

# **Towards a Development-Oriented Multilateral Framework on Competition Policy**

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## **I. Introduction: WTO Multilateral Framework on Competition Policy**

Competition policy deals with principles and laws designed to facilitate competition, essentially by preventing anti-competitive conducts. Its objectives are founded in the basic notion that increased competition in the market fosters better outcomes for consumers, in terms of efficiency, quality and resource allocation. Trade policy also regulates international trade to enhance economic efficiency and consumer welfare, mainly through free trade and market liberalization.<sup>2</sup> The interaction between these two distinct yet similar policies has led to discussions at various international organizations including but not limited to the OECD and the UNCTAD.<sup>3</sup>

Interaction between trade and competition policy became one of the WTO issues at the 1999 Singapore Ministerial Conference, for it was believed that anti-competitive practices, private or public, undermined the gains of trade liberalization achieved by the WTO. This Ministerial Conference established the WTO Working Group on the Interaction between Trade and Competition Policy (WGTCP) to discuss the issues of interaction at a theoretic level. And at the WTO Doha Ministerial Conference in 2001, it was recognized that a multilateral framework on competition policy could enhance the contribution of competition policy to international trade

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<sup>2</sup> WTO, *Report of the WGTCP to the General Council*, WT/WGTCP/2, ¶¶ 22-23, 1998.

<sup>3</sup> SEUNG WHA CHANG, *Interaction Between Trade and Competition: Why a Multilateral Approach for the United States*, 14 *Duke J. of Comp. & Int'l L.* 1, pp. 7-10, 2003.

and development.<sup>4</sup> In essence, the Declaration provided that negotiations will commence after the Fifth Ministerial Conference, subject to a decision on modalities of negotiations.<sup>5</sup> In addition, it authorized the WGTCP to work on the clarification of core principles, including transparency, non-discrimination and procedural fairness, and provisions on hard-core cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building.<sup>6</sup>

Regarding a multilateral framework on competition policy, several developing countries had expressed opposition even before the Doha Ministerial Conference. They argued that such an approach would be controversial, if not unhelpful.<sup>7</sup> India stated that instead of developing multilateral rules, the WGTCP should continue to study this issue because the issues at stake is too complex and understanding on it by WTO members are far from agreement.<sup>8</sup> Brazil argued that there is a need to consider the different levels of development; the different cultural context

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<sup>4</sup> WTO Doha Ministerial Declaration (WT/MIN(01)/Dec/1), Paragraph 23 states:

“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 the 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.”

This paragraph represented a compromise between WTO Members that desired an immediate launch of negotiations on trade and competition policy and those desiring that work on this subject would continue in a non-negotiating or educational mode.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at ¶ 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.”

<sup>7</sup> WTO, *Report on the WGTCP Meeting 2-3 October*, WT/WGTCP/M/12, ¶ 35, 2000. India argued “(i)t is not at all necessary to have a basic framework of multilateral rules to ensure WTO objectives are achieved.” See also AJIT SINGH, *Multilateral Competition Policy and Economic Development: A Developing Country Perspective on the EC Proposal* presented at the 5<sup>th</sup> Session of the Intergovernmental Group of Experts on Competition Law and Policy at Geneva, p. 2, 2003.

<sup>8</sup> WTO, *Report on the WGTCP Meeting of 19-20 April*, WT/WGTCP/M/8, ¶ 20, 1999. India argued “(t)he WGTCP was in an exploratory and educative process and was still a long way off from the point where it could be in a position to gauge the need for multilateral rules.”

in which these regimes will be implemented; the difference in availability of resources for this purpose; and the different levels of institutional development.<sup>9</sup> Paragraph 24 of the Doha Declaration, which emphasized the developing countries' need for enhanced level of technical assistance and capacity building, and paragraph 25, which stated that full account should be taken of the needs of developing countries and that flexibility should be provided to them were responses to such concerns.<sup>10</sup>

After the Doha Ministerial Conference, the WGTCP made substantial progress regarding the nature of the linkage between trade, competition and development. The primary objectives of the WGTCP were to foster economic development, recognizing that competition policy can be the servant of industrial policy; to promote global economic efficiency and consumer benefits; to increase the presence of active competition authorities in all markets and enhance voluntary cooperation among these authorities; and finally, to maintain a high degree of national independence in administering competition policy.<sup>11</sup> However, developing countries had continuously expressed opposition to such a multilateral approach.<sup>12</sup>

As mandated by the Doha Declaration, Ministers were to decide by explicit consensus on modalities of negotiations on a multilateral framework on competition at Cancun in 2003. However, a bargaining impasse between the developed and developing members resulted in a failure to reach an agreement. The US and EU were not willing to give a sufficient package in

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<sup>9</sup> WTO, *supra note* 6, ¶ 38.

<sup>10</sup> *Supra note* 3, ¶ 24, 25. Paragraph 24 states:

“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.”

<sup>11</sup> ALAN WOLFF, *Launching Competition Policy Negotiations in the WTO: Relevant Considerations*, Global Business Dialogue at the Cancun WTO Ministerial September, 2003.

