

To be published in *Competition Policy in East Asia*
(Erlinda Medalla, ed., forthcoming)

**Competition Policy, Economic Development and the Role of a Possible
Multilateral Framework on Competition Policy: Insights from the WTO
Working Group on Trade and Competition Policy**
By
Robert Anderson and Frédéric Jenny*

INTRODUCTION

The relationship between competition policy and economic development has been a central theme in the work of the World Trade Organisation's Working Group on the Interaction between Trade and Competition Policy and of related technical assistance activities undertaken by the WTO Secretariat over the past several years. This work has identified a number of ways in which anticompetitive practices of firms can impede economic development, and in which national competition policies that are appropriately adapted to the circumstances of developing countries can support development. These findings are independent of questions regarding the pros and cons of a possible WTO agreement on competition policy, which have also been extensively discussed in the working group but on which a consensus has been lacking.

This chapter examines the links between competition policy, development and trade liberalisation. It begins with a review of the role and importance of competition policy and its relationship to economic reform in developing countries. Account is also taken of the role of such policy in addressing international anticompetitive practices. The chapter outlines some of the arguments that have been put forward in the WTO working group regarding the potential benefits for developing countries of a WTO framework on competition policy. It also outlines the principal elements that have been proposed for inclusion should negotiations on such a framework be launched, which currently appears unlikely. The purpose is not to defend or advocate a particular approach toward implementation of the Doha mandate on trade and competition policy, but to facilitate informed discussion in the international community.

The central theme of this chapter is the fundamental complementarity of competition policy, trade liberalisation and domestic economic reform, and their importance for development. In debates on development, poverty alleviation and the WTO, it is sometimes argued that a WTO initiative on competition policy would deplete scarce human and institutional resources that would be better applied in the pursuit of external liberalisation (see, e.g., Winters 2002). This reflects a false dichotomy. As important as external liberalisation is, it is unlikely to achieve its objectives absent internal market reforms to facilitate an appropriate supply-side response. Furthermore, absent effective competition policies, the economic welfare gains expected to materialise from the reduction of government-imposed barriers to trade can be undercut by the operation of international anticompetitive practices such as cartels. Ample evidence now exists that such cartels are a recurring feature of markets that lack effective competition rules and institutions, and that appropriate enforcement actions by developed countries, while of vital importance, do not adequately protect the interests of developing countries in this area.

In addition to addressing the above concerns, competition policy can itself contribute to continuing external liberalisation, through the advocacy activities of competition agencies. In particular, competition agencies can become an important source of analytical support for continuing market-oriented reforms, both internally and externally. For these reasons, appropriate investments in national competition policies are more likely to contribute to than detract from external liberalisation efforts. Nonetheless, in order to be effective, it is important that competition law and institutions are adapted to national economic circumstances and institutional constraints.

The possible role and content of a WTO agreement in this area has been widely misunderstood, including in learned journals and by otherwise well-informed authors. For example, in the run-up to the 2004 Cancun Ministerial, an article in *Foreign Affairs* (Evans 2002) reiterated the concern that WTO rules on competition policy ‘could be administered through a supranational agency’, notwithstanding that this possibility figured nowhere in any of the recent or earlier proposals that have been made in the context of the WTO and has been explicitly disavowed by the proponents of WTO negotiations on various occasions (see, e.g., Garcia-Bercero and Amarasingha 2001). Also, extensive references were made to the possibility of a WTO antitrust code – implying a comprehensive set of substantive rules. As elaborated below, the proposals for a WTO agreement in this area indicate that any such agreement (if negotiations were to be launched) is likely to be a good deal more modest in its content and aspirations. In particular, such an agreement would likely focus on the promotion of voluntary cooperation and technical assistance, in addition to modest commitments to action against hardcore cartels and to adherence to core principles of transparency, non-discrimination and procedural fairness that are widely recognised as being central to the effective implementation of competition policy.¹ It would not involve the harmonisation of competition laws, where this term is understood as implying the enforcement of uniform approaches to competition policy at the national level (see also Garcia-Bercero and Amarasingha 2001).

This chapter discusses the role of competition policy in developing countries, drawing on, among other sources, work completed in the WTO Working Group on the Interaction between Trade and Competition Policy, and considers the domestic and international applications of competition law in addition to the advocacy function of competition institutions. Some of the arguments that have been made in favour of action on competition policy in the framework of the WTO are discussed, in addition to the major reservation that has been voiced by developing countries with regard to a possible WTO agreement in this area – namely, the concern that such an agreement would limit their policy options and development strategies. To carry the discussion forward, some key aspects of the recent proposals for a multilateral framework on competition policy are outlined.

THE RELEVANCE OF COMPETITION POLICY FOR DEVELOPING ECONOMIES

Competition law and/or policy² is important to protect consumers and industrial users from anticompetitive practices that raise prices and reduce output. This is no less true in developing countries than in developed ones. In fact, there are reasons for believing that less mature markets tend to be more, rather than less, vulnerable to anticompetitive practices. The reasons include: (a) high ‘natural’ entry barriers due to inadequate business infrastructure, including distribution channels, and (sometimes) intrusive regulatory regimes; (b) asymmetries of information in both product and credit markets; and (c) a greater proportion of local (non-tradable) markets. For these reasons, consumers in developing countries are more vulnerable to anti-competitive practices and have a particularly compelling need to be protected against cartels, monopoly abuses and the creation of new monopolies through mergers. The competition agency can also play a useful role in making the case for related policy and legal reforms (e.g., property rights, contract enforcement and corporate governance) that are necessary to create a healthy market economy (see, for useful elaboration, Dutz 2002).

A specific role of competition policy which may be of particular importance in developing countries (although it is important in all economies) relates to the prevention of bid rigging in public procurement processes. Empirical evidence suggests that the costs of bid rigging to public treasuries substantially exceeds the costs of establishing a competition office to investigate and deter such activities (see discussion and references cited in this section, below). The possibility of rigged bids cannot be prevented merely by opening procurement processes to foreign competitors, since the latter may be party to any bid-rigging conspiracies (see, e.g., US Department of Justice 2000).

The argument is sometimes made that competition policy is irrelevant in circumstances of extreme poverty. However, where incomes are severely limited, it would seem even more important than otherwise that the purchasing power of consumers not be further diminished through anticompetitive practices. There is growing evidence that anticompetitive practices are particularly prevalent in regard to goods for which there are limited substitutes available in developing country markets, for example foodstuffs. Many of the major international cartels that were disclosed in the mid- to late 1990s and that were believed to have been active in developing country markets, for

example those relating to the sale of vitamins, lysine and citric acid, all important inputs to agrifood production (Levenstein and Suslow 2001; Evenett et al. 2001; Jenny 2001; Anderson and Holmes 2002). Similarly, the effective prevention of bid rigging would seem to be particularly important where, as in many developing countries, governments are subject to severe fiscal constraints.

Fortunately, the evidence is also growing that, with appropriate resources and training, developing countries can take steps to deal effectively with anticompetitive practices that affect their consumers. A recent comparative study of the role of competition policy in Africa and South Asia initiated by the Consumer Unity and Trust Society with participation by numerous outside researchers found important parallels between the experiences of developing and transition economies (Consumer Unity and Trust Society 2003). The countries studied were India, Sri Lanka, Pakistan, Zambia, Kenya, Tanzania and South Africa, all of which have taken steps to reduce protectionism, reliance on state-owned enterprises and bureaucratic control of the private sector and have seen fit to implement competition laws in one form or another. In addition, in a few cases, advanced developing countries such as Mexico, Brazil and Korea have initiated successful enforcement actions in relation to international cartels (Working Group on the Interaction between Trade and Competition Policy 2003a; Hur 2002; Mexico 2002). Moreover, evidence regarding the implementation of competition policy as tool of economic transformation in Central and Eastern Europe suggests that in the majority of countries in that region competition law provisions (in particular, provisions relating to abuses of a dominant position) have *not*, contrary to concerns expressed by some Western analysts at the time the laws were enacted, been over-used or used in ways that are counter-productive (see Pittman 2004).

