

WHAT CAN WE REALLY LEARN FROM THE COMPETITION PROVISIONS OF REGIONAL TRADE AGREEMENTS?

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Abstract:

Even though members of the World Trade Organization decided not to negotiate a multilateral framework on competition policy in the context of the Doha Round a growing number of them have agreed to international rules on competition law and policy in regional trade agreements (RTAs). Having summarized the main types of competition provisions in RTAs, this chapter then explores the possible lessons of this form of international rule-making for potential future multilateral initiatives on competition law and its enforcement. It is argued that, at the moment, particular care must be taken not draw erroneous conclusions for the latter.

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1. Introduction

When considering the negotiation of international binding rules on competition law, competition policy, and associated enforcement matters, something of a paradox has emerged in recent years. On the one hand, the members of the World Trade Organization (WTO) decided not to negotiate a binding multilateral framework on competition policy during the Doha trade round.² Yet, many of the same countries have signed in principle binding international rules on competition law and policy in regional trade agreements.³ Even though it did not claim to be comprehensive, one analysis (OECD 2005) identified competition policy-related provisions in 47 recently concluded RTAs. Relatedly, the number of RTAs has mushroomed in recent years, and competition provisions are often part of such initiatives. This seemingly paradoxical outcome raises a number of questions not all of which, admittedly, will be pursued here. One question that is, however, is what are the implications of the recent proliferation of competition law provisions in RTAs for the negotiation of potential future multilateral agreements on competition law and policy? This chapter examines various possible answers to this question and offers a note of caution about what lessons can be properly drawn from the recent experience with rule-making on competition law and policy in RTAs.

Section two of this chapter summarizes the principal components of competition provisions in RTAs and makes some comparisons to leading proposal for a multilateral framework on competition policy advanced in 2002-03. Section three poses a number of questions that might help establish the implications of rule-making in RTAs for future multilateral decision-making. Section four attempts to answer some of those questions, drawing on the factual record established in section two. Concluding remarks are offered in section five.

2. An overview of the competition provisions of recent RTAs

Depending on how one counts RTAs in 2005 the cumulative number of such agreements signed lies between 225 and 275 (World Bank 2005: 27)⁴. The number of such agreements that were concluded rose sharply after 1990 with

² This decision was taken as part of the so-called July package in 2004. WTO members also agreed not to negotiate multilateral disciplines on transparency in government procurement and on investment measures.

³ For the purposes of this chapter a regional trade agreement (RTA) is taken to be a free trade area, a customs union, or an economic partnership agreement that covers state-to-state cooperation in many areas of government policy. Of course, many free trade areas are codified in agreements that do not involve signatories from the same region or continent; therefore, the terminology "regional trade agreement" can be somewhat misleading. For this reason, some authors prefer the term of "preferential trade agreement". To add further to the semantic soup that surrounds these discussions, most of what are RTAs are in fact agreements between two parties, hence the emphasis of some on bilateral agreements.

⁴ The number of reported RTAs varies across studies for the following reasons: not all RTAs are reported to the WTO; RTAs involving nations that accede to the European Union are not always treated the same way by researchers; some RTAs that do not involve the creation of a free trade area on "substantially all trade" are nevertheless included in some counts. For further discussion of the number of RTAs notified to the WTO in recent years see Alvarez, Clarke, and Silva's contribution to this volume.

10-20 agreements typically signed annually. In certain years in the mid-to-late 1990s the number of RTAs signed exceeded 25, indicating a significant amount of rule-making was taking place outside of the auspices of the WTO.

Many of the recently signed RTAs contain provisions on competition law and policy. Recently the OECD secretariat analyzed the competition provisions of 47 RTAs and this has shed considerable light on their prevalence and content (OECD 2005). Notwithstanding concerns about the representative nature of this sample of 47 RTAs, a point the OECD secretariat properly acknowledges, in what follows here extensive reference is made to this OECD study. Readers are cautioned that the interpretations given here to the evidence presented are my own and any criticism of these interpretations should be directed at me and not at the OECD secretariat.⁵

The OECD analyzed 47 RTAs 36 percent of which are between developing countries (which are often referred to as South-South agreements), 3 percent were between industrialized economies (the so-called North-North agreements), and the remainder have signatories from developing and industrialized economies (the so-called North-South agreements.) Eight types of competition policy-related provisions were identified in these 47 RTAs. It is important to appreciate that not every agreement contained all eight types of competition provisions, although to be included in the OECD study presumably at least one such provision must have been present. The classification of competition provisions in the OECD study was as follows⁶:

1. "Measures"⁷ relating to the adoption, maintenance, and application of competition law;
2. Provisions relating to the cooperation and coordination of activities by competition law enforcement bodies;
3. Provisions relating to anti-competitive acts and measures to be taken against them;
4. Provisions relating to non-discrimination, due process, and transparency in the statement and application of competition law;
5. Provisions to exclude the use of antidumping measures against the commerce of signatories;
6. Provisions concerning the circumstances and conditions under which recourse to trade remedies (such as antidumping measures, countervailing duties, and safeguards) are permitted;
7. Provisions relating to the application of dispute settlement procedures in competition policy-related matters;

⁵ Readers may also want to bear in mind that this OECD study focuses on the nature of the competition provisions in RTAs and not on whether those provisions have been used, whether the parties to RTAs are satisfied with their use, or on other analyzes of the effectiveness of such provisions. Generally, limitations in data availability seem to constrain the ability to address the latter points.

⁶ It should be noted that the OECD study further sub-divided the following eight types of provision into component provisions, providing an even richer taxonomy of the competition provisions of RTAs.

⁷ The word "measures" here is taken to mean "best endeavour" clauses and other promises as well as formal commitments to enact and enforce certain competition laws.