<sup>12</sup> See, e.g., WTO WGTCP, *Communication from Colombia*, WT/WGTCP/W/162, ¶¶ 3-6, 9-12, 2001.

ratcheting down their agricultural subsidies and thus could not strongly argue for the framework on competition policy. The whole Cancun package had collapsed. The EC, the strongest proponent for a multilateral approach, gave up its single undertaking approach in the WTO and decided to take a plurilateral approach.<sup>13</sup> As a result, competition along with the other Singapore issues were removed from the negotiation tables last July. At present, almost all progress that had been made to negotiate a multilateral framework on competition has been suspended.

The essential argument of this paper is that a multilateral framework on competition policy benefits the developing countries by promoting their economic development. Section II of this paper will briefly introduces the multilateral framework, proposed mainly by the EC at the WGTCP (hereinafter “Proposed Framework”). Then it will go on to outline the developing countries’ opposing positions and refute that the concerns are not as significant as they argue. Section III will recapitulate why a WTO multilateral framework on competition is beneficial to the developing countries’ developmental needs. Section IV will go on to suggest some possible development-oriented revisions to the Proposed Framework. Section V will conclude by urging “developing countries” to take a courageous yet wise step towards reengaging in negotiations for a multilateral framework on competition policy.

## **II. Proposed Framework, Oppositions and Counterarguments**

### **1. The Proposed Framework**

What the Havana Charter had tried to achieve on the subject of restrictive business

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<sup>13</sup> EC COMMISSION, *Reviving the DDA Negotiations*, Communication from the Commission to the Council, To the European Parliament, and to the Economic and Social Committee, p. 2, 2003. In this Communication, the EC Commission also stated that this was the only way to develop rules on Singapore issues because not all Members were ready to take the step now or in the future.

practices is definitely not the goal of discussions at the WGTCP.<sup>14</sup> The Proposed Framework basically consists of two features: ban on hardcore cartels<sup>15</sup> and conformity of domestic competition laws with the core WTO principles. The Proposed Framework requires every WTO member to have measures prohibiting hardcore cartels. But the members are given the autonomy to include certain provisions or exemptions into their competition regime.<sup>16</sup> The only condition is that they meet certain WTO principles of MFN, non-discrimination, national treatment, transparency and procedural fairness. The members must also establish a mechanism for mandatory consultation and cooperation on hardcore cartels but cooperation on other matters would be voluntary. A WTO Competition Policy Committee would be established to monitor a future agreement, assist cooperation, conduct peer reviews and facilitate exchanges of information.<sup>17</sup> An integrated approach to technical assistance and capacity building can also be provided for the developing countries.

This Proposed Framework is undoubtedly “modest” compared to those proposed earlier in the discussion.<sup>18</sup> It does not advocate WTO members to adopt a full set of competition laws.

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<sup>14</sup> Article 46 (1) of the Havana Charter states as follows:

“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.”

<sup>15</sup> The OECD defines hard-core cartels as anticompetitive agreements, anticompetitive concerted practices or anticompetitive arrangements by competitors “to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories or lines of commerce.” OECD, *Recommendation of the Council Concerning Effective Action Against Hard Core Cartels*, 1998.

<sup>16</sup> For a general overview see WTO WGTCP, *Communication from the European Community and its Member States*, WT/WGTCP/W/184, 2002.

<sup>17</sup> For a more detailed description of the proposal, see WTO WGTCP, *Communication from the European Community and its Member States, Dispute Settlement and Peer Review: Options for a WTO Agreement on Competition Policy*, WT/WGTCP/W/229, 2003.

<sup>18</sup> For a historical survey of international debates on international competition law/policy, see ELEANOR M. FOX, *International Antitrust and the Doha Dome*, 43 Va. J. Int'l L. 911, pp 925-932, 2003; CHANG, *supra* note 2, pp. 14-20.

Instead, it only involves a minimum set of reasonable rules.<sup>19</sup> It does not aim at a comprehensive harmonization of domestic competition laws, but takes into consideration the peculiarities of national circumstances.<sup>20</sup> It is framed in terms of adherence to certain core principles that embody fundamental values of both competition policy and the multilateral trading system. It deliberately leaves broad scope for continuing adaptation of national approaches to competition policy in response to economic learning and national circumstances. It is a response to the key concerns raised by critics of a multilateral approach in the WTO,<sup>21</sup> and seems to be in harmony with the developmental interests.<sup>22</sup>

## 2. Developing Countries Oppositions and Counterarguments

Although the discussion at the WGTCP may seem to have been based on a consensus for a multilateral framework on competition policy, it was not. Countries had continuously expressed oppositions. The basic foundation of such opposition is that there is no consensus on the robustness of the link between trade and competition and on whether that linkage is strong enough to call for a multilateral competition policy.<sup>23</sup> Responding to such a theoretic question is out of the scope of this paper. This paper only focuses on those contrasting opinions from the developing country perspectives.

### 1) One-Size-Fits-All Approach

Very few developing countries have competition laws. Many of the least-developing

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<sup>19</sup> Singh, *supra note 6*, p.10.

<sup>20</sup> IGNACIO GARCIA-BERCERO AND STEFAN AMARASINHA, *Moving the Trade and Competition Debate Forward*, JOURNAL OF INTERNATIONAL ECONOMIC LAW, pp. 481-506, 2001. See also WTO WGTCP, *Communication from the European Community and its Member States*, WT/WGTCP/W/222, 2002.