Work in the WTO working group in addition to other venues has highlighted the need for a pragmatic approach to the introduction of competition policies in developing countries, focusing on the most blatantly harmful practices and avoiding overly elaborate institutional structures. The inappropriateness of a one-size-fits-all approach and the necessity of adapting competition policy to the economic circumstances and institutional endowments of individual countries have been repeatedly stressed, including by the proponents of a WTO agreement in this area (WTO Working Group on the Interaction between Trade and Competition Policy 2001, paragraph 15; WTO Working Group on the Interaction between Trade and Competition Policy 2003b, paragraph 16). Under one possible approach discussed in the working group, a national competition authority would first focus on the suppression of horizontal cartels (the most unambiguously harmful type of enterprise practice) and on basic competition advocacy activities relating to essential market reforms. After gaining adequate experience in these areas, it would then take on additional responsibilities for matters such as merger review and anticompetitive vertical restraints. In the last stage, it would take on more sweeping responsibilities for competition advocacy activities relating to all aspects of the interplay between competition policy and regulation (WTO Working Group on the Interaction between Trade and Competition Policy 1998, paragraph 51). Noteworthy here are both the non-insistence on immediate adoption of comprehensive competition laws and the emphasis placed on the advocacy function (for elaboration, see below).

Facilitating a supply-side response to trade liberalisation and reinforcing domestic reforms

As Osakwe (2001) emphasises, in many cases failures of trade liberalisation to generate sustained development and growth can be traced to a failure to introduce complementary domestic policy reforms. In most cases, countries will not be well poised to take advantage of the potential benefits of trade liberalisation unless they simultaneously take steps to reduce costs and enhance the efficiency of infrastructure sectors such as telecommunications and transportation; to promote flexibility by eliminating artificial restrictions on entry, exit and pricing in manufacturing and other industries; and to establish and strengthen incentives for investment, innovation, the creation of efficient management structures and productivity improvement. Competition policy has a role to play in all of these areas. A failure to implement competition policy and related reforms will prevent countries from realising the potential gains from external liberalisation, by inhibiting an appropriate supply response (see also Krueger 1984).

The point has also been made in the WTO Working Group on the Interaction between Trade and Competition Policy that the implementation of a transparent and effective competition policy can be an important factor both in enhancing the attractiveness of an economy to foreign investment and

in maximising the benefits of such investment. Competition policy can make an economy attractive to foreign investors by providing a transparent dispute-mechanism mechanism that is consistent with international norms. Vigorous competition in markets, reinforced by competition policy, encourages foreign firms to construct state-of-the-art production facilities in host countries, transfer modern technology and undertake training programs, and also prevents the exploitation of consumers. These effects may be particularly important in developing countries, in view of the crucial importance of technology transfer to economic development (WTO Working Group on the Interaction between Trade and Competition Policy 1998).

In the WTO working group, the point has also been stressed that competition policy can reinforce, and may be essential to realising, the potential benefits of privatisation programs and initiatives. The argument here is that, unless appropriate measures are taken to prevent the continuation and/or re-establishment of monopolistic market structures, privatization will not result in any fundamental change in the incentives facing firms that will improve their behaviour and performance. Supporting the importance of this concern, in the working group, there has been a frank acknowledgement that, in many cases, privatization and deregulation in the developing world have failed to deliver their vaunted benefits due precisely to a failure to engage in pro-competitive restructuring and related market reforms (WTO Working Group on the Interaction between Trade and Competition Policy 1998).

The advocacy function of competition agencies

Apart from the potential benefits for developing countries of appropriate competition law enforcement activities, discussions in the WTO Working Group on the Interaction between Trade and Competition Policy and other relevant forums such as the OECD Global Forum on Competition Policy and the UNCTAD Expert Group on Competition Law and Policy have also called attention to the importance of the advocacy activities of competition agencies, particularly in regard to the implementation of pro-competitive regulatory reforms. Such activities may include public education activities, studies and research undertaken to document the need for market-opening measures, formal appearances before legislative committees or other government bodies in public proceedings, or behind-the-scenes lobbying within government. These, it has been suggested in the working group, may be among the most useful and high-payoff activities undertaken by competition agencies (WTO Working Group on the Interaction between Trade and Competition Policy 1998, paragraphs 34 and 229).

A particularly important focus of competition advocacy activities is in relation to regulation. To be sure, in both developed and developing economies, regulation can serve valid efficiency-related public purposes. For example, it is well established that regulation can be an efficient response to market failures such as imperfect information, the existence of a natural monopoly (a situation in which a market is most efficiently supplied by a single firm) and other such problems. Nonetheless, it is important to recognise that, notwithstanding its avowed aims, regulation often thwarts rather than promotes efficiency and economic welfare. This is likely to be the case, for example, where it imposes restrictions on entry, exit and/or pricing in non-natural monopoly industries. Experience in both developed and developing countries shows that, in many cases, rather than having regulation imposed on them for the public benefit, incumbent firms have sought regulation for their own benefit, for the purpose of limiting entry into the industry and helping them to enjoy higher prices for their products (the classic diagnoses of this problem are presented in Stigler 1971 and Jordan 1972). Recognition of the significance of such conduct as a barrier to economic development dates back at least to Krueger (1974), and is affirmed in recent analyses by the World Bank and other development-related agencies (see, e.g., World Bank 1997; UNCTAD 1998). In the light of this, efforts to remove inefficient regulatory restrictions and related interventions are central to the establishment of healthy market economies in developing and transition economies (World Bank 1997; World Bank 2000; Frischtak 1995).

In the discussion in the WTO Working Group on the Interaction between Trade and Competition Policy, important links have been made between competition advocacy, successful efforts at regulatory reform and external trade liberalisation. The following examples of regulatory situations having adverse effects on competition and trade have been noted: outmoded or unnecessary regulations; a failure by countries to recognise each others' technical standards; state zoning laws or

sanitary and phytosanitary requirements that limit entry unnecessarily or serve as disguised tools for excluding competing suppliers; legal systems that facilitate strategic use of courts by firms to harass competitors; and discriminatory research and development funding. The following additional categories of regulation have been mentioned as warranting appropriate reforms: regulation that openly discriminates in favour of domestic suppliers; regulations that are non-discriminatory on the surface but subtly discriminatory in their substantive requirements; regulations that simply are no longer needed; and poorly designed regulations that are desirable in principle but unnecessarily intrusive. The potential contribution of competition advocacy in addressing these measures has been emphasised (WTO 1998, paragraphs 110 and 111).

The foregoing clearly points to the important contribution that competition advocacy activities can make to both the internal efficiency of markets and to trade liberalisation. As noted, competition agencies in both the developed and (in some cases) the developing world attach high priority to such activities which aim at minimising unnecessary regulatory intervention and ensuring that, where it is used, regulation serves genuinely pro-competitive purposes (for the experience of Canada, see Anderson et al. 1998). In doing so, the agencies advance goals that are closely related to those of international trade liberalisation – a further and little-noted but important example of why the proliferation of strong competition agencies is in the broad interest of the multilateral trading system (see also Anderson and Holmes 2002).