8. Provisions relating to flexibility and progressivity, sometimes referred to as special and differential treatment (SDT) provisions.⁸

It should be evident from the above list that certain provisions are related to others. For example the first and third provisions could be similar, and the fifth and sixth provisions address similar (but not identical) matters. Care must therefore be taken when interpreting the summary statistics concerning the prevalence of different types of provisions that is presented below. Any analysis of this kind is likely to raise questions about the nature of the classifications used, misclassification errors, and double-counting, points the reader may want to bear in mind.

As the OECD study notes, the overwhelming impression is that of the substantial diversity in the competition provisions adopted in RTAs. Having said that, one common feature of the agreements analyzed was that statements that anti-competitive acts, orchestrated by both the state and the private sector, could frustrate the broad liberalizing objectives of the RTA in question. It seems, therefore, that the competition provisions were included not for their own sake, or because of their own intrinsic value or merit to signatories, but rather as an important measure to support the barrier-reducing objectives of the RTA. This is a statement about the purported rationale for including competition provisions in RTAs and not about the effects of such provisions which, in principle, need not be confined to influencing cross-border commerce.

Broad agreement on ends, however, does not imply agreement on means. As the OECD study shows, the types and prevalence of competition commitments taken on varies markedly across RTAs. The following provisions were found in at least 35 of the 47 RTAs considered in OECD (2005): provisions relating to the exchange of evidence and information, provisions relating to the abuse of dominance or monopolization, provisions relating to anti-competitive agreements between firms such as cartels, provisions relating to non-discrimination (in particular as they relate to state monopolies), and provisions establishing, or encouraging, consultation mechanisms for the resolution of disputes on competition policy-related matters.

In contrast the following provisions were found in five or fewer of the 47 RTAs studied: provisions relating to negative comity, provisions relating to positive comity, provisions relating to anti-competitive mergers, provisions relating to the elimination and use of antidumping measures between signatories, provisions relating to less-than-full reciprocity of commitments for lesser

⁸ The question does arise as to whether special and differential treatment as traditionally understood in the context of trade negotiations and agreements is the appropriate way to think about the potential role and form of special and differential treatment in the competition law context. For example, some have argued that in the trade context SDT is motivated by the goal of deferring or avoiding international obligations and that in the competition law context SDT is motivated by the goal of furthering the effective implementation of competition law. The differences in goals, it is argued, may have implications for the different types of SDT deemed appropriate in a given situation.

developed signatories⁹, and provisions directly related to exemptions and exceptions for lesser developed signatories.

It would seem, then, that the recent batch of RTAs contain relatively more provisions on anti-competitive practices than on forms of special and differential treatment, as well as more provisions on consultations and broader cooperation mechanisms between competition enforcement agencies than specific obligations relating to negative and positive comity, the latter often being thought of as “deeper” forms of inter-agency cooperation on competition matters.

Given that a majority of the agreements analyzed in the OECD study are North-South agreements, and that the Northern parties are often the United States, Canada, or the European Communities and its member states (EC), the diverse picture alluded to above does include certain similarities across distinct groups of RTAs.¹⁰ OECD (2005) notes that agreements involving the EC tend to be oriented more around substantive rules than around cooperative provisions, the latter being found more in agreements involving Canada and the USA. Two broad “families” of competition provisions can, therefore, be identified (OECD 2005: 14).¹¹ Having said that, readers should note that a clear majority of RTAs in the OECD study do not include the EC, the USA, or Canada as a signatory, and these RTAs do not necessarily fall into the two families identified above. Diversity, it would seem, is the dominant attribute of RTA provisions on competition law and policy.

Since the principal matter to be addressed in this chapter is the potential lessons of rule-making in RTAs for future multilateral initiatives on competition law and policy, it would be remiss not to compare the above findings with the ill-fated proposals for a multilateral framework on competition policy that were advanced before the Cancun Ministerial Meeting of WTO members in 2003. Although a number of WTO members made submissions concerning the potential elements of such a multilateral framework, the European Communities and its member states advanced the most comprehensive set of proposals in this respect and here they will form the comparator to the RTAs analyzed in the OECD study.

The EC proposed that a binding multilateral framework on competition policy should have the following components: a commitment to ban so-called hard core cartels and to take measures at the national or regional level to give effect to such a ban; a commitment to adhere to so-called core principles (of non-discrimination, due process, and transparency) in the statement of national competition laws; modalities for voluntary cooperation between agencies responsible for the implementation of competition law; and progressivity and flexibility, including technical assistance and capacity

⁹ Here the phrase “lesser developed signatory” is taken to mean a signatory to a RTA that is at an earlier stage of development than another signatory, and should not be confused with the United Nations classification of Least Developed Countries.

¹⁰ Of the just under 30 North-South RTAs analyzed, at least 18 include the USA, Canada, or the EC as one of the signatories.

¹¹ The differences between these two families may be less than they appear at first because many of the RTAs involving the EC, in fact, tend refer to existing legislation and the anti-competitive practices referred thereto. The author thanks Stefan Amarasinha for bring this point to his attention.

building, for developing country members of the WTO. It was also argued that dispute settlement would only apply to the first two of the above elements. This, in turn, implies that the application of competition law would not be subject to the Dispute Settlement Understanding (DSU) of the WTO, at least under the provisions of the multilateral framework proposed by the EC.

In a few respects the proposed multilateral framework would have gone further than the competition provisions negotiated in RTAs in recent years. Special and differential treatment provisions are relatively scarce in the latter¹², as are provisions relating to the core principles (although in so far as the latter concern state monopolies and state aids they are quite common in recent RTAs.) The dispute settlement provisions of the proposed multilateral framework stands in contrast to the consultation mechanisms and arbitration procedures found in most RTAs.