<sup>21</sup> DANIEL K. TARULLO, *Norms and Institutions in Global Competition Policy*, AMERICAN JOURNAL OF INTERNATIONAL LAW, vol. 94, no. 3, July, pp. 478-504, 2000.

<sup>22</sup> Singh, *supra note 6*, p. 25.

<sup>23</sup> *Id.*, p. 6.

countries have no legislation at all. Most of the 90 or so developing countries, which now have competition laws, enacted their laws only during the 1990s.<sup>24</sup> Moreover, even among those countries that have competition law, the content and enforcement of those laws differ, depending on economic resources and institutional capacity. Thus, it is argued that an appropriate competition policy has to differ between countries depending on their level of development, on the state of their governance and many other factors.<sup>25</sup> The main concern is based on the belief that the Proposed Framework pursues a one-size-fits-all approach and not a case-by-case approach.

But as the Chairman of the WGTCP stated in Cancun, the Proposed Framework does not inhibit the development of national approaches to competition policy in line with national circumstances.<sup>26</sup> The Proposed Framework is not based on a one-size-fits-all approach. It merely asks Members to adopt the core principles of the WTO to their competition regime. The “multilateral” approach should be distinguished from the more extreme “uniform” approach, which pursues a single global antitrust law.

## 2) Burden on Developing Countries

Developing countries have also argued that not of them have the capacity to implement competition laws. In order for competition policy to become effective, it takes time, perhaps even decades for the appropriate social and legal culture of competition and competition policy to evolve. Before serious enforcement can proceed, much learning must occur and political support

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<sup>24</sup> Of the 38 jurisdictions that enacted competition laws in the 1990s, 27 were developing countries. SIMON J. EVENETT, *Links Between Development and Competition Law in Developing Countries*, Case Studies for the World Development Report, 2005; *see also* INVESTMENT CLIMATE, Growth and Property, 2003.

<sup>25</sup> *See, e.g.*, WTO WGTCP, *Report on the WGTCP Meeting of 10-11 June 1999*, WT/WGTCP/M/9, ¶¶ 30-31, 1999.

<sup>26</sup> ROBERT ANDERSON AND FREDERIC JENNY, *The Current Proposals for WTO Negotiations on Competition Policy: Background and Overview*, 2003.

must be built.<sup>27</sup> Developing countries will also have the burden of adjustment costs caused by new regulations and enforcement mechanisms.<sup>28</sup> Thus, the argument that developing countries lack the resources and experience to fully participate meaningfully in a multilateral competition policy sounds convincing. In a submission to the WGTCP, Thailand had stressed the financial constraints and argued that competition agencies in developing countries need to be financially compensated and should be allowed to cooperate to the extent possible subject to technical and financial constraints.<sup>29</sup>

The Proposed Framework does not bind the developing countries to these constraints. It realizes that imposing such obligation is unrealistic and would be burdensome on the developing countries. By inserting provisions for technical assistance and capacity building, the seemingly heavy burden on developing countries is shared among the members, especially with developed countries. Detailed modalities must go through a negotiation process, which is currently impossible.

In fact, the developing countries fears regarding excessive implementation costs might be too exaggerated.<sup>30</sup> The ultimate test of the effectiveness of competition policy in developing countries would have to consider the beneficial impacts compared to the cost of implementation. Competition policy can bring important benefits to the poor, but careful attention must be paid to avoid over-elaborate institutions.<sup>31</sup> Although a few case studies cannot generalize the cost-benefits analysis, the case of Peru shows a good example that benefits exceed the implementation

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<sup>27</sup> F.M. SCHERER, *International Trade and Competition Policy*, Harvard University, p. 18, 1996.

<sup>28</sup> MYRIAM VANDER STICHELE, *What is Wrong with Competition Negotiations in the WTO? The Problems of a Competition Policy Agreement in the WTO in Investment and Competition Negotiations in the WTO – What's Wrong with it and What are the Alternatives?*, Seattle to Brussels Network, 2002. (available at <http://www.s2bnetwork.org>)

<sup>29</sup> WTO WGTCP, *Communication from Thailand*, WT/WGTCP/W/213, ¶ 6, 2002.

<sup>30</sup> S.J. EVENETT, *Interim Report on the Issues Relating to a Possible Multilateral Framework on Competition Policy*, WGTCP, 2003.

