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Towards a Development-Oriented Multilateral Framework on Competition Policy

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Towards a Development-Oriented Multilateral Framework on Competition Policy

JAE SUNG LEE*

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I. INTRODUCTION: WTO MULTILATERAL FRAMEWORK ON COMPETITION POLICY

Competition policy facilitates competition by preventing anti-competitive conduct. 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 by encouraging free trade and market liberalization.¹ The interaction between these two distinct yet similar policies has led to discussions at various international organizations, including, but not limited to, the Organisation for Economic Co-operation and Development (OECD) and the United Nations Conference on Trade and Development (UNCTAD).²

The interaction between trade and competition policy became one of the key issues at the 1996 World Trade Organization's (WTO) Singapore Ministerial Conference. It was believed that anti-competitive practices, private or public, undermined the gains made by the WTO with regard to trade liberalization. This Ministerial Conference established the WTO Working Group on the Interaction between Trade and Competition Policy (WGTCP) to discuss beneficial issues raised by the interaction of trade and competition policy. The 2001 WTO Doha Ministerial Conference participants recognized that a multilateral framework could enhance the contribution of competition policy to international trade and development.³ The Doha Declaration provided that negotiations would commence after the Fifth Ministerial Conference, subject to a decision

1. WTO, Working Group on the Interaction between Trade and Competition Policy [WGTCP], *Report of the WGTCP to the General Council*, WT/WGTCP/2, ¶¶ 22-23, 1998.

2. 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, 7-10, 2003.

3. World Trade Organization Ministerial Declaration of November 2001, WT/MIN(01)/Dec/1, 41 I.L.M. 746 (2002) [hereinafter Doha Declaration]. 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.

Id. 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.

on modalities of negotiations.⁴ In addition, the Declaration authorized the WGTCPC to clarify “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.”⁵

Several developing countries expressed opposition to the multilateral framework even before the Doha Ministerial Conference. They argued that such an approach would be controversial, if not unhelpful.⁶ India’s representatives stated that, instead of developing multilateral rules, the WGTCPC should continue to study this issue because it is too complex and WTO members were far from agreement.⁷ Brazil argued that there is a need to consider differing levels of development and cultural contexts for these regimes, as well as the difference in available resources for this purpose and levels of institutional development.⁸ These arguments led to the adoption of Paragraph 24 of the Doha Declaration, which emphasizes developing countries’ need for enhanced technical assistance and capacity building, and Paragraph 25, which states that full account should be taken of developing countries’ needs and greater flexibility provided.⁹

4. *Id.*

5. *Id.* ¶ 25.

6. Ajit Singh, Multilateral Competition Policy and Economic Development: A Developing Country Perspective on the European Community Proposals at 2 (presented at the 5th session of the Intergovernmental Group of Experts on Competition Law and Policy at Geneva, July 2-4, 2003); *see also* WTO Working Group on the Interaction between Trade and Competition Policy [WGTCPC], *Report on the WGTCPC Meeting of 2-3 October*, WT/WGTCPC/M/12, ¶ 35 (Nov. 8, 2000).

7. WTO, Working Group on the Interaction between Trade and Competition Policy [WGTCPC], *Report on the WGTCPC Meeting of 19-20 April*, WT/WGTCPC/M/8, ¶ 20 (June 10, 1999). India argued “(t)he WGTCPC 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.” *Id.*

8. *Id.* ¶ 22.

9. Doha Declaration, *supra* note 3, at ¶¶ 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 organisations, including UNCTAD, and through appropriate regional and bilateral channels, to provide strengthened and adequately resourced assistance to respond to these needs.

After the Doha Ministerial Conference, the WGTCP made substantial progress regarding the linkage of trade, competition and development. The primary objectives of the WGTCP were to foster economic development, recognizing that competition policy can serve the needs 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.¹⁰

As mandated by the Doha Declaration, Ministers were to decide by explicit consensus on the modalities of negotiations on a multilateral framework on competition at Cancun in 2003. However, a bargaining impasse among the developed and developing members resulted in a failure to reach an agreement. The United States and the European Union were not willing to sufficiently reduce their own agricultural subsidies to strongly argue for concessions by the developing countries on the framework for competition policy.¹¹ The Cancun package collapsed as a whole. The European Union, the strongest proponent for a multilateral approach, gave up its single undertaking approach in the WTO and decided to promote a multilateral approach.¹² As a result, competition, along with the other Singapore issues, was removed from the Doha Round negotiations in July 2004.¹³ At present, almost all the work done to lead to a multilateral framework on competition has been suspended.

