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Competition Policy and the Future of the Multilateral Trading System

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COMPETITION POLICY AND THE FUTURE OF THE MULTILATERAL TRADING SYSTEM

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Recently, at the World Trade Organization Ministerial Conference in Doha, Qatar, the Member governments of the Organization agreed on a broad work programme for the coming years, including negotiations and/or related work on, *inter alia*, agriculture, trade in services, market access for non-agricultural goods, trade-related aspects of intellectual property rights, trade and the environment, the relationship between trade and investment and the interaction between trade and competition policy. Concerning the latter subject, the relevant paragraphs of the Ministerial Declaration read as follows:[1]

"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." [2]

The foregoing text represents a compromise between WTO delegations that desired an immediate launch of negotiations on trade and competition policy at Doha and those desiring that work on this subject, which was initially launched at the Singapore Ministerial Conference in December 1996, continue in a non-negotiating ("educational") mode. In essence, it: (i) provides that negotiations will commence after the Fifth Ministerial, which under the WTO Agreement must be held within two years of Doha, subject to a decision on modalities;[3] (ii) directs that enhanced levels of technical assistance and support for capacity-building be provided to developing countries in this area; and (iii) identifies a number of elements to be studied by the WTO Working Group on the Interaction between Trade and Competition Policy in the period prior to the Fifth Ministerial.

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[1] See also Anderson and Jenny (2001a).

[2] World Trade Organization, Ministerial Declaration (Fourth Session of the Ministerial Conference, Doha, WT/MIN(01)/DEC/1, November 9-14, 2001), paragraphs 23-25.

[3] In a statement made prior to the adoption of the Declaration, the Chairman of the Conference, Mr. Youssef Kamel, 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 of the Ministerial Conference until that Member is prepared to join an explicit consensus.".

The relationship of competition policy to the multilateral trading system has been the subject of much debate in academic and legal literature as well as in the WTO and other intergovernmental fora. On the one hand, there is wide acknowledgement that competition policy and trade liberalization share common objectives relating to the promotion of economic efficiency and consumer welfare, and that a lack of effective competition policies can impede the realization of the gains from liberalization.[4] Furthermore, there is also a growing recognition that anti-competitive practices impact directly on the welfare and development prospects of developing countries, and hence are no longer (if they ever were) a concern exclusively for the developed world.[5] A view has also been expressed that international agreements can play a crucial role in enabling developing countries to implement effective policies in this area, by promoting cooperative approaches to institution-building and enforcement and by providing a tool for overcoming domestic constituencies that might otherwise block the reform process.[6] Recent inter-jurisdictional conflicts relating to high-profile merger cases have also added, in some quarters, to the call for WTO rules on competition policy,[7] although achieving greater international coordination in the area of merger enforcement may be one area in which progress is more likely to be made, at least initially, outside the WTO.

On the other hand, some academic and other commentators have argued against expanded involvement by the WTO in the area of competition policy, on various grounds. For example, doubts have been expressed about the compatability of the operational modalities of competition policy and trade liberalization.[8] A particular concern relates to the potential implications of application of the WTO Dispute Settlement Understanding (DSU) in the field of competition law and policy for the exercise of prosecutorial discretion and other decisions of national competition authorities and courts.[9] A concern has also been voiced that an undue focus on market access objectives in a WTO agreement on trade and competition policy could distort the principles of competition policy and/or be inimical to the interests of developing countries in this area.[10] The general disadvantages of an overly-rigid codification of the principles of competition policy have also been emphasized.[11]

The foregoing insights and concerns from both academic literature and practical experience have already had a profound impact on the debate on the role of competition policy in the multilateral trading system during the past four years and, particularly, the nature and content of current proposals for the more systematic integration of competition policy into the WTO.[12] For example, past proposals for a detailed multilateral "code" on competition policy have been abandoned in favour of reliance on broad principles that are generally accepted in the competition policy as well as the trade worlds (e.g., transparency, non-discrimination on the basis of nationality and the effective prohibition of cartels).[13] As well, statements made by the proponents of a multilateral framework in the run-up to Doha indicate that they foresee (at most) a limited role for the WTO dispute settlement mechanism in this area.[14] In addition, the substantive focus of current proposals for a multilateral framework on competition policy in the WTO has shifted from one of securing market access to one of promoting

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[4] See World Trade Organization (1997), UNCTAD (1997) and OECD (2001).

[5] See UNCTAD (1997), Jenny (2001), Osakwe (2001), Hoekman and Holmes (1999) and Levenstein and Suslow (2001).

[6] Jenny (2001), Garcia-Bercero and Amarasinha (2001) and Birdsall and Lawrence (1999).

[7] "GE Ruling Shifts Power Toward EU", *International Herald Tribune*, 10 July 2001.

[8] See, e.g., Tarullo (2000) and Klein (1996).

[9] Klein (1996).

[10] Hoekman and Holmes (1999) and Tarullo (2000).

[11] Klein (1996); Melamed (1998) and Tarullo (2000).

[12] The words "more systematic integration" reflect the fact that competition policy concepts and principles are already embedded in the WTO Agreements in a number of places. See Part I, *infra*.

[13] European Community and its member States (2000). See also Garcia-Bercero and Amarasinha (2001).

[14] WTO Working Group on the Interaction between Trade and Competition Policy (2001), paragraph 27.

the sound development of national competition institutions and expanded international cooperation to address anti-competitive practices as they are generally recognized in the antitrust community.[15]

This paper explores and provides background on the foregoing issues and developments. Part I provides historical background on the issues and summarizes recent developments in the WTO. Part II examines some specific areas of interaction between trade and competition policy, including the following aspects: (i) anti-competitive practices and market access; (ii) the problem of international cartels; (iii) the relationship of competition policy, economic regulation and liberalization in the services sector; (iv) the role that sound and effective competition rules can play as a balancing factor vis-à-vis the rights embodied in the Agreement on Trade-Related Intellectual Property Rights (TRIPS); (v) issues in the agriculture sector; and (vi) the applicability to competition law/policy of general provisions of the WTO Agreements. Part III discusses the role of competition policy in relation to economic development, and the potential significance of initiatives in the WTO for developing countries. Part IV reflects on the nature and content of the current proposals for negotiation of a multilateral framework on competition policy. Part V provides concluding remarks. The purpose of the paper is not to defend or advocate a particular position regarding future work in this area, but to facilitate informed discussion of the issues.