<sup>31</sup> N. MCCULLOCH, L.A. WINTERS AND X. CIRERA, *TRADE LIBERALIZATION AND POVERTY: A HANDBOOK*, CEPR, 2001.

costs. In the first few years of Peruvian Competition Agency, Indecopi's operation (1993-1996), the economic benefits arising from intensification of competition amounted to \$ 120 million against operating costs of \$20 million.<sup>32</sup> The heads of the competition agencies of Zambia, Gabon and South Africa also provided positive assessments of their experience.<sup>33</sup> Of course, this does not necessarily mean that high implementation costs are irrelevant or unimportant. For the least-developed countries, it would be of more significance.<sup>34</sup>

### 3) Limitation of Developing Countries Policy Options

Developing countries also argue that a multilateral approach would limit the policy options of developing countries when they pursue economic development; in short, it harms the policy autonomy of the developing countries. As mentioned, developing countries vary and for many of them other policies such as industrial policy may play a more useful role than competition policy in their pursuit for economic development.<sup>35</sup> Competition might need to be restricted in order to achieve economic efficiency. Some anti-competitive practices might need to be permitted to target other development goals or to achieve economies of scale. Developing countries might want to protect small or mid-sized companies and infant industries that have to compete against large multinationals with far better access to finance or global marketing networks. In fact, some developing countries that are far from an ideal world for competition, where the basic concept of market is not even understood, might be better off with no competition

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<sup>32</sup> A. CACERES, *Indecopi's First Seven Years*, B.Boza, 2000.

<sup>33</sup> WTO SECRETARIAT, *Report on WTO Regional Workshop on Competition Policy, Economic Development and the Multilateral Trading System*, 2000.

<sup>34</sup> *Id.*

<sup>35</sup> A.H. AMSDEN, *The Rise of "The Rest"—Challenges to the West from Late-Industrializing Economies.*, Oxford University Press, p. 78 2001; AJIT SINGH AND R. DHUMALE *Competition Policy, Development, and Developing Countries in* ARETIS P., M. BADDELEY, AND J. MCCOMBIE (eds.) *What Global Economic Crisis?* Palgrave. pp 122-145, 2001.

policy at all.<sup>36</sup>

If, indeed, the Proposed Framework goes to the extreme and fosters homogenization of competition policy objectives among WTO members, it would deprive the developing countries of very important developmental instruments.<sup>37</sup> Simply adopting the US or EU competition law would also be far from helpful in assisting the economic development of developing countries.<sup>38</sup> The Proposed Framework does not designate what the objectives of competition law or policy should be. There has actually been a considerable debate about what the goals of competition law should be. And it is generally accepted in developed countries that the goal is to enhance the static and dynamic efficiency of the economy by altering the allocation of resources.<sup>39</sup> Dynamic efficiency may also be emphasized as the central element in consideration of competition policy for developing countries.<sup>40</sup> But under the Proposed Framework, developing countries are able to choose whatever policy, a good industrial or a socio-political policy that they feel necessary. Developing countries may pursue other non-efficiency-based economic objectives or even non-economic objectives. South Africa's competition law, which lists six objectives for its 1998 Competition Act including the promotion of a greater spread of ownership, in particular, to increase the ownership stakes of historically disadvantaged persons, is one good example. Developing countries will not be hindered from their competition policy objectives.

#### 4) Concerns Regarding Market Access

Although, it was decided that market access would not be the focus of discussions at the

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<sup>36</sup> J.J. LAFFONT, *Competition, Information, and Development*, Annual World Bank Conference on Development Economics, pp.237-257, 1998.

<sup>37</sup> SINGH, *Competition and Competition Policy in Emerging Markets: International and Developmental Dimensions*, *Economic Journal*, p. 31.

<sup>38</sup> SINGH AND DHUMALE, *supra note 31*.

<sup>39</sup> R. POSNER, *Antitrust in the New Economy*, *ANTITRUST LAW JOURNAL*, pp. 31-33, 2001.

<sup>40</sup> D. AUDRETSCH, W. BAUMOL AND A. BURKE, *Competition Policy in Dynamic Markets*, *INTERNATIONAL JOURNAL OF INDUSTRIAL ORGANIZATION*, Vol.19, No.5, pp. 613-634, 2001.

WGTC, market access issues were a concern of the developing countries. Worries had been expressed that excessive emphasis on market access objectives could distort the principles of competition policy and also be detrimental to the interests of developing countries.<sup>41</sup> This is because the developed countries had asserted that obstacles to market access, which are prevalent in developing countries, are in clear breach of competition principles and should therefore be the subject of greater scrutiny.<sup>42</sup> The market access debate reflects most distinctly the divide between those Members wishing to pursue direct negotiations on competition policy and those who do not.<sup>43</sup>

The focus of the Proposed Framework has shifted from one of securing market access to one promoting the development of effective national competition regimes and expanding international cooperation to address anti-competitive practices. The Chairman of the WGTC in Cancun had stated that the Proposed Framework would not give market access objectives a privileged position at the expense of more broadly-based goals of competition law and policy such as economic efficiency, consumer welfare and economic development.<sup>44</sup> Thus, the developing countries don't need to worry about developed countries utilizing the multilateral framework on competition to gain market access to developing countries.

### **III. The Rationale for a WTO Multilateral Framework Approach**

In Section II, the developing countries oppositions to the Proposed Framework and their

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<sup>41</sup> TARULLO, *supra note 20*, p. 121; DIANE WOOD, *When is market access really market access?*, INTERNATIONAL BUSINESS LAWYER, vol. 24, no. 10, 1996; WTO WGTC, *Annual Report of the WGTC to the General Council*, WT/WGTC/3, ¶ 13.

<sup>42</sup> ROBERT D. ANDERSON AND PETER HOLMES, *Competition policy and the Future of the Multilateral Trading System*, *Journal of International Economic Law*, Vol. 5, Issue 2, p 539, 2002.

