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## The Coming Competition Policy Agenda in the WTO

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The time is ripe for multilateral negotiations over conditions of competition. The World Trade Organization (WTO) is the place to begin such negotiations, but they will take a long time to reach fruition. This chapter and other papers by my colleague Edward M. Graham and me all reach these simple conclusions.<sup>1</sup>

There is a natural agenda for such negotiations that would involve a limited, sequential, and experimental blending of principles, institutions, and commitments from the worlds of trade and competition policy, all aimed at achieving “contestability.” That agenda is as natural for multilateral trade negotiations as competition policy itself<sup>2</sup> is natural for a modern market economy. Competition policy almost always improves the average performance of firms, their workers, and the markets they create.<sup>3</sup> Characterized by a state of affairs in which markets offer the

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1. Our contributions are brought together in Graham and Richardson (1997a, 1997b). Our other contributions include Graham (1994, 1995, 1996, 1998), Graham and Lawrence (1996), and Richardson (1995, 1997a, 1997b).

2. Competition policy is the rules governing market behavior by new and incumbent firms. Americans think of this as “antitrust” policy, but both they and others define it more broadly than monopoly issues. US rules, for example, ban price fixing and foreclosure of entry by new rivals. European competition policies include, for example, rules on “state aids”—how much and in what ways a government can aid a particular firm.

3. That is, as determined in comparisons of average performance measures in countries with competition policies to those in countries without them. Competition policies

potential for access by exporters, foreign investors, and new home suppliers alike,<sup>4</sup> contestability will likewise improve the workings of the modern global economy.

Indeed, a “conditions of competition” agenda is becoming even more natural for the trade arena because the concerns and ambiance of trade negotiation and grievance are rapidly changing. Concessions that concern regulatory practice pervade recent negotiations over insurance, intellectual property, telecommunications services, and trade-related investment measures. Contentions over industrial policies lie ahead in financial services, information technology, agriculture, and technology-related investment requirements. Fundamental disagreement about what government is and who it represents will make bargaining over procurement, labor relations, and environmental issues thorny. Chinese and Russian accession to the WTO—or failure to gain it—will ultimately rest on bargaining over internal policies, not border measures such as tariffs.

What ever happened to border measures, anyway?

What few commentators have noted is that conditions of competition are the common themes in recent conflicts and discussions. Who may compete with whom? Or displace them, or absorb them? Under what contingencies? With what kinds of government support? Using what processes, technology, contractual practices, or employment relations?

Recent examples are legion. Can overseas suppliers of services provided over the internet freely compete with more traditional service providers? Are they subject to the same regulation and the same taxation? Can large telecommunications companies that are still publicly owned and regulated freely buy out small telecommunications upstarts in other countries? Can software companies prohibit computer companies from including rivals’ software in the machines they offer? Can producers of photographic film prohibit camera stores from offering rivals’ products? Can aircraft producers sign long-term contracts with airlines to be their suppliers? (These last examples seem to have no immediate international relevance, but in fact they concern Microsoft, Fuji Film, and Boeing, respectively, against rivals that were both foreign and domestic.)

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themselves, however, are hardly homogeneous (see Graham and Richardson 1997a, 1997b). They are a richly diverse array of norms and procedures that aim at a mix of various types of fairness and of static and dynamic efficiency in various industries and countries. Curiously, they rarely aim directly for competition per se; it is a secondary goal, or really an instrument of contestability.

4. Contestability is not the same as market access as usually described in trade negotiations. It is merely the right to compete for market access, and not a guarantee that it will be realized. Anything beyond a mere right to compete leads dangerously toward the “capture” of competition policy by industrial-policy advocates and other special interests. Wolff (1997), for example, conflates the issues. Antitrust specialists keep them distinct, for example, in the commitment to “defend competition, but not any given competitors.”

Conditions of competition are governed by what are broadly called competition policies. Competition policies have evolved from mostly domestic to increasingly international policies because more and more of their effects have spilled over borders.<sup>5</sup> Even their domestic theaters are today occupied by firms of many and mixed nationalities. This is why concern has mushroomed over competition policies (and competition conventions in countries with few formal policies<sup>6</sup>) in global trade negotiations.