This paper argues that a multilateral framework on competition policy would benefit the developing countries by promoting their economic development. Section II of this paper briefly introduces the multilateral framework, as proposed mainly by the EC at the WGTCP (hereinafter “Proposed Framework”). The article goes on to outline the developing countries’ opposing positions to the Proposed Framework, and demonstrates

10. Alan W. Wolff, Remarks on Launching Competition Policy Negotiations in the WTO: Relevant Considerations (before Global Business Dialogue at the Cancun WTO Ministerial September 13, 2003), http://www.dbtrade.com/publications/launching_competition_policy.htm.

11. Anup Shah, WTO Meeting in Cancun, Mexico 2003, *available at* <http://www.globalissues.org/TradeRelated/FreeTrade/Cancun.asp> (last visited on Mar. 13, 2006).

12. Commission of the European Communities, *Reviving the DDA Negotiations—the EU Perspective*, Communication from the Commission to the Council, to the European Parliament, and to the Economic and Social Committee, COM(2003)734 final (Nov. 26, 2003), *available at* http://trade-info.cec.eu.int/doclib/docs/2003/november/tradoc_114259.pdf. 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. *Id.*

13. WTO, Doha Work Programme, Decision Adopted by the General Council on 1 August 2004, ¶¶ 1.g. A general outline of this so-called “July Package” is available at http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm.

that the concerns raised are not as significant as they argue. Section III recapitulates why a WTO multilateral framework on competition is beneficial to the developing countries' developmental needs. Section IV suggests some possible development-oriented revisions to the Proposed Framework. Section V concludes by urging "developing countries" to take a courageous yet wise step towards re-engaging in negotiations for a multilateral framework on competition policy.

II. PROPOSED FRAMEWORK, OPPOSITIONS AND COUNTERARGUMENTS

A. The Proposed Framework

The Havana Charter's goal regarding restrictive business practices is definitely not the goal of the WGTCP discussions.¹⁴ The Proposed Framework basically consists of two features: a ban on hardcore cartels¹⁵ and conformity of domestic competition laws with the core WTO principles. The Proposed Framework requires every WTO member to adopt measures prohibiting hardcore cartels, but the members are given autonomy to include certain provisions or exemptions into their competition regime.¹⁶ The only condition is that they meet certain WTO principles of most-favored nation treatment (MFN), non-discrimination,

14. See U.N. Conference on Trade and Employment, *Havana Charter for an International Trade Organization*, ch. V, art. 46(1), U.N. Doc. E/CONF.2/78 (Apr. 1948). Article 46 (1) of the Havana Charter states as follows:

Each Member shall take appropriate measures and shall co-operate 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.

15. The Organisation for Economic Co-operation and Development defines hardcore 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." Organisation for Economic Co-operation and Development, *Recommendation of the Council Concerning Effective Action Against Hard Core Cartels* at 3, C(98)35/FINAL (Mar. 25, 1998).

16. For a general overview of the proposal, see WTO Working Group on the Interaction between Trade and Competition Policy, *Communication from the European Community and its Member States: A WTO Competition Agreement's Contribution to International Cooperation and Technical Assistance for Capacity-Building*, WT/WGTCP/W/184 (Apr. 18, 2002).

national treatment, transparency and procedural fairness. The members must also establish a mechanism for mandatory consultation and cooperation on hardcore cartels; cooperation regarding other matters is voluntary. A WTO Competition Policy Committee would be established to monitor a future agreement, facilitate cooperation, conduct peer reviews and facilitate exchanges of information.¹⁷ An integrated approach to technical assistance and capacity building would also be provided for the developing countries.

This Proposed Framework is undoubtedly modest compared to those proposed earlier in the discussion.¹⁸ It does not advocate WTO members adopt a full set of competition laws. Instead, it only involves a minimum set of reasonable rules.¹⁹ It does not aim at a comprehensive harmonization of domestic competition laws, but takes into consideration the peculiarities of national circumstances.²⁰ 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 leeway for the continuing adaptation of national approaches to competition policy in response to economic learning and individual circumstances. It responds to the key concerns raised by critics of a multilateral approach in the WTO,²¹ and seems to be in harmony with the interests of development.²²

B. Developing Countries' Oppositions and Counterarguments

The WGTCP definitely failed in reaching a consensus for a multilateral framework on competition policy, as many countries continuously expressed opposition. The basic foundation of such opposition was the lack of consensus on the robustness of the link between trade and competition, and whether such a linkage is sufficiently strong to call for a multilateral

17. For a more detailed description of the proposal, see WTO Working Group on the Interaction between Trade and Competition Policy, *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 (May 9, 2003).