I. BACKGROUND AND RECENT DEVELOPMENTS IN THE WTO

Notwithstanding widespread references to competition policy as a "new" issue for the international trading system, it is manifestly *not* a new issue either in scholarly literature or policy debates. In his classic *The Wealth of Nations* (published in 1776), the founder of modern economics, Adam Smith, gave much attention to issues that can fairly be characterized as concerning the interaction between trade and competition policy. He denounced the monopoly power of the East India Company, which he argued hurt both India and the UK, thus presciently drawing attention to the significance of international anti-competitive behaviour for trade and development and to the symbiotic role of private and public actors. In fact, most of chapter VII of Book 2 of Smith's treatise is concerned with the costs of the colonial trading monopolies of the eighteenth century. He argued, further, that the UK suffered extensively by excluding non-British capital from investment in this trading sector, both by diverting profitable investment from other activities and generally reducing competition in colonial trade; this pushed up the prices of imported products. From a rather different ideological perspective, Lenin also called attention to the adverse consequences of anti-competitive practices of firms, particularly international cartels, as an element of his critique of capitalism.[16]

The Havana Charter of the abortive International Trade Organization (ITO) contained an entire chapter, Chapter V, on the subject of restrictive business practices, including a requirement for members to police anti-competitive practices of an international nature:

> Article 46 (1). Each Member shall take appropriate measures and shall cooperate with the Organization to prevent, on the part of private or public commercial enterprises, business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control, whenever such practices have harmful effects on the expansion of production or trade and interfere with the achievement of any of the other objectives set forth in Article 1.[17]

The Charter would thus have required its members to act against anti-competitive behaviour affecting trade, although it contained no general obligation to adopt a competition law. The ITO as an organization would have been called upon to investigate any complaints not resolved by consultation and make recommendations for action in a report. It appears that it was envisaged that failure to

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[15] See Part IV, infra. This is *not* to suggest that the new approach would not have important benefits for market access, for both developed and developing countries. See Part II(1), infra.

[16] Lenin (1916).

[17] http://www.globefield.com/havana.htm#CHAPTERV.

comply would have been dealt with by the standard procedures laid down in the Charter. The Havana Charter also provided for intergovernmental cooperation, and, in Article 51, provided a means for dealing with disputes in the services sector, although this involved reference to existing international bodies in the sector, which might well not have been sympathetic to competition considerations. As is well known, Chapter V of the Charter was ultimately abandoned, in spite of the support of the US administration, due to opposition from the Congress; the GATT of course was signed, embodying the chapter on trade in goods of the Havana Charter but without Chapter V and the ITO context.

The debate today has moved a long way from the Havana Charter in many respects, but it is striking that the aim of Chapter V, namely that of preventing private business practices from nullifying the benefits from the removal of governmental barriers to trade, retains its relevance. Perhaps, the most striking differences are that today's debates distinguish less sharply between domestic and international anti-competitive practices and that the discussion has focussed, to a considerable degree, on how far the application or non-application of general competition law may affect trade and development.[18]

Notwithstanding the GATT founders' decision not to proceed with implementation of a comprehensive body of rules on competition policy as an integral component of the multilateral trading system, in practice it has proven impossible to exclude competition policy considerations altogether from the system. The importance for the system of measures to ensure the competitive operation of markets is reflected in a number of provisions and subordinate instruments that have been incorporated in the various Agreements over the years and particularly with the 1994 transition from the GATT to the WTO. For example, Article 11:3 of the Agreement on Safeguards prohibits Members from encouraging or supporting the adoption of non-governmental measures equivalent to voluntary export restraints, orderly marketing arrangements or other governmental arrangements prohibited under Article 11:1. This was considered to be necessary if the latter (explicitly governmental) arrangements were not to be replaced by "private" cartels having similar effects that were encouraged or orchestrated by governments. Article 40 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) provides authority for Members to take measures against anti-competitive practices relating to the licensing of intellectual property rights. In effect, this acknowledges that competition policy may be a necessary antidote to ensure that the rights provided under this Agreement ultimately serve the welfare of citizens.[19] Another important example is the Reference Paper on regulatory principles which was adopted by a number of Members as an outcome of the Negotiations on Basic Telecommunications Services which were completed in 1997 and which commits such Members to adopt measures to prevent anti-competitive practices by major suppliers. Even though these and other examples represent, at best, a partial and ad hoc integration of competition policy concepts and provisions into the multilateral trading system, they demonstrate that such considerations cannot not be entirely excluded from the system.

In the 1980s and early 1990s, there was growing awareness of the implications of alleged anti-competitive practices and the failure to enforce competition law for trade liberalization and market access. For example, a key pre-occupation of the U.S. in its bilateral relations with Japan during this period (especially the so-called "Structural Impediments Initiative") concerned the alleged failure by Japan to effectively enforce its national competition law, the Anti-Monopoly Act, and the perceived adverse consequences of this for access to the Japanese market by foreign exporters. In this context, the 1995 Annual Report of the [U.S.] Council of Economic Advisors called attention to the potential benefits of developing general principles regarding the application of competition policy across sectors, at both the bilateral and multilateral levels:

> Trade negotiations, from the bilateral to the multilateral level, will continue to focus on market access issues, and thus inevitably deal with entry barriers and competition policy…. The key to faster progress will be whether general principles that cut across sectors can be

[18] See related discussion in Parts II and III, infra.

[19] For related discussion and references, see Part II(4), below.

formulated. For example, these might deal with the definition of national treatment [a fundamental principle of the WTO] in markets where entry is by individual licence, or the access of foreign firms to private industry associations that have a regulatory role or provide services necessary for participation in the domestic market.[20]

Around the same time, arguments for the negotiation of comprehensive international rules on competition policy as a bulwark of the international trading system were put forward in European Commission (1995).

At the Singapore Ministerial Conference in December 1996, WTO Ministers established a Working Group on the Interaction between Trade and Competition Policy (WGTCP). The mandate given to the Working Group was to consider issues raised by Members relating to the interaction of the two policy fields, including anti-competitive practices, and to identify any areas that might merit further consideration in the WTO framework.[21] In 1997 and 1998, the work of the WTO Working Group was organized around a Checklist of Issues Suggested for Study which was developed at the first meeting of the Group.[22] A detailed Report on the issues identified in the Checklist was issued in December 1998.[23] Pursuant to a decision by the General Council of the WTO in December 1998, in 1999, 2000 and 2001 the Working Group examined three further topics: (i) the relevance of the fundamental WTO principles of national treatment, transparency, and most-favoured-nation treatment to competition policy and vice versa; (ii) approaches to promoting cooperation and communication among Members, including in the field of technical cooperation; and (iii) the contribution of competition policy to achieving the objectives of the WTO, including the promotion of international trade.[24] These topics were the subject of further substantive Reports issued by the Working Group in October 1999, November 2000 and October 2001.[25]

Building on this educational work, in the run-up to Doha, a number of WTO Member countries proposed that the WTO commence negotiations on a multilateral framework agreement on competition policy, as an integral element of a new Round of Multilateral Trade Negotiations.[26] This proposal was supported by most developed countries as well as by several developing countries and led to the decision incorporated in the above-quoted paragraphs of the Doha Ministerial Declaration. The nature and content of the proposal for development of a multilateral framework on competition policy as it is reflected in the Doha Declaration and in related submissions by WTO Members is discussed in Part VI, below.

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[20] U.S., Council of Economic Advisors (1995), p. 248.

[21] *Singapore Ministerial Declaration*, Paragraph 20.

[22] In particular, the work focused on the following main elements of the Checklist:

- The relationship between the objectives, principles, concepts, scope and instruments of trade and competition policy; and their relationship to development and economic growth.
- Stocktaking and analysis of existing instruments, standards and activities regarding trade and competition policy, including of experience with their application.
- The impact of anti-competitive practices of enterprises and associations on international trade;
- The impact of state monopolies, exclusive rights and regulatory policies on competition and international trade;
- The relationship between the trade-related aspects of intellectual property rights and competition policy;
- The relationship between investment and competition policy;
- The impact of trade policy on competition.

