

APEC STUDY CENTER



COMPETITION POLICY AND ECONOMIC DEVELOPMENT

The Costs and Benefits of Multilateral Principles on Competition for Developing Economies

Since the Doha Declaration, there is now active consideration of a multilateral set of rules or principles on competition policy at the WTO. While some developed and developing countries have expressed interest in such principles, there is also considerable concern in a number of developing countries about the possible constraints that a set of principles might impose on their preferred economic development strategies. In other words, an oft-voiced concern is that competition policies might constrain nations in their preferred approach to industrial policy, technology policy, investment policy, or economic development strategy more generally. In the past, similar concerns have been raised about trade liberalization.

This workshop brought together leading legal practitioners, economic and legal experts, and government officials from both developing and developed economies to consider the relationship between competition policy and economic development. The agenda was divided into two sessions. The opening session, presided over by Merit E. Janow, Professor in the Practice of International Trade, Columbia University, focused on "Competition Policy and Economic Development." Discussion was interdisciplinary, incorporating the perspectives of economists, including initial comments by Joseph E. Stiglitz, Professor of Economics and Finance, Columbia University; and government officials, including Dr. David Lewis, Chief, South African Competition Tribunal, and Dr. Mario Monti, Commissioner for Competition Policy, European Commission. Mr. Pradeep S. Mehta, Secretary General, Consumer Unity and Trust Society, India, offered insight into developing country perspectives. Workshop participants discussed a number of issues, including the crucial role of competition policy in furthering the process of economic reform in developing economies; how best to address conflicts between competition policy and industrial policy and other public interest considerations; ways to bolster both the public and governmental support for competition policy; the appropriate model for a national competition authority; and what shape the multilateral approach to competition should adopt in order to best serve developing economies and their particular circumstances.

The working luncheon focused explicitly on the role of the WTO in supporting developing economies' needs with regard to competition policy. Dr. Frederic Jenny, Vice Chairman, Conseil du Concurrence and Chairman, WTO Working Group on Competition, delineated the work under way on competition and trade policy within the WTO working group. Professor Jagdish Bhagwati offered further insight into the perspectives of developing economies with regard to their perception of multilateral competition policy and how it could best serve them.

The closing session, presided over by Eleanor M. Fox, Professor, New York University School of Law, addressed "Multilateralizing Competition Policy: Can It Help?" Discussing the pros and cons for developing countries were economists Dr. Bernard Hoekman, Research Manager, Development Economic Research Group, The World Bank, and Professor Peter Drysdale, Australian National University. Dr. Fernando Sanchez Ugarte, President, Commission Federal de Competencia, Mexico, represented a governmental viewpoint. Given the frustration of the developing world with the progress of globalization and their own fiscal and manpower constraints, it was agreed that it is crucial to prioritize the work to be done in furthering competition policy in these economies at the multilateral level. Various suggestions were made as to what issues constitute "priority" concerns. Concrete approaches for implementing competition policy were also given, with particular attention paid to modes of gathering support. Participants also delineated the complementary roles of the WTO, the ICN, international business organizations, bilateral negotiations and domestic consumer watchdog institutions in gathering support for competition policy, as well as in shaping the scope and form of multilateral cooperation in promoting markets.



Joseph Stiglitz

Competition policy is being introduced as a tool to support the transition from planning to markets.



Mario Monti

Session I: Competition Policy and Economic Development

This session addressed a number of concerns developing countries share on the relationship between competition policy and economic development. More than 90 jurisdictions now have some kind of competition law, a great many having been introduced in the last fifteen years. Competition policy is being introduced as a tool to support the transition from planning to markets, and used generally to promote greater reliance on markets in developing economies. Still, there is considerable debate surrounding the merits and demerits of competition law and policy at the national level. There is a great deal of tension between competition policy and other economic policy tools that developing countries, in particular, are in the process of using, considering or even abandoning these policies, which include industrial policies, infant industry policies, deregulation, and privatization. Conflicts also exist between the agencies charged with promoting and enforcing competition law and other institutions in the developing country context.

