-called situation complaint under Art. XXIII:1(c), but was ultimately never

Use of Art. XXIII:1(b) could be facilitated in a number of ways. One is to seek agreement that non-enforcement of national antitrust law is a "measure" and weakening the "reasonable expectations" language (Hindley, 1996). Non-enforcement will have to be defined in operational terms. In commenting on this paper, Mitsuo Matsushita suggested that even under the current relatively restrictive WTO language, the "measure" constraint may be satisfied if the national antitrust authority has ruled against a petition by a foreign firm alleging violation of the antitrust law. Explicit agreement on this could be sought, so that a necessary condition for invocation of non-violation is that the antitrust remedy has been pursued by complainants.[4] Similarly, Graham and Richardson (1994) have suggested that in the case of antitrust-related disputes the application of domestic legislation first be reviewed by a multilateral panel of experts, and that invocation of Art. XXIII:1(b) proceedings be made conditional upon a finding that national laws have not been appropriately applied.

Option 4. Create Multilateral "Discovery" Mechanisms

A weaker version of the foregoing option is to limit activities in the WTO context to research and analysis. Analogous to the Committee on Trade and Environment that was established by the WTO, a Committee on Trade and Competition could be created. This body would have the mandate to study the interaction between trade and competition policies and act as a forum for the exchange of views between governments. The reach of WTO trade policy review reports could also be expanded

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pursued (see Bronckers, 1985; WTO, 1995, p. 670) Hoekman and Mavroidis (1994) argue that the absence of antitrust-related GATT Art. XXIII:1(b) cases suggests that anticompetitive practices may not be much of a market access issue. A similar argument has been made by Finger and Fung (1994), who found that antitrust violations were not a factor underlying Section 301 actions by the US.

[4] Any time a private party requesting action is rejected in writing by the competition authorities, this could be argued to amount to a "measure." Of course, a necessary condition is that countries have national antitrust legislation. Many do not. But most of the countries where antitrust enforcement has been a trade issue involve OECD countries; trade barriers and state intervention in the economy are generally more important in many developing countries.

to cover the impact of antitrust enforcement (or the lack thereof) on the trade of a country. This approach would require a substantial strengthening of the analytical capacity of the WTO Secretariat to undertake and support the work of the Committee, or alternatively, reliance on the use of external experts.

Options 5. Keep TRAPs Completely Off the WTO Agenda

A final option is not to do anything at all in the WTO context for the time being. Some have argued that efforts should be devoted to expanding the reach and depth of bilateral and plurilateral cooperation between the competition agencies of the major trading countries, including application of the principle of positive comity. The basic presumption is that in the WTO setting priority should be given to more "traditional" government policies that restrict access to markets, including investment regulations and policies that restrict access to service markets.

III. Payoffs and Pitfalls

Which TRAPs option may eventually emerge is an issue for negotiation. As in any negotiation a necessary condition for agreement is that no party is made worse off. Much will depend on the number of issues on the table: the set of feasible agreements expands the greater are the possible tradeoffs/linkages that can be made. What those issues will be is still unknown, and possible issue linkages will not be explored here. Instead, the focus in what follows is on the desirability and feasibility of alternative TRAPs options. Three criteria are useful in evaluating the alternatives: (i) the extent to which they satisfy the purported rationale underlying the recent interest by proponents of antitrust to pursue multilateral disciplines: enhance the contestability of markets for foreign firms; (ii) the likely impact of the alternatives on national economic welfare of WTO members; and (iii) their effect on the functioning and integrity of the existing trading system.

As far as the last is concerned, at a minimum any option should satisfy Palmeter's (1994) recommendation that Hippocrates' dictum *primum non nocere* (first, do no harm) be met. Clearly the trade negotiators focus on market access is not necessarily welfare improving, as it tends to be driven by mercantilist and reciprocity considerations, and may easily give rise to market sharing and "voluntary" import expansion agreements that are defended as enhancing market contestability. Its use as a yardstick in this paper is motivated by realism; this is after all what is driving antitrust on to the negotiating agenda.[5]

Market Access

To what extent can the different TRAPs options help increase contestability of markets for foreign firms? There are two dimensions to this: (i) the degree to which they can offset the effects of various government policies that restrict competition; and (ii) the impact they will have on anti-competitive practices pursued by enterprises. It is not clear what a TRAPs agreement on minimum standards can do to deal with either *discriminatory* policies (e.g., trade or investment barriers, procurement practices, and subsidies) or *non*discriminatory regulatory regimes (e.g, operating conditions, zoning requirements, granting of exclusive rights to specific firms). All such policies are generally beyond the reach of antitrust law. Instead, explicit agreements between governments are required to deal with the competition-restricting effects of both types of policies. This is of course what the many existing WTO agreements attempt to do.