[23] WTO Working Group on the Interaction between Trade and Competition Policy to the General Council (1998).

[24] See Appendix II to this paper.

[25] See WTO Working Group on the Interaction between Trade and Competition Policy (1999), (2000) and (2001).

[26] See, e.g., the European Community and its member States (2000).

II. THE INTERFACE BETWEEN COMPETITION POLICY AND THE MULTILATERAL TRADING SYSTEM: ANALYTICAL DIMENSIONS

(1) Anti-competitive practices and market access for imports

Possibly the most widely-discussed aspect of the interface between trade and competition policy concerns the implications of anti-competitive practices of firms for market access for goods and services.[27] Practices that can impede market access include vertical market restraints, import cartels, private standard-setting activities and state trading, exclusive or special privileges and monopolies.[28] It is widely recognized that private anti-competitive conduct having such effects is often intertwined with governmental actions and/or inaction that tolerate or encourage the relevant practices.[29] The empirical significance and impact of such practices has been much-debated, in both scholarly literature and official proceedings. In its 2001 assessment of the available evidence and relevant commentaries, the U.S. 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 policy makers in both national and international contexts.[30]

Notwithstanding general recognition of the implications of anti-competitive conduct for market access as being an important dimension of the interface of trade and competition policy, the concern has also been expressed that an excessive focus on market access objectives in work on competition policy in the WTO could distort the principles of competition policy and/or be inimical to the interests of developing countries in this area.[31] Scholarly writings and competition law enforcement experience counsel against a simplistic approach to the treatment of private anti-competitive practices as barriers to trade, on the basis that the practices in question are often difficult to assess and may, depending on the circumstances, have efficiency-related benefits. For example, in both the economics of industrial organization and U.S. antitrust jurisprudence (and to a greater or lesser extent in that of most other jurisdictions with experience in this area), it has long been recognized that vertical market restraints such as exclusive dealing or tied selling can assist in overcoming free-rider problems and otherwise facilitate the efficient functioning of markets, notwithstanding that they sometimes deter entry by individual competitors.[32] More generally, addressing exclusionary conduct that potentially impedes access to markets is only one dimension of competition policy, and possibly not the most pressing dimension, particularly for developing countries.[33]

The foregoing suggests an approach to tackling anti-competitive practices that impede market access that: (i) is built around the established principles and insights of competition law and industrial

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[27] See, e.g., World Trade Organization (1997), part IV.1 and, for a thoughtful review of specific complaints regarding perceived anti-competitive conduct allegedly having the effect of impeding market access, U.S., International Competition Policy Advisory Committee (2000), pp. 211-226. See also Marsden (1997).

[28] World Trade Organization (1997), chapter IV, part IV.1.

[29] For example, it has been alleged that market access in the worldwide steel industry has been extensively disrupted by a government-tolerated cartel. See Wolff (1995). The United States' complaint in the so-called Kodak-Fuji case (Japan-Measures Affecting Consumer Photographic Film and Paper, WTO WT/DS44/R, 31 March 1998) was based, in part, on the alleged role of Japanese government authorities in encouraging perceived exclusionary practices in the Japanese film distribution sector.

[30] U.S. International Competition Policy Advisory Committee (2000), p. 225.

[31] See, e.g., Wood (1996), Hoekman and Holmes (1999) and WTO Working Group on the Interaction between Trade and Competition Policy (1999), paragraph 13.

[32] As pointed out in U.S., Council of Economic Advisors (1995), p. 246, many of the practices which have been labelled as private barriers to entry "fall in the area of non-price vertical restraints to trade, where there is appropriately no presumption of illegality. In many instances, vertical restraints, such as exclusive dealing arrangements or ownership interests in distributors, can increase efficiency and ensure product and service quality, even as they act as barriers to new entry".

[33] Hoekman and Holmes (1999).

organization economics (including the insight that, in some cases, vertical market restraints are efficiency-enhancing); (ii) aims principally at ensuring that alleged restrictions are subjected to effective scrutiny under such laws; and (iii) represents only one aspect of a sound and balanced approach to the implementation of national competition laws and policies, consistent with development-related objectives and concerns. As discussed below, current proposals for a multilateral framework on competition policy in the WTO appear to be consistent with this objective, in that they give much attention to institution-building processes and do not place disproportionate emphasis on market-access objectives.

An important related consideration which has received attention in international debates concerns the extent of exemptions from national competition laws, of both a sectoral and a non-sectoral nature, as a barrier to market access.[34] There is no dispute that such exemptions are widespread. Apart from the question of exemptions, whether anti-competitive practices that impede market access are adequately dealt with under national competition laws may depend on factors such as the existence or non-existence of relevant laws as well as on the effectiveness and impartiality of related enforcement bodies.[35] A question of interest is whether enhanced attention to these questions at the international level might contribute to a gradual reduction of exemptions that are not justified on efficiency or other public policy grounds and/or a related strengthening of enforcement policies and structures, with resulting benefits for consumer welfare, market access and development-related objectives.[36]

A final consideration relating to competition policy and market access concerns relates to the potential contribution of competition advocacy activities.[37] As noted, in many cases, practices affecting market access for imports may be underpinned by some element of governmental action or inaction. Experience in both developed and some developing countries suggests that advocacy activities can make important contributions in addressing anti-competitive actions by government, with resulting benefits for competition, internal and external trade, and economic welfare.[38]

(2) The problem of international cartels

A growing body of evidence indicates that cartels are a recurring feature of international markets for goods and services, and that such arrangements proliferate wherever they are not deterred by the vigorous application of competition laws. In the first half of the Twentieth Century, the world economy was characterized by extensive international cartel activity. A database maintained by the University of Leiden lists more than 20 sectors where cartels operated in the 1930s, with as many as 60 individual agreements in the case of the chemical and pharmaceutical sector.[39] A common feature of many of these cartels is that they persisted for years or (in some cases) decades in countries that lacked laws and enforcement policies to deal with them. The significance of these arrangements for the gains from trade is clear: to the extent that they artificially raise prices and reduce output in markets and, in many cases, also prohibit cross-trading by one country's suppliers into markets assigned to other countries' suppliers, they directly inhibit realization of these gains. This is not to suggest that the international trading system should carry the "front-line" responsibility for dealing with such arrangements, but that ensuring that they are properly dealt with is an important and legitimate concern of the system.

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[34] See, generally, OECD (1996). The concept of a sectoral exemption is self-explanatory; non-sectoral exemptions relate to particular types of conduct (e.g., joint ventures).

[35] World Trade Organization (1997), Chapter IV, Part IV.5.

[36] This would appear to be the underlying premise of the 1996 OECD study, with respect to the question of exemptions.

[37] These are activities such as speeches, public education, research and analysis, interventions before relevant statutory bodies or legislative committees and other non-enforcement activities that are undertaken by competition agencies for the purpose of advancing their fundamental objectives.

[38] WTO Working Group on the Interaction between Trade and Competition Policy (1998), paragraphs 36, 45, 51, 53 and 109. For a review of the Canadian experience in this area, see Anderson et al (1998).