But why multilateral negotiations? The main answer is that multilateral trade negotiations and competition policies usually have very similar objectives. The aim of both is more open market organization of economic activity. By contrast, bilateral and regional negotiations often have many other objectives, from coalition building to regional security.

Most commentators agree that, as obstacles to the goal of open market organization, border barriers are waning in importance relative to contestability barriers—the behind-the-border barriers to fully open markets. Tariffs, quotas, and border discrimination are being negotiated away, while regulatory and other barriers that protect incumbent firms—by keeping new suppliers from establishing themselves and surging suppliers from growing—are declining much more slowly, especially in large services sectors. Retail distribution and insurance constraints are ubiquitous. Transportation systems worldwide are governed by a maze of insular regulatory barriers. Even vaunted privatization has sometimes merely replaced a public monopoly with a private monopoly. Even vaunted international market opening has sometimes imposed new regulatory barriers to foreign investment.<sup>7</sup>

We believe that multilateral negotiations should begin by judicious experimentation with a combination of policy measures—what we call therapeutic cocktails, with ingredients drawn from the worlds of competition policy and international trade policy, all aimed at feasible and attractive ways of enhancing market contestability worldwide. We borrow

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5. Miriam Camps and William Diebold (1983, 22, 28, 39-40) were among the most prescient early commentators on spillovers of domestic into international policies and on the implications for multilateralism: “[O]ne of the basic principles that we think should guide the new multilateralism . . . [is] that the international community has a legitimate concern with domestic actions when they have important external effects. . . . An objective to be worked toward—one which few governments will look on with favor—would be to permit countries to claim injury as a result of what other countries have done in their industrial policies even if no violation of a specific GATT rule were alleged. This would insure some sharply focused consultations.” Their closing remark is, of course, a classic understatement.

6. The number of countries implementing a formal competition policy in recent years has risen sharply to almost 70 (UNCTAD 1997; WTO 1997).

7. This was true of the lower Malaysian foreign-ownership share ceilings in Malaysia’s financial services “liberalization” offer.

the idea of a therapeutic cocktail not only from medicine, where drug cocktails often have benefits that are more than the sum of their ingredients, but also from economics.<sup>8</sup> The cocktails we propose are blends of principles, policies, and institutions. The therapeutic trials are alternative rules for transition, implementation, and dispute settlement.

The ideal population for experimental trials on this issue is multilateral. And the ideal laboratory is the WTO. An important reason is that WTO-sponsored liberalization in key sectors such as services, telecommunications, and information technology will be the principal proving ground for these new policies. A second reason is that competition policy commitments by large would-be members of the WTO, especially China and Russia, will solidify the organization; without such commitments, all the more traditional WTO conventions “at the border” will be seriously undermined by private practices “behind” it. (China, for example, does not even practice interregional freedom of trade.) A third reason is that the adoption of core competition policies in all WTO member countries will help ease each member’s transition toward more open borders. Enhancing internal contestability helps rationalize a country’s internal market structure, allowing the fittest firms to prosper, absorbing weaker firms, and thereby making it easier for countries to cope with the additional pressures from freer trade and investment.

In our various writings, we have outlined the economic and institutional groundwork for this position. We have proposed three progressive generations of policy initiatives that we and our coauthors have found simultaneously desirable and feasible for a WTO forum.<sup>9</sup> By progressive we mean sequential, with each step in the sequence being conditional on progress in the previous steps. The first generation focuses on procedure and mediation. The second generation focuses on a minimal-standards agreement and dispute settlement. Only the third generation focuses on broader, more controversial substance that aims to rationalize the world

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8. There are at least two examples of therapeutic economic cocktails. Consensus is growing that the keys to successful economic development are mutually reinforcing commitments to education, investment, outward orientation, and institution building. Consensus is growing that the keys to successful labor market reform are mutually reinforcing commitments to mobility, portability of pension and health benefits, basic and ongoing training, and maximal job-search information. In each example the whole effect is greater than the sum of the constituent effects taken individually.