<sup>43</sup> E. M. GRAHAM, *"Internationalizing" Competition Policy: An Assessment of the Two Main Alternatives*, THE ANTITRUST BULLETIN, Vol. 48, Issue 4, pp. 952-953, 2003.

<sup>44</sup> ANDERSON AND JENNY, *supra note 25*; See also ROBERT D. ANDERSON AND PETER HOLMES, *Competition Policy and the Future of Multilateral Trading System*, Discussion Paper in Economics 84, University of Sussex, pp. 19-21, 2002.

counterarguments were outlined. This section illustrates why there still exists a strong rationale for the developing countries to pursue a WTO multilateral framework, notwithstanding the possible drawbacks mentioned above.

### 1. Competition Policy and Economic Development

One rationale for a multilateral framework on competition policy regards domestic considerations. Developing countries recognize that adoption of competition policy could lead to efficient allocation of resources, which foster economic development. Although the nature of the relationship between competition and development is somewhat unclear,<sup>45</sup> studies show that competition enhances dynamic economic performances.<sup>46</sup> Competition between firms sharpens incentives for them to cut costs and to improve productivity. Active enforcement of competition laws substantially improves the allocation of resources and plays a direct role in promoting long-term economic performance.<sup>47</sup>

With worldwide deregulation, privatization and liberalization, competition policy also plays a complementary role to other trade or market policies. Developing countries now take part in liberalizing and integrating its markets to the global economy. But benefits of an open market economy cannot be fully realized when restrictions on competition exist.<sup>48</sup> A comparative study on the role of competition policy showed that developing countries in Africa and South Asia, on their move away from protectionism, had integrated competition regimes during the process of

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<sup>45</sup> EVENETT, *supra note 23*; JAMES R. TYBOUT, *Manufacturing Firms in Developing Countries: How Well Do They Do, and Why?* JOURNAL OF ECONOMIC LITERATURE, Vol. 38, No. 1, pp.11-44, 2000.

<sup>46</sup> WTO WGTCP, *Study on Issues Relating To A Possible Multilateral Framework on Competition Policy*, WT/WGTCP/W/228, 2003. As Michael Porter puts it “domestic rivalry not only creates pressures to innovate but to innovate in ways that upgrade the competitive advantages of those firms.”

<sup>47</sup> J. L CLARK AND S. J.EVENETT, *The Deterrent Effects of National Anti-Cartel Laws: Evidence from the International Vitamins Cartel*, ANTITRUST BULLETIN, 2002; EVENETT, *supra note 23*

<sup>48</sup> ADB, *Asian Development Outlook 2005*, p. 246.

promoting vigorous market economies.<sup>49</sup> This study also showed that benefits from trade reform, deregulation, and privatization cannot be realized without the potential for active and effective enforcement of competition law. The case of Korea, Singapore and Taiwan provides similar ideas. The existence of vibrant competition agencies in these countries had been an important factor contributing to the adoption of open market policies through the agencies' advocacy function.<sup>50</sup> The importance of such activities and their contribution to the process of economic reform and development cannot be stressed heavily enough.<sup>51</sup> Competition policy reinforces and is instrumental in the implementation of a range of related economic reforms taken by the developing countries in their process to a market economy. Conversely, a failure to implement competition policy and related regulatory reforms can prevent countries from realizing the potential gains from liberalization.<sup>52</sup>

Commitments to a multilateral framework on competition policy allow the developing countries to pursue the fundamental goal of economic development. Competition policy, itself, complements and reinforces market reforms, i.e. liberalization, privatization and regulatory reforms. It is also useful in overcoming protectionist resistance from interest group and thus provides momentum for those reforms.<sup>53</sup> In other words, international agreements might be able to assist developing countries in prevailing over "political market failures" or rent-seeking

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<sup>49</sup> CONSUMER UNITY AND TRUST SOCIETY, *The 7-Up Project: A Comparative Study of Competition Regimes in Select Developing Countries of the Commonwealth*, 2001. (available on the internet at <http://cuts.org/7-up%20project.htm>).

<sup>50</sup> WTO WGTCP, *Annual Report of the WGTCP to the General Council*, WT/WGTCP/2, ¶¶ 34, 45, 109, 1998.

<sup>51</sup> *Id.* at ¶¶ 51, 53.

<sup>52</sup> CHIEDU OSAKWE, *Poverty Reduction and Development: The Interaction of Trade, Macroeconomic and Regulatory Policies*, 2001.