[39] See http://www.let.leidenuniv.nl/history/rtg/cartels/.

A particularly notorious example of an international cartel was the arrangement that prevailed in the heavy electrical equipment sector for decades, beginning in 1907 and continuing well into the second part of the century.[40] As has been noted in the WTO Working Group on the Interaction between Trade and Competition Policy, this case illustrates the impact that such arrangements can have not only on international trade, but also on economic development, given that heavy electrical equipment is an important input to energy production and diverse user industries. In addition, it is noteworthy that, even after it was prosecuted in the United States, the cartel continued to operate and impose heavy costs on jurisdictions without effective competition laws – thereby suggesting a need for each country to have effective laws to deal with such practices.

Although concern over international cartels receded somewhat in the 1970s and 80s, extensive evidence surfaced in the 1990s that they were far from being a concern limited to the past and, indeed, that such arrangements were alive and flourishing in the "globalizing" economic environment. Investigations conducted particularly by the U.S. Department of Justice but also by the European Commission and other countries' enforcement authorities revealed the existence of major cartels in, *inter alia*, 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 agricultural and human use).[41]

The costs to the world economy entailed by such cartels appear to be in the multi-billions of dollars annually. Levenstein and Suslow (2001) report many cases of such cartels involving firms headquartered in the developed world with substantial exports to developing countries. Looking at 16 "cartelized" products they note:

> "Examining these sixteen products -- which were cartelized 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."

Furthermore, it is noteworthy that in many or perhaps most cases, the immediate impact of cartels is on other firms using the products as industrial inputs, rather than on final consumers. This underscores the detrimental impact of cartels on the development prospects of poor countries.

Foreign aid projects are also vulnerable to cartel activity, in the form of bid rigging. For example, it has been reported by the U.S. Department of Justice that:

> "Philipp Holzmann AG, a major German construction firm, pleaded guilty and was sentenced to pay a $30-million fine for bid-rigging on two U.S. Agency for International Development-funded wastewater treatment projects in Egypt…."

Particularly in recent years, the investigation and prosecution of international cartels has been a major concern of the antitrust agencies of leading developed jurisdictions.[42] To this extent, the problem is already being aggressively addressed. Nonetheless, it is important to note that developed

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[40] For an authoritative discussion, see U.S., Congress (1980). The electrical equipment cartel is referred to specifically by Lenin, who observed in his contemporary account, "In 1907, the German and American trusts concluded an agreement by which they divided the world between themselves. Competition between them ceased. The American General Electric Company (G.E.C.) got the United States and Canada. The German General Electric Company (A.E.G.) got Germany, Austria, Russia, Holland, Denmark, Switzerland, Turkey and the Balkans.". Lenin (1916). In addition to providing food for Lenin's work, the electrical equipment industry gave birth to Phoebus, the light bulb cartel, which plays a key role in Thomas Pynchon's novel, *Gravity's Rainbow*.

[41] Levenstein and Suslow (2001); OECD (2000) and Klein (1999).

[42] See, e.g., Klein (1999).

country competition agencies are principally concerned with addressing the harm caused by international cartels *in their own markets*. Furthermore, as was shown by the case of the heavy electrical equipment conspiracy, vigorous prosecution of such arrangements in some jurisdictions will not necessarily deter or address the effects of such practices in other (especially developing country) markets. There appears to be no getting around the need for countries that wish to protect themselves from such arrangements to establish their own, effective competition laws and/or policies and institutions, notwithstanding that international cooperation arrangements are also of vital importance for establishing and implementing such laws.[43]

Some would dispute that international cartels can appropriately be characterized as a 'trade" issue, preferring that they be dealt with as an "international antitrust" issue. However, these two domains may overlap. Recognizing that strong antitrust laws and agencies are the key to addressing this issue, it remains that international cartels can undermine the benefits of trade liberalization; hence, ensuring the existence of laws and institutions to address these arrangements would seem to be a legitimate concern of the international trading system.

Furthermore, in some cases, addressing the impact of cartels may necessitate legislative and/or international action to repeal existing exemptions from competition laws. In the view of some observers, a case in point is that of international shipping conferences – cartels that regulate rates and conditions of service in international liner (regularly-scheduled) freight shipping services. While the desirability of exemption of such arrangements has been questioned by many observers, for political-economic reasons, it may be difficult for individual countries to unilaterally repeal the relevant exemptions.[44] Much attention has also been directed to the matter of exemptions for export-only cartels (e.g. the US Webb-Pomerene Act or the original UK Restrictive Trade Practices Act). However, it is not clear that acts with effects felt wholly outside the home country would (even without the relevant exemptions) constitute offences under the home countries' national competition laws.[45] The inducement to cartelization that may be provided by national industrial and other policies has also been noted in the WTO Working Group.[46]

(3) Competition policy, regulation and trade in services

Competition policy has an important interface with sectoral regulation in both the domestic and international contexts. This has implications both for market access and consumer welfare. Regulation can have both pro-competitive (welfare-enhancing) and anti-competitive (welfare-reducing) effects. Regulation can be pro-competitive where it is employed to provide access to essential facilities; where it otherwise serves to limit the exercise of monopoly power; or where it addresses other forms of market failure such as a lack of adequate information regarding the characteristics of products. However, even here, regulation can entail its own significant problems.[47] Moreover, regulation is likely to have anti-competitive effects where it imposes restrictions on entry, exit and/or pricing in non-natural monopoly industries. In fact, 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 in such industries 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.[48] Recognizing this, many competition agencies in both the developed and developing world

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[43] Levenstein and Suslow (2001) and OECD (2000).

[44] This was the conclusion, e.g., of Canada, National Transportation Act Review Commission (1993).

[45] World Trade Organization (1997), chapter IV.

[46] WTO Working Group on the Interaction between trade and Competition Policy (1998), paragraph 87.

[47] For example, it has been argued that unduly sweeping use of the essential facilities doctrine can deter investment for new competitors to "invent around" existing bottlenecks. See World trade Organization (1997), chapter IV.

[48] The classic diagnoses of this problem are presented in Stigler (1971) and Jordan (1972). Krueger (1974) highlights the costs of rent-seeking through regulation and related forms of intervention in the context of developing economies.

attach high priority to "advocacy activities" aimed at minimizing unnecessary regulatory intervention and ensuring that, where it is used, regulation serves genuinely pro-competitive purposes. In doing so, such agencies advance goals that are closely related to those of international trade liberalization -- a little-noted but important example of why the proliferation of strong competition agencies is in the broad interest of the multilateral trading system.

The importance of effective competition laws and institutions for efficient performance in international markets in the services sector is illustrated by recent developments in the airline industry. In late 2001, the U.S. Department of Justice urged the Department of Transportation (DOT) to impose divestitures and other conditions on a proposed airline alliance between American Airlines and British Airways in order to protect consumers.[49] In the Department's view, the alliance threatens a substantial loss of competition which would likely result in higher air fares and reduced service for consumers. At the same time, the Department called for replacement of an existing, restrictive air service treaty between the United States and the United Kingdom with a full "Open Skies" arrangement, which would remove government restrictions on entry and pricing, also emphasizing the need for a freeing up of airport landing "slot" allocations. This illustrates both the importance of competition law enforcement in a deregulated environment and the potential contribution of competition advocacy activities to further liberalization and consumer protection.