In contrast to minimum standards, introducing more competition principles into existing WTO rules relating to trade policy could have an impact on the use of contingent protection (i.e., limit the reach of trade barriers). The option of expanding the reach of WTO dispute settlement would allow

[5] In what follows it will be assumed that the minimum standards proposal (option i above) will involve an agreement in the WTO, with enforcement left to national authorities. The establishment of an international antitrust office is in the opinion of many quite unlikely to materialize in the foreseeable future.

governments to contest measures such as nondiscriminatory regulations that restrict the sale of goods or services on which trade concessions have been made. It would also permit governments to raise antitrust-related issues in the WTO, and thus generate information on what types of practices are considered most problematical. However, the remedies that may be suggested by a WTO panel cannot affect the application of antitrust law--at best a complainant country will be offered compensation, something that is unlikely to benefit the firm that brought the complaint. That is, the conditions of competition for firms will not necessarily improve as the situation does not violate any WTO rule. Finally, the "do more research" and "do nothing" options would obviously have no impact in terms of enhancing the contestability of markets for foreign firms.

If attention is limited to the narrower issue of anticompetitive practices *per se* (market conduct), the choice is between the adoption of minimum antitrust standards and expansion of nonviolation. Doubts can be expressed regarding the effectiveness of minimum standards on enhancing the contestability of markets for foreign firms. One reason is that in the markets without strong antitrust law enforcement, which are mostly developing economies, the magnitude of trade and investment restrictions far exceeds those that are applied by most high income nations. Agreement on minimum antitrust standards is therefore unlikely to have much of an impact on the conditions of competition for foreign firms. In developing countries the major challenge remains the reduction of traditional trade and investment barriers, and conventional economic wisdom is that these must be reduced first (Hoekman and Mavroidis, 1994; Khemani and Dutz, 1996). Conversely, what matters most for developing country exporters is secure access to export markets. Given relatively high levels of antitrust enforcement in industrialized country markets, agreement on minimum standards will be of little relevance to them.

Welfare

From a national welfare/efficiency perspective, there is a rationale for adopting and enforcing antitrust rules, especially for non-tradable sectors. Competition from whatever source--national or foreign--is generally welfare improving.[6] Of course, as in any area of regulation, care must be taken that the specific multilateral disciplines that are adopted are appropriate to the economic situation of each country. Once attention moves from minimum standards or principles to the details of the decision criteria to be applied, the benefits of common norms may decline rapidly. Much more research is required in this area. The option of linking trade and competition policy disciplines--i.e., making the WTO more competition-friendly--is also likely to be welfare enhancing. Indeed, the potential for negative outcomes is smaller than for the minimum standards option as there is less uncertainty regarding optimal policies. The welfare implications of expansion of dispute settlement are also likely to be positive as countries obtain additional instruments to ensure that liberalization commitments will be implemented.

Systemic implications

From a trading system perspective only the "do research" and introduction of greater competition disciplines into the WTO appear to be unambiguously beneficial, assuming of course that agreement on the latter could be achieved (more on this below). The other options all have potential downside risks as well as potential benefits. Minimum standards could clearly strengthen the system--e.g., if export cartels were to be prohibited. But if "too much" is sought in terms of harmonization of antitrust rules and enforcement, the scope for disputes and breakdown of cooperation will increase; to the detriment of the system. A similar argument pertains to the expansion of dispute settlement--there is surely scope for stressing the system. Expanding the reach of Art. XXIII:1(b) has the

[6] See Khemani and Dutz (1996) for a survey.

disadvantage of introducing some degree of ambiguity and uncertainty into the trading system insofar as panels are requested to look at the *effects* of enforcement or nonenforcement of antitrust laws. An advantage for of the nonviolation option for governments is that there is no need to agree on minimum common standards; any measure or non-enforcement of national law can be contested, especially if it use is facilitated through agreement on what constitutes a "measure." As a result, dispute settlement will not only generate information, but has significant potential to guarantee negotiated market access commitments. Finally, even the "do nothing" option may be detrimental to the trading system insofar as it leads to use of unilateral actions, discriminatory solutions, and so forth. It can be noted in this connection that the adoption of minimum standards may help to diffuse bilateral pressure and actions. As noted previously, a necessary condition for using WTO nonviolation procedures to address anticompetitive behavior is the existence of an antitrust law. Many countries do not have such legislation. By adopting antitrust legislation that satisfies the minimum standards, a country could argue that the multilateral nonviolation route should be pursued.