18. 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, 925-32 (2003); Chang, *supra* note 2, at 14-20.

19. Singh, *supra* note 6, at 10.

20. Ignacio Garcia-Bercero & Stefan Amarasinha, *Moving the Trade and Competition Debate Forward*, 4(3) J. INT'L ECON. L. 481, 481-506 (2001); see also WTO Working Group on the Interaction between Trade and Competition Policy, *Communication from the European Community and its Member States: Core Principles*, WT/WGTCP/W/222 (Nov. 19, 2002).

21. Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy*, 94 AM. J. INT'L L. 478, 479-504 (2000).

22. Singh, *supra* note 6, at 25.

competition policy.²³ Responding to such a theoretical question is outside the scope of this paper. This paper focuses only on contrasting opinions from the perspective of the developing countries.

1. A One-Size-Fits-All Approach

Very few developing countries have competition laws. Many of the least-developed countries have no competition legislation at all. Of the 90 or so developing countries that now have competition laws, most were enacted during the 1990s.²⁴ Moreover, even among countries that have competition laws, the content and enforcement of those laws differ depending on economic resources and institutional capacity. Thus, it has been argued that an appropriate competition policy must differ among countries depending on their level of development, on the state of their governance and on many other factors.²⁵ The main concern is based on the belief that the Proposed Framework should pursue a case-by-case rather than a one-size-fits-all approach.

In fact, the Proposed Framework does not inhibit the development of national approaches to competition policy that accords with nations' individual circumstance.²⁶ The Proposed Framework is not based on a one-size-fits-all approach, but merely urges members to adopt the core principles of the WTO in their competition regime. The "multilateral" approach should be distinguished from the more extreme "uniform" approach, which advocates for a single global antitrust law.

2. Burden on Developing Countries

Developing countries have also argued that some members lack the capacity to implement competition laws. In order for competition policy

23. *Id.* at 6.

24. 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* (Oct. 28, 2003).

25. *See, e.g.*, WTO Working Group on the Interaction between Trade and Competition Policy, *Report on the WGTCF Meeting of 10-11 June 1999*, WT/WGTCF/M/9, ¶¶ 30-31 (Aug. 4, 1999).

26. Robert Anderson & Frédéric Jenny, *Competition Policy, Economic Development and the Multilateral Trading System: Overview of the Linkages and Current Proposals for an Agreement in the WTO 11*, paper presented at the 28th Pacific Trade and Development Conference on Competition Policy in the New Millennium, Makati, Philippines (2002), available at <http://dirp3.pids.gov.ph/paftad/documents/Conference.Papers/PAPER.CP.ECONDEV.PDF>.

to become effective, the appropriate social and legal culture of competition and competition policy must evolve, a process that can take time, perhaps decades. Serious enforcement requires education and political support.²⁷ Developing countries will also bear the burden of adjustment costs created by new regulations and enforcement mechanisms.²⁸ Thus, the argument that developing countries lack the resources and experience to participate meaningfully and fully in a multilateral competition policy is a convincing one. In a submission to the WGTCP, Thailand stressed its financial constraints and argued that competition agencies in developing countries need financial compensation and should be allowed to cooperate to the extent possible, subject to their technical and financial constraints.²⁹

The Proposed Framework, realizing that such implementation obligations are unrealistic and burdensome to developing countries, does not bind developing countries to these constraints. By inserting provisions for technical assistance and capacity building, the seemingly heavy burden on developing countries is shared among the members, and particularly with developed countries. Detailed modalities must undergo a process of negotiation, one that is currently impossible.

In fact, developing countries' fear about excessive implementation costs may be exaggerated.³⁰ The ultimate effectiveness of any competition policy in developing countries will be tested by weighing the beneficial impacts against the cost of implementation. Competition policy can bring important benefits to the poor, but at the same time, overly elaborate institutions must be avoided.³¹ Although a cost-benefit analysis cannot be derived from a few case studies, the case of Peru provides a good example of a situation in which the benefits exceed implementation costs. In the first three years of the Peruvian Competition Agency's (Indecopi) operation, the economic benefits resulting from the

27. F.M. Scherer, *International Trade and Competition Policy* 18, (ZEW Indus. Econ. & Int'l Mgmt Series, Discussion Paper No. 96-26, 1996).