A further important example of the links between competition policy, economic regulation and trade liberalization is provided by the so-called "Reference Paper" on regulatory principles which forms part of the commitments made by most WTO Members in the context of the WTO Negotiations on Basic Telecommunications Services that were concluded in February 1997. The Paper is intended to address, inter alia, situations where the services provided by public telecommunications networks constitute essential facilities that are exclusively or predominantly provided by a single or limited number of suppliers and for which there are no feasible substitutes – a situation which potentially constitutes an impediment to both competition and market access for service suppliers. To address this concern, the Reference Paper sets out detailed rules relating to interconnection of downstream service providers with major suppliers on non-discriminatory terms; the prevention of anti-competitive acts, including anti-competitive cross-subsidization and the making available of information needed for efficient inter-connection.[50] These rules draw importantly on concepts of antitrust and regulatory policy such as exclusionary practices and the essential facilities doctrine. Since the adoption of the Reference Paper, suggestions have been put forward to adopt similar approaches with regard to other services sectors in which efficient competition and meaningful liberalization may also require addressing issues of bottleneck monopolies and anti-competitive practices, including electricity and postal and express delivery services.[51]

The foregoing developments in the services sector illustrate both the general relevance of competition policy and related aspects of regulatory policy to trade liberalization and a need to draw effectively on the insights and experience of horizontal competition law in implementing related concepts. In this connection, Bronckers (1997) has observed:

> "Without a common understanding of the goals and methods of competition law, it is difficult to see how WTO Members to begin with, and WTO dispute settlers later on, can interpret some of the specific commitments on the prevention of anti-competitive practices. ….Without a reference to common principles, and without the benefit of experience in other sectors of the economy, there is a risk of sub-optimal interpretation. It will also be difficult to

[49] "Justice Department urges [Department of Transportation] to impose conditions on American Airlines/British Airways Alliance", Department of Justice, Press Release, December 17, 2001.

[50] World Trade Organization (1997), chapter IV.

[51] Similar issues have been raised by some developing countries with regard to certain aspects of tourism-related services.

adjudicate disputes in WTO about the correct interpretation of these critical, but generally worded principles."[52]

(4) Competition policy vis-à-vis intellectual property rights: a further important area of interface with the multilateral trading system

The application of competition policy vis-à-vis intellectual property rights (IPRs) is viewed, in many jurisdictions, as helping to balance the exclusive rights provided to producers under intellectual property legislation.[53] Issues concerning perceived abuses of intellectual property rights have figured in numerous competition law cases in recent years.[54] Recently, in the United States, the Federal Trade Commission (FTC) and the Department of Justice have initiated public hearings into the relationship between these two policy fields.[55] To the extent that the application of competition policy acts as a check against abuse of the exclusive rights embodied in IPRs, it also carries wider implications for international trade and development.[56] In fact, the application of competition policy vis-à-vis IP rights is specifically addressed in relevant articles of the WTO Agreement on Trade-Related Intellectual Property Rights (TRIPS). In addition, the interface between competition policy and intellectual property rights has been an important subject of discussion in the work of the WTO Working Group on the Interaction between Trade and Competition Policy.[57]

Currently, most economists recognize that, although the long term objectives of intellectual property rights and competition policy are similar, tensions can arise between competition policy objectives and the existence and exercise of intellectual property rights in particular cases.[58] For example, practices such as exclusive dealing requirements or tying arrangements in licensing agreements can limit competition, particularly where the firm or firms engaging in the practice enjoys a high market share. Recent scholarship also suggests that anti-competitive practices associated with intellectual property protection may raise particular concerns in the context of network industries (e.g., computer software), due to the existence of externalities that increase the likelihood of "locking into" a socially inefficient standard and/or the feasibility of leveraging power into related markets.[59] Concerns about effects of this nature have been heightened by perceptions that the scope of IPRs as currently defined by national legislation may, in some circumstances, be excessively broad, or at least that the trend is in this direction.[60]

The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) contains specific provisions relating to the control of anti-competitive licensing practices and other abuses of IPRs.[61] Article 8.2 stipulates that "Appropriate measures, provided they are consistent with this Agreement, may be needed to prevent the abuse of intellectual property rights by rights holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer

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[52] Bronckers (1998).

[53] For a review of the role of national competition policies vis-à-vis intellectual property rights in the United States, the European Community, Japan and Canada, see Anderson (1998).

[54] A prominent example is the recent *Microsoft* litigation.

[55] See http://www.ftc.gov/opp/intellect/index.htm.

[56] For example, exclusive dealing arrangements, territorial market limitations or other restrictions incorporated in licensing agreements can affect directly the terms of international trade and technology transfer. A useful discussion of the implications of intellectual property protection for trade and development is provided in Lahouel and Maskus (1999).

[57] In particular, the Working Group has reflected on such topics as (i) the objectives of intellectual property and their relationship to those of competition policy; (ii) the optimal treatment of intellectual property licensing arrangements; and (iii) the implications of the territorial segmentation of intellectual property protection from the perspective of competition policy. See, in particular, WTO Working Group on the Interaction between Trade and Competition Policy (1998), paragraphs 112-122.

[58] See, generally, Anderson and Gallini, eds. (1998).

[59] See Church and Ware (1998) and references cited therein.

[60] See, e.g., Barton (1997).

[61] See, generally, World Trade Organization (1997), Part IV.4 and Anderson (2001).

of technology". Article 40 affirms the right of Members to specify in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having adverse effects on competition in the relevant market and to adopt, consistent with the other provisions of this Agreement, appropriate measures to prevent or control such practices. The Agreement also contains a short illustrative list of practices which may be treated as abuses.[62] The compulsory licensing provisions of the TRIPS Agreement also implicate competition policy considerations.[63]

While the above-mentioned provisions of the TRIPS Agreement provide clear authority for countries to take measures to protect themselves against anti-competitive abuses of specific types of intellectual property rights, they also leave important questions unanswered. For example, they give little guidance as to the practices that should be treated as abuses or (still less) to the standards to be applied in evaluating related practices or the appropriate remedies. Certainly, they do not create any obligations on the part of "home" countries in the event of abuse of IPRs in host countries. As noted, currently, work is under way to clarify the relationship between competition policy and intellectual property in joint hearings by the U.S. FTC and the Department of Justice. The outcome of the hearings is likely to be of interest beyond the U.S. domestic context. Given the extensive concerns and lack of effective policies on the part of developing countries in this area, the question arises as to whether, at some stage, there will be a need for further reflection or action on this issue in the framework of the WTO.[64]

(5) Competition policy and the agricultural sector

Agriculture is a sector which is subject to extensive government intervention in the form of subsidies, trade barriers and supply management programmes. In countries such as Canada, competition advocacy activities by the relevant authorities have played a role in bringing to light the potential costs of such intervention for consumers.[65] Arguably, this makes an important contribution to the goals of trade liberalization – a contribution which can be enhanced through greater cooperation among competition authorities.[66]

The rise of "agribusiness" has also brought with it extensive concerns about possible anti-competitive practices and market dominance by large players in the supply of certain products Studies for the ICPAC Report and the OECD[67] indicate that the agri-food sector has been particularly prone to violations of US antitrust laws, particularly the operation of international cartels. For example, ADM, a major player in U.S. and Brazilian soya and other markets, was recently fined $100m for its role in two international cartels in the agrifood sector (specifically, the lysine and citric acid markets). A study by Ahmed (1995) concluded that the worldwide fertiliser industry was characterised by extensive anti-competitive behaviour.[68]

There are also fears of domination by a small number of firms on the agricultural input side. Murphy (1999) asserts that:

> "A recent report from four research organizations in South East Asia points to an alarming level of concentration in the commercial corn seed markets of Thailand, the Philippines, Vietnam and Indonesia. The report claims three companies, Cargill, Pioneer and CP-DeKalb, control 70 per cent of the Asian seed market. With Monsanto's recent acquisitions, that

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[62] These are exclusive grant-back conditions, conditions preventing challenges to validity and coercive package licensing.