<sup>53</sup> NANCY BIRDSALL AND ROBERT Z. LAURENCE, *Deep Integration and Trade Agreements: Good for Developing Countries?* in *GLOBAL PUBLIC GOODS: INTERNATIONAL COOPERATION IN THE 21ST CENTURY*, edited by INGE KAUL, ISABELLE GRUNBERG AND MARC A. STERN, Oxford University Press for the United Nations Development Programme, p. 136, 1999.

activities that reduce welfare and impede development.<sup>54</sup> Furthermore, a multilateral agreement has the potential to assist governments in implementing policies through promoting the building of institutional and enforcement capacity and providing opportunities for international cooperation.<sup>55</sup> Indeed, the Proposed Framework could 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.<sup>56</sup>

## 2. Effective Mechanism to Respond to International Hardcore Cartels

The main idea of competition policy is to deter and to provide remedies for specific abuses such as cartels, monopolies or anti-competitive mergers that raise the price and/or reduce the quality and availability of goods and services.<sup>57</sup> These conducts are no longer an exclusive concern of the developing countries. There is a growing recognition that anti-competitive practices impact directly on the welfare and development prospects of developing countries.<sup>58</sup>

Hardcore cartels provide a relatively undisputed high-ground for a multilateral

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<sup>54</sup> ROBERT D. ANDERSON AND FREDERIC JENNY, *Internal Reform as a Necessary Condition for Realizing the Benefits of Trade Liberalization: The Case for Regulatory Reform and Competition Policy* in THE POLICY-RELEVANCE OF MAINSTREAMING TRADE INTO COUNTRY DEVELOPMENT STRATEGIES: PERSPECTIVES OF LEAST-DEVELOPED COUNTRIES (Report on the Seminar by the Integrated Framework Core Agencies, WT/LDC/SWG/IF/15/Rev.1, 2001), pp. 70-77, 2001.

<sup>55</sup> ERNST-ULRICH PETERSMANN, *Legal, Economic and Political Objectives of National and International Competition Policies: Constitutional Functions of WTO "Linking Principles" for Trade and Competition*, NEW ENGLAND LAW REVIEW, pp. 156, 159, 1999.

<sup>56</sup> See e.g. IGNACIO GARCIA-BERCERO AND STEFAN AMARASINHA, *Moving the Trade and Competition Debate Forward*, JOURNAL OF INTERNATIONAL ECONOMIC LAW, pp. 481-506, 2000; ANDERSON AND HOLMES, *supra* note 41.

<sup>57</sup> ANDERSON AND HOLMES, *Id.*

<sup>58</sup> FREDERIC JENNY, *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 pp. 31-70, 2001; M. LEVENSTEIN AND V. SUSLOW, *Private International Cartels and Their Effect on Developing Countries*, Background Paper for the World Bank's World Development Report, 2001. (available at <http://www-unix.oit.umass.edu/~maggie1/WDR2001.pdf>).

competition policy. In fact, hardcore cartels are widely regarded as the strongest argument favoring the intervention of competition policy.<sup>59</sup> Korea stated that regulations on cartels should be included in the multilateral framework on competition policy, for their negative impacts are clear and also significantly affect international trade.<sup>60</sup> Studies have indicated that international cartels raise the costs of developing countries' imports from developed countries by billions of dollars annually.<sup>61</sup> Competition authorities of developing countries are unable to gather enough evidence due to lack of resources and experience, even when they acknowledge a cartel. If they are unable to obtain cooperation from competition authorities of developed countries, their consumers would have to unwillingly bear the high cost incurred by cartels. In the recent Vitamin case, developing countries were not able to attain cooperation from developed countries even when their importers and consumers were severely hurt.<sup>62</sup> At present, there exists no legal structure for assisting developing countries. Thailand, in its submission to the WGTCP, recognized the potential damage associated with international cartels and the urgent need to eradicate these cross-border collusive practices.<sup>63</sup> It went on to state that these cartels tend to operate in countries with weak enforcement of competition laws and thus supported multilateral assistance in providing mutual assistance in fighting these cartels.<sup>64</sup> Without a minimum global standard for national cartel enforcement, hardcore cartels are likely to target their conspiracies in those jurisdictions with no or weak anti-cartel measures, meaning developing countries.

Competition policy in the national level is of critical importance. However, it is

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<sup>59</sup> S.J. EVENETT, *Study on Issues Relating to a Possible Multilateral Framework on Competition Policy*, WTO WGTCP, WT/WGTCP/W/228. p. 33, 2003. For a more in-depth analysis see M. LEVENSTEIN, V. SUSLOW, AND L. OSWALD, *International Price-Fixing Cartels and Developing Countries: A Discussion of Effects and Policy Remedies*, Political Economy Research Institute (PERI) University of Massachusetts Amherst, Working Paper Series, No. 53, 2003.

<sup>60</sup> WTO WGTCP, *Communication from Korea to the WGTCP*, WT/WGTCP/W/200, ¶ 4, 2002.

<sup>61</sup> LEVENSTEIN, SUSLOW AND OSWALD, *Id.*

<sup>62</sup> LEVENSTEIN AND SUSLOW, *supra note 57*.

<sup>63</sup> WTO WGTCP, *Communication from Thailand to WGTCP*, WT/WGTCP/W/213, ¶ 1, 2003.

<sup>64</sup> *Id.*

significantly inadequate for certain issues. In a global world like today, developing countries need to cooperate with other competition authorities to deal with anti-competitive effects of international cartels and mergers that harm their consumers.<sup>65</sup> Developing countries are not able to protect themselves from these cartels, and harms caused in these countries have a spill-over effect on the rest of the world. While developed countries might ease these problems through bilateral agreements, developing countries cannot due to the lack of influence or power to obtain such cooperation. Bilateral cooperation arrangements are usually entered into by developed countries and developing countries are left out of such arrangements.<sup>66</sup> For the developing countries, they can do nothing else but to endure those anti-competitive practices.