28. Myriam Vander Stichele, *What is Wrong with Competition Negotiations in the WTO? The Problems of a Competition Policy Agreement*, in INVESTMENT AND COMPETITION NEGOTIATIONS IN THE WTO—WHAT'S WRONG WITH IT AND WHAT ARE THE ALTERNATIVES? (Vanya Walker-Leigh & Alexandra Wandel eds., 2002), available at <http://www.s2bnetwork.org>.

29. WTO Working Group on the Interaction between Trade and Competition Policy, *Communication from Thailand*, WT/WGTCP/W/213, ¶ 6 (Sept. 23, 2002).

30. See WTO Working Group on the Interaction between Trade and Competition Policy, *Study on Issues Relating to a Possible Multilateral Framework on Competition Policy*, WT/WGTCP/W/228, at 52-73 (May 19, 2003), available at http://www.jmcti.org/2000round/com/doha/wg/wt_wgtcp_w_228.pdf.

31. Neil McCulloch, L. Alan Winters & Xavier Cirera, TRADE LIBERALIZATION AND POVERTY: A HANDBOOK 350-51 (Centre for Economic Policy Research eds., 2001), available at <http://www.ids.ac.uk/ids/global/pdfs/tlpov.pdf>.

intensification of competition amounted to \$120 million, as compared with \$20 million in operating cost.³² This does not, of course, necessarily mean that high implementation costs are irrelevant or unimportant; an amount that seems small by developed countries' standards is of significance to the least-developed countries.

3. *Limitation of Developing Countries' Policy Options*

Developing countries also argue that a multilateral approach would limit their policy options and autonomy when pursuing economic development. Other policies, such as industrialization policy, may play a more pivotal role in developing countries' pursuit of economic development than competition policy.³³ In some cases, competition may need to be restricted to achieve economic efficiency, and anti-competitive practices may need to be permitted to target other development goals or to achieve economies of scale. Developing countries may want to protect small or mid-sized companies and infant industries that compete with large multinationals that possess far better access to finance or global marketing networks. In fact, some developing countries, which provide a far from an ideal setting for competition and where basic market concepts are not understood, may benefit from having no competition policy at all.

If, indeed, the Proposed Framework goes to the extreme and fosters homogenous competition policy objectives among WTO members, it will deprive the developing countries of very important developmental instruments.³⁴ Simply adopting U.S. or EU competition laws would do little to assist the economic development of developing countries.³⁵ The Proposed Framework does not designate the objectives of competition law or policy. Although still a subject of considerable debate, it is generally accepted in developed countries that the goals of competition policy are to ensure a competitive market, to protect consumer welfare

32. Armando Caceres, INDECOPI'S FIRST SEVEN YEARS 60-63 (B. Boza ed., 2000).

33. For a description of the relationship between competition policy and industrial policy, see generally McCULLOCH et al., *supra* note 31, at 11-42.

34. Ajit Singh, *Competition and Competition Policy in Emerging Markets: International and Developmental Dimensions* 15-16 (UNCTAD, G-24 Discussion Paper Series No. 18, 2002), available at http://www.unctad.org/en/docs/gdsmdpbg2418_en.pdf.

35. *Id.*

and to enhance economic efficiency.³⁶ But under the Proposed Framework, developing countries may choose whatever policy, industrial or socio-political, they feel necessary. Developing countries may pursue other non-efficiency-based economic objectives or even non-economic objectives. One good example is South Africa's competition law, which lists six objectives for its 1998 Competition Act, including the promotion of a greater spread of ownership, and in particular, increased ownership stakes of historically disadvantaged persons.³⁷ Developing countries will not be hindered from pursuing their respective competition policy objectives.

4. Concerns Regarding Market Access

Although it was agreed that market access would not be the focus of discussions at the WGTCF, market access issues were nonetheless a concern for the developing countries. Some members expressed concerns that excessive emphasis on market access objectives may distort the principles of competition policy and detrimentally affect the interests of developing countries.³⁸ Concerns were raised 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 subject to greater scrutiny.³⁹ The market access debate reflects most distinctly the divide between those members who wish to pursue direct negotiations on competition policy and those who do not.⁴⁰

The focus of the Proposed Framework has shifted from securing market access to one of promoting the development of effective national competition regimes and expanding international cooperation to address anti-competitive practices. The Proposed Framework does 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.⁴¹ Thus, developing countries need not worry about developed countries utilizing

36. Debra A. Valentine, Asst Dir., Int'l Antitrust Div. FTC, Remarks before the Pacific Council Conference on Trade and Competition Policy: The Goals of Competition Law (May 13-14, 1997), available at <http://www.ftc.gov/speeches/other/dvspeech.htm>.

