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The international paper examines aspects of the World Trade Organization, OECD, UNCTAD and ICN to the extent that they involve antitrust.

## **I. The WTO**

### **Institutional Structure**

None of the three models described in the Template is applicable to the WTO. In its enforcement aspects, the WTO relies upon self-enforcement by the nation/members who are harmed by breach of the rules—thus bearing some resemblance to a pure private enforcement system in which the harmed entity must trigger enforcement. The members have recourse to the dispute resolution mechanism governed by the Dispute Settlement Understanding (DSU).

The WTO has a tripartite governance structure. Its legislative functions are concentrated in the Ministerial Conferences. Its administrative functions are carried out by the Secretariat, a number of councils and committees, and the Trade Policy Review Body. Its adjudicatory functions are entrusted to the Dispute Settlement Body (DSB), panels, and a standing Appellate Body (AB). We deal here only with the adjudicative or dispute resolution branch. We note, however, that some controversy surrounds the questions of access, transparency and equality in the process of bargaining for the rules.

The DSB establishes panels, appoints AB members, adopts panel and AB reports, supervises their implementation and authorizes sanctions in case of non-compliance. The WTO General Council, composed of representatives of all members, serves as the DSB, but the latter has its own chairman and procedures. The AB is a standing body comprised of 7 individuals normally with a high level of trade expertise. They are appointed for four-year terms, cannot be affiliated with any government, and must be “broadly representative” of WTO membership. The AB sits in randomly-selected divisions of three. Panels are composed of three (occasionally five) governmental or non-governmental individuals, nominated by the WTO Secretariat drawing from a list.

At the request of the complaining party, and after consultations, a panel must be established unless the DSB decides by consensus not to establish one. The panel receives evidence and argumentation from both sides through written submissions and two hearings. The panel meets in closed session. Panels have the right to seek information and technical advice from anyone and may request an advisory report from an expert review group.

The panel may take up to 6 months (3 for urgent matters) to issue a report, a period that can exceptionally be extended to 9 months. The panel first submits to the parties an interim report. Parties can request the panel to review specific aspects of the interim report prior to its circulation to WTO members. Within 60 days after the date of circulation, the DSB adopts the report unless i) it decides by consensus not to do so, or ii) a party appeals the report to the AB.

Only parties to the dispute may appeal a panel report. Appeals must be limited to issues of law covered in the panel report. No dissenting or concurring opinions are allowed. The parties have the right to submit written observations and the right to a hearing before the AB. AB reports are adopted by the DSB and “unconditionally accepted by the parties to the dispute” unless the DSB decides by consensus not to adopt the report.

Panel or AB reports may set out recommendations that a member bring its legislation or conduct into line with WTO obligations. Failure to comply with reports may trigger an obligation for the losing party to provide compensation in the form of additional trade concessions or a right of retaliation (suspension of concessions) by the winning party.

## **The Mandate**

Antitrust is not within the core mandate of the WTO, which is to move increasingly towards global welfare through liberalization of cross-border trade according to bargains struck by the members. Anticompetitive conduct by private actors may impair trade and may offset benefits accruing from trade liberalization. Accordingly, some provisions in WTO agreements bear on antitrust. Stronger and more central prohibitions of anticompetitive conduct have been proposed but not adopted. State trade-restraining acts, which are usually anticompetitive, are more readily caught.

Relevant provisions include: Article XI of the General Agreement of Tariffs and Trade (GATT) prohibits members from imposing or maintaining import and export restrictions, including import and export cartels. Article 8.1 of the Technical Barriers to Trade (TBT) Agreement requires WTO members to ensure that non-governmental bodies operating conformity-assessment procedures do not engage in exclusionary conduct against non-members. Article 11.1(b) of the Agreement on Safeguards prohibits WTO Members from ordering, encouraging or tolerating voluntary export restraints. Article 40.1 of the Trade-Related Aspects of Intellectual Property or Rights (TRIPS) Agreement states that nothing in TRIPS prevents members from taking appropriate action to address IP licensing conditions that may restrain competition and notes that such conduct may include exclusive grantbacks, conditions preventing challenges to validity, and coercive package licensing.

Article VIII GATS requires each member to ensure that its monopoly or exclusive service suppliers do not act in a manner inconsistent with that member’s specific commitments and MFN obligations both inside the scope of their monopoly rights, or, through abuse of their position, outside of that ambit. The GATS Annex on Telecommunications requires each member to ensure that any service supplier of any other member is accorded “access to and use” of public telecommunications transport networks and services on “reasonable” and “non-discriminatory” terms and condition, for the supply of a service included in that member’s schedule of commitments. The Telecoms Reference Paper requires the WTO members who have signed to prevent its major suppliers from engaging in anticompetitive practices such as cross-subsidization. The panel report in *Mexico–Telecoms* interpreted the provision to include cartels within the category

of anticompetitive practices, after taking account of WTO members' antitrust legislation and international instruments on competition policy.

### **Due Process and Institutional Performance Norms**

WTO procedural rules (e.g. when to file, etc.) are relatively clear. There is transparency and fairness. The publication of reports has helped to transform the dispute settlement process from one of diplomatic facilitation to one of reasoned adjudication generally of a high quality.

There is in general adequate opportunity to be heard and full notice of the allegations, adequate notice of the evidence relied on, and time to prepare. There is a right to appeal panel reports to the AB. Timeliness is a problem. Dispute settlement procedures may take a considerable amount of time.