Conversely, most recent RTAs do not confine their provisions on anti-competitive practices to hard core cartels and typically refer also to abuses of a dominant position and to state monopolies and enterprises. Indeed in this respect it is worth noting that the substantive provisions that the EC proposed for inclusion in a multilateral framework are in fact narrower than they often negotiate in RTAs with trading partners.¹³ It would be unwise, therefore, to conclude that the principal proponent of a multilateral framework on competition policy was seeking to “multilateralize” the provisions that it had agreed to in numerous bilateral and regional trade agreements. Rather, the proposed multilateral framework on competition policy would have taken international rule-making in yet another direction. It would have added to the diversity of international rules on competition law and policy rather than replicated or merely extended those competition provisions found in RTAs.

In the light of the recent competition policy-related rule-making in RTAs, it is interesting to note the objections from developing country officials and analysts to the ill-fated proposals for a multilateral framework on competition policy.¹⁴ At first some argued that hard core cartels were not a concern for developing countries, a view that was tempered once the range and extent of the international cartels prosecuted in the 1990s began to be better understood. Later, some argued that the multilateral framework would not do enough to tackle the harm done by such cartels to developing countries. Others argued that abuses of a dominant position, rather than cartels, were more important for developing countries and that the proposed multilateral framework did not reflect this priority. A different group argued that rule-making of this nature was not directly related to the market opening objective of the multilateral trading system, while others saw such proposals as attempting to prise open markets in developing countries “through the back

¹² Readers may wish to note that, in their chapter in this volume, Brusick and Clarke find that 13 percent of the 157 RTAs that they examined includes some type of flexibility for the less-developed partners. Brusick and Clarke also provide an interesting discussion of the difficulties in classifying provisions as being related to special and differential treatment, which ought to be borne in mind when counts of such provisions are presented.

¹³ These points can be inferred from the statistics presented in the OECD (2005) study.

¹⁴ In what follows a pretty comprehensive list of the objections raised is presented. Readers should not assume that every critic of the proposed multilateral framework subscribed to each of the objections listed here.

door” (presumably through tackling import-impeding anti-competitive practices.)

Some opponents in developing countries felt that the proposed non-discrimination provisions would compromise their government’s ability to influence mergers and acquisitions on the grounds of industrial policy and the like. Concerns about implementation costs worried others, as well as fears that developing countries did not have enough expertise to negotiate in “new” areas such as competition policy. Insufficient attention to special and differential treatment in the proposed framework, it was said, was another ground for opposition. The proposed cooperation provisions of the multilateral framework, essentially being voluntary, were felt to offer little benefit to developing countries. Others argued that negotiations on a multilateral framework should not advance because of a lack of progress in other areas of the Doha Round. Moreover, those WTO members that never really wanted the Doha Round in the first place, which according to some careful observers in Geneva could account for over half of the WTO membership, were a natural constituency to oppose negotiations on multilateral rules on competition policy or on any of the Singapore Issues for that matter.

It might be useful to ask what the grounds for opposing the multilateral framework might reveal about the true level of support by developing countries for rule-making on competition policy in RTAs. For the sake of argument, let us take the criticisms of the multilateral framework at face value¹⁵, putting aside the possibility that some of these criticisms were advanced merely for tactical reasons. It would seem that developing countries’ emphasis on the abuse of dominant position does manifest itself in the competition provisions in recent RTAs. Of the RTAs involving developing country signatories in the OECD study (OECD 2005) only COMESA omits such provisions.¹⁶ In contrast, more RTAs involving a developing country—five in fact—omit provisions on anti-competitive agreements, including hard core cartels. (Interestingly, most of those five agreements involve Chile as a party.)

Moreover, developing country concerns about general non-discrimination provisions do seem to find counterparts in recent RTAs. Only the agreements between Bulgaria and Israel, between Canada and Costa Rica, between the members of CARICOM, and between Chile and the USA, appear to contain broad non-discrimination provisions. The other RTAs involving poorer nations do not. These two considerations may account, in part, for the opposition of developing countries to a multilateral framework, yet their willingness to sign RTAs with competition provisions. (If this is the case then the paradox alluded to in the introduction of this chapter may well be resolved.¹⁷)

¹⁵ In doing so it should not be assumed that this author endorses those criticisms.

¹⁶ Information provided in Dean (2004) and on the relevant webpage of COMESA would, however, seem to contradict this finding of the OECD study. (The competition policy webpage of COMESA is <http://www.comesa.int/trade/issues/policy/>). If the latter information is correct, then it reinforces the point made here, namely, that developing countries’ concerns about abuse of a dominant position have found themselves into the RTAs that they have signed. This is not to say that those RTA provisions have satisfactorily addresses those developing country concerns, just that those provisions exist in the first place.

¹⁷ The author thanks Pierre Horna for bringing this point to his attention.

Yet, if their opposition to a multilateral framework is anything to go by, certain aspects of the competition provisions in recent RTAs cannot surely find favor with developing countries. First, the special and differential treatment provisions of most RTAs are limited or non-existent. Where they do exist, according to the OECD (2005) study, almost all refer to transition periods and to technical assistance, not to less-than-full reciprocity.¹⁸ This is true of both North-South and South-South agreements.

Developing country opposition to a multilateral framework on the grounds of market opening sits very oddly with the fact that most RTA's competition provisions are explicitly motivated by the desire to support other market opening measures, such as tariff reductions. Moreover, developing countries' agreement to take on substantive provisions on hard core cartels in RTAs (and in other areas of competition law for that matter) are hard to square with their concerns about implementation costs. Furthermore, as noted earlier, the voluntary cooperation provisions of many RTAs are pretty limited yet developing countries agreed to them while they opposed what they regarded as insufficiently robust provisions on voluntary cooperation in the proposed multilateral framework. It could be argued, of course, that unsatisfactory experiences in RTAs were the reason why developing countries opposed similar provisions at the multilateral level. If this is the case, then one also ought to see greater opposition to such provisions in negotiations over future RTAs.