The role of competition policy in addressing international anticompetitive practices

In the 1990s, extensive evidence surfaced that international cartels are alive and flourishing in the ‘globalising’ economic environment. Investigations conducted by the US Department of Justice, the European Commission, the Canadian Competition Bureau and authorities in other jurisdictions revealed the existence of major cartels in (to cite but a few of many examples) the following industries: graphite electrodes (an essential input to steel mini-mill production); bromine (a flame retardant and fumigant); citric acid (a major industrial food additive); lysine (an agricultural feed additive); seamless steel pipes (an input to oil production); and vitamins (for details, see Levenstein and Suslow 2001). In many such cases, the cartels are known to have operated extensively throughout the developing world, substantially raising the costs of developing countries’ imports of the affected products (Levenstein and Suslow 2001; Evenett et al. 2001; Anderson and Holmes 2002; Jenny 2003).

The costs imposed by such cartels on the world economy and, specifically, on developing countries have been shown to be in the multi-billions of dollars annually. Levenstein and Suslow (2001) note that many examples of international cartels involve firms headquartered in the developed world with substantial exports to developing countries. Looking at sixteen ‘cartelised’ products, they note that:

Examining these sixteen products – which were cartelised at some point during the 1990s and for which we were able to obtain reasonably reliable trade data – the total value of such ‘cartel-affected’ imports to developing countries was \$81.1 billion. This made up 6.7% of all imports to developing countries. It is equal to 1.2% of their combined GDP.

The price impact of cartels supplying these products appears to have been in the range of 20–30 per cent on average – implying a total overpayment by developing countries for their imports of something in the order of US\$10–24 billion annually in respect of these cases alone. It is also noteworthy that in many or perhaps most cases, the immediate impact of cartels is on other firms using the products as industrial inputs. This underscores the detrimental impact of cartels on the development prospects of poor countries.

The available evidence suggests that the benefits for developing countries of the implementation of effective measures to tackle international hardcore cartels may exceed the welfare gains for these countries from agricultural liberalisation. An article in the September 2002 edition of the IMF’s *World Economic Outlook* suggests that the increase in the welfare of developing countries that would result from a 50 per cent liberalisation of the agricultural policies of industrialised economies would be approximately US\$8 billion per annum (International Monetary Fund 2002). While this is unquestionably a significant gain, it is less than the above-noted costs imposed on

developing economies by international cartels – implying that the gains from the implementation of effective competition regimes and related co-operation arrangements to tackle the operations of such cartels in developing countries could be even greater (see, for related discussion and additional supporting references, WTO Working Group on the Interaction between Trade and Competition Policy 2003a).

International cartels are not only more numerous and durable, but also impair the process of development in developing countries more significantly than has previously been thought. This is true for at least three reasons (Jenny 2001):

1. In the early stages of their industrialisation, and given their narrow domestic industrial base, developing countries have to rely on imports. To the extent that such imports are subject to anticompetitive practices either by domestic firms (e.g., an import cartel) or by foreign suppliers of these imports (e.g., an export or international cartel), the importing country will be penalised by higher than necessary import prices.
2. To achieve economic development, and in view of the fact that narrowly based domestic markets lead them to rely on export markets, developing countries will be penalised by international cartels, or by import cartels, and by abuses of dominant positions in the countries of export.
3. Foreign firms are more likely to engage in across-the-border anticompetitive behaviour when the countries to which they export do not have a domestic competition law and can neither individually nor through cooperation with foreign competition authorities challenge the firms' market behaviour. Thus, countries that do not have a domestic competition law will be the prime victims of transnational anticompetitive practices.

The implications of international cartels for the gains from trade are also clear: to the extent that they raise prices and reduce output in transnational markets and, in some cases, limit cross-trading by one country's suppliers into markets assigned to other countries' suppliers, they directly inhibit realisation of the gains that should accrue to participating countries. This is *not* to suggest that the international trading system should itself carry the primary responsibility for investigating and prosecuting cartels – clearly, this will continue to be done primarily at the national level and through the work of specialized agencies – but that ensuring that measures are in place to deal appropriately with such arrangements is a legitimate concern of the system (Anderson and Holmes 2002). Over time a failure to respond adequately to the costs imposed by international cartels on developing countries is likely to subvert confidence in the market economy on the part of the citizens of such countries (Jenny 2003).

To be sure, international cartels are not the only example of anticompetitive practices with an international dimension that can have an impact on trade and development. Access to markets by foreign suppliers can be directly undermined by exclusionary vertical market restraints (contractual linkages between manufacturers and their suppliers or distributors), import cartels and other forms of anticompetitive conduct (Wolff 1994). The empirical significance of such practices and the appropriate policy response have been much debated in relevant literature and official proceedings. In its comprehensive 2000 assessment of the available evidence and commentaries on this issue, the US International Competition Policy Advisory Committee concluded that, although uneven, the record is sufficient to show that private, governmental and mixed public-private restraints that inhibit market access are a problem worthy of the attention of policymakers in both national and international contexts (US International Competition Policy Advisory Committee 2000; see also Marsden 2003 for useful commentary on this issue).³

Competition policy, dynamic efficiency and the 'policy space' available to developing countries

An important consideration in discussions on the importance of competition policy for economic development has been the implications of such policy for dynamic as opposed to static efficiency. The point has been made that dynamic efficiency gains are likely to be even more important for development than static efficiency considerations. Developing country representatives have expressed concerns that conventional approaches to competition policy may undervalue or possibly even

represent an obstacle to the realisation of dynamic efficiency gains (WTO Working Group on the Interaction between Trade and Competition Policy 2001, 2002b; Singh 1999, 2002).

In response, the point has been made that modern approaches to competition policy are by no means concerned only with the achievement of static efficiency; rather, dynamic efficiency is increasingly an explicit goal of such policy.⁴ Indeed, much attention has been given in recent years to appropriate ways of supporting and factoring dynamic efficiency gains into competition policy analysis (see, e.g., Gilbert and Sunshine 1995; Gilbert and Tom 2001; Anderson and Gallini 1998). The consensus among scholars is that this has not involved a radical realignment of competition policy principles; rather, it has been a question of adapting well-founded principles to the subject matter of the 'new economy' (see, e.g., Posner 2001). On the whole, competition and competition policy are more likely to contribute to than detract from the attainment of dynamic efficiency gains and other developmental objectives, in that inter-firm rivalry provides a key incentive for firms to lower their costs; to provide better service and expanded choices for consumers; and to innovate and/or adopt the best available technologies (WTO Working Group on the Interaction between Trade and Competition Policy 2003b, paragraph 67). As one particular dimension of its role in promoting dynamic efficiency, competition policy in many jurisdictions is employed to ensure that intellectual property rights are used in ways that support rather than restrict innovation and technology transfer (US Federal Trade Commission 2003; Anderson and Gallini 1998; Anderson 2002).

A closely related argument has been that, even recognising that competition is one important determinant of dynamic efficiency, it is by no means the only determinant, perhaps particularly in the context of developing countries (Singh 1999, 2002). In pursuing development, developing countries may need to have access to a range of tools, possibly including sectoral initiatives and forms of intervention that are at variance with competition policy tools and objectives. In this regard, it is important that their 'policy space' not be unduly restricted (WTO Working Group on the Interaction between Trade and Competition Policy 2001, 2002b).