Affirming that competition is essential for the performance of a market economy, it was noted that there are strong forces at play in most economies that limit competition. In many developing countries, the small scale of the economy results in a limited number of firms, particularly in the distribution sector. Workshop participants acknowledged that while many reforms, such as eliminating marketing boards and encouraging

a competitive private sector, have indeed been successful, there are also a number of cases in which government monopolies were merely replaced with private sector monopolies. Moreover, as one participant emphasized, these private monopolies are often able to exploit farmers and other economic actors more than their government counterparts, undermining both growth and economic equity in the economy. Trade officials are still learning when and how best to privatize, and exploring other options such as maintaining public ownership, but tendering management. This is not to say that public enterprises, per se, are detrimental to the economy. Many developing economies have had a major expansion of the public sector out of necessity, as private entrepreneurs were unwilling or unable to provide certain goods and services deemed critical by policymakers to the economy. Yet, while trade liberalization and privatization are appropriate for fostering economic growth in developing economies, they are insufficient to ensure competitive markets, particularly when moving beyond tradable goods, into the areas of services and investment. Competition policy can be crucial to promoting marketization and economic development.

One participant suggested that media diversity was an important component in the transition toward a more marketized economy, and a factor that should be addressed within the framework of competition policy. This idea proved controversial, however. While most participants agreed that media diversity was

important in promoting political freedom, they felt that this goal should not be pursued as a matter of competition policy, since competition policy is concerned largely with consumer welfare, not diversity for its own sake. It was pointed out, for example, that while the European Commission did prohibit a media merger a few years ago on competition policy grounds, it did this because it was found that the merger would strengthen dominance with detrimental effect on consumers, not on media pluralism grounds.

Industrial policy is another tool of developing economies that is often at odds with competition policy. Developing economies, it was argued, continue to emphasize the use of industrial policy for several reasons. The first is that in most developing economies, the state remains a very important direct participant in the economy, as is evidenced by the continued existence of very large state-owned enterprises. The second reason, which is the subject of more debate, is that the most highly regarded development model for developing countries is still the Asian tigers. It is widely held that the Asian states' success was in managing incentives that were directed at securing effective private sector participation in the development process. The actual utility of industrial policy in successfully targeting industries and promoting growth in East Asia continues to be the subject of great debate. As one participant pointed out, there are many industries where one dollar's worth of input is really four dollars' worth of output. However,

he noted, "My problem is, I don't know which ones they are. Unfortunately, bureaucrats and politicians know what they are, and that is the problem."

Although industrial policy continues to be a factor in the working of economic policy, significant concessions have been made by both sides in the states vs. markets, or industrial policy vs. competition policy debate. Proponents of the free market have been forced to recognize that the state has not always been replaced with a benign invisible hand pointing in the direction of efficient and equitable outcomes. At the same time, in the wake of the Asian crisis, the image of industrial policy since the 1990's has become somewhat tarnished. The developmental state was charged with being an instrument of cronyism and inefficiency. Even die-hard proponents of industrial policy acknowledged that the effectiveness of a developmental state of the Asian variety depended on unusually high levels of bureaucratic efficiency and discipline, not to mention authoritarian political regimes. Still, while few now advocate a return to the interventionist development strategies of the 1950s and 1960s, the respect for industrial policy remains very strong. At a minimum, advocates of competition continue to confront those "mouthing the rhetoric of international competitiveness."

Industrial policy, however, is not the only concern that may be in conflict with competition policy. Issues of labor and trade policy also frequently challenge those concerned with promoting competition, as do

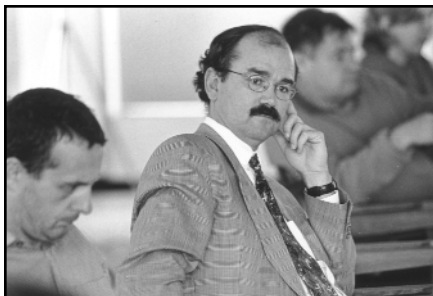


Merit E. Janow

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Left to right: Joseph Stiglitz, Frederic Jenny, Jagdish Bhagwati



Bernard Hoekman

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Peter Drysdale

other public interest considerations—one example given was that of small business and black empowerment policies in South Africa. Competition policy is at a disadvantage in many cases because, as one participant pointed out, competition law is often “an idea in search of a social champion.” While this situation is not unique to developing economies, it is particularly strong in developing economies and made more difficult by the combined lobbying of old producer lobbies intent on defending their interests, as well as new entrepreneurs who are pressing for protection and have often supported the new democratic governments.