Further perspective on these matters can be obtained by asking, given the arguments made by developing country officials against a multilateral framework, what they imply for their "real" view of the two families of competition provisions in RTAs identified in the OECD study.¹⁹ The broader range of substantive obligations that are a characteristic of RTAs in which the EC is a signatory is, on the basis of what was said about the proposed multilateral framework, a mixed blessing. The inclusion of abuse of dominance provisions would appear on this metric to be a plus, but concerns about the implementation costs of taking on a number of substantive provisions (many of which are based on intra-EU experience) is a negative. Meanwhile, the so-called North American family of agreements, with their emphasis on cooperation provisions and on fewer substantive provisions, and a tendency to exclude competition provisions from dispute settlement, might be attractive to developing countries in saving them implementation costs and limiting the enforceability of the competition provisions. But such agreements are unlikely to allay any fears about the likelihood of precious little cooperation actually resulting from these RTAs.

To summarize, this section has described the principal characteristics of competition provisions in RTAs and contrasted them with the components of the ill-fated multilateral framework on competition policy, which was proposed by the EC. Even though there is a broad agreement on the goal of the former,

¹⁸ Again, the manner in which legal provisions are classified appears to matter. In their contribution to this volume Brusick and Clarke found 14 instances of provisions in RTAs that "safeguard [the] interests of less-developed partners", seven provisions relating to exemptions and exceptions, another seven provisions relating to transitional time periods, and only one provision relating to technical assistance (see Table one of Brusick and Clarke.)

¹⁹ Here readers are encouraged to bear in mind the point made in footnote 11.

there was significant diversity in their legal content. It was also argued that the latter was neither a direct expansion of, nor a multilateralization of, the competition provisions that the EC has negotiated in recent RTAs with its trading partners.

Moreover, the grounds stated by many developing countries for opposing the multilateral framework on competition policy were used to assess what they might reveal about developing country's preferences concerning competition provisions in RTAs. It would seem that the recent batch of RTAs contain provisions that do not match up with the stated preferences of many developing countries, a finding that may reflect the give-and-take of commercial diplomacy. This finding also holds in RTAs among developing countries, and therefore cannot be attributed solely to the limited bargaining power of developing countries when negotiating with industrial countries over the terms of a RTA.²⁰ This finding concerning South-South RTAs is unfortunate as there appears to be no set of current RTAs whose experience, if deemed over time to be satisfactory, could satisfy the developing country critics of the previous multilateral initiative on competition policy.

3. Questions raised by the recent rule-making in RTAs on competition policy

The purpose of this section is to describe the questions that might arise in thinking through the implications for future multilateral rule-making on competition law and policy of the recent proliferation of RTAs containing such rules. The next section will go some way to answering those questions. The separation of the discussion of questions from answers is deliberate as readers may be more persuaded of the arguments made in one section than in the other.

A number of important preliminary comments are in order as they provide some context and boundaries to this investigation. First, in thinking through the lessons for possible future multilateral rule-making one should be clear what institutional parameters a new multilateral initiative might add to. For example, have the lessons drawn taken account of the potential future relationship between a multilateral initiative and the set of RTAs that prevail at that time?²¹ A number of logical possibilities present themselves here. Do the lessons drawn imply that a future multilateral agreement would substitute for or strengthen the competition provisions in prevailing RTAs? Or, implicitly, are the lessons being drawn on the assumption that the potential multilateral initiative will operate independently of the prevailing set of RTA provisions? A related matter would concern the sequencing of any potential future multilateral and non-multilateral initiatives on competition law and policy.

²⁰ The matter of asymmetries in bargaining power is taken up again under the fourth theme addressed in section three of this chapter.

²¹ A similar question might be asked of the relationship between any future multilateral initiative and the bilateral agency-to-agency cooperation agreements on competition law and enforcement matters. The author thanks Stefan Amarasinha for bringing this point to his attention.

Moreover, the standing of the latter's provisions in any future multilateral agreement would have to be thought through.²²

Another preliminary comment is that, *a priori*, the circumstances of WTO members differ so markedly and this ought to condition the lessons we draw from the competition provisions in existing RTAs. A competition provision in a given RTA may be successful but to what extent is the success due to the characteristics of the RTA signatories, the circumstances that those signatories have faced, or the provision itself? Likewise, a competition provision in a given RTA may be barely used or used with few positive results, but does this imply that the provision would perform as well in every RTA or indeed if incorporated into a future multilateral framework? Separating out the effects of different influences to draw generalizable lessons is very difficult, especially as little is known about the operation of competition provisions in more than a few RTAs. (Hopefully initiatives such as this book project and others will remedy this deficiency over time.²³) We should not be surprised, therefore, that most of the arguments made are of a conceptual nature or involve reasoning by analogy.

When discussing lessons from RTAs it is worth noting that multilateral initiatives could differ along (at least) the following important dimensions: membership, the inclusion and nature of substantive provisions to enact or enforce certain competition laws (recognizing that there are a variety of anti-competitive acts, including state-induced acts), the inclusion and nature of cooperation provisions, the inclusion and content of provisions for special and differential treatment, mechanisms for the resolution of disputes, and provisions relating to the statement and enforcement of competition laws in general. The fact that a multilateral initiative could differ along any of these dimensions suggests that there is a wide range of logical possibilities that readers should bear in mind. Therefore, if an analyst argued that a RTA's experience with competition provisions undermined the desirability or viability of one type of multilateral initiative, this does amount to a case against all multilateral initiatives. Moreover, readers might ask themselves whether the multilateral initiatives or initiatives being considered by an analyst are comprehensive, representative, or illustrative of the potential future set of such initiatives.