In responding to this concern, the point has been made that the efficacy of sectoral initiatives and interventions such as the promotion of national champions is a matter of debate. Interventions by relevant WTO members in the WTO working group and related scholarly studies suggest that, to a large extent, the success of East Asian and other developing economies has been despite, rather than because, of efforts to promote national champions and other industrial policy interventions (see WTO Working Group on the Interaction between Trade and Competition Policy 2003a and other studies referenced therein). Nonetheless, it has been acknowledged that all governments have employed such measures from time to time and it is understandable that developing countries would not wish their recourse to such tools to be restricted. In this regard, a study prepared for the WTO working group in 2003 identified five ways in which potential conflicts between competition policy and national industrial policy have historically been managed, and the policy space of countries thereby preserved. These are: (1) the use of industrial policy instruments which, even where they tended to restrict competition in markets, are not actionable under the competition laws of most countries (e.g., tariffs, subsidies, training programs and public ownership); (2) the explicit incorporation of goals such as dynamic efficiency gains in national competition laws; (3) the explicit taking into account, by responsible officials, of dynamic as well as static efficiency considerations in the application of national laws; (4) where necessary, the provision for exemptions, exceptions and exclusions from competition law; and (5) allowing for a governmental body to overrule a decision made by the competition enforcement agency in the event that national development priorities might be compromised (WTO Working Group on the Interaction between Trade and Competition Policy 2003a).

The study also found that, by and large, the adoption of a multilateral framework on competition policy along the lines that have been proposed by some WTO members is consistent with and would not jeopardise the ability of members to continue to use these five tools (WTO Working Group on the Interaction between Trade and Competition Policy 2003a, 2003b, paragraph 67). This is not to suggest that such derogations necessarily constitute good policy in all cases, but only that they have been widely used and would continue to be available under the terms of a multilateral framework on competition policy as they have been put forward by the proponents.

Beyond the perceived potential for intrusion on developing countries' policy space, a further concern of some such countries involves the direct costs of setting up and operating a national

competition agency. This matter was also addressed in the study prepared for the Working Group in 2003. The study suggested that the direct operating costs of national competition agencies in developing countries may be smaller than has been feared and, in any case, pale in comparison to the potential benefits. For example, data assembled by the Consumer Unity and Trust Society indicate that the annual budget of competition enforcement agencies in seven countries, namely India, Kenya, Pakistan, South Africa, Sri Lanka, Tanzania and Zambia, in the year 2000 was in all cases less than 0.06 % of the total budget for the central government – i.e., less than one thousandth of the total government budget (in several cases, much less) (Consumer Unity and Trust Society (2003), table 7, p. 54; reprinted in WTO Working Group on the Interaction between Trade and Competition Policy (2003a), p. 64).⁵ Clarke and Evenett (2003) estimate that the resource saving that would be generated by only a 1% reduction of bid rigging on government contracts would be greater than the operating budget of the competition agency in these countries, in most cases by a factor of several times over (Clarke and Evenett 2003, p. 127).

Summary: why external liberalisation is not, by itself, sufficient to ensure the efficient functioning of markets

A strong case can be made that the implementation of well-adapted competition policies in developing countries will help to advance development-related goals, both by contributing to and complementing domestic reform processes and by tackling domestic and transnational anticompetitive practices that reduce the welfare of consumers and raise business input costs. With appropriate care, such policies need not restrict countries' access to other tools through which they promote their development.

In debates on the role of competition policy in the WTO, the argument is sometimes made that competition policy and especially competition law may be an inferior instrument for achieving satisfactory economic performance – rather, competition may be more efficiently induced through external market-opening measures such as the reduction of tariffs (Winters 2002; see also Blackhurst 1991). Indeed, the elimination of barriers to international trade and investment can be a powerful instrument in promoting competition and the efficient functioning of markets – there is no disagreement on this point. However, it is a fallacy to conclude from this that competition policy itself is unimportant. The reasons for this follow directly from the foregoing description of the role of competition policy and competition authorities in developing countries.

First, depending on the natural configuration of industries as well as a variety of policy-related factors, markets for many goods and services (particularly the latter) may be largely insulated from external sources of competition. This problem is likely to be particularly prevalent in developing or least-developed countries, due for example to inefficient infrastructure sectors that can impede trade and investment flows.

Second, in many cases, the potential benefits of market-opening measures will not be realized unless countries simultaneously take steps to address anti-competitive practices and structural barriers to development such as private and public monopolies in infrastructure sectors, domestic and international cartels that raise business input costs and reduce the welfare of consumers, and restrictions on entry, exit and pricing in manufacturing and other industries.

Third, experience shows clearly that certain manifestly harmful anticompetitive practices (e.g., international cartels) cannot be remedied by external (or internal) liberalisation alone, where the relevant arrangements cover the main foreign firms in addition to any domestic firms operating in the relevant market(s). Similarly, the possibility of rigged bids, for example in relation to major infrastructure projects, cannot be prevented merely by opening procurement processes to foreign competitors (since such competitors may also be party to bid-rigging conspiracies).

Competition law can be important for other reasons as well. For example, in many jurisdictions it is recognised that competition law has a role to play in preventing abusive practices relating to intellectual property rights in the domestic economy. It is unlikely that the mere absence of tariffs, quotas or other traditional trade barriers can suffice to prevent such practices – particularly since patents or copyrights can themselves affect the ability to supply domestic markets through imports.

Finally, the existence of vibrant competition agencies in developing countries can itself be an important factor contributing to the adoption of external and internal market-opening policies, through the agencies' advocacy function. Numerous interventions in the WTO Working Group on the Interaction between Trade and Competition Policy, including by developing country representatives, have stressed the importance of such activities and their contribution to the process of economic reform and development (WTO Working Group on the Interaction between Trade and Competition Policy 1998, paragraphs 36, 45, 51, 53 and 109). This is another reason why competition law and trade liberalization should be regarded as complements rather than as substitutes, and why the proliferation of effective competition laws and institutions is likely to strengthen the multilateral trading system, over time.

POSSIBLE RATIONALES FOR INTERNATIONAL COMMITMENTS ON COMPETITION POLICY

The subject of international cooperation in the field of competition law and policy is not new. A number of developed countries and a few developing countries are party to bilateral cooperation agreements regarding competition law enforcement. Such agreements have been a key factor in the progressive strengthening of competition law enforcement in various countries over the past two decades, particularly in developed countries (Evenett et al. 2000). Limited cooperation arrangements also feature in a large and growing number of regional trade agreements (World Trade Organisation 1997). The benefits of such arrangements include not only the obtaining of information and sharing of insights relevant to specific investigations but also the resulting learning process for the participating officials (WTO Working Group on the Interaction between Trade and Competition Policy 2002a).

Nonetheless, much evidence suggests that the actual extent of international cooperation in competition law enforcement is less than is optimal in light of what is known about the extent and frequency of anticompetitive practices with an international dimension (see, e.g., Jenny 2002). In this context, a key focus of the exploratory work of the WTO Working Group on the Interaction between Trade and Competition Policy has been on the scope for and potential benefits of new approaches to cooperation in the field of competition law enforcement, particularly at the multilateral level.

A number of rationales for international collective action on competition policy, including at the multilateral level, have been put forward in the economic literature and by delegates in the WTO working group. Clarke and Evenett (2003) postulate two sources of positive spillovers that provide rationales for international action in this area. First, public announcements of cartel enforcement actions in one country tend to stimulate enforcement efforts in other countries, particularly where there is an established relationship between the relevant enforcement authorities. In this way, trading partners benefit from active enforcement abroad. Second, the investigation and prosecution of arrangements such as international cartels can be greatly facilitated by accessing information about the nature and organisation of the arrangement from another jurisdiction that has successfully completed such an investigation. Conversely, a failure to take action against cartels headquartered in a particular jurisdiction may create 'safe havens' that make it more difficult for other affected jurisdictions to take such action. These considerations point to the potential benefits of some form of international accord committing the participating countries to take action in this area (Clarke and Evenett 2003: 117–18).