9. The WTO is currently well equipped to handle certain government measures with alleged anticompetitive impacts, but not their private counterparts. While the WTO is not the only multilateral forum in which integration of competition, trade, and investment policies could be pursued, we conclude from our research, as do Brittan (1997) and Van Miert (1998), that the WTO is best poised to take on this task. The Agreement on Trade-Related Aspects of Intellectual Property (TRIPs) and those on financial services, basic telecommunications, and other services will inevitably change the character of WTO proceedings in the direction of professional and regulatory expertise and information provision. This is exactly the direction of change necessary to undertake our proposals.

market system (in the way that competition policy rationalizes a national market system).

The first-generation initiatives are modest procedural steps toward multilateral cooperation, aimed at building a base of informed experience while maintaining national sovereign initiative: WTO-centered fact finding, consultation, and mediation.<sup>10</sup> In this first generation there are no cross-territorial rules and no international tribunals or panels. We even prefer to call it “cooperative unilateralism,” in preference to multilateralism.

The second-generation initiatives are tougher but more rewarding, codified in a multilateral Trade-Related Antitrust Measures (TRAMs) agreement that would be patterned on the Uruguay Round’s Agreement on Trade-Related Aspects of Intellectual Property (TRIPs). A desirable yet feasible TRAMs agreement would establish minimal standards concerning cartels and horizontal restrictions, national treatment for investors, and mergers and acquisitions that have important international spillovers.<sup>11</sup> It might be initially restricted, if necessary, to a “plurilateral” set of first movers within the WTO or, better yet, phased in at different rates by different member groups.

Finally, we explore the potential for a longer-run multilateral TRAMs plus a third-generation replacement of anticompetitive provisions of current antidumping and countervailing duty regimes with a new set of competition policy safeguards that would in principle be more efficient, more predictable, more equitable, and more peaceable than the current

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10. We envision obligations undertaken by competition policy authorities (perhaps in concert with trade policy authorities) to investigate, if requested after consultations, behavior in their jurisdictions that spills over anticompetitively to others (perhaps subject to some threshold of injury) and to mediate conflicts that remain, perhaps along lines outlined in EPG (1995, 12-15 and Annex). Not all behavior would be eligible, but that which impedes contestability, as defined for both trade and investment, would be covered. Investment coverage would include mergers and acquisitions with cross-border effects. The procedural effort would itself be nurtured sequentially. It would begin with a process of positive comity, advancing to (mandatory) consultation, even among countries with little formal competition policy. It would ultimately involve a commitment to informational mediation, as nations take on more organized competition policy commitments. It would explicitly *not* involve dispute settlement procedures, which would flow only subsequently from a multilateral Trade-Related Antitrust Measures (TRAMs) agreement under the auspices of the WTO, part of our second generation of initiatives.

11. The subset of promising competition policy issues in our proposed TRAMs agreement all concern contestability. Cartelization by its very nature impedes entry by those firms not willing to sell according to preestablished, collusive rules. In export markets especially, cartelization only aids one country at the expense of others, and evades current competition policy disciplines that are largely aimed at efficiency and fairness in domestic markets only. Horizontal collusion to dominate or divide markets and fix prices or allowable products, foreclosing new entrants, also clearly deters contestability. And denial of national treatment, or excessive limits thereon, makes entry by foreign suppliers impossible or difficult, standing in the way of the gains from contestability.

mechanisms. Our measures focus especially on easing of competition policy regulations for declining sectors and on facilitating rationalization mergers that absorb firms with weak relative performance.<sup>12</sup>

Until recently, proposals like these have met with strong caution. They were viewed as visionary at best. But in reality the ingredients of competition policy and international trade policy are already being blended at the global level. This is happening via two routes. First, a number of high-level groups have been established to examine these issues. The most important of these is the WTO's formal working group on trade and competition policy.<sup>13</sup> Second, many recent international "trade" disputes have had competition policy fundamentally at their core, such as those concerning

- entry conditions for new suppliers in basic telecommunications, insurance, and other financial services (e.g., whether a nation's offer of freedom to enter a particular foreign country's market ought to be contingent on that country's offer of reciprocal freedom to enter);
- so-called vertical relationships among manufacturers, users, and distributors of auto parts, semiconductors, and photographic film and paper (e.g., are contractual constraints that bind suppliers and distributors to only one firm anticompetitive? This was at issue in complaints concerning the Japanese *keiretsu* system of corporate organization and in the dispute between Fuji Film and Kodak); and
- merger or joint-venture approval of large global oligopolists (e.g., the proposed joint venture of American Airlines and British Airways).