In interpreting recent experience another factor to bear in mind is that many bilateral, regional, and cross-regional initiatives on competition law and its enforcement between 1996 and 2003 have been influenced by the discussions in the WTO concerning the possible negotiation of a multilateral framework on competition policy. Some opponents, often found in the community of competition law practitioners and enforcers, preferred to see international cooperation take place outside of international trade fora.²⁴ As a result, the amount of effort that went into designing, negotiating, and eventually using the competition provisions in RTAs was almost surely less than could have been the case. Indeed, the growing number of bilateral

²² The author thanks David Round for reminding him of these important points concerning sequencing.

²³ Marsden and Whelan (2005a,b,c) and Acevedo (2005) are promising examples of the latter.

²⁴ Amarasingha (2004) evaluates the criticisms levelled by some in the competition law community towards the proposals for a multilateral framework on competition policy.

accords between competition enforcement agencies and the prominence of the International Competition Network stand as evidence of where many in the competition law community have placed their efforts in recent years.²⁵

Related factors were at work when RTAs including competition provisions were negotiated. It has been said that some developing country negotiators were well aware of the potentially precedent setting nature of competition provisions in RTAs for discussions on a multilateral framework in the WTO. In addition, others have noted that linkages between competition provisions and trade remedies, such as antidumping, that were found in some earlier RTAs were avoided in subsequent RTAs precisely because such linkages might be explored in a multilateral context.

In short, it would be unwise to evaluate the content and performance of the current set of competition provisions in RTAs without bearing in mind the multilateral context in the run up to the Cancun meeting of WTO ministers in September 2003, when a decision on the modalities for negotiations on competition policy in the WTO was made. To the extent that that decision and the prior debate conditions current discussions on the efficacy of competition provisions in RTAs, including in particular the Economic Partnership Agreements between the European Union and selected African, Caribbean, and Pacific countries, the drawing of appropriate lessons from experiences after Cancun can be challenging too.

So what are the questions raised by the competition provisions in RTAs that may be relevant for the design of potential future multilateral initiatives on competition law and policy? In what follows these questions have been organized around four themes.

The first theme concerns the *rationale for multilateral rules*. Here the following questions arise: What does the actual and stated rationales for competition provisions in RTAs imply about the appropriate rationale, or rationales, for a multilateral framework? "Appropriate" here could be taken to mean "widely acceptable," "coherent," "economically important," "consistent with the long-standing goals of the multilateral trading system," and "value-adding," all of which are distinct, yet in some cases related, criteria for evaluating a proposed rationale for multilateral rules. The value-added criteria, for example, should make an analyst ask whether future multilateral rules are needed given the current set of RTAs and other inter-governmental or inter-agency accords on competition law and related matters. Analysts should also be open to the possibility that the appropriate rationale differs across types of anti-competitive act. Moreover, the logical possibility that a rationale may be

²⁵ In less than five years the International Competition Network (ICN) has undertaken work on a number of important competition law and enforcement-related matters, including merger notification and review, cartels, the implementation of competition law (including analyses of technical assistance and capacity building programmes), and antitrust enforcement in regulated sectors. In the coming year will be established on matters relating to abuse of a dominant position, a long-standing concern of certain prominent developing country participants in the ICN. The rate of progress made in the ICN stands in contrast to the developments in other non-binding fora. Having said that, it is too early to say whether the ICN membership can sustain the current level of momentum or whether all of its membership are satisfied with the resulting degree of international cooperation and convergence on competition law and enforcement matters.

appropriate for a multilateral initiative without being an appropriate rationale for competition provisions in a RTA cannot be ruled out.

The second theme concerns the *impact of competition rules in RTAs on non-signatories* and whether this provides a rationale for multilateral action. Ever since the path-breaking research of Jacob Viner analysts of RTAs have considered the possibility that these accords effectively discriminate against non-signatories, with possibly detrimental effects. In the present content, the question arises as to whether competition provisions in RTAs introduce discrimination (differential treatment) between WTO members? If so, what form does that discrimination take? Does it represent a violation of the Most Favored Nation (MFN) principle? Moreover, is there any evidence, or means to suppose, that the discrimination harms the commercial interests of non-signatories? If so, are there any non-discriminatory alternatives to the discriminatory provision that can attain the same legitimate goals as the latter? Or, is there another discriminatory provision that attains the same goals as the latter but does less harm to the commercial interests of non-signatories? Should any plausible alternatives exist to the discriminatory provision, can a ranking be established among them in terms of their desirability for inclusion in a multilateral initiative?

Analysts should also be open to the logical possibility that the commitments to non-discrimination in competition provisions are, in fact, implemented in such a way as to benefit all WTO members. In which case one might ask whether, given the prevailing set of RTAs, there is much additional bite from implementing a generalized non-discrimination provisions in a multilateral initiative on competition policy? Here much would turn on the nature of the non-discrimination provisions in prevailing RTAs, whether there are differences in such provisions across RTAs, as well as the substantive content of non-discrimination provisions in a multilateral framework.

A third theme concerns the *effectiveness of certain competition policy-related provisions of RTAs* that the debate over the proposed multilateral framework on competition policy from 1996 to 2003 revealed to be of particular interest to developing countries such as the provisions that relate to cooperation between signatories and the provisions relating to special and differential treatment. With respect to voluntary cooperation, the nature and likely extent of such cooperation is of interest, as are the factors conditioning the degree of such cooperation. It would be useful in this respect to know if “harder” (that is more demanding) obligations to cooperate actually induce more cooperation, or at least make non-cooperation more costly or more transparent.