An important related argument is that the field of competition policy may be subject to 'political market failures' that result in systematic under-investment in related institutions in many countries, owing to the diffuse nature of the interests whose welfare is promoted by such institutions (i.e., consumers). In the work of the WTO Working Group on the Interaction between Trade and Competition Policy, the view has been expressed that cooperation at the multilateral level could be particularly helpful in generating political support for the implementation of effective competition policies at the national level; in ensuring that such policies are applied in a non-discriminatory and transparent manner; in promoting common approaches to particular practices where this seems feasible and warranted; and in promoting educational exchanges regarding the content and sound application of competition policy.

In a recent contribution to the theory of international economic policymaking, Birdsall and Lawrence (1999) state that a principal benefit of trade agreements aimed at measures beyond the

border can be to facilitate domestic policy reforms, by providing a tool for overcoming domestic constituencies that could otherwise block the reform process. They refer specifically to the case of competition policy, observing that:

When developing countries enter into modern trade agreements, they often make certain commitments to particular domestic policies – for example, to antitrust or other competition policy. Agreeing to such policies can be in the interests of developing countries (beyond the trade benefits directly obtained) because the commitment can reinforce the internal reform process. Indeed, participation in an international agreement can make feasible internal reforms that are beneficial for the country as a whole that might otherwise be successfully resisted by interest groups. (Birdsall and Lawrence 1999: 136)

The foregoing are by no means the only rationales that have been advanced by proponents of a multilateral framework on competition policy. Specific objectives that have been advanced include promoting the growth of strong competition agencies in developing countries to protect them from anticompetitive practices that impact on their consumers and businesses; promoting (voluntary) cooperation between the competition agencies of participating countries to assist them in investigating particular cases; and contributing to a greater degree of ‘balance’ in the WTO system between the rights of producers and the protection provided for consumers and other members of society.

The argument has also been made in the WTO working group that a multilateral framework could reinforce the effectiveness of institution-building programs in the area of competition policy by providing hands-on exposure to best practices in dealing with cross-border cases. Within such a framework, technical assistance programs could receive higher priority and be better focused on the needs of recipient countries (WTO Working Group on the Interaction between Trade and Competition Policy 2001, paragraph 57). A cooperation framework might also contribute to the promotion of a culture of competition (WTO Working Group on the Interaction between Trade and Competition Policy 1999, paragraph 61).

The view has also been expressed that the introduction of appropriate peer review mechanisms could reinforce and enhance the effectiveness of capacity building through technical assistance (WTO Working Group on the Interaction between Trade and Competition Policy 2000, paragraph 61). Peer reviews, which would be voluntary in nature, would be an instrument through which enforcement issues could be discussed in an open and constructive manner. For example, in the case of developing countries, peer review could identify capacity constraints as well as examine enforcement policies being followed in individual countries. Peer review provides an opportunity for countries to learn from others with similar experiences or similar problems. If done well, it promotes convergence and builds confidence among agencies as well as credibility and support. It has also been suggested that a peer review process would help to establish benchmarks or guidelines to evaluate the implementation process. However, peer review needs to exist side-by-side with capacity building since they both have a role to play (WTO Working Group on the Interaction between Trade and Competition Policy 1999, paragraph 43; WTO Working Group on the Interaction between Trade and Competition Policy 2000, paragraphs 23 and 47).

The foregoing is not intended to resolve the debate as to whether there is a need for a multilateral framework on competition policy in the WTO and, if so, what would be the appropriate content of such a framework. A range of concerns have been advanced about the implications of such a framework, including that it might not yield sufficient benefits for developing countries. As already mentioned, a key related concern of developing countries relates to the perceived potential for a multilateral framework on competition policy to intrude on their "policy space". Clearly, much would depend on the terms of such a framework. As an initial step toward further evaluation of this question, some aspects of the recent proposals for a multilateral framework on competition policy are discussed below.

A MULTILATERAL FRAMEWORK FOR COMPETITION POLICY?

At the WTO Ministerial Conference in Cancun, Mexico, in September 2003, the majority of developing countries rejected the launching of negotiations on a multilateral framework on

competition policy as had been proposed by the European Union and various other countries in the lead-up to the conference. This seemingly reflected a range of tactical and more fundamental concerns, including concerns about a perceived lack of negotiating capacity in this area, the costs that might be involved in setting up a national competition authority, the perceived risk that a multilateral framework in this area might intrude on industrial policy goals, and other considerations. Still, it is useful to review the nature and content of recent proposals for such a framework to the extent that a number of WTO members remain committed to the long-run goal of developing an agreement to better integrate the implementation of competition policy with the goals and instruments of the multilateral trading system. The European Union, in particular, remains of the view that the case for multilateral agreements in regard to competition policy and the other 'Singapore issues' (investment, transparency in government procurement and trade facilitation) 'remains as strong as ever' (Lamy 2004).

As noted in the Introduction to this chapter, there have been extensive misconceptions regarding the nature and scope of a possible WTO agreement on competition policy. Such misconceptions may, in some cases, have reflected a confusion between the proposals that were put forward in the WTO and the considerably more far-reaching proposal that was put forward by the Munich Group in the early 1990s (Draft International Antitrust Code 1993).⁷ In addition, they may reflect the continuing influence of commentaries made by leading representatives of the antitrust community during the early stages of the WTO's exploratory work in this area, before the likely parameters of a possible agreement became clear. These commentaries (perhaps motivated, in part, by the excesses of the Munich proposal) called attention to certain risks posed by the prospect of WTO negotiations in this area, including: (1) a suppression of the scope for innovation in national competition policies, owing to the premature locking in of detailed substantive standards; and (2) an undermining of the scope for the exercise of prosecutorial discretion in antitrust enforcement, which of course is central to current approaches to competition law enforcement in the United States and other common law countries (see, in particular, Klein 1996; Melamed 1997; Tarullo 2000). Furthermore, the concern was voiced that a WTO agreement on competition policy would likely have an undue focus on market access objectives and that this would inevitably distort the principles of competition policy and/or be inimical to the interests of developing countries in this area (Tarullo 2000; Hoekman and Holmes 1999).

These commentaries served a useful purpose in highlighting the potential downsides of an overly rigid or sweeping approach to the implementation of international norms in this area. What is perhaps less well known is the extent to which the early commentaries influenced the debate in the WTO and were even taken on board in the proposals put forward in the run-up to Cancun. This is not to imply that the approach proposed by the proponents of a multilateral framework was necessarily 'right' but only that it was a good deal more modest than has sometimes been pictured and that it deliberately sought to avoid some of the pitfalls identified in the early commentaries.

The main elements of the proposal for a multilateral framework on competition policy are described in the relevant paragraphs of the Doha Ministerial Declaration (see Box 1 (next page), especially paragraph 25).⁸

Box 1: Relevant paragraphs of the Doha Ministerial Declaration

INTERACTION BETWEEN TRADE AND COMPETITION POLICY

23. Recognizing the case for a multilateral framework to enhance the contribution of competition policy to international trade and development, and the need for enhanced technical assistance and capacity-building in this area as referred to in paragraph 24, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations.

24. We recognize the needs of developing and least-developed countries for enhanced support for technical assistance and capacity-building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development. To this end, we shall work in cooperation with other relevant intergovernmental organizations, including UNCTAD, and through appropriate regional and bilateral channels, to provide strengthened and adequately resourced assistance to respond to these needs.

25. In the period until the Fifth Session, further work in the Working Group on the Interaction between Trade and Competition Policy will focus on the clarification of: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity-building. Full account shall be taken of the needs of developing and least-developed country participants and appropriate flexibility provided to address them.

Source: World Trade Organization, Ministerial Declaration, Fourth Session of the Ministerial Conference, Doha, WT/MIN(01)/DEC/1, 9–14 November 2001.