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12. The goal of the competition policy safeguard is to reduce exit costs, the one-time costs of abandoning an economic activity. Looser competition policies for R&D joint ventures is a mirror-image example of an easing of competition policy to reduce entry costs. Sectoral "rationalization cartels" are an example of sectoral exceptions. Academic research remains guarded on these devices (Richardson 1997a, 32-33) but finds them more likely to be effective when the demonstrated production cost savings are large and when government industrial subsidies are scrupulously absent. (Thus, a competition policy safeguard only works well with strong restraints on "state aids"—subsidies and other protections granted to firms in a country's declining sectors.) Competition policy safeguards can be less conflictual than border safeguards if they are clearly implemented on a national-treatment basis, with no favoritism toward domestically owned firms. Mergers in which strong firms, both foreign and domestic, voluntarily "save" weak ones are both efficient and fair if the only other real alternative is extinction of the weak. The most important key to free entry is often rational exit.

13. Others include the long-standing interaction between trade and competition committees within the Organization for Economic Cooperation and Development, even longer discussion of these issues under the auspices of UNCTAD (1997), the Working Party on Trade and Competition of the International Chamber of Commerce, and a high-profile international Competition Policy Advisory Committee to the US Department of Justice's assistant attorney general for antitrust measures.

Such examples of current conflicts lead back to the broad conclusion with which we began: multilateral negotiations toward interdependent regimes for trade, investment, and competition policy are entirely natural. They are happening already, albeit in piecemeal fashion, in services, basic telecommunications, and intellectual property arrangements. That, among other things, makes the WTO the natural host for such negotiations. Conversely, integration of trade and competition policy regimes is not a cynical attempt to corrupt competition policy to the ends of mercantilist trade goals. It is not a ploy to find one more family of reasons to employ trade sanctions. Indeed, the most natural enforcement mechanism of last resort is the maintenance of strong competition-policy standards above any minimal TRAMs thresholds and their nondiscriminatory application to residents, investors, exporters, and import suppliers alike “interterritorially.”<sup>14</sup> Such new regimes are admittedly corruptible, but what is not?

Admittedly, the issues are complex. In fact, they are too complex to solve comprehensively or soon. But they are also too important to neglect out of frustration with this same complexity.<sup>15</sup> What is *unnatural*, indeed incredible, is that the 50-year-old multilateral trading system could continue long *without* such negotiations to integrate trade, investment, and competition policy. That said, it may well take 50 more years—roughly three generations!—to see their full outworking.<sup>16</sup>

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14. National commitments to “higher” or different standards would be preserved, subject to the agreement, and applied in a nondiscriminatory manner to domestic and foreign firms alike, contingent on demonstrated injury to domestic residents. To the extent that national treatment for direct investors leads to significantly greater cross-border investment penetration, such a policy would simultaneously enhance the capability of national competition law to “cover” firms of all types without heavy-handed “extraterritorial reaches” into “offshore” anticompetitive practices. For example, it would make fines a more viable last-resort sanction, reducing the need to consider trade sanctions or limitations of national treatment (see, e.g., Wolff 1997 on fines as sanctions.)

15. Early reports seem to suggest that the WTO working party on trade and competition policy may mistakenly refuse to travel very far at all because the journey is so long.

16. Informed commentary on the recent WTO agreement on basic telecommunications suggests that more than 10 years are necessary just to build institutional capability into the WTO (see, e.g., Hufbauer and Wada 1997; Beltz forthcoming). It took the WTO TRIPs Council more than two years and 20,000 pages just to catalog member countries’ intellectual property laws (*WTO Focus* 25, December 1997, 6).

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