IV. Feasibility of Alternative TRAPs Agreements

There is a great deal of diversity across countries with respect to competition legislation and, especially, its enforcement. The conclusion that is often drawn is that this will greatly complicate any effort to establish unified minimum standards of competition law at the multilateral level. However, the emerging set of new "deeper integration-type" regional agreements suggests that agreement on minimum standards of competition law may well be feasible. At the same time, they suggest that introducing competition principles into those trade policy areas where this could be most beneficial from both a welfare and a contestability perspective--e.g., antidumping--could prove difficult. Informal discussions between major trading nations on the TRAPs issue suggest that the same may apply in the multilateral context.

The Regional Experience

A number of regional integration agreements have been negotiated in recent years that include provisions on competition law or contain language calling for the development of such disciplines. Recent efforts in the Free Trade Agreement of the Americas (FTAA) context can also be mentioned, where work is ongoing to explore what might be done pursue common policies in the antitrust area. Most far-reaching in both substantive terms and geographic coverage are agreements between the European Union (EU) and Central and East European countries (CEECs). In principle the ultimate goal of most of the countries involved in these arrangements is to accede to the EU, which makes them less relevant from a multilateral (WTO) perspective. More interesting are the agreements concluded last year with Morocco and Tunisia, and ongoing negotiations with Egypt, Lebanon and Jordan, where accession to the EU is not on the table. Under these agreements the countries involved commit to virtually eliminate trade barriers against industrial products on a reciprocal basis, and to adopt the basic competition disciplines of the EU, in particular with respect to collusive behavior, abuse of dominant position, and competition-distorting state aid (Articles 85, 86, and 92 of the Treaty of Rome), insofar as they affect trade in goods (not services) between the EU and each partner country.[7]

Will the agreement by partner countries to abide by EU competition laws have much of an impact? Given that many of the more important entry barriers in these countries are due to government policies, and these have been kept off the table, this is not very likely. For example, the right of establishment (i.e., freedom to engage in FDI) is an objective in the agreement. Modalities

[7] There are transition periods and some practices continue to be permitted. For the first 5 years after entry into force of the EMA, Tunisia will be regarded as a disadvantaged region under Article 92.3(a) of the Treaty of Rome. This implies that state aids can be applied to the entire territory of the partner country during this period. Rules to enforce competition policy and subsidy disciplines are to be adopted by the Association Council after the initial 5 year period. Until then, GATT rules with respect to countervailing of subsidies will apply. There is therefore an implicit link between the elimination of countervail threats and the adoption of competition disciplines.

to achieve it are to be determined by the Association Council. No specific language is devoted to this subject and no time path or target date is mentioned for its realization in the Morocco or Tunisia agreements. Nor are specific commitments made regarding liberalization of cross-border supply of services; this is an objective that is again to be pursued by the Association Council. The agreements simply refer to the obligations of each Party under the GATS, which do not imply liberalization (or deregulation). Mediterranean countries made very limited commitments under the GATS, subjecting only some 6 percent of their service sectors to the national treatment and market access principles (Hoekman, 1996). Finally, liberalization of government procurement is not required; reciprocal and gradual liberalization of public purchasing is again an objective.

Adoption of EU competition rules did not eliminate contingent protection. Antidumping remains applicable to trade flows between partners. The same is true in the EU's agreements with the CEECs which go beyond the Mediterranean countries in terms of granting the right of establishment and liberalizing trade in services. Similarly, the North American Free Trade Agreement (NAFTA) also maintains antidumping for internal trade flows. Despite the Canadian government's great interest in disciplining the use of antidumping (with a stated preference for abolition) negotiators were unable to agree to replace antidumping with antitrust enforcement.[8]

Summing up, the recent RIAs suggest agreement on common antitrust rules may well be feasible, but linking antitrust agreements to trade policy may be more difficult. Informal proposals to link antitrust and trade policy (i.e., make the WTO more competition friendly) have been confronted with strong opposition. This reflects the preferences of both the antitrust community and the proponents of "unfair trade" laws in a number of high-income countries. Discussion of minimum

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[8] There are agreements where the antidumping option has been repealed, i.e., the European Economic Area (EEA) and the Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA). In both cases achieving such agreement took a long time, and was conditional upon substantial harmonization of policy, including on issues such as subsidies. For a discussion see Hoekman and Mavroidis (1996).

antitrust standards is not rejected by either group; what is opposed is making any agreement on TRAPs "too" trade-related. Many antitrust authorities are hesitant about becoming drawn into trade policy, given the different objectives in practice of the two policy communities. While in principle favoring the introduction of competition principles into trade policy in general and "unfair trade" laws in particular, there is concern about involving antitrust offices in the trade policy process. The fear is that this might end up "corrupting" antitrust enforcement by shifting the focus from protection of competition to protecting domestic firms from foreign competitors.