Further insights are provided in relevant submissions to the WTO working group by members favouring the development of such a framework. Broadly speaking, these sources indicate that, in the view of those members, a multilateral framework on competition policy would embody the following five elements:

1. A commitment by WTO members to a set of core principles relating to the application of competition law and policy, including transparency, non-discrimination and procedural fairness.
2. A parallel commitment by member governments to the taking of measures against hardcore cartels.
3. The development of modalities for cooperation between member states on competition policy issues. These would be of a voluntary nature, and could encompass cooperation on national legislation, the exchange of national experience by competition authorities and aspects of enforcement.
4. A commitment to ongoing support for the introduction and strengthening of competition institutions in developing countries through technical assistance and capacity building, in the framework of the WTO but in cooperation with other interested organisations and national governments.
5. The establishment of a WTO standing committee on competition policy that would administer the agreement and act as a forum for the ongoing exchange of national experiences, the identification of technical assistance needs and sources for such assistance, and so on. The committee could also provide a forum for discussion of policy issues such as market access barriers arising out of a combination of government policies (or tolerance of anticompetitive conduct) and private actions.

Without attempting a comprehensive assessment of these proposals, the following observations are offered for reflection.⁹ First, as already noted, the recent proposals had little in common with earlier calls for a detailed multilateral code on competition policy as proposed by the Munich Group. Certainly, the idea of establishing an international competition law enforcement agency figured nowhere in the proposals. Clearly, the proposals also did not aim at a comprehensive harmonisation of competition law (Garcia-Bercero and Amarasingha 2001). Rather, they were framed in terms of adherence to certain core principles and other elements that embody fundamental values of both competition policy and the multilateral trading system (i.e., non-discrimination, transparency and the suppression of hardcore cartels). As such, these approaches seem unlikely to undermine the scope for continuing adaptation of national approaches to competition policy in response to economic learning and national circumstances (one of the concerns raised in the early commentaries); arguably, they might encourage accelerated learning in this area.¹⁰

Second, the approaches to hardcore cartels and modalities for cooperation that were called for under the recent proposals were extensively informed by cooperative approaches favoured in other forums, for example the OECD Recommendations on Hardcore Cartels and Cooperation, and were less ambitious than elements that were proposed in the past. For example, an early proposal for the introduction of 'compulsory positive comity' (i.e., a legal obligation for national authorities to undertake investigations into activities allegedly affecting other countries' national interests, when requested to do so by such countries) was dropped some time ago. The proponents of negotiations also made it clear that, as they envisaged it, a WTO framework would not require the exchange of confidential information (WTO Working Group on the Interaction between Trade and Competition Policy 2002b, paragraph 76) – although it also would not preclude individual countries from exchanging such information to the extent it is provided for in relevant bilateral arrangements. Much emphasis would be placed on voluntary cooperation in the development of national legislation and the exchange of national experience, in addition to the enforcement process.

Third, the proposals (and the Doha Ministerial Declaration) placed considerable emphasis on support for technical assistance and capacity building in this area, responding to a key concern of developing countries. This represented a clear recognition that simply mandating the adoption of relevant laws without long-term support for institution building is unlikely to yield satisfactory or appropriate results. Moreover, the expectation was that the required capacity-building activities would be undertaken not principally by the WTO itself; rather, it would be a cooperative effort in which the support and cooperation of other organisations would be essential (although the WTO would play a catalytic role).¹¹

Fourth, by relying on broad principles, measures to strengthen cooperation and support for institution building rather than on detailed legal prescriptions, the recent proposals sought to avoid problems that would have been inherent in a more detailed, intrusive approach. For the most part (and contrary to the way in which the proposals were sometimes characterised in academic commentaries), it would have been left for individual countries to define the details of their national legislation.

Fifth, and notwithstanding concerns expressed previously by some commentators, the recent proposals were not tilted toward market access objectives at the expense of economic efficiency and consumer welfare. Rather, the focus of the proposals was on promoting the development of effective national competition institutions and expanded international cooperation to address anticompetitive practices as they are generally recognised in the competition policy community. In the work of the WTO working group, the value of competition advocacy activities has also been stressed. This approach would undoubtedly yield significant benefits for market access (something which could benefit both developed and developing economies), in that robust competition policies and institutions are supportive of market access objectives in various ways (including through both advocacy and enforcement activities). However, it would not do so at the cost of undermining more fundamental objectives of competition policy such as efficiency and consumer welfare.

Notwithstanding any of the foregoing, this chapter is not suggesting that the case for a multilateral agreement on competition policy is or was self-evident. As noted, at Cancun the initiation of negotiations leading to the development of such a framework was rejected by the majority of developing countries. In addition to possible tactical considerations, the reasons underlying this rejection included the above-noted concern regarding a perceived intrusion on developing countries' 'policy space', concerns about a lack of negotiating capacity in this area and, for some, a sense that

the proponents' proposals were unbalanced and might not, in the end, yield tangible benefits in the form of cooperation for developing countries.¹² It remains to be seen if these concerns can be resolved through some combination of: (a) further educational work and capacity-building activities, particularly to address the perceived deficit in negotiating capacity;¹³ and (b) clarification or possible adjustments to the proponents' proposals¹⁴. It also goes without saying that any measures relating to competition policy to be adopted in the framework of the WTO should be practical, should not entail disproportionate administrative burdens and should meet the concerns of countries with experience in this area.

Much is at stake for developing countries and for the success of the multilateral trading system. The empirical record shows clearly that anticompetitive practices impose heavy costs on developing countries. Furthermore, where present, practices such as international cartels directly undermine the goals that the system is intended to serve – including not only access to markets but the continual improvement of living standards and the optimal use of the world's resources in accordance with the objective of sustainable development (as laid out in the Marrakesh Agreement Establishing the World Trade Organisation). Unless measures are put in place to counteract such practices (whether at the multilateral or some other level), the realisation of these benefits will continue to be impeded. This, in turn, may contribute to further erosion of confidence in the benefits of the market economy and a liberalised trading order.¹⁵

REFERENCES

- Anderson, Robert D. (2002) 'Intellectual property rights, competition policy and international trade: reflections on the work of the WTO Working Group on the Interaction between Trade and Competition Policy', in Thomas Cottier and Petros Mavroidis (eds) *Intellectual Property: Trade, Competition and Sustainable Development*, Ann Arbor: University of Michigan Press, December.
- Anderson, Robert D. and Nancy T. Gallini (1998) *Competition Policy and Intellectual Property Rights in the Knowledge-based Economy*, Calgary: University of Calgary Press for the Industry Canada Research Series.
- Anderson, Robert D., Abraham Hollander, Joseph Monteiro and William Stanbury (1998) 'Competition policy and regulatory reform in Canada, 1986–1997', *Review of Industrial Organization* 13(1–2): 177–204.
- Anderson, Robert D. and Peter Holmes (2002) 'Competition policy and the future of the multilateral trading system', *Journal of International Economic Law* 5(2): 531–63.
- Anderson, Robert D. and Frédéric Jenny (2001) 'Current developments on competition policy in the World Trade Organization,' *Antitrust*, vol. 16, no. 1, Fall: 40–44.
- Anderson, Robert D. and Frédéric Jenny (2003) 'The current proposals for WTO negotiations on competition policy: background and overview', paper presented at the Conference Board Conference on Antitrust Issues in Today's Economy, New York City, March.
- Birdsall, Nancy and Robert Z. Lawrence (1999) 'Deep integration and trade agreements: good for developing countries?' in Inge Kaul, Isabelle Grunberg and Marc A. Stern (eds) *Global Public Goods: International Cooperation in the 21st Century*, New York: Oxford University Press for the United Nations Development Program.
- Blackhurst, Richard (1991) 'Trade Policy is Competition Policy', in *Competition and Economic Development*, OECD.
- Clarke, Julian and Simon J. Evenett (2003) 'A multilateral framework for competition policy?', in State Secretariat of Economic Affairs and Simon Evenett, *The Singapore Issues and the World Trading System: the Road to Cancun and Beyond*, Bern: State Secretariat for Economic Affairs.
- Consumer Unity and Trust Society (2003) *Pulling Up Our Socks* [Report based on the 7-Up Project], Jaipur: Consumer Unity and Trust Society, February.
- Draft International Antitrust Code (1993) 5 *World Trade Materials*, September, 126–96.
- Dutz, Mark A. (2002) 'Competition policy issues in developing and transition markets', presentation at the OECD Global Forum on Competition, Paris, 14–15 February 2002.
- Evans, David S. (2002) 'The new trustbusters', *Foreign Affairs* 81(1): 1–19.