How, then, is it possible to balance competition policy against these other social and economic imperatives? Workshop participants emphasized the importance of establishing the independence of the competition authorities, as well as of the judiciary, in order to safeguard enforcement. It is crucial that they be independent of other branches of government and that they have exclusive jurisdiction over competition policy matters.

The difficult question is how to establish this independence. Aside from the issue of corruption, there are also problems of inertia, indifference, and a lack of resources and staff. Participants cited the utility of having a dual approach to enforcement of competition law in which both government and private, civil action is supported. One participant emphasized that this approach was, in fact, adopted by the U.S. at the end of the 19th century in dealing with anti-trust

laws, precisely because it was acknowledged that large firms would use their enormous fiscal and political resources to block anti-trust actions. Providing the judiciary can be relied upon to be free from corruption, private action would involve fewer resources and be less rigid in approach. An active bar is also critical—private litigation encourages individuals to become expert in competition policy and to support institutions that will allow competition policy to flourish.

More broadly, participants emphasized the importance of a commitment to competition policy at the public, political and academic levels. One participant described two scenarios that can take place without that commitment firmly in place:

“First, the president or the prime minister looks at the (competition) authority and sees some slots to be filled. A car is assigned, a staff, a cell phone and some perks, and there’s really not very much commitment to actually enforcing the law in a positive sort of way. Or, you may get a good competition authority staff. They investigate cases and they go out and try to take some brave action in order to implement the competition law. The streets of Latin America are littered with the heads of former competition agency directors who lost their jobs by attempting to do their job. The reason for this is, the political will was not there to back up what they said. The public did not understand. They did not put pressure on their politicians to give the agency the support it needs, and as a result, it fails.”

To help build this public support for competition policy, it was suggested that competition agencies engage in outreach programs, in order to gain support across the private sector and in other government departments. One participant cited the value of appointing point persons to engage in ongoing dialogues with other government departments, making it clear that their views and input were valuable, while emphasizing the independence and ultimate authority of the competition office. This approach could encourage those in other departments to consult with the competition office frequently and discouraged “end-runs” around the office. At the same time, the agency must be careful to obtain input from large and small business, as well as consumer groups, particularly in order to familiarize these groups with enforcement policy, but also to build a base of support. This increases transparency and clarity, but it also reduces costs, not only for the private sector, but also for the public sector in clarifying procedure.

Public support becomes critical when the competition authority takes unpopular steps, such as prohibiting aid to a company, which then results in increased unemployment. Another participant cited efforts to introduce a bill in the European Union to enhance the participation of consumer organizations in merger control proceedings. Similarly, one participant described the creation of the American Antitrust Institute, an organization in the U.S. that brings together people who are advocates of strong antitrust policies to combine their influence.

A great deal of debate centered upon the question of whether consumer protection should dominate the model of what sort of competition authority should exist in a country. Several participants pointed out that a consumer orientation could be very useful in developing economies as consumer protection issues tend to get high public visibility and is generally well-received by the public. It would seem to offer a relatively low-cost approach to promoting competition. Others countered that there are problems inherent in adopting consumer welfare as the “ultimate barometer” of competition law. One participant argued that establishing consumer welfare could be extremely difficult if the competition policies adopted led to job losses extensive enough to mean that there were no longer consumers to have any welfare.

It was suggested that it made sense to promote a multilateral approach to competition in which no one model predominates. It was agreed that countries approach competition from a variety of perspectives and that history plays an important role. It was pointed out that competition law had strong populous roots in South Africa, while in Indonesia, it was introduced as part of IMF conditionality. This could not fail but to influence how competition law is written and how it is received in that country. It was argued by some participants that the resources, institutions and traditions of a country should inform the design of that country’s competition law and enforcement mechanisms. Where resources are limited, fewer subjects should be



Ko-Yung Tung

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Donald Baker (left), William Rowley



David Lewis

Given the pervasive disadvantages of developing countries, what does fair competition mean?