37. Competition Act 89 of 1998 s. 2 (S. Afr.).

38. Tarullo, *supra* note 21, at 483; see Diane P. Wood, *When is Market Access Really 'Market Access'?*, 24 INT'L BUS. LAW. 492 (1996).

39. Robert D. Anderson & Peter Holmes, *Competition Policy and the Future of the Multilateral Trading System*, 5 J. INT'L ECON. L. 539, 540-41 (2002).

40. See Edward M. Graham, "Internationalizing" Competition Policy: An Assessment of the Two Main Alternatives, 48 ANTITRUST BULL. 947, 952-53 (2003).

41. Anderson & Jenny, *supra* note 26, at 3, 11-12.; see also Anderson & Holmes, *supra* note 39, at 559-60.

the multilateral framework on competition to gain market access to developing countries.

III. THE RATIONALE FOR A WTO MULTILATERAL FRAMEWORK APPROACH

The arguments presented by developing countries against the Proposed Framework and their counterarguments were outlined in Section II. This section illustrates why a strong justification still exists for developing countries to pursue a WTO multilateral framework, notwithstanding the possible drawbacks mentioned above.

A. Competition Policy and Economic Development

One rationale for a multilateral framework on competition policy is based on domestic considerations. Developing countries recognize that the adoption of competition policy could lead to efficient allocation of resources, which would foster economic development. Although the nature of the relationship between competition and development is somewhat unclear,⁴² studies show that competition enhances dynamic economic performance.⁴³ Competition among firms sharpens incentives to cut cost and improve productivity. Active enforcement of competition laws improves the allocation of resources and plays a direct role in promoting long-term economic performance.

With worldwide deregulation, privatization and liberalization, competition policy also plays a complementary role to other trade or market policies. Developing countries now liberalize and integrate their markets into the global economy. However, the benefits of an open market economy cannot be fully realized when restrictions on competition exist.⁴⁴ A comparative study on the role of competition policy has shown that developing countries in Africa and South Asia, moving away from protectionism, have integrated competition regimes while promoting vigorous market economies.⁴⁵ This study also showed that benefits

42. See generally James R. Tybout, *Manufacturing Firms in Developing Countries: How Well Do They Do, and Why?*, 38 J. ECON. LITERATURE 11, 11-44 (2000).

43. WTO Working Group on the Interaction between Trade and Competition Policy, *supra* note 30, at 28-29.

44. Asian Development Bank, *ASIAN DEVELOPMENT OUTLOOK 2005*, at 246 (2005).

45. Consumer Unity and Trust Society, *The 7-Up Project: A Comparative Study of Competition Regimes in Select Developing Countries of the Commonwealth* (2001), available at <http://cuts-international.org/7-up%20project.htm>.

cannot be realized from trade reform, deregulation and privatization without active and effective enforcement of competition law.

The cases of Korea, Singapore and Taiwan support these conclusions. The existence of vibrant competition agencies in these countries was an important factor leading to the adoption of open market policies through the agencies' advocacy function.⁴⁶ The importance of such activities and their contribution to the process of economic reform and development cannot be overemphasized.⁴⁷ Competition policy reinforces—and is instrumental in—the implementation of a range of related economic reforms taken by the developing countries in their progression towards a market economy. Conversely, a failure to implement competition policy and related regulatory reforms can prevent countries from realizing the potential gains from liberalization.

A commitment to a multilateral framework on competition policy would allow developing countries to pursue the fundamental goal of economic development. Competition policy itself complements and reinforces market reforms through liberalization, privatization and regulatory reforms. It is also useful in overcoming protectionist resistance from interest groups, and thus provides momentum for reforms.⁴⁸ In other words, international agreements may assist developing countries in prevailing over “political market failures” or rent-seeking activities that reduce welfare and impede development.⁴⁹ Furthermore, a multilateral agreement has the potential to assist governments to implement policies by promoting the building of institutional and enforcement capacity and providing opportunities for international cooperation.⁵⁰ 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

46. WTO Working Group on the Interaction between Trade and Competition Policy [WGTCP], *Annual Report of the WGTCP to the General Council*, ¶¶ 34, 45, 109, WT/WGTCP/2 (1998).

47. *Id.* ¶¶ 51, 53.

48. Nancy Birdsall & Robert Z. Laurence, *Deep Integration and Trade Agreements: Good for Developing Countries?* in GLOBAL PUBLIC GOODS: INTERNATIONAL COOPERATION IN THE 21ST CENTURY 136-37 (Inge Kaul, Isabelle Grunberg & Marc A. Stern eds., 1999).