- Evenett, Simon J., Alexander Lehmann and Benn Steil (eds) (2000) *Antitrust Goes Global: What Future for Transatlantic Co-operation?*, Washington DC: The Brookings Institution.
- Evenett, Simon J., Margaret Levenstein and Valerie Suslow (2001) 'International cartel enforcement: lessons from the 1990s', *The World Economy*, vol. 24, iss. 9, pp. 1221-1245.
- Frischtak, Claudio C. (1995) *Regulatory Policies and Reform in Industrializing Countries*, Washington, DC: The World Bank.
- Garcia-Bercero, Ignacio and Stefan Amarasinha (2001) 'Moving the trade and competition debate forward', *Journal of International Economic Law*, 4(3): 481-506.
- Gilbert, R. and S. Sunshine (1995) 'Incorporating dynamic efficiency into merger analysis: the use of innovation markets', *Antitrust Law Journal* 63:2, Winter, pp. 569-602.
- Gilbert, R. and W.K. Tom (2001) 'Is innovation king at the antitrust agencies? The intellectual property guidelines five years later', *Antitrust Law Journal* 69:1, pp. 43-86.
- Hoekman, Bernard and Peter Holmes (1999) 'Competition policy, developing countries and the WTO', *The World Economy* 22(6): 875-93.
- Hur, J.S. (2002) 'Theories and case study of extraterritorial application of international cartel cases: the international graphite electrodes cartel', mimeo, October.
- International Monetary Fund (2002) *World Economic Outlook*, September.
- Jackson, John H. (1969) *World Trade and the Law of GATT*, Indianapolis: Bobbs-Merrill.
- Jenny, Frédéric (2001) 'Globalization, competition and trade policy: convergence, divergence and cooperation', in Yang-Ching Chao Gee San, Changfa Lo and Jiming Ho (eds) *International and Comparative Competition Law and Policies*, The Hague: Kluwer Law International.
- Jenny, Frédéric (2002) 'International co-operation on competition: myth, reality and perspective', paper presented at the University of Minnesota Law School Conference on Global Antitrust Law and Policy, Minneapolis, 20-21 September.
- Jenny, Frédéric (2003) 'Competition law and policy: global governance issues', *World Competition* 26 (4): 609-24, December.
- Jordan, W.A. (1972) 'Producer protection, prior market structure and the effects of government regulation', *Journal of Law and Economics* XV(1): 151-76.
- Klein, Joel (1996) 'A note of caution with respect to the WTO agenda on competition policy', remarks to the Royal Institute of International Affairs, Chatham House, London, November.
- Kolasky, W. and A. Dick (2003) 'The merger guidelines and the integration of efficiencies into antitrust reviews of horizontal mergers', *Antitrust Law Journal*, 71:1, pp. 207-251.
- Korea Fair Trade Commission (2002) *Seoul Competition Forum 2002*, Seoul: Korea Fair Trade Commission, December.
- Kovacic, William E. (2004) 'The modern evolution of U.S. competition policy enforcement norms', *Antitrust Law Journal* 71(2): 377-478.
- Krueger, Anne O. (1974) 'The political economy of the rent-seeking society', *American Economic Review* 64(3): 291-303.
- Krueger, Anne O. (1984) 'The problems of trade liberalization', in A.C. Harberger (ed.) *World Economic Growth*, San Francisco: International Centre for Economic Growth.
- Lamy, Pascal [Trade Commissioner for the European Communities] (2004a) 'The relaunching of negotiations under the Doha Development Agenda', Strasbourg: 13 January.
- Lamy, Pascal [Trade Commissioner for the European Communities] (2004b) 'Moving the Doha Development Agenda Forward', Washington, D.C., European-American Business Council, 26 February.
- Levenstein, Margaret and Valerie Suslow (2001) 'Private international cartels and their effect on developing countries', background paper for the World Bank's *World Development Report 2001*, 9 January, available at <http://www-unix.oit.umass.edu/~maggie1/WDR2001.pdf>.
- Marsden, Philip (2003) *A Competition Policy for the WTO*, London: Cameron May.
- Mexico (2002) 'Communication to the Working Group on the Interaction between Trade and Competition Policy: hardcore cartels' WT/WGTCP/W/196, issued 14 August 2002.
- Melamed, Douglas A. (1997) 'International antitrust in an age of international deregulation', remarks to the George Mason Law Review Symposium on Antitrust in the Global Economy, Washington DC, October 10.

- Osakwe, Chiedu (2001) 'Poverty reduction and development: the interaction of trade, macroeconomic and regulatory policies', Tenth Joseph Mubiru Memorial Lecture, organised by the Bank of Uganda, 14 December.
- Pittman, Russell (2004) 'Abuse-of-Dominance Provisions of Central and Eastern European Competition Laws: Have Fears of Over-Enforcement Been Borne Out? Department of Justice (Antitrust Division), Economic Analysis Group, Working Paper, 04-1, January.
- Posner, Richard A. (2001) 'Antitrust in the New Economy', *Antitrust Law Journal*, vol. 68, issue 3, pp. 925-943.
- Singh, A. (1999) 'Competition policy, development and developing countries', Working Paper No. 50, Indian Council for Research on International Economic Relations, New Delhi, November.
- Singh, A. (2002) 'Competition and competition policy in emerging markets: international and development dimensions', Paper No. 18, G-24 Discussion Paper Series, New York: United Nations, September.
- Stigler, G.J. (1971) 'The theory of economic regulation', *Bell Journal of Economics and Management Science* 2(1): 3–21, Spring.
- Tarullo, Daniel K. (2000) 'Norms and institutions in global competition policy', *American Journal of International Law* 94(3): 478–504, July.
- UNCTAD (1998) *Empirical Evidence of the Benefits from Applying Competition Law and Policy Principles to Economic Development in order to Attain Greater Efficiency in International Trade and Development*, Geneva: UNCTAD, document TD/B/COM.2/EM/10.
- US Department of Justice (2000) 'German company pleads guilty to rigging bids on USAID construction contracts in Egypt', press release, August 18.
- US Department of State (1945) 'U.S. proposals for an international trade organization', Publication No. 2411, Washington DC: Department of State.
- US Federal Trade Commission (2003) *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy*, Washington DC: Federal Trade Commission, October.
- US International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust (2000), *Final Report*, Washington DC: Department of Justice, February.
- Winters, Alan (2002) 'Doha and world poverty targets', New York: World Bank, mimeo.
- Wolff, Alan W. (1994) 'The problems of market access in the global economy: trade and competition policy', Contribution to the OECD Roundtable on Market Access, June 30.
- World Bank (1997) 'Fostering markets: liberalization, regulation and industrial policy', in *World Development Report*, New York: World Bank, chapter 4.
- World Bank (2000) 'Making markets work better for poor people', in *World Development Report*, New York: World Bank, chapter 4.
- World Trade Organisation (1997) 'Special study on trade and competition policy', in *Annual Report of the World Trade Organization for 1997*, Geneva: WTO, chapter IV.
- WTO Ministerial Conference, Fourth Session (2001). Summary Record of the Ninth Meeting, Doha, WT/MIN(01)/SR/9.
- WTO Working Group on the Interaction between Trade and Competition Policy (1998) *Report (1998) of the Working Group on the Interaction between Trade and Competition Policy to the General Council*, Geneva: WTO, WT/WGTCP/2.
- (1999) *Report (1999) of the Working Group on the Interaction between Trade and Competition Policy to the General Council*, Geneva: WTO, WT/WGTCP/3.
- (2000) *Report (2000) of the Working Group on the Interaction between Trade and Competition Policy to the General Council*, Geneva: WTO, WT/WGTCP/4.
- (2001) *Report (2001) of the Working Group on the Interaction between Trade and Competition Policy to the General Council*, Geneva: WTO, WT/WGTCP/5.
- (2002a) *Background Note by the Secretariat on Modalities for Voluntary Co-operation*, Geneva, WT/WGTCP/W/192.
- (2002b) *Report (2002) of the Working Group on the Interaction between Trade and Competition Policy to the General Council*, Geneva: WTO, WT/WGTCP/6.
- (2003a) *Study on Issues Relating to a Possible Multilateral Framework on Competition Policy* (principal author: Simon Evenett), Geneva: WTO, WT/WGTCP/W/228.