Supporters of antidumping and related "unfair trade" instruments are strongly opposed to any antitrust-related involvement in the enforcement of such laws (Rosenthal and Silliman, 1996; Stewart, 1996). For example, they argue that antidumping focuses on what is recognized by the WTO to be an "unfair" practice, that the appropriate disciplines and remedies were recently re-negotiated with great difficulty in the Uruguay Round, and that "antidumping policies as articulated in the [GATT] Agreement on Article VI better promote rational resource allocation between countries than national competition policies...[and] since there are no internationally agreed rules on competition policy, it is at a minimum premature to discuss a merger of one area into another" (Stewart, 1996, p. 3). If anything, it is argued by Stewart, competition policy has significant lessons to learn from antidumping law. These propositions suggest that antitrust authorities do have potential cause for concern. The apparent confluence of interest between defenders of strong antitrust laws and the antidumping lobby may create a powerful coalition against any attempt to ensure that a TRAPs agreement introduces antitrust principles into the contingent protection process, especially antidumping.[9]

[9] The antidumping lobby comprises not only import-competing industries and the legal establishment that pursues antidumping cases in active users of the instrument such as Canada, the EU, the US, but also the institutions that have been developed in the last 5 to 10 years in developing countries to apply antidumping legislation. Many of the officials charged with applying new antidumping legislation have worked hard to master the technicalities of the subject and to ensure that their procedures are GATT consistent. They are often not well disposed to the message that antidumping enforcement is an anticompetitive endeavor.

Making WTO rules more competition friendly may therefore be difficult to attain, at least as far as "unfair trade" laws such as antidumping are concerned. This would be particularly detrimental to developing countries, who have much to gain from the introduction of competition principles in this area. Clearly a necessary condition for achieving this will be significant "concessions" by such countries. Whether enough concessions can be made to convince (force) the antidumping lobby to accept competition disciplines, and whether any resulting benefits will be worth these concessions are open questions. However, the WTO agreements on safeguards and technical barriers to trade suggest that it may be less difficult to incorporate antitrust-related disciplines into other WTO agreements. This could prove very valuable, especially if agreement can be obtained that these antitrust disciplines have direct effect and can be invoked by private parties through national judiciaries. This innovation was introduced in the WTO's Agreement on Government Procurement, and could in principle be extended to other areas.

How feasible might it be to extend the reach of Article XXIII:1(b)? The fact that GATT contracting parties did not avail themselves of this provision in the past, even though in principle it offers the opportunity to allege that nonenforcement of antitrust or measures supporting anticompetitive practices nullified benefits, suggests that extension may not be that easy to achieve. This is an approach that leaves it to panelists to determine the rules of the game, and countries may fear that they tread on a slippery slope. Moreover, insofar as agreement is reached on minimum antitrust standards, the need for expanding the reach of the nonviolation or nullification option may become less compelling to negotiators. After all, it can be argued that disputes will then revolve around violations of WTO commitments to abide by the minimum standards, and that expanding nonviolation is unnecessary.[10] This would be an unfortunate development, as it would greatly limit

[10] It can be noted, however, that delegating "hot" issues to the dispute settlement process has been a time-honored approach in the GATT context. Many of the disputes that arose in the 1980s on antidumping and agricultural subsidies involved issues on which no negotiated agreements proved possible. Over time, however,

the ability of the WTO to address business practices tolerated by governments that restrict the ability of foreign firms to contest markets.

A limited and clearly circumscribed expansion of the nonviolation option may prove more acceptable. One possibility would be to require that a necessary condition for invoking Article XXIII:1(b) is prior rejection of a case in writing by the antitrust authorities of the importing nation. In such cases, panels might be limited to a review of the application of domestic antitrust legislation; a somewhat more far-reaching alternative would be to allow them to determine whether a decision not to act by a domestic antitrust agency implies nullification of negotiated liberalization commitments. A problem that remains concerns the remedies that are available. Given that the antitrust law is not subject to WTO rules, a panel cannot recommend changes in such laws or regulations. Thus, a complainant firm will not be helped much directly. From a national welfare and trading system it is therefore important that countries not be induced to pursue voluntary import expansion and similar arrangements.