49. Robert D. Anderson & Frédéric Jenny, *Internal Reform as a Necessary Condition for Realizing the Benefits of Trade Liberalization: the Case of Regulatory Reform and Competition Policy*, in WTO Sub-Committee on Least-Developed Countries, *The Policy Relevance of Mainstreaming Trade Into Country Development Strategies: Perspectives of Least-Developed Countries*, WT/LDC/SWG/IF/15/Rev.1 at 70-77 (2001).

50. Ernst-Ulrich Petersmann, *Legal, Economic and Political Objectives of National and International Competition Policies: Constitutional Functions of WTO “Linking Principles” for Trade and Competition*, 34 NEW ENG. L. REV. 145, 156, 159 (1999).

providing a tool for prevailing over domestic constituencies that might otherwise block the reform process.⁵¹

B. Effective Responses to International Hardcore Cartels

The main objective of competition policy is to deter anti-competitive practices 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.⁵² These issues are no longer exclusively the concern of developed countries; there is growing recognition that anti-competitive practices directly impact the welfare and development prospects of developing countries.⁵³

Hardcore cartels provide a relatively undisputed high-ground for multilateral competition policy. In fact, hardcore cartels are widely regarded as the basis of the strongest argument in favor of competition policy.⁵⁴ Korea has stated that regulations on cartels should be included in the multilateral framework on competition policy because of their significant, negative effect on international trade.⁵⁵ Studies have indicated that international cartels raise the cost of imports from developed to developing countries by billions of dollars annually.⁵⁶ Competition authorities in developing countries are unable to effectively combat cartels due to a lack of resources. Unless competition authorities

51. See, e.g., Ignacio Garcia Bercero & Stefan D. Amarasinha, *Moving the Trade and Competition Debate Forward*, J. INT'L ECON. L. 481, 481-506 (2000); Anderson & Holmes, *supra* note 39, at 541.

52. Anderson & Holmes, *supra* note 39, at 532-33, 541-45.

53. Frédéric Jenny, *Globalization, Competition and Trade Policy: Convergence, Divergence and Cooperation in INTERNATIONAL AND COMPARATIVE COMPETITION LAW AND POLICIES* 31-70 (Yang-Ching Chao, Gee San, Changfa Lo & Jiming Ho eds., 2001); see generally Margaret Levenstein & Valerie Suslow, *Private International Cartels and Their Effect on Developing Countries* (World Bank's *World Development Report 2001*, Background Paper No. 27826, 2001), http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2004/02/10/000265513_20040210163259/Rendered/PDF/wdr27826.pdf.

54. WTO Working Group on the Interaction between Trade and Competition Policy, *supra* note 30, at 60-63, 96-98. For an in-depth analysis see Margaret Levenstein, Valerie Suslow & Lynda 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).

55. WTO Working Group on the Interaction between Trade and Competition Policy, *Communication from Korea*, ¶ 4, WT/WGTCP/W/200 (Aug. 12, 2002).

56. WTO Working Group on the Interaction between Trade and Competition Policy, *supra* note 30, at 92-96.

in developing countries can obtain the cooperation of their counterparts in the developed countries, their consumers will unwillingly bear the high cost incurred by cartels. In the recent *Vitamin case*, developing countries were unable to obtain the cooperation of developed countries, even when their importers and consumers were severely hurt.⁵⁷

At present, no legal structure exists for assisting developing countries in their efforts to restrain cartels. Thailand, in its submission to the WGTCP, recognized the potential damage caused by international cartels and the urgent need to eradicate their cross-border collusive practices.⁵⁸ Cartels tend to operate in countries in which competition laws are weakly enforced, and multilateral assistance is therefore necessary to fight these cartels. Without a minimum global standard for national cartel enforcement, hardcore cartels are likely to target jurisdictions with weak or non-existent anti-cartel measures, particularly the developing countries.

Competition policy at the national level is of critical importance. However, it is severely inadequate for certain issues. In today's global world, developing countries are unable to protect themselves, and must therefore cooperate with other competition authorities to combat the anti-competitive effects of international cartels and mergers that harm their consumers.⁵⁹ This is particularly true because harms caused in these countries have a global spill-over effect. While developed countries can alleviate these problems through bilateral agreements, developing countries cannot, because they lack the influence and power to obtain such cooperation. Bilateral cooperation arrangements are usually entered into by developed countries, and developing countries are left out of such arrangements.⁶⁰ Developing countries are therefore left with few options other than to endure anti-competitive practices.