The independence of decision-makers from external influence and their open-mindedness has been questioned. It has been alleged that panel members may be linked to or influenced by lobbies and special interests and that there may be discrimination against developing countries. The rules of conduct on dispute settlement attempt to prevent potential conflicts of interest; they require each panel and AB member to comply with a self-disclosure requirement and they contain a subsequent disclosure procedure. The DSU sets out special and differential treatment provisions in favor of developing countries and the Advisory Centre on WTO Law advises those countries at discounted rates.

The absence of rules of evidence in decision-making can be a problem, and may become a more significant problem if antitrust should become a WTO competence. The AB lacks sophistication in handling and evaluating evidence. The DSU does not include any express rules concerning burden of proof, although the AB has clarified that the party that asserts a fact is responsible for proving it. The required level of proof is unclear. Absence of a rule of *stare decisis* could lessen predictability. Still, well-reasoned reports are likely to be followed in subsequent similar cases, and reasoning contained in unadopted panel reports can provide useful guidance.

Implementation and remedies may be problematic. A successful complainant is not awarded compensation for harm suffered or right to reimbursement for legal expenses. In the event of non-implementation, not all members have the same ability to resort to the suspension of obligations. The discretionary control accorded to the winning party in the implementation and enforcement phase substantially undermines predictability and effectiveness especially in its impact on less powerful members.

Opportunities for participation by non-members and NGOs is a hotly debated topic. Following repeated calls for greater NGO involvement in the dispute resolution process, the AB affirmed that both it and the panels have discretion to consider unsolicited amicus briefs. The AB set out a special procedure to that end.

## **II. Three Other International Institutions, none of which has rule-making or enforcement powers: OECD, UNCTAD and ICN**

Case-by-case due process norms are not applicable.

## **The Organization for Economic Co-operation and Development**

### **Institutional Structure and Mandate**

The OECD is an organization of developed nations. It has a secretariat in Paris. Its members are states. Its mandate is to bring together governments committed to democracy and market economy to help its member countries achieve sustainable growth and employment, raise the standard of living, and contribute to development of the world economy.

The OECD operates through committees, one of which is the Competition Committee. A steering group, the Committee Bureau, helps to lead the Committee and set the agenda, which includes cutting edge issues of law and procedure. Global fora expand the purview to developing countries. Research reports, best practices and guidelines may result. Peer reviews of member countries are undertaken. Two recommendations have had particular influence: the 1995 recommendation on cooperation on anticompetitive practices, and the 1998 recommendation concerning effective action against hard core cartels.

### **Process and Performance Norms**

Access, transparency, accountability, responsiveness, expertise. Members have good access to agenda setting. Transparency is excellent. Performance is periodically evaluated, assuring accountability. Responsiveness and level of activity seem to have improved with the advent of ICN into the circle of “competitors” dealing with the issues of antitrust in a global economy. The expertise, as in reports and peer reviews, is very high.

## **The United Nations Conference on Trade and Development**

### **Institutional Structure and Mandate**

UNCTAD is the principal arm of the United Nations General Assembly dealing with issues of trade, investment and development. It is comprised of states. Its mandate is to improve trade, investment and development opportunities of developing countries particularly with a view to ensuring that domestic policies and international action are mutually supporting.

UNCTAD’s work is carried out through branches, one of which is the Competition and Consumer Policies Branch. The CCPB attempts to help developing countries maintain and modernize their competition laws and policies, through updating commentaries on the UN Set on Competition Policy, a Model Law, peer reviews and fora.

## **Process and Performance Norms**

**Access, transparency, accountability, responsiveness, expertise.** UNCTAD is largely secretariat driven; the agenda is controlled by the secretariat. The work product increasingly reflects expertise. Recent peer reviews have been written by volunteers from member states who have great expertise. Significant work of the CCPB centers around the UN Set on Competition Policy, which dates back to the 1970s; the Set was adopted in 1980. Its language cannot be changed without reopening a process for a new consensus. This would be a daunting challenge and there is no initiative for revision, and the thirty-year-old formulations make it difficult for the leadership to move flexibly to a new platform in advocating principles of competition law appropriate to developing countries. The CCPB is sponsoring cutting edge research, and it runs a well-received program of capacity building in Latin America, and it is an important forum for convening developing (and developed) country competition officials and thus facilitating a developing country competition community.

## **The International Competition Network**

### **Institutional Structure and Mandate**

The ICN is the youngest of the three organizations. It was founded in 2001. It counts itself as a “virtual” organization, having no secretariat, no geographic location, no rule-making much less adjudicative or dispute resolution power. Its members are the competition authorities of the world. It is led by a steering group elected by its members. Non-governmental advisors contribute to its work, which is largely carried out through working groups and may result in guidelines or recommended practices, including principles and formulations of law. Its mandate is to solve actual competition problems capable of practical solution and to provide an informal environment likely to produce convergence of the competition laws of the nations.

### **Process and Performance Norms**

**Access, transparency, accountability, responsiveness, expertise.** On all of these counts, performance and process are excellent. ICN is engaged in a process of self-assessment to assure that it is responsive to its members’ wants and needs and that it moves in directions desired by its members. If access to the agenda and the benefits of first-draft authorship fall mainly to individuals in the developed world, that is because the agencies in the developing nations have few human and monetary resources to devote to ICN, given more urgent priorities.