The Proposed Framework identifies the importance of international hardcore cartels as a distortion of the world trading system and has rightly located two of the policy-related causes of sub-optimal levels of enforcement: ineffective or non-existent national cartel enforcement regimes and inadequate information exchange. It provides solutions for problems that could not be solved through bilateral cooperation. In fact, it assists developing countries in addressing hardcore cartels that impose significant costs on their national economies.

### 3. The WTO, an Appropriate Forum?

Some people, even after realize that it is necessary to take a multilateral approach, argue that the WTO is not an appropriate forum for dealing with competition issues. They argue that competition policy, a complex undertaking and an enormous challenge, should not be taken by an organization already overloaded with other problems. As an alternative, the UNCTAD, which

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<sup>65</sup> “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.” from Levenstein and Suslow, *supra note 57*.

<sup>66</sup> KONRAD VON FINCKENSTEIN, *International Antitrust Cooperation: Bilateralism or Multilateralism?* Canada Competition Bureau (available at <http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/en/ct02240e.html#top>)

already has a Set of Principles on Restrictive Business Practices, is suggested. UNCTAD currently supports developing countries in designing competition policy rules more suited to development needs.<sup>67</sup>

However, the WTO is a more suitable forum for coordinating worldwide cooperation. A multilateral framework on competition within the WTO would give competition authorities of developing countries direct access to an extensive network of competition authorities to which they could address requests for assistance.<sup>68</sup> The WTO is currently the only global economic body. That is why nearly all proponents of global antitrust concluded that the appropriate forum would logically and practically be the WTO.<sup>69</sup> Discussions on the complex issues regarding the interaction between trade and competition are also possible. Furthermore, a WTO approach works as a building block for integrating developing countries into the trading system.

The WTO also provides a forum for exchange of interests. Developing countries may be able to obtain other interests by agreeing to adopt the Proposed Framework. As we have seen in Cancun, in order to reach a consensus on this issue, developed countries would need to offer concessions in other trade areas in exchange for developing countries' support.<sup>70</sup> The fact that WTO is the only body that has the breadth of jurisdiction to enable such exchange of interest must be given significant importance.

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<sup>67</sup> MYRIAM VANDER STICHELE, *What is wrong with competition negotiations in the WTO?*, The problems of a competition policy agreement in the WTO in Investment and Competition Negotiations in the WTO – What's wrong with it and what are the alternatives? Seattle to Brussels Network, available at <http://www.s2bnetwork.org> 2002

<sup>68</sup> WTO, *Communication from the European Community and its Member States: The Development Dimension of Competition Law and Policy*, WT/WGTCP/W/140, 2000.

<sup>69</sup> FOX, *supra* note 17.

<sup>70</sup> ANDREW T. GUZMAN, *International Antitrust and the WTO: The Lesson from Intellectual Property*, VIRGINIA JOURNAL OF INTERNATIONAL LAW, 43, p 951, 2003.

#### **IV. A Development-Oriented Framework?**

Whether developing countries will benefit from negotiations on a multilateral framework on competition policy at the WTO will depend on a number of factors and no outcomes can be guaranteed. A general cost and benefit analysis will not be persuasive to developing countries for the cost and benefit will vary according to their national circumstances. We will also have to wait for future negotiations to see how it will benefit the interest of the developing countries. But, it is of importance that a multilateral framework will have to respect the core principles of competition policy; permit and facilitate their continuing elaboration in response to economic learning and other developments; and build positively on the institutional and other strengths of such policy. Carefully assessed with particular attention to factors such as implementation costs and consistency with development objectives, the Proposed Framework seems to respond to these concerns.

Notwithstanding the foregoing observation, this paper does not suggest that the Proposed Framework necessarily meets all of the concerns that may be raised, in particular by developing countries. The fundamental opposition against this Proposed Framework stems from the belief that the Framework is not “development-oriented.” Indeed, it is argued that the basic concepts used in the discourse at WGTCF are inimical to the interests of developing countries and that new definitions and concepts are required to adequately address the concerns of developing countries.<sup>71</sup> But the Proposed Framework is merely a ‘framework’ not a completed set of agreements. Through further discussion and negotiation, the framework can be reframed to focus

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<sup>71</sup> SINGH AND DHUMALE, *supra note* 31; SINGH, Competition and Competition Policy in Emerging Markets: International and Developmental Dimensions, ESRS Centre for Business Research, University of Cambridge. Working Paper No. 246. December 2002.

more on economic development. By adding necessary elements to assist developing countries, a multilateral framework on competition policy will complement other national objectives and policies of the developing countries. In the following, this paper will suggest some of the elements that need to be emphasized to make the framework development-oriented.

