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Trade and competition

Competition after Cancún – a personal view

By Philip Marsden*

A couple of years ago I argued that the International Competition Network would lead to more practical advances in international cooperation on antitrust enforcement than anything likely to happen at the World Trade Organisation, at least in my lifetime.

Not surprisingly, officials involved in the WTO talks took me to task about this. They viewed the ICN as a talking shop of competition officials who would produce – at most – non-binding recommendations for “best practices” on enforcement issues. The work planned for the WTO was to be far more involved and far-reaching.

Having more than 145 countries meet in Geneva to discuss competition policy at an organisation governed by justiciable trade rules made delegates think long and hard about the kinds of commitments they might make. This would help to ensure that, as competition laws were adopted throughout the world, they would be based on a common “competition culture” and be backed up by truly binding rules. One day, WTO members could be taken to international dispute settlement for not banning cartels or for discriminating against foreign companies.

I still think that the talks at the ICN offer more practical and more immediate benefits than the work at the WTO. After only a year of substantive talks, the ICN did produce best practice guidelines on merger review. These may not be binding, but the process of formulating them and their level of detail makes it unlikely that competition authorities will diverge from this agreed-upon approach. Even if they do, they will feel compelled to explain why, and that will improve international understanding and cooperation more than any legal requirement to toe a common but vaguely-defined line ever could.

Since I take this view, people have asked me why I wrote a book called “A Competition Policy for the WTO” earlier this year. The answer is easy. I think that the WTO could benefit a very great deal from having the discipline of competition policy applied to it. I do not just mean in terms of competition laws entering its rulebook, though. (The sound rationale for that is repeated like a mantra at every trade-related forum considering competition issues: as markets are opened, private anticompetitive practices must not be allowed to replace public trade barriers.) Nor do I mean, as some have argued recently, that “competition policy is crucial to the balance of the [Doha Development] round.”

Competition on the trading table

Of course, I know that in trade circles WTO commitments on competition policy are viewed as simply one of many things that the EU has been asking for in return for reform of its

Common Agricultural Policy. Obviously, no one ever says that out loud at WTO meetings on the subject.

Commitments to have a competition law and to ban cartels are sold as being valuable in their own right, as well as being an important bolstering of trade liberalisation commitments more generally. The same could be said of the reform of the CAP, of course – any movement there would introduce competition into a large and important sector in Europe, and place developing country farmers on a more level playing field.

However, whether something makes sense on its own, or not, does not matter when vested and long-protected interests are at issue. For example, for years now WTO members have been trying to add greater checks on each others’ ability to protect their sunset industries through the imposition of antidumping measures. Such a disarmament programme does not work of its own volition, however. It is not enough for everyone to agree that it is a bad idea to raise the price of foreign imports at the border without proof that they are harming competition in the domestic market, or that misuse of antidumping measures harms world trade, competition and consumers, and ensures that protected domestic industries never have to bother raising their game. Something outside the “antidumping” box has to give before there can be reform within it.

All multilateral trade agreements are based on trade-offs, and competition policy is just one of many bargaining chips on a very large, and increasingly messy table.

Competition off the trading table in Cancún

At the latest meeting of the WTO in Cancún, however, the EU indicated that it was prepared to drop its request on competition policy for the greater good of reaching a more limited, but still liberalising, trade agreement.

However pragmatic that decision was at the time, it was unfortunate for two reasons. First, and most obviously, it did not work: “too little, too late” is one way of explaining why developing countries failed to rise to the bait, though there are myriad others. (Was the EU’s offer on CAP reform not enough? Did developing countries engage in too much brinkmanship? Or was it simply a more boring bureaucratic lesson – one that should have been learned in Seattle – that there were too many areas left open for 150 trade ministers to agree on over five short hot days at the seaside?) A post-mortem of this failed ministerial would show several contributing causes of death, all of which offer important lessons for the preparation for – and conduct at – future meetings.