The Proposed Framework identifies the importance of international hardcore cartels in distorting the world trading system. It has further correctly identified two of the policy-related reasons for sub-optimal

57. *Id.* at 99.

58. WTO Working Group on the Interaction between Trade and Competition Policy, *Communication from Thailand*, ¶ 2.1, WT/WGTCP/W/213 (Sept. 23, 2003).

59. Levenstein and Suslow assert that

[e]xamining 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.

Levenstein & Suslow, *supra* note 53, at 12.

60. WTO Working Group on the Interaction between Trade and Competition Policy, *Communication from the European Community and its Member States* at 2, WT/WGTCP/W/184 (Apr. 22, 2002), available at http://www.jmcti.org/2000round/com/doha/wg/wt_wgtcp_w_184.pdf.

levels of enforcement: ineffective or non-existent national cartel enforcement regimes and inadequate information exchange. The Proposed Framework provides solutions for problems that cannot be solved through bilateral cooperation. In fact, it assists developing countries in addressing hardcore cartels that impose significant costs on their national economies.

C. The WTO, an Appropriate Forum?

While recognizing the necessity of adopting a multilateral approach, some argue that the WTO is not an appropriate forum for dealing with competition issues. They argue the WTO is overloaded with other problems, and should not undertake as complex a project and enormous a challenge as competition policy. Some have suggested that UNCTAD, which has already adopted a Set of Principles on Restrictive Business Practices, serve as an alternative forum. UNCTAD currently supports developing countries in designing competition policy rules more suited to their development needs.⁶¹

However, the WTO is better suited to coordinate worldwide cooperation. A multilateral framework on competition within the WTO would allow developing countries to seek direct assistance from an extensive network of competition authorities.⁶² The WTO is currently the only global economic body and is perceived to be the only appropriate forum by nearly all proponents of global antitrust policy.⁶³ Discussions on the complex issues regarding the interaction between trade and competition are also possible within the WTO's framework. Furthermore, a WTO approach works as a building block for integrating developing countries into the trading system. The WTO also provides a forum for the exchange of interests. Developing countries may be able to obtain support in other areas by agreeing to adopt the Proposed Framework. As the discussions in Cancun demonstrated, a consensus on this issue requires developed countries to offer concessions in other trade areas in exchange for the

61. Stichele, *supra* note 28, at 14.

62. WTO Working Group on the Interaction between Trade and Competition Policy, *Communication from the European Community and its Member States: The Development Dimension of Competition Law and Policy* at 9, WT/WGTCP/W/140 (June 8, 2000).

63. Fox, *supra* note 18, at 925.

support of developing countries.⁶⁴ The fact that the WTO is the only body with the breadth of jurisdiction to enable such an exchange must be given significant weight.

IV. A DEVELOPMENT-ORIENTED FRAMEWORK?

The ability of developing countries to benefit from negotiations on a multilateral framework on competition policy at the WTO depends on a number of factors. No outcomes can be guaranteed. A general cost-benefit analysis will not persuade developing countries to engage in such negotiations, because the real costs and benefits will vary according to their individual circumstances. We will also have to wait for future negotiations to actually see how a multilateral framework will benefit the interests of the developing countries. Such a framework must respect the core principles of competition policy; permit and facilitate their continuing elaboration in response to economic learning and other developments; and build on the institutional and other strengths of such policy. Careful assessment of the Proposed Framework, with particular attention to factors such as implementation costs and consistency with development objectives shows that it seemingly responds to these concerns.

Notwithstanding the foregoing observation, this paper does not suggest that the Proposed Framework necessarily addresses all of the concerns of developing countries. The fundamental opposition to this Proposed Framework by many developing countries stems from the belief that the Proposed Framework is not “development-oriented.” Indeed, it is argued that the basic concepts used in the discourse at WGTCP are inimical to the interests of developing countries, and new definitions and concepts are required to adequately address their concerns.⁶⁵ It is important to note that the Proposed Framework is just that—a ‘framework’ rather than a complete set of agreements. Through further discussion and negotiation, the Proposed Framework can focus more significantly 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 paragraphs, this paper will suggest several elements that should be emphasized to make the Proposed Framework more development-oriented. The first is the inclusion of special and differential

64. Andrew T. Guzman, *International Antitrust and the WTO: The Lesson from Intellectual Property*, 43 VA. J. INT'L L. 933, 951 (2003).