With respect to special and differential treatment, the following questions arise. In any particular RTA, were the transition periods appropriately tailored to the circumstances of, and technical assistance received by, the developing country signatory?²⁶ Did the transition periods merely postpone compliance to the last minute or were the transition period used to nurture capacity (perhaps through programs of capacity building and technical assistance) in the

²⁶ In answering this question analysts might consider the views of private sector practitioners and scholars. These parties may view the transition times and technical assistance necessary to meet the obligations in a RTA differently from the trade negotiators representing a given country.

developing country? What factors, perhaps unrelated to the RTA itself, affected this outcome? Concerning less-than-full reciprocity provisions, to what extent if at all where the benefits of the RTA compromised by the signing of such provisions? For example, are there reasons to believe that certain anti-competitive practices exist that reduce the value of the RTA to its signatories and that could only effectively be tackled by full reciprocity on the part of a developing country signatory or signatories? Analysts should also be open to the possibility that the effective types of special and differential treatment vary across developing countries, and that the effects of different types of special and differential treatment depends critically on the other provisions contained in a RTA or in a future multilateral initiative.

The fourth theme concerns the *lessons for the political economy of successfully negotiating a potential future multilateral initiative*. Within signatories to a RTA it would be useful to know which interest groups, if any, were galvanized to support the inclusion of, and subsequent compliance with, the competition provisions of a RTA? The answer to this question might provide important clues as to the circumstances under which such interest groups would support a similar multilateral initiative. (The word “similar” is used here with care as surely any multilateral initiative must add value along some dimension to the set of prevailing RTAs for interest groups to support the former.) Analysts should be open to the possibility that a RTA indirectly strengthens the popular or interest group-based support for the enforcement of competition law in a signatory country through reinforcing the legal status of the competition enforcement agency and the resources that the national legislature gives to such an agency. Thus, the political economy linkages within signatories may be more varied than support for, or opposition to, a competition provision in a RTA at the time of negotiation or ratification.

There are political economy factors at the international level worth exploring too. It would be useful to know which signatories to a RTA were keen on the inclusion of competition provisions, and which were opposed. How “deep” was the opposition of any signatory and, relatedly, what if anything did these parties obtain in return for acquiescing to the inclusion of the competition provisions? Did proponents of such provisions come to regret their inclusion and, if so, why? Did initial opponents or skeptics change their view after the RTA was signed and, if so, why? How significant were concerns about negotiating costs and implementation costs in determining the level of support for competition provisions? Were concerns about implementation costs assuaged by the provision of technical assistance, capacity building, aid, or by weak dispute settlement provisions? Are there concerns that multiple RTA negotiations have placed too great costs on developing country parties and have increased the potential for adopting conflicting, or at least inconsistent, obligations? Alternatively, have trade negotiators in developing countries become more comfortable with competition provisions in RTAs as they have negotiated more such RTAs?

Other political economy questions relate to the relationship between existing provisions in RTAs and potential multilateral initiatives. To what extent has the emergence of two families (recall the OECD Secretariat's finding of the so-called EU and US families) of competition provisions in RTAs imposed additional costs on signatories countries? What multilateral initiatives, if any,

would be consistent with both families of RTA provisions? To what extent, if at all, would negotiators of a multilateral initiative be willing to substitute one set of competition provisions in RTAs for another set of provisions?

This section had argued that, while there are a wide range of interesting questions concerning the lessons for multilateral rule-making of competition provisions in RTAs, there are a number of important factors that condition our ability to effectively answer them. Moreover, the efficacy of any future multilateral initiative on competition policy is likely to depend on some factors wholly independent of the experience of competition provisions in RTAs. These points ought to be borne in mind when considering the arguments advanced in the next section and in the rest of this book.

4. Some thoughts on the lessons from competition provisions in existing RTAs

As the OECD (2005) study made clear the often stated motivation for competition provisions in RTAs is to ensure that the gains from implementing such agreements are not undermined by anti-competitive practices. Often this is articulated in market access terms, where the fear is that state-erected impediments to local markets are replaced by private anti-competitive acts.²⁷ It is worth dwelling on this rationale for international collective action, exploring what multilateral initiatives it appears to be consistent with and those it is inconsistent with. In this respect the following points could be made. First, this motivation could be interpreted as being only concerned with a subset of the possible cross-border spillovers created by anti-competitive practices. Specifically, it is concerned solely with the effects of those acts on a nation's export interests in so far as those interests can, or are attempting to, supply overseas markets. On this view, therefore, such a rationale would not consider as relevant the effects of anti-competitive practices in markets where a nation's export interests sources parts, components, or services. Nor would this rationale place any weight on anti-competitive acts that harmed a nation's consumers, including its government (which is typically a large purchaser of goods and services.)

Arguably such a narrow conception of the purpose of multilateral competition rules would sit well with the long-established practice in trade negotiations whereby reciprocal exchanges of market access takes place. Moreover, such multilateral rules would, in preserving or ensuring previously agreed market access is secured, not be out of place with other WTO provisions that discourage member states from nullifying or impairing the effects of reductions in border barriers.

Such a narrow conception would logically focus on those anti-competitive acts that block the entry into, or that directly impair the competitive position of those firms attempting to enter, overseas markets whether by direct exporting, by foreign direct investment, or by other legitimate means. Arguably, therefore,

²⁷ One's view of the merits of such arguments may depend on whether the competition provisions are supposed to ensure that *previously agreed* to market access concessions are not impeded by private anti-competitive practices or whether such provisions are supposed to expand market access *beyond* previously agreed levels.

the focus here would be on some of the anti-competitive practices that fall under the heading of abuse of a dominant position and on anti-competitive vertical restraints. Cooperation provisions, including negative and positive comity provisions, could reinforce presumptions to take enforcement action against market access blockages.

A challenge faced by this approach is that the same mercantilist calculus that might encourage a government to seek the removal of privately-inspired market access impediments abroad is the same calculus that seeks to delay, avoid, or prevaricate in investigating such practices at home. This consideration places a significant burden on the dispute settlement provisions of an agreement based on this narrow motivation for multilateral competition rules. Any arbitration or dispute resolution mechanism would have to judge the degree of inaction, or the ineffectiveness of action, of a signatory against an alleged blockage to market access. Judging whether a signatory has gone far enough, or has acted in good faith, is a lot harder than judging whether a government has done something at all. The nature of such disputes would be extremely contentious. These concerns would be exacerbated if the agency tasked with enforcing the competition law and associated international obligations rejected the mercantilistic calculus in favor of a welfare standard. Employing either a total welfare standard or a consumer welfare standard is unlikely to satisfy the demands of a trading partner whose sole interest in any market access-related investigation is going to be the interests of its exporters.