- (2003b) *Report (2003) of the Working Group on the Interaction between Trade and Competition Policy to the General Council*, Geneva: WTO, WT/WGTCP/7.
- (2003c) *Secretariat Technical Assistance Activities Pursuant to Paragraph 24 of the Doha Ministerial Declaration*, Geneva: WTO, WT/WGTCP/W/230.

*The authors are, respectively, Counsellor, Intellectual Property Division, WTO Secretariat and Professor, ESSEC (Paris). Professor Jenny is also Vice-Chair, Conseil de la Concurrence, France and has served as Chairman of the WTO Working Group on the Interaction between Trade and Competition Policy since 1997. This chapter draws on material in the various annual reports of the WTO Working Group on the Interaction between Trade and Competition Policy, in Anderson and Holmes (2002), in Anderson and Jenny (2003) and in Jenny (2003). A preliminary version of the first part of the chapter was published in Korea Fair Trade Commission (2002). The views expressed are the personal responsibility of the authors and should not be attributed to the WTO, its Secretariat or any of its members. Helpful discussions with Simon Evenett, Peter Holmes and Adrian Otten are gratefully acknowledged.

¹ At the time this chapter was finalised (April 2004), it seemed unlikely that negotiations on a multilateral framework will be launched within the framework of the 'single undertaking' of the Doha Development Agenda. The concept of a single undertaking, outlined in paragraph 47 of the Doha Ministerial Declaration, recognises that all agreements and instruments contained therein are accepted as elements of a package. Recently, the European Community has raised the possibility of negotiations that would be conducted outside the single undertaking of the Doha Development Agenda and on a plurilateral or 'opt-in/opt-out' basis (see Lamy 2004a and related discussion, below).

² In this paper, "competition policy" refers to all measures through which governments seek to promote the efficient and competitive operation of markets. "Competition law" refers to legislation that prohibits or otherwise deals with specific anti-competitive practices of firms such as cartels, abuses of a dominant position or monopolization and mergers that create a dominant position or otherwise stifle competition.

³ Notwithstanding the acknowledged importance of these practices, they have not been the main focus of work in the WTO on a possible multilateral framework on competition policy. As discussed below, the focus of that work has been on the development of provisions to deal with cartels, on the promotion of voluntary co-operation and related capacity building activities, and on "core principles" (transparency, non-discrimination and procedural fairness) to guide the application of legislation in this area. The reason for the lack of any proposal focused specifically on vertical market restraints relates to complexity of this area of competition law enforcement and the reluctance of many authorities to reduce the role of prosecutorial discretion and case-by-case analysis in this area. Nonetheless, to the extent that it would play a role in strengthening competition regimes in various respects (including by providing greater political legitimacy and guarantees of independence, transparency and non-discrimination), a multilateral framework could assist in the implementation of this aspect of competition law, as well.

⁴ A related discussion can be found in Working Group on the Interaction between Trade and Competition Policy (2003a) and a useful typology of relevant efficiencies is provided in Kolasky and Dick (2003).

⁵ This is not to suggest that funding for the competition agency in these countries was necessarily optimal.

⁶ As an alternative to development of a multilateral framework on competition policy as foreseen in relevant provisions of the Doha Ministerial Declaration (but rejected by developing countries at Cancun), the European Community has recently raised the possibility of negotiations that would be conducted outside the single undertaking of the Doha Development Agenda and on a plurilateral or 'opt-in/opt-out' basis (Lamy 2004).

⁷ The draft code was a detailed, ambitious proposal for a binding international agreement on competition law that was put forward by a private group of academics and practitioners.

⁸ In a statement made prior to the adoption of the declaration, the Chairman of the WTO Ministerial Conference, Mr Youssef Kamal, expressed his understanding that the requirement in paragraph 25 for a decision to be taken, by explicit consensus, on the modalities for negotiations before negotiations on competition policy and other 'Singapore issues' could proceed gave 'each Member the right to take a position on modalities that would prevent negotiations from proceeding after the Fifth Session until that Member was prepared to join in an explicit consensus' (WTO Ministerial Conference, Fourth Session (2001), p. 2). At the Cancun Ministerial Conference, such a consensus proved elusive.

⁹ These observations draw on material in Anderson and Jenny (2001), Anderson and Holmes (2002), Anderson and Jenny (2003) and Jenny (2003).

¹⁰ The importance of transparency in the formulation of competition policy and its contribution to the evolution of sound enforcement norms in this field is emphasised in the thoughtful analysis in Kovacic (2004), who also stresses the importance of broad scope for experimentation and risk taking in policy formulation in this area.

¹¹ Paragraph 24 of the Doha Ministerial Declaration specified that assistance mandated by the declaration will be provided 'in cooperation with other relevant intergovernmental organisations, including UNCTAD, and through appropriate regional and bilateral channels'.

¹² As noted, for some, a further concern was the direct financial cost of setting up a national competition agency.

¹³ Since the Doha Ministerial Conference, the WTO Secretariat has undertaken an extensive program of technical assistance in the area of trade and competition policy (WTO Working Group on the Interaction between Trade and Competition Policy 2003c).

¹⁴ As an alternative to development of a multilateral framework on competition policy as foreseen in relevant provisions of the Doha Ministerial Declaration (but rejected by developing countries at Cancun), the European Community has recently raised the possibility of negotiations that would be conducted outside the single undertaking of the Doha Development Agenda and on a plurilateral or 'opt-in/opt-out' basis (Lamy 2004a and Lamy 2004b).

¹⁵ There is no doubt that such concerns were in the minds of the system's founders. Provisions to address 'restrictions imposed by private combines and cartels' were a key element of the US proposal for an International Trade Organisation at the conclusion of World War II. Although this proposal was not, in the end, incorporated into the General Agreement on Tariffs and Trade (GATT) in 1947, its rationale remains instructive: 'when a private agreement divides the markets of the world among the members of a cartel, none of [the goods affected] can move between the zones while the contract is in force. Clearly, if trade is to increase as a result of the lightening of government restrictions, the governments concerned must make sure that it is not restrained by private combinations' (US Department of State 1945: 4; also quoted in Jackson 1969: 522, which provides related context). In a related vein, in 1944 President Franklin Delano Roosevelt had written to Secretary of State Cordell Hull, observing that 'Cartel practices which restrict the free flow of goods in foreign commerce will have to be curbed' (see also Wolff 1994).