[63] See World Trade Organization (1997), Part IV.4.

[64] Anderson (2001).

[65] Robertson et al (1997) and Canada, Bureau of Competition Policy (1989).

[66] See Loyns et al (1997).

[67] Abbot (1998).

[68] Ahmed (1995).

effectively leaves the continent with only two competitors in the commercial corn seed markets: Monsanto and Pioneer. Pioneer is owned by Du Pont, another chemical company."

A related consideration concerns the role of plant breeders' rights.

The cross-border dimension to these issues is striking, both in the way that dominant positions in one territory have effects in others and in the frequency of allegations of anti-competitive behaviour involving trade as such. If and when agriculture becomes a "normal" sector in WTO Members' economies it may well be the case that the need for cooperation in competition law enforcement will be especially significant here.

(6) The applicability to competition law/policy of general provisions of the WTO Agreements

A further important dimension of the debate concerns the extent to which competition laws and policies are already subject to the general disciplines of the WTO. The three main WTO agreements, namely the GATT, the GATS and the TRIPS Agreements, contain broad rules relating to national treatment, most-favoured-nation treatment and transparency which would appear to be applicable, at least in some measure, in the domain of competition law and policy, although they are also subject to certain exceptions and limitations. For example, Article III of the GATT holds that there must be no discrimination between domestic and imported goods "in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use". Jurisprudence relating to this provision makes it clear that enforcement procedures as well as substantive laws and requirements are subject to its provisions. With regard to the GATS, the MFN obligation contained in Article II is also of general application, albeit subject to various exceptions.[69]

In the WTO Working Group on the Interaction between Trade and Competition Policy, the view has been expressed that, when WTO Members have considered it important to emphasise such principles in a particular context, they have often been incorporated into individual Agreements dealing with the relevant subject matter. Examples would include both the Agreement on Technical Barriers to Trade, which deals with technical regulations and standards, and the TRIPS Agreement. Where this is done, the principles can be adapted to ensure that they address effectively the specific issues that arise in a particular policy area.[70]

A related question concerns the ability to address issues regarding the interaction of trade and competition policy through the mechanism of non-violation complaints, in which is alleged that benefits accruing to a Member under an existing WTO agreement are nullified or impaired by a measure even where the measure does not entail a violation of an existing agreement. Although this suggestion has been put forward from time to time by various authorities, experience in the WTO including in the recent Kodak-Fuji case[71] suggests that it can be difficult to apply in practice. Given this, Roessler (1999) concludes that it would be an illusion to expect that WTO panels or the Appellate Body could deal appropriately with the subject of anti-competitive practices that impact adversely on trade and development without explicit normative guidance from the WTO's Members – i.e., through development of an appropriate agreement.

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[69] World Trade Organization (1997), chapter IV, section V.1

[70] WTO Working Group on the Interaction between Trade and Competition Policy (2001), paragraph 59.

[71] *Japan - Measures Affecting Consumer Photographic Film and Paper*, (WTO WT/DS44/R, 31 March 1998). In this case, a number of non-violation claims by the United States relating to various measures by relevant Japanese authorities which allegedly encouraged the adoption of perceived exclusionary practices in the Japanese film distribution sector were dismissed by the Panel on the ground that nullification and impairment resulting from the various measures had not been shown.

III. COMPETITION POLICY AND ECONOMIC DEVELOPMENT: IMPLICATIONS FOR THE MULTILATERAL TRADING SYSTEM

In early writings on economic development, it was sometimes taken for granted that high rates of profit were desirable to promote accumulation and that, by implication, competition was irrelevant or even undesirable. This view has gone out of favour in recent years, but candour requires us to admit that the nature of the relationship between competition and development is not fully understood. Nonetheless, the need for competition policy is clear. To understand this, it is important to distinguish between three questions, each of which is considered below:

- How does competition (as opposed to competition policy) contribute to economic development?

- What is the specific role of competition policy in responding to the challenges of developing countries, as opposed to or in tandem with broader structural policies that promote competition and efficiency?

- Could an (appropriately structured) multilateral agreement help?

The importance of competition and competition policy for economic growth and development is a central theme of Michael Porter's (1990) survey of the sources of growth and technological improvement in wide array of developed and developing countries. He concludes that:

> "Among the strongest empirical findings from our research is the association between vigorous domestic rivalry and the creation and persistence of competitive advantage in an industry…. Domestic rivalry not only creates pressures to innovate but to innovate in ways that upgrade the competitive advantages of a nation's firms." [72]

Porter goes on to make the point that "A strong antitrust [competition] policy … is essential to the rate of upgrading in an economy. He places particular emphasis on vigorous enforcement of competition laws in the areas of horizontal mergers, collusive behaviour (i.e., cartels) and strategic alliances." [73]

Tybout (2000) notes that the precise nature of the relationship between competition and development remains somewhat unclear. Surveying the available evidence on firm size, new entry and productivity, he notes that:

> "It is often argued that in [developing] countries, (1) markets tolerate inefficient firms, so cross-firm productivity dispersion is high; (2) small groups of entrenched oligopolists exploit monopoly power in product markets; and (3) many small firms are unable or unwilling to grow, so important scale economies go unexploited. Drawing on plant and firm-level studies, I assess each of these conjectures and find none to be systematically supported."

As Tybout (2000) himself emphasizes, the foregoing does not mean that we can dismiss the value of competition, just that we are not sure precisely how it works.[74] Most economists would still argue that the promotion of entrepreneurial effort and innovation through competition is at the heart of a dynamic and productive economy that is well-adapted to the needs of its citizens. One important dimension of this is the impact of competition in ensuring that transnational mergers and acquisitions bring about beneficial transfers of technology to host countries. The available evidence suggests that

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[72] Porter (1990), p. 117.
[73] Porter (1990), p. 663.
[74] One explanation for the results might be that most of the data came from economies where there was already some competition and it could not pick up the impact of moving from no entry barriers to only some.

this is indeed important, since competition provides a key incentive to more rapidly transfer up-to-date technologies and provide related training.[75]

In any case, the importance of competition policy for developing and other countries does not stand or fall on abstract discussions of the nature of competition and its relationship to economic performance. The main job of competition policy is to deter and/or provide remedies for specific abuses such as cartelization, monopolization or anti-competitive mergers that raise the price and/or reduce the quality and availability of (often socially important) goods and services – practices which can hardly be justified on the ground that they are pro-poor or pro-development. As discussed in Part II(2) above, the findings of Levenstein and Suslow (2001) indicate that international cartels raise the costs of developing countries' imports from developed countries (including imports of socially important food and feed-related products and industrial input goods) by a factor of billions of dollars annually.[76] In respect of competition advocacy activities, which admittedly take a more pro-active approach to promoting competition, the emphasis is normally on making a case for removal of regulatory or other restrictions in specific instances where they are shown to be harmful to users.