Russell Damtoft

covered and perhaps simpler, more per se-like rules should be the norm, rather than broader, more open rules.

One participant suggested that this sort of multilateral approach, in which no single standard predominates, could result in “competition among competition policy makers” where the strongest set of competition policies could emerge. The strengths of one approach might make up for the weaknesses of another.

Not all participants favored this approach. Some argued that allowing a wide variety of local circumstances to determine the nature of implementation of competition law could be unwise. While many legitimate approaches were possible, some may not represent the consumer welfare orientation that many in the competition policy community advocate. Do we take the proliferation of competition laws in the world at face value and promote them without much consideration? What ideas are we really trying to advance? What approaches are effective? Which can be accomplished? It was suggested by another participant that most of those present were in agreement that “no one size fits all,” but that there could be some fundamentals all could support.

Key to determining what these fundamentals should be is adopting an approach that is conscious of the needs and concerns of the developing world. The multilateral approach to competition risks its capture by the developed economies, focusing on their concerns and interests alone. It was pointed out that “much of the multilateral

discussion under the WTO has been dictated by the more advanced industrial countries. The less developed countries have had to sign on at the end.” The Uruguay Round, for example, resulted in support for the kinds of industrial policies developed economies promote, such as defense research expenditures, but not for the sort of incentives the developing economies tend to use. Developing economies view this restriction as a strain on their development efforts, one that is fundamentally unfair. Where developed economies once took advantage of many of these incentives themselves, perversely they now wish to deprive latecomers to development of the use of these tools.

Given the pervasive disadvantages of developing countries, what does fair competition mean? In developed countries, for example, firms are in effect subsidized through extensive provision of infrastructure. How can we decide what are acceptable subsidies and what are not? When governments in less developed countries provide money through a development bank, if that interest rate is lower than the “market rate of interest,” is it a subsidy? The reason this is such a difficult issue is that when the IMF comes into a country with an austerity program, the interest rates may go up to forty percent, and if any interest below that is viewed as a subsidy, effectively, these countries will not be able to provide money to facilitate their development. Allowing developing country concerns to inform the shape of a multilateral approach to competition policy is made more difficult by fears on the part of

some economies, including the U.S., that this could result in an agreement representing the least common denominator, in fact lowering the standards for some participants.

Working Luncheon Comments

The working luncheon began by discussing the role of the WTO Working Group on Trade and Competition Policy. In an effort to dispel some of the misconceptions about the role of the working group, it was emphasized that no negotiations are taking place at the present time. The working group is attempting to define the parameters of possible negotiation, and is thus raising the comfort level of the participants in discussing issues they would be less comfortable addressing in a more formal, negotiating session. Members of the working group are not concerned with defining a single standard for competition law, nor are they discussing the concentration of enforcement of competition law in a centralized agency or multilateral agency. More specifically, there has been no proposal that the WTO become an enforcement agency and take over cases from the national authorities. It is not concerned with revising anti-dumping laws, which is the purview of another arm of the WTO. Nor is the group as narrowly focused as the ICN, which is concerned only with competition law and policy. The WTO Working Group discusses trade and competition, but also extends its discussions beyond competition policy as such. It has not, however, talked about mergers or abuse of dominance,

but it has focused on the anti-competitive behavior of cartels, including with respect to developing economies.

What has been the focus of discussion at the WTO? It is recognized that the creation of a global market necessitates the creation of rules, and that economic transactions need a legal background in order to lead to efficiency. There has also been discussion of the relationship between static and dynamic competition efficiencies, the latter being especially important for developing countries. Lastly, there was discussion of how to create a competition culture. It was affirmed that convincing political leaders of the value of competition laws and policy was not merely a matter of rational efficiency, but of generating “a sufficient level of outrage against anti-competitive practices.” The aggressive pursuit of international antitrust cartels by the U.S. antitrust authorities over the last eight years was argued to have made a deep impression on the minds of local officials in developing economies. Generating a culture of competition extends beyond raising the profile of the competition authority to persuading the public that competition law serves a useful purpose.