The first is special and differential treatment, which was also emphasized in the Doha Ministerial Declaration.<sup>72</sup> This would mean that “development dimensions” will be valid grounds for differential treatment for countries with different capacities.<sup>73</sup> Negotiations on transitional periods, exceptions and exemptions from the multilateral framework will have to be conducted. In general, competition policy will be adopted gradually and flexibly suitable to their level of development and their development interests and in a way that does not defer the socio-political policies. Such a “flexible” and “progressive” approach will allow developing countries more autonomy in competition policies.<sup>74</sup> In its submission to the WGTCP, Thailand had insisted on the inclusion of special and differential treatment for developing countries to the core principles of competition policy.<sup>75</sup> The EC also stated that least-developed countries and smaller economies should be allowed to adopt any new WTO obligations regarding a domestic competition regime in a flexible and progressive manner.<sup>76</sup>

The second is voluntary cooperation in the development of national legislation and the exchange of national experience, in addition to the enforcement process. This would broaden the coverage of approaches already in force under existing “soft” cooperation agreements at the

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<sup>72</sup> See OECD, *The Role of Special and Differential Treatment at the Trade, Competition and Development Interface*, Joint Group on Trade and Competition, Directorate for Financial, Fiscal and Enterprise Affairs, Paris, 2001.

<sup>73</sup> WTO WGTCP, *Communication from India*, WT/WGTP/W/212, 2002.

<sup>74</sup> *Id.*

<sup>75</sup> WTO WGTCP, *Communication from Thailand*, WT/WGTCP/W/216, 2002.

<sup>76</sup> WTO WGTCP, *supra note 19*.

bilateral and regional level, to which developing countries are not parties.<sup>77</sup>

The third is technical assistance and capacity building, which will assume greater importance as discussions intensify about the developmental consequences of a credible competition policy. Developing economies have raised concerns about the implementation costs of potential disciplines regarding competition policy and these concerns have been echoed by certain trade policy experts.<sup>78</sup> Support for technical assistance and capacity building should be emphasized as responding to a key concern of developing countries. This would be effective in responding to the concerns based on the developing countries' perceived lack of institutional capacity and experience in this area, and reduce the burden of the developing countries when implementing cooperation policies. The inclusion of technical assistance provisions in the Doha Declaration was one of the key elements that made it possible for many developing countries to accept potential WTO negotiations on competition policy. Future negotiation should tailor technical assistance according to the diversity of needs and distinct national conditions of developing countries.

## **V. Conclusion**

Last July, it was decided that no formal negotiations on a multilateral framework on competition policy will be held at the WTO for the time being. In the absence of multilateral negotiations, developing countries are now free to develop their own competition regime. They are also free not to adopt any competition law. But as this paper has argued, developing countries should realize the benefits of a multilateral approach and reconsider discussions at the WTO.

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<sup>77</sup> ROBERT D. ANDERSON AND FREDERIC JENNY, *Current Developments on Competition Policy in the World Trade Organization, Antitrust*, 2001.

<sup>78</sup> L. A. WINTERS, *Doha and the World Poverty Targets*, Mimeo. University of Sussex, 2002.

But there is a more pragmatic reason for the developing countries to argue for reviving the discussions on a multilateral framework on competition policy. By pushing the competition policy as well as other Singapore issues off the negotiating table, developing countries have actually surrendered an important issues which trade-offs could have been made. Exploiting these trade-offs is at the heart of multilateral trade negotiations and the associated give-and-take would have allowed the developing countries to maximize there interest. In fact, the developing countries could have approached the market access concerns from a different perspective. Developing countries could have utilized the multilateral framework on competition and negotiations to improve the market access conditions of the developed countries. They could have strongly argued that anti-dumping issues would also need to be dealt in the competition context. Of course there is no guarantee that EU and US will be willing to make concessions on these issues,<sup>79</sup> but by including issues of anti-dumping and subsidies in a more comprehensive framework on competition, developing countries interests would have been more reflected.

Development will be best served if developing countries commit themselves to stronger multilateral rules and try to benefit from the commitments made by the developed countries. Developing countries could utilize a multilateral approach to best further their individual and collective interests.<sup>80</sup> And active participation by developing countries could tilt the balance in their favor. They could robustly demand that a flexible and progressive approach be taken to all commitments, recognizing differences in stage of development, legal and business cultures, and the like. They could insist on enhanced capacity-building efforts during the negotiations and not after their conclusion. As India stated “developing countries should be ensured that they would

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<sup>79</sup> S.J. EVENETT, *Can Developing Economies Benefit from WTO Negotiations on Binding Disciplines for Hard Core Cartels?*, UNCTAD, p. 27-28, 2003.

<sup>80</sup> EVENETT, *supra note* 78 at p. 31.

benefit from international cooperation and capacity-building on competition.<sup>81</sup>

My paper started out from the belief that a multilateral framework will foster a “competition culture” among the developing countries. It was a humble wish met with oppositions. I just hope that discussions on a multilateral competition policy at the WTO will not be suspended for a long time. The WGTCPC should, as least, continue to be a forum for discussion on these issues. Without such discussion, the developing countries as well as the developed countries will not be able to realize the benefits that a multilateral approach may provide. And discussions at the WTO, where more than any other members participate, will have a positive effect in expanding “competition culture.” Promotion of consumer benefits, economic efficiency, and economic development are worthy goals. The liberalization of world trade that the GATT has accomplished over the course of four decades is a primary source of progress toward meeting these goals and a possible framework on competition at the WTO will be of help in continuing that progress.

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<sup>81</sup> WTO WGTCPC, *supra note 72*.