To be sure, competition law/policy as such is only one factor bearing on the degree of competition in markets. Factors such as external openness and an absence of unnecessary regulatory barriers to entry have a profound impact on the state of competition in an economy and the efficient functioning of markets. However, it is a fallacy to conclude from this that competition *policy* itself is unimportant. First, certain manifestly harmful anti-competitive practices (e.g., international cartels) cannot be remedied by external (or internal) liberalization alone. Second, as noted, 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.[77]

The latter observation points toward a further potential benefit of competition policy for developing economies: its role as an underpinning of related microeconomic reforms. For example, much evidence suggests that privatization initiatives may fail to produce improvements in performance unless they are accompanied, from the outset, by measures to strengthen competition.[78] Otherwise, the effect may simply be to replace a public monopoly with a private one. More broadly, discussions in the WTO Working Group on the Interaction between Trade and Competition Policy suggest that, in the experience of a growing number of developing and transition countries, competition policy, including competition advocacy activities, can reinforce and be instrumental in the implementation of a range of related microeconomic reforms, including regulatory and infrastructure reforms as well as external liberalization.[79] Conversely, a failure to implement competition policy and related regulatory reforms can prevent countries from realizing the potential gains from external liberalization, by inhibiting an appropriate supply response.[80] This, in turn,

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[75] UNCTAD (2000).

[76] As Jenny (2001), pp. 52-53, points out, "even if one believes that competition law and policy is not an appropriate tool to foster domestic economic development …, it is clear that private international anti-competitive practices or monopolization by global firms of domestic markets can prevent economic development or limit its scope and that failure by developing countries to have adequate means to fight such practices exposes them to significant costs and setbacks on the road to economic development".

[77] WTO Working Group on the Interaction between Trade and Competition Policy (1998), paragraphs 36, 45, 51, 53 and 109.

[78] WTO Working Group on the Interaction between Trade and Competition Policy (1998), paragraph 36; see also Stiglitz (1995).

[79] WTO Working Group on the Interaction between Trade and Competition Policy (1998), paragraphs 34 and 229.

[80] Osakwe (2001).

suggests a need for "mainstreaming" or systematic implementation of trade liberalization and related policy reforms as integral elements of countries' development strategies.[81]

The ultimate test of the effectiveness of competition policy in developing countries concerns how the beneficial impact of such policy on the living standards of poor people compares to the cost of implementation. McCulloch et al (2001) argue that competition policy can bring important benefits to the poor, but that careful attention must be paid to avoid over-elaborate institutions[82]. A study by the Peruvian Competition Agency, Indecopi, claimed that in the first few years of its operation (1993-1996), the economic benefits arising from intensification of competition amounted to $120m against operating costs of $20m[83]. The benefits attributed included some from trade liberalisation due to transferring parts of trade policy to INDECOPI. Competition agencies are, by now, operating across most of Latin America. The coverage of competition policy in Sub-Saharan Africa and in Asia is less comprehensive. Nonetheless, the heads of the competition agencies of Zambia, Gabon and South Africa gave upbeat assessments of their experience to a recent WTO meeting in Cape Town.[84] They did, however, insist on the need for international support to succeed.

An ongoing comparative study of the role of competition policy in Africa and South Asia initiated by the Consumer Unity and Trust Society (CUTS) with participation by numerous outside researchers found important parallels between the experience of developing and transition economies.[85] The countries being studied are India, Sri Lanka, Pakistan, Zambia, Kenya, Tanzania and South Africa. All are moving away from protectionism, reliance on para-statals in manufacturing and services and bureaucratic control of the private sector. The competition regimes in these countries are integral parts of the process of promoting healthy market economies. A key issue is where the boundary between competition policy and new-style regulation of privatised utilities should lie. The role of competition policy in a developing country can be seen in the light of the need to create competitive markets, but different countries have chosen different patterns of division of responsibility between sectoral regulators and competition authorities. As the CUTS project shows, there is also an issue of an overlap between consumer protection and competition agencies. Supporters of the introduction of competition policy in developing countries argue that since the government will be engaging in these activities, it is best to have a dedicated pro-competition agency in overall charge of them, even if it is forced to administer exceptions, since this is the best way to ensure predictablity. Pressure for imposition of price controls is clearly less if it can be shown that markets are competitive, and entry of multinationals can be made easier if there is some guarantee that competitive behaviour will be enforced.

International cooperation can facilitate effective implementation of national competition policies in diverse ways, including the drafting of relevant legislation, training of enforcement personnel, exchange of national experience regarding policy and enforcement issues that cut across jurisdictions and case-specific enforcement assistance.[86] In addition, Birdsall and Lawrence (1999) make the case 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 might otherwise block the reform process. In developing this point of view, they refer specifically to the case of competition policy:

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[81] Osakwe (2001); see also Osakwe and Rajapatirana (2001) and Krueger (1984).

[82] McCulloch et al (2001), Ch.17 Competition Policy.

[83] See Caceres (2000).

[84] Report on WTO Regional Workshop on Competition Policy, Economic Development and the Multilateral Trading System (22-24 February 2001; available from WTO Secretariat).

[85] Consumer Unity and Trust Society (2001), "The 7-Up Project: A Comparative Study of Competition Regimes in Select Developing Countries of the Commonwealth" (available on the internet at http://cuts.org/7-up%20project.htm).

[86] See Jenny (2001).

> "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." [87]

In other words, an additional possible contribution of (appropriately-constructed) international agreements in this area might be to assist countries in overcoming "political market failures" or rent-seeking activities that reduce welfare and impede development.[88] This possibility has also been mentioned by the proponents of a multilateral agreement in the WTO Working Group on the Interaction between Trade and Competition Policy.[89]

IV. THE CURRENT PROPOSALS FOR ACTION ON COMPETITION POLICY IN THE WTO: AN OVERVIEW

As noted in the introduction to this paper, building on the work done to date in the WTO Working Group and in other fora, a number of WTO Member governments have put forward a proposal for development, in the context of the new Round of multilateral trade negotiations which has been launched at Doha, of a "multilateral framework on competition policy". Elements of this proposal are reflected in relevant paragraphs of the Declaration.[90] In addition to the mandate given in Doha, further insights into the possible content of a multilateral framework on competition policy 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 delegations, it should have three main elements:[91]

- A commitment by WTO Members to a set of core principles, including transparency, non-discrimination and procedural fairness in the application of competition law and/or policy, and the taking of measures against hardcore cartels.