Given the fragmentation of law and the globalization of markets, there are many undesirable practices that countries, even if they wish to, cannot eliminate by themselves. An important feature of the discussion of the WTO working group has been concerned with developing a protocol of cooperation. How should such a protocol be organized? It was suggested



Eleanor Fox

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Workshop in session



Pradeep Mehta (left), William Rowley

The heart of the discussion of the WTO working group has been concerned with developing a protocol of cooperation.



Eleanor Fox, David Lewis

that it allow for the diversity of situations and for progressivity because many countries do not have competition law enforcement. Is a law enforcement mechanism required? While it is not necessary that a country have competition laws itself, competition law must apply there. Some kind of domestic agency should be charged with the responsibility for examining these sorts of problems. At the same time, whatever law enforcement system exists, it should not be antagonistic to other proactive social or political objectives. The protocol should be based on non-discrimination, transparency and procedural fairness. Inevitably, there are questions concerning what is to be considered discriminatory and how far transparency should go. Should decisions, for example, not to prosecute someone be made public and how should they be made public? The desirability of a dispute settlement mechanism is another question that has been raised.

The response to the description of the concerns of the WTO Working Group on Trade and Competition Policy affirmed the need for a multilateral agreement incorporating diversity, but emphasized the importance of a minimalist, voluntary approach. Developing economies do not have the manpower to consider adequately the proliferation of issues that might be “tacked onto” such an agreement: issues of intellectual property, of labor standards, etc. The perspective of these economies is also rather different. While there has been a great deal of discussion of the role of developed economies’ cartels

coming into poor countries, there has been little discussion of the possible positive role of a poor country’s cartels in enriching poor countries. Should OPEC be off limits when people talk of commodity power? The assumption tends to be that all cartels are bad, all the time.

Final commentary addressed the experiences of some participants with competition laws in developing environments. For example, a certain skepticism about the role of competition policy was expressed with respect to the Indian context, because the record of an earlier anti-monopoly commission had an overly zealous approach that resulted in enormous inefficiencies and bottlenecks.

Multilateralizing Competition Policy: Can It Help?

This session explored the possible contribution of multilateral efforts to promote competition policy. What kinds of initiatives are likely to be most helpful or harmful? What do these countries perceive to be the biggest concerns?

It was stressed that those charged with addressing competition policy in developing economies are operating in a particularly difficult environment, as many of these economies have become disenchanted with the globalization process of the last twenty or so years. One participant pointed out that we are witnessing not only the reaction of dissident groups, but even those that have traditionally supported more liberal economic policies. He argued that one of the reasons for the discontent has to

do with improper sequencing of liberalization programs in these economies, and that these programs paid little attention to competition policy. If the problems present in the sequencing of the liberalization programs are to be corrected, it will require a much more active role for competition policy. There is, thus, a certain amount of irony involved in the lack of receptivity for competition policy developed economies may find in the developing world.

The workshop participants stressed the importance of prioritizing the work to be done, pointing out that the WTO has an enormous mission in dealing with policies that restrict market access and distort competition. Some have argued that its agenda is, in fact, over-loaded. As one participant pointed out, it makes little sense to draw attention away from efforts, for example, to eliminate agricultural subsidies which amount to something on the order of 300 billion dollars a year, in order to focus on the much smaller amounts involved in some of the competition cases on international cartels. There are still large benefits to be accrued to developing economies via the WTO's trade policy agenda. Therefore, it makes sense to encourage research to identify the most serious anti-competitive practices.

Others in the workshop echoed this sentiment. One pointed out that it was important to recognize the political economy underlying the relationship between developing economies and international business. Small economies often feel they cannot create a "credible threat to the abuse of market

power within their economies", especially where multinational companies are concerned, because they feel that they stand to lose more from applying their laws than from not applying them. Large companies can threaten to leave markets if they are treated aggressively.

One participant suggested that the WTO would be best equipped to address the negative externalities that competition law enforcement (or non-enforcement) can impose on other economies, particularly with respect to international cartels. When policies which are in fact legal (or not explicitly illegal) allow export cartels to injure foreign consumers (and where domestic consumers are unaffected, and therefore, can be exempted from antitrust law and competition law), this is clearly an example of a negative externality associated with the enforcement of national antitrust law. Maritime shipping, for example, is a case that comes up frequently. Another possible case worthy of special emphasis would be that of anti-dumping.