The second reason why the EU’s withdrawal of its request on competition is unfortunate also focuses on what it means

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for the future. It is not easy to go back on a concession at the WTO, and the EU dropping the issue effectively takes it off the table for this round. Yes, there are other *demandeurs*, such as Canada, Japan and Korea, and yes, within the WTO Working Group on the Interaction between Trade and Competition Policy, agreement seemed to be very close. After all, the only proposals on the table were positive ones: to start negotiations on a limited and quite banal set of rules, or to have more “clarificatory” discussions to build the necessary “explicit consensus” to launch negotiations at a later stage.

Developing countries were happy to keep meeting in Geneva to discuss the issue, but just did not feel ready to make the political and financial commitment needed to introduce competition enforcement to their markets.

No one was seriously arguing that competition be dropped off the WTO’s agenda altogether. But the EU’s move effectively does that. The Chairman of the WTO Working Group, Frédéric Jenny, may still call a meeting, but it is not obvious that anyone will come, or that anything of substance may be discussed.

Direction from the membership as a whole is needed, and the sort of discussion that this will require is not likely even to mention competition policy. Its function as a bargaining chip seems to be exhausted, at least for this round.

The dawn of a new era for competition at the WTO

This is a positive development, however, and one that bodes well for the future of competition policy at the WTO. I mentioned above that the WTO could benefit a great deal from having the discipline of competition policy applied to it. I also explained what I did not mean by that. I said that competition policy was more than just an important guarantor of trade liberalisation commitments. I also noted that it should be seen as something more than a mere bargaining chip to be put up against remaining bastions of protectionism.

As I have repeatedly argued for years now, the bargaining chip itself was devalued – and therefore would never amount to much – the minute that the trade negotiators got their hands on it. Following the diplomatic code of “making the possible necessary,” the EU requested banal commitments to have a competition law that banned cartels and did not discriminate on its face, to cooperate voluntarily in enforcement and to explain one’s policies and decisions.

As there was only an indirect and distant link to trade in this proposal, most developing country governments could only see budgetary demands that they would rather see applied to more pressing issues like clean water, medicine and infrastructure. The need for developing countries to see a clear trade-related benefit from such a commitment was all the more important since the US and EU were not offering to open their markets to agricultural or textile exports, let alone stop subsidising their companies when those were competing directly with companies from the South.

With this impasse, now is the very time that the *demandeurs* on trade and competition should re-group and re-think matters both of substance and of strategy. Fortunately, the two aspects come together when one considers the subject of exclusionary business practices.

Of all possible business arrangements, those that exclude foreign entrants (or indeed any entrants at all) are the ones that have caused the most trade friction over the years. These may be exclusive dealing arrangements, refusals to deal or to license IP rights, vertical mergers, or any practice or arrangement that can operate to impede entry and expansion in the market.

These practices cut across all aspects of competition law, and will be the most difficult to negotiate agreement on. Nevertheless, some of the spadework has already been done in studies at the OECD. Furthermore, exclusionary business practices all share a clear link as potential trade restrictions, and thus cry out most clearly for the combined attention of trade and competition experts alike.

By focusing on “making the necessary possible,” WTO members can produce a proposal for competition rules that has value in and of itself, as an issue that is directly “trade-related,” and as a bargaining chip in the multilateral trading game. It will not be easy, and will definitely not please negotiators who just want the boffins to give them a checklist of “deliverables” that can be readily handed over at any one meeting. But, since negotiations on competition are off the agenda for this next trade round – due to end in 2005 or so – the substantive experts now have an opportunity to get things right from the start.

Focusing on exclusionary business practices is the way forward. It will be a hard tree to climb – of this there is no doubt – but it will be the only one in the forest that bears fruit in a trade negotiation – that is certain.

In my book, I set out an analytical framework of economic and legal reasoning that can be applied to exclusionary business practices and draws from the experience and case law of both trade and competition policy. It focuses on seeking consensus, rather than compromise, between the two policy areas. It will not satisfy those who want unfettered access to all markets.

However, I hope that it can go a small way towards helping governments to introduce some true competition policy discipline into the world trading system... and I don’t mind if that still doesn’t happen in my lifetime, just as long as they get it right this time.

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