- Modalities for cooperation, of a voluntary nature, with respect to national legislation, the exchange of national experience by competition authorities and aspects of enforcement. These modalities would be intended to supplement, rather than replace, existing cooperative arrangements at the bilateral and regional levels.

- A commitment by Members to ongoing, enhanced support for technical assistance and institution-building relating to competition policy, in the framework of the WTO but in cooperation with other interested organizations and national governments.

Without attempting a comprehensive assessment of the foregoing proposals, which would go beyond the scope of this paper, the following points may be noted.[92] In particular, it is noteworthy that the current proposals have evolved significantly in response to concerns and criticisms voiced by academic and other commentators as well as national representatives in the early years of the Working Group's work. First, it should be noted that the current proposals have little in common with earlier calls for development of a detailed multilateral "code" on competition policy as proposed some time

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[87] Birdsall and Laurence (1999), p. 136.
[88] See also Anderson and Jenny (2001b) and Jenny (2001).
[89] See Anderson and Jenny (2001b).
[90] See, especially, paragraphs 23 and 25.
[91] See also Anderson and Jenny (2001a).
[92] This section of the paper draws, to an extent, on Anderson and Jenny (2001a).

ago by the Munich Group[93] or related calls for establishment of an international competition law enforcement agency. Clearly, they do not aim at a comprehensive "harmonization" of competition law.[94] Rather, they are framed in terms of adherence to certain core principles that embody fundamental values of both competition policy and the multilateral trading system (non-discrimination, transparency and the proposed commitment to action against hard-core cartels). This approach deliberately leaves broad scope for continuing adaptation of national approaches to competition policy in response to economic learning and national circumstances – thereby responding to a key concern raised by critics of action on trade and competition policy in the WTO.[95]

Second, the current proposal foresees, at most, a limited role for the WTO Dispute Settlement Understanding in the field of competition law and policy. In the debates in the Working Group, the proponents of a WTO Agreement on Trade and Competition Policy have suggested that dispute settlement would apply, at most, in respect of basic commitments relating to the adoption of national legislation and enforcement machinery, and would not, in particular, apply to individual decisions of national competition authorities. This seemingly reflects the importance attached to concerns that were articulated by prominent representatives of the international antitrust community (particularly in the U.S.) that WTO dispute settlement panels should not be in a position to overturn or call into question particular decisions of national authorities in this field.[96] Statements by some Members in the Working Group also suggest that a peer review mechanism could play an important role in the context of the proposed multilateral framework; to some extent, this might serve as an alternative to dispute settlement.[97]

Third, it should be noted that the modalities for cooperation that are called for under the current proposals would be voluntary in nature and are less ambitious than elements that were proposed in the past. For example, an early proposal for introduction of "compulsory positive comity" was dropped some time ago. 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 as such. Overall, this aspect of the proposals would seem to be calling for a broadening of the coverage of approaches already in force under existing "soft" cooperation agreements at the bilateral level and in many regional trade agreements.[98]

Fourth, the proposals (and the Ministerial Declaration) place considerable emphasis on support for technical assistance and capacity building in this area, responding to a key concern of developing countries. In the Ministerial Declaration, it is foreseen that assistance will be provided "in cooperation with other relevant intergovernmental organisations, including UNCTAD, and through appropriate regional and bilateral channels."[99]

Fifth, by relying on broad principles, cooperation, moral suasion and support for institution-building rather than on detailed legal prescriptions, the current proposals avoid additional potential problems.[100] In particular, and perhaps in response to concerns expressed previously by various commentators,[101] the current proposals do not appear to place excessive weight on market access objectives. Rather, the focus of the current proposals is on promoting the development of effective national competition institutions and expanded international cooperation to address anti-competitive

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[93] See "Draft International Antitrust Code (DIAC)", 5 *World Trade Materials*, September 1993, pp. 126-196. The DIAC 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 in July 1993.

[94] See also Garcia-Bercero and Amarasinha (2001).

[95] See, e.g., Klein (1996), Melamed (1997) and Tarullo (2000).

[96] See, e.g., Klein (1996).

[97] WTO Working Group on the Interaction between Trade and Competition Policy (2001).

[98] Anderson and Jenny (2001a).

[99] Ministerial Declaration (WT/MIN(01)/DEC/1, November 9-14, 2001), paragraph 24.

[100] Anderson and Jenny (2001a).

[101] E.g., Hoekman and Holmes (1999).

practices as they are generally recognized in the competition policy community.[102] Also, for the most part, it would be left for individual countries to define the details of their national legislation.

Notwithstanding the foregoing observations, we are not suggesting that the current proposals necessarily meet all of the concerns that may be raised, in particular, by developing country Members. In the debates in the Working Group prior to Doha, it was evident that at least some such countries remain to be convinced of the benefits for their development of implementing national competition laws and/or a multilateral agreement in the WTO in this area. To a large extent, such countries' concerns appear to center on their perceived lack of institutional capacity and experience in this area – something to which the Doha provisions on technical assistance and capacity building seek to respond.

V. Concluding Remarks

This paper has discussed the general relevance of competition policy to the WTO, with particular reference to developments in the areas of market access for imports; the problem of international cartels; the relationship between competition policy, economic regulation and services liberalization; the relationship between competition policy and intellectual property rights; and developments in the agricultural sector. Numerous instances have been noted of apparent complementarities between the two fields. For example, it has been noted that international cartels and other anti-competitive arrangements, if left unchecked, impede the efficient functioning of transnational markets and thereby undermine the gains from trade; that competition policy is an important underpinning of regulatory reform and liberalization in the services sector; that the role of such policy is an important balancing factor built into the TRIPS Agreement; and that it will also be important in the context of agricultural sector reform.

The role of competition policy in developing countries, and the potential contribution of international agreements in this area, have also been discussed. This aspect of the analysis suggests that competition policy can assist developing countries in addressing particular abuses (e.g., international cartels) that impose significant costs on their national economies; that such policy is an important underpinning of related market reforms such as privatization and regulatory reform; and that it may be critical to enabling countries to address supply-side restrictions that otherwise inhibit them from realizing the potential benefits of trade liberalization and related reforms. Furthermore, there is some basis for believing that international agreements can play a crucial role in enabling developing countries to implement effective policies in this area.

While these areas of interaction illustrate clearly the deepening relationship between competition policy, economic development and the multilateral trading system, they do not and should not pre-judge the merits of any specific initiative in the WTO. Clearly, the contents of any such arrangement will need to be carefully assessed by WTO Members with particular attention to factors such as their implementation costs and consistency with development objectives. In addition, it is of obvious importance that any arrangement at the multilateral level respects the core principles of competition policy; permits and facilitates their continuing elaboration in response to economic learning and other developments; and builds positively on the institutional and other strengths of such policy. In fact, the current proposals of the proponents of a multilateral framework respond, in a number of ways, to these concerns. We recognize, however, that the task before WTO Members in this area is a complex one with many dimensions, only some of which have been surveyed in this paper.

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[102] No doubt, this will ultimately have benefits for market access, in that robust competition policies and institutions can be supportive of market access objectives in various ways (including through their advocacy functions). However, it avoids the risk of distorting the principles of competition policy which was highlighted by past commentators.

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