It would be useful to examine how well the current set of RTAs have fared in the face of these challenges. In particular in jurisdictions with independent competition agencies, many of whose officials would openly reject a mercantilistic calculus, surely there are doubts as to how effective the competition provisions have been in clearing market access blockages? This is an empirical question and it would be helpful to know more about the factual record in this regard.

Another way of looking at this matter is to note that a multilateral framework based on a narrow market access perspective would almost surely require a change in the competition laws of signatories so as to entrench the market access objective. In this way, even independent competition agencies would be forced to consider market access objectives when examining complaints of firms in the import-competing sector. (Of course, if the competition agency has multiple objectives, as many do, the agency could still find reasons to demote the market access objective.) These points are mentioned not because competition agencies should as a general proposition take on market access-related objectives, but because it seems that the logic of the narrow market access conception of multilateral rules would almost surely require that steps be taken to ensure that competition agencies take those objectives seriously. These considerations, and the others detailed above, would surely become important if the market access objective of current RTAs were to be generalized into a multilateral agreement.

Although a narrow market access motivation for a multilateral framework aligns well with the traditional emphasis on border barrier reduction in the WTO system and its predecessor, developments during the latest round of multilateral trade negotiations suggest that an exclusive focus on market

access may no longer command universal support. At the Doha Ministerial meeting in 2001 WTO members added promoting economic development as an explicit objective to the multilateral trading system. Without doubt the export opportunities of developing countries, and the private anti-competitive acts that may impede them, have some bearing on the economic development prospects of poorer nations. But other cross-border competition-related knock-on effects do too, and a development focus might therefore provide a rationale for a multilateral initiative on competition policy that goes beyond securing market access. (Of course, what is logically possible need not be uppermost in the minds of trade negotiators at the moment, or indeed at any future point in time, and the following remarks should be seen in that light.)

The first point to be made in this regard is that many developing country exporters do not sell directly to customers in industrialized countries. Instead, they often sell to intermediaries, some of which are large oligopolistic trading companies. These intermediaries may have good access to the markets of industrialized countries while at the same time exerting considerable buyer power over suppliers located in developing countries. The potential for abuses of a dominant position by these intermediaries could motivate a different type of multilateral initiative on competition policy. Very recent World Bank research that has tried to demonstrate how little benefit non-reciprocal preferences are to the African, Caribbean, and Pacific countries has placed considerable weight on buyer power-related arguments.²⁸ It would be useful to see if other research and experience reinforces these findings.

The second non-market access-related spillover that could influence the development prospects of poor countries are those related to cartels with cross-border consequences. There is now a growing body of literature on these matters, which is quite well known, and there is no need to repeat all of the findings here.²⁹ National decisions about cartel enforcement can generate two cross-border spillovers which may form the basis for international collective action. Non-enforcement of a cartel law, or more simply non-

²⁸ In their discussion of the determinants of the value of non-reciprocal preferences Hoekman and Prowse (2005: 5) argue that

"to the extent there is market power on the part of either importers/distributors (Francois and Wooton 2005) or the transport and logistics sector (Francois and Wooton 2001), the benefits of preferential tariff reductions will be captured at least in part by those intermediaries with market power rather than the exporters. If preferences apply to highly protected sectors in donor countries, they will result in high rents for those able to export free of trade barriers. However, the existence of these rents will be known to buyers, and if they have the ability to set prices (have market power), the rents may predominantly be captured by distributors or other intermediaries (Tangermann, 2002). There is evidence, based on the [African Growth and Opportunity Act] AGOA preference scheme, that the pass through of preference margins is indeed partial at best. Olarreaga and Özden (2005) find that the average export price increase for products benefiting from preferences under AGOA was about 6 percent, whereas the average MFN tariff for these products was some 20 percent. Thus, on average exporters received around one-third of the tariff rent. Moreover, poorer and smaller countries tended to obtain lower shares—with estimates ranging from a low of 13 percent in Malawi to a high of 53 percent in Mauritius. In the case of market power, the result is a simple redistribution of the benefits of preferences: rents are transferred to importers."

²⁹ See, for example, Levenstein and Suslow (2003).

enactment of such a law, may encourage internationally-minded cartels to organize and hide evidence in that jurisdiction—so harming those trading partners whose consumers and producers source goods from cartel members. In contrast, the successful prosecution of an international cartel by a jurisdiction may result in the cessation of its activities in other jurisdictions, either directly through the collapse of the cartel or indirectly through other jurisdictions taking measures to prosecute the cartel and to demand an end to its anti-competitive acts. Either way, the latter jurisdictions have benefited from the prosecution in the original jurisdiction. Both spillovers imply that, in the absence of a global norm to enact and seriously enforce a cartel law, there will be a sub-optimal degree of cartel enforcement. To the extent that the victims of such sub-optimal enforcement are the poor and the defenseless, then a development-related rationale for a multilateral initiative could be advanced.

The third cross-border spillover created by anti-competitive acts that could motivate international collective action relates to mergers and acquisitions that have international reach. The effects of consolidation on markets need not be confined to the jurisdictions where the headquarters of the participating firms are located. Given the resurgence in merger and acquisitions activity after the first quarter of 2005, and the last wave of such activity between 1995 and 2000, these matters deserve at least some thought, even if action is unlikely to result in the foreseeable future. Now, it could be argued that, like industrialized economies, developing countries could undertake merger reviews that evaluate the effect of the proposed transaction within their jurisdiction and, where appropriate, place conditions on the approval of the transaction. This argument is not without its problems, however. Leaving aside concerns that developing countries may not have the technical expertise to evaluate complex transactions, from the perspective of the merging parties and their legal counsel surely there are concerns that the decisions of many competition agencies might conflict, that the total impact of the remedies sought by such agencies individually are sub-optimal compared to other alternatives, and that delays and expenses are greater than otherwise.

