

COMPETITION AND THE WTO - A DEAD END

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Abstract

The philosophy of market access and foreign competition has given impetus to calls for the liberalization of trade and commerce. Post-Asian crisis, the need was felt for an order for international competition to improve the financial markets. The recent decision to exclude competition policies from the purview of the WTO seems to be an unwelcome move. This article addresses the concerns that have arisen as a consequence of removing competition policies from the purview of the WTO. It suggests that politicization of WTO and the regionalization of competition policy may prove to be detrimental for a good economic order. Competition is a direct consequence of the liberalization of a trade regime and an effective trade regime requires addressing the rules for trade and competition under the same umbrella in order to develop a cohesive jurisprudence.

Öz

Pazara erişim ve rekabet felsefesi ticaret alanında hızla gelişen bir serbestleşme ihtiyacı doğurmuştur. Asya krizi sonrasında finansal pazarın geliştirilmesine yönelik bir uluslararası rekabet düzenine olan ihtiyaç hissedilir hale gelmiştir. DTÖ'nün yetki alanından rekabet politikalarının çıkarılması kararı ise olumlu karşılanmayan bir gelişme olmuştur. Bu makale, DTÖ'nün yetki alanından rekabet politikalarının çıkarılmasına ilişkin kararın bir sonucu olarak oluşan kaygıları ortaya koymaktadır. Makale, DTÖ'nün siyasallaştırılması ve rekabet politikalarının bölgeselleştirilmesinin iyi bir ekonomik düzene zarar getireceği fikrini öne sürmektedir. Rekabet, ticaret rejiminin serbestleşmesinin doğrudan bir sonucu olup, etkin bir ticaret rejimi

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ise kaynaştırıcı bir hukuki yapı oluşması için aynı şemsiye altında ele alınacak ticaret ve rekabet kurallarını gerektirmektedir.

Keywords: *free and fair trade, competition and trade, WTO*

Anahtar Kelimeler: *serbest ve adil ticaret, rekabet ve ticaret, DTÖ.*

INTRODUCTION

The philosophy of market access and foreign competition has given impetus to calls for the liberalization of trade and commerce