65. Singh, *supra note* 34, at 18.

treatment, which was also emphasized in the Doha Ministerial Declaration.⁶⁶ This would mean that “development dimensions” would be valid grounds for differential treatment of countries with different capacities. Negotiations on transitional periods, exceptions and exemptions from the Multilateral Framework will have to be negotiated. In general, competition policy should be adopted gradually and flexibly, in a manner suitable to the member countries’ level of development and their development interests, and in a way that does not undermine their socio-political policies. Such a “flexible” and “progressive” approach will allow developing countries more autonomy in implementing competition policies. In its submission to the WGTCP, Thailand insisted on building in special and differential treatment for developing countries to the core principles of competition policy.⁶⁷ The EC has also stated that least-developed countries and smaller economies should be allowed to adopt new WTO obligations pertaining to competition policy in a flexible and progressive manner.⁶⁸

The second element 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 bilateral and regional level, to which developing countries are not parties.⁶⁹

The third element 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. These concerns have been echoed by certain trade policy experts.⁷⁰ Technical assistance and support for capacity building would address developing countries’ concerns over the perceived lack of institutional capacity and experience

66. See Doha Declaration, *supra* note 3.

67. WTO Working Group on the Interaction between Trade and Competition Policy, *Communication from India*, WT/WGTP/W/212 (2002).

68. WTO Working Group on the Interaction between Trade and Competition Policy, *Communication from Thailand*, WT/WGTCP/W/215 (Sept. 24, 2002).

69. Robert D. Anderson & Frédéric Jenny, *Current Developments on Competition Policy in the World Trade Organization*, 16 ANTITRUST 40, 43 (2001).

70. See, e.g., L. Alan Winters, *Doha and the World Poverty Targets* 31-32 (paper presented at the World Bank’s 14th Annual Bank Conference on Development Economics, Washington D.C. (2002)), available at <http://siteresources.worldbank.org/INTABCDEWASHINGTON2002/Resources/Winters.pdf>.

in this area, and would reduce the burden of implementing cooperation policies on developing countries. The inclusion of technical assistance provisions in the Doha Declaration was one of the key elements that enabled many developing countries to accept potential WTO negotiations on competition policy. Future negotiations should tailor technical assistance according to the diversity of needs and distinct national circumstances of developing countries.

V. CONCLUSION

In July 2004, formal negotiations on a multilateral framework on competition policy at the WTO were deferred 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 article has argued, developing countries should realize the benefits of a multilateral approach and reconsider discussions at the WTO.

There is a pragmatic reason for developing countries to advocate for the revival of the discussions on a multilateral framework on competition policy. By pushing competition policy as well as other Singapore issues off the negotiating table, developing countries have actually surrendered an important issue for which trade-offs could have been made. Exploiting these bargaining chips is at the heart of multilateral trade negotiations and the associated give-and-take would have allowed the developing countries to maximize their benefits. In fact, the developing countries could have approached market access concerns from a different perspective. Developing countries could have utilized the multilateral framework on competition and its negotiations to improve the market access conditions of the developed countries. They could have strongly insisted on dealing with anti-dumping issues in the competition context. Of course, there is no guarantee that the European Union and the United States would be willing to make concessions on these issues,⁷¹ but including anti-dumping and subsidy issues in a more comprehensive framework on competition would allow developing countries to emphasize clear interests.

Developing countries can best promote development by committing themselves to stronger multilateral rules and trying to benefit from the commitments made by the developed countries. Developing countries can utilize a multilateral approach to further their individual and collective

71. See United Nations Conference on Trade and Development [UNCTAD], *Can Developing Economies Benefit from WTO Negotiations on Binding Disciplines for Hard Core Cartels?*, at 27-28, U.N. Doc. UNCTAD/DITC/CLP/2003/3 (2003) (prepared by Simon J. Evenett).

interests.⁷² Active participation by developing countries could also tilt the balance in their favor. They could robustly demand a flexible and progressive approach to all commitments, recognizing differences in development, legal and business cultures. They could insist on enhanced capacity-building efforts during the negotiations rather than after their conclusion. This paper stems from the belief that a multilateral framework will foster a “competition culture” among the developing countries. It was a humble wish met with opposition. However, discussions on a multilateral competition policy at the WTO should not be suspended. The WGTCPC should, at the very least, continue to serve as a forum for discussion on these issues. Without such discussion, developing countries as well as developed countries will be unable to reap the benefits from the multilateral approach. Discussions at the WTO, with more participating members than any other forum, would also help expand “competition culture.” Promotion of consumer benefits, economic efficiency and economic development are worthy goals. The liberalization of world trade accomplished by GATT over the course of four decades is the primary source of progress made toward meeting these goals. A possible framework on competition at the WTO will build on that progress.

72. *Id.* at 31.