If the focus is to be on international cartels, one participant argued that, in light of the capacity constraints existing in many developing countries, it would make sense for the industrialized economies to bear much of the burden in helping developing economies enforce discipline on the cartels. The question remains, however, as to what kind of quid pro quo developing countries would have to place on the table in order to encourage this in the WTO.

Given that there is little discussion on the substantive harmonization



William Kolasky

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Jagdish Bhagwati (left),
Fernando Sanchez Ugarte



Peter Drysdale (left),
Fernando Sanchez Ugarte

It was argued that the champions of competition policy must be “built within the institutions and cultures on the ground,” rather than in Geneva.



Calvin Goldman

of norms and binding enforcement in the WTO, and more focus instead on principles like transparency, national treatment, due process, and similar topics, one participant expressed the concern that this avoids addressing the fundamental issues for developing economies. Other participants emphasized the key role of organizations such as the International Competition Network (ICN) in supplementing the work of the WTO. The ICN is better able to consider how to globalize competition in accord with global markets, and consider the broader aspects of competition beyond those related to trade alone.

The work of the ICN is described as three-fold, consisting of advocacy, merger review and enforcement. Advocacy is one of the simpler tasks a competition authority can accomplish. In advocating competition, the authority creates the least amount of damage, either politically or substantively, and is part of the effort to complement and continue the economic reforms that have been adopted by many countries. Merger review is a “soft” attempt to converge policies. In contrast with the “hard disciplines” of the WTO, the ICN is creating a forum where competition authorities can discuss best practices that, once adopted, would make the process of merger review more attuned to the needs of increasing flows of investment and trade. It is a “soft” approach in that no economy is being forced to change its ways. The process clarifies the benefits of trying to harmonize competition policy as much as possible. Substantial progress has been made in agreeing on best

practices, and the hope is that this will help businesses that have to do major reviews across different jurisdictions. Implementation will take some time, but the fact that the economies involved are choosing to adopt the new criteria voluntarily should encourage the process. The final work of the ICN, which concerns enforcement of competition law, is still in its nascent stage and likely will be addressed in the future.

Still others argued that the ICN and the WTO cannot stand alone in efforts to encourage the adoption of competition policy. As one participant emphasized, there is still the problem of “socializing competition policy in all the relevant constituencies in which competition policy has yet to be socialized.” It was argued that the champions of competition policy must be “built within the institutions and cultures on the ground,” rather than in Geneva. The role of a consumer watchdog agency was cited as being particularly helpful in gathering and sustaining political support for the benefits of competition regulation. The importance of a grassroots approach was reiterated, another participant suggesting that it would be fruitful to focus on “pressing local issues” where prompt results could be achieved without the necessity of a great deal of international cooperation. It was suggested that service industries would be a worthy target. Hong Kong and Singapore, for example, have very open markets, but also a good deal of local cartelization. If consumers can point to a concrete instance where competition policy was effective saying, “Gee, the taxi

rates went down as a result,” that will certainly encourage support for competition policy on the ground.

It was further suggested that while bilateral efforts alone are not sufficient to deal with the problems that emerge on a global scale, they can help resolve trade policy friction in a way that effectively addresses, from time to time, the anti-dumping issue. The Closer Economic Relations (CER) arrangement between Australia and New Zealand was cited as a case in which the anti-dumping problem was resolved effectively. This suggests that it may be possible to build up from a bilateral and regional base toward multilateral arrangements in some areas.

Finally, it was reiterated that competition policy needs the support of the business community; if middle and large-sized companies are sufficiently opposed to certain regulations, they are capable of slowing the adoption, implementation and enforcement of them. Thus it was suggested that it would be valuable to maintain a consultative dialogue with international business organizations, such as the International Chamber of Commerce, and establish transparent safeguards for the protection of confidential business information.

In concluding moments, participants stressed the importance of respecting the needs and viewpoints of developing countries, as well as linking them into the world family of trade and competition. The world system, it was observed, offers a support and anchor for developing countries as they move forward on a common mission based on markets.



John Fingleton

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*Left to right: Hugh Patrick, Allan Fels,
Peter Drysdale*

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