The recent decision by the US to bring a nonviolation complaint to the WTO alleging that Fuji has restricted Kodak's ability to contest the Japanese market by engaging in anti-competitive practices suggests that there may be a willingness to explore expanding the reach of Article XXIII:1(b). The fact that the US decided not to invoke a bilateral 301 action suggests that the US perceives there to be value in addressing the issue in the multilateral context. From a systemic perspective it is beneficial that actions be brought to the WTO; from a national perspective it is valuable to be able to "deflect" pressures for action to the multilateral level--allowing firms access to an objective fact-finding mechanism may be enough in many instances to "clear the air." Moreover, if it helps to prevent the use of unilateral remedies, this also will be valuable.

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agreements on the key issues were negotiated in the Uruguay Round. A similar dynamic may arise on antitrust-related disputes.

Whatever type of TRAPs agreement will eventually be pursued, the option of creating a Committee with the mandate to undertake research into the broad issues of trade and competition law and policy interactions appears to be the most beneficial in the short to medium run. From a pragmatic point of view greater research and discussion of the issues is the best option presently available, as this can help to define the possible agenda for a future negotiation on a TRAPs agreement. It appears evident that governments are not yet ready to decide which particular option, or combination of options, to pursue at this point in time. The work of the Committee could start with a process of notification of purported antitrust-related "market access problems" and submission of national position papers. These might then be submitted to an independent expert group for examination and evaluation. A similar "do research" approach is being pursued in the FTAA context, and was also followed in the area of services after the 1982 GATT Ministerial. At the same time, nations could be encouraged to use the existing dispute settlement process to raise antitrust-related cases. This would provide additional information on the types of issues that may need to be dealt with, and on the importance that is attached to antitrust enforcement by the exporting community.

V. Conclusions

Five options were identified regarding trade and competition policy in the WTO: agree to minimum standards; introduce more competition principles into WTO trade policy rules; expand the reach of the WTO provision on nullification and impairment to policies that restrict competition; establish a body with the mandate to undertake research and explore the implications of alternative options; or do nothing. From a trade negotiators "market access" perspective, expansion of the WTO's dispute settlement mechanism and introduction of competition principles into WTO rules, especially in the area of "unfair trade," could be most effective at this point in time. The introduction of competition law standards and criteria in the WTO's rules on trade policies would help ensure that

such policies become more consistent with the ultimate goal of the multilateral trading system, i.e., an efficient allocation of resources.

Introducing antitrust-type disciplines into antidumping would be valuable from both a "market access" and a welfare perspective. However, attempting to achieve this will give rise to strong opposition. The political need for "unfair trade" instruments is more likely to increase than decline in the coming decade. The elimination of MFA quotas, and the commitment by the US to reduce all tariffs to zero by 2010 in the APEC context suggests that industries that can expect more import competition will attempt to safeguard their access to antidumping and related instruments.

Expanding the reach of Article XXIII:1(b) is the most "hands-off" way of allowing antitrust-related market access problems to be raised in the WTO. It has the advantage of not requiring substantive agreements on common disciplines. In principle all types of anti-competitive practices tolerated by governments could be contested, and much might be learned about the significance of the various anticompetitive practices that are alleged to constitute market access restrictions. While this may be seen as too much of a potential "slippery slope" various ways exist to limit the openendedness of this mechanism, including agreement to tie invocation of WTO nonviolation procedures to decisions by antitrust authorities not to investigate or to act in a specific case.

A number of arguments were presented why agreement on minimum standards may prove feasible. In itself this is likely to be beneficial to developing countries, as competition law enforcement is generally needed as a supplement to a liberal trade policy (Khemani and Dutz, 1996). However, without significant progress in reducing barriers to trade and investment such minimum standards cannot do much to improve the contestability of markets or the conditions of competition. What minimum standards may emerge is impossible to predict. From a trade perspective, it would appear that priority should be given to agreeing to prohibit export and import cartels. The disciplines introduced in Art. 11:3 of the Agreement on Safeguards suggests progress along these lines may be

possible. If so, it should be complemented by strengthened disciplines on state-trading (Art. XVII GATT; Art. VIII GATS) and rules regarding the use of export taxes (see Hoekman and Mavroidis, 1994).

Whatever the eventual coverage of a TRAPs agreement, if any emerges at all, in the short run the best option is to establish a Committee on Trade and Competition with the mandate to study the many issues that arise; and focus its attention in particular on determining the empirical economic significance of private anti-competitive practices as barriers to trade and investment. This could be complemented by greater use of the WTO's nonviolation dispute settlement mechanism, which is a useful additional source of information on the types and prevalence of anticompetitive behavior perceived by traders.

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