These factors suggest firms with international operations may have an interest in some international coordination and cooperation on merger enforcement (that arguably goes well beyond the current approaches pursued by members of the International Competition Network). Competition enforcement agencies may see advantages in coordinating and sequencing investigations, and even in specializing in certain types of investigations, much in the same way that certain national competition law enforcement agencies in the same jurisdiction cooperate with one another. Arguably the current discussions on international cooperation on competition law and enforcement are a long way from this type of outcome, but the goal here is not to show what is practicable immediately but where the logic of internalizing cross-border spillovers leads to in terms of international collective action.

To summarize, so far in this section it has been argued that the narrow market access-related perspective that has apparently motivated many competition provisions in RTAs would face significant (principally implementation-related and political economy-related) challenges if generalized at the multilateral level. The first challenge is created by the fact that market access objectives

are not entrenched in many nations' competition laws. Difficulties are likely to arise in reconciling—or at least accommodating—a new objective with existing ones. The second challenge relates to the fact that preserving and expanding market access is no longer seen as the sole legitimate goal of the multilateral trading system. The inclusion of development objectives implies that, as far as anti-competitive acts are concerned, a multilateral initiative that is confined to market access-related cross-border spillovers is likely to be seen now as too limited in scope. Indeed to the extent that, as a general proposition, multilateral competition provisions stimulate inter-firm rivalry within national markets then one should expect non-trade-related developmental benefits to accrue also.³⁰

Turning now to a different matter, what are the implications for multilateral initiatives on competition policy of the fact that many RTAs involving developing countries have few competition-specific provisions relating to special and differential treatment? Should we infer from this that developing country calls for such treatment at the multilateral level are all smoke without fire? One should be cautious about drawing this conclusion as the following four explanations could account for the factual record in this regard. First, developing countries may have found in negotiations on RTAs that they could not persuade richer counterparts to accept special and differential treatment provisions on competition matters. Relatedly, developing countries may well feel more confident of successfully demanding these provisions in multilateral negotiations where they are more like-minded parties arguing together.

Second, the generalized special and differential treatment provisions of RTAs may, from the perspective of developing countries, satisfactorily cover the competition obligations of those agreements and so additional competition-specific SDT provisions are unnecessary. Third, developing countries may not have demanded strong special and differential treatment provisions in RTAs, or at least acquiesced in having few of them, precisely because the binding competition obligations in a RTA were covered by limited dispute settlement provisions. Finally, developing countries may well have acquiesced in having few SDT provisions in RTAs precisely because they received something valuable in return somewhere else in the agreement (which might include preferential market access to the large economy of another signatory.) In the absence of a significantly large non-competition-related payoff in ongoing multilateral negotiations, this may well account for developing countries sticking to their demands for elaborate provisions on special and differential treatment.

Likewise, does the fact that few RTAs have strong dispute settlement provisions relating to their commitments on competition policy imply that a future multilateral framework on competition policy must have similarly weak (often taken to mean limited in scope and non-binding) mechanisms for resolving disputes between parties? Here it is worth noting that, with a few exceptions, generally RTAs have much weaker dispute settlement procedures than WTO agreements. Therefore, there may not be anything intrinsic about competition provisions in trade agreements that call for alternative, weak, or no dispute resolution methods. Second, the strength of dispute settlement

³⁰ The author thanks Oliver Solano Castro for reminding him of this important point.

procedures required is often a function of the nature of the provisions taken on in a trade agreement, not the least of which is whether the provisions are binding at all. To the extent, therefore, that competition provisions in RTAs contain few binding commitments of what to do, and what not to do, by signatories, there may be little point in seeking strong dispute settlement procedures for these provisions. An ambitious future multilateral initiative would, on this logic, probably have to include robust dispute settlement provisions, and there may be little to learn from the current set of RTAs in this regard.

5. Concluding remarks: some notes of caution

It is not surprising that policy makers, government officials, practitioners, and scholars are interested in establishing lessons from one type of international rule-making on competition law and policy for other potential international initiatives, especially given the differential rates of progress in agreeing competition-related measures in bilateral, regional, cross-regional, and multilateral fora. Indeed, as suggested in section two of this chapter, there are a substantial number of policy-relevant questions that arise, in particular if one is exploring the lessons for future multilateral rule-making from recently-agreed preferential trade agreements.

It has also been argued repeatedly, however, that our ability to draw solid inferences may at the moment be more than limited than one might otherwise think. Not only is the available evidence on the operation of competition provisions in RTAs limited—arguably a concern that will be mitigated over time by research projects, such as those assembled in this book—but it must be recalled that many such provisions were negotiated at a time when the ultimately ill-fated proposals for a WTO multilateral framework on competition policy was being discussed. The legacy of those proposals is being felt to this day, not least in negotiations over the Economic Partnership Agreements between the European Commission, on behalf of the European Union member states, and the latter's former colonies. Furthermore, the nature and extent of one set of competition provisions agreed to in a RTA may well have depended on the nature of the other competition provisions in that agreement, and on other factors; this consideration again qualifies what conclusions we might draw about the preferences of signatories concerning international competition commitments and the associated implications for multilateral rule-making.

It is also worth bearing in mind that the case for future multilateral rule-making may well be made independently of developments in RTAs. Although there may be relationships between decision-making in different international fora, and potential lessons to be learned from initiatives in each fora, care should be taken not to focus on these matters to the exclusion of other factors that might independently account for future international collective action on competition law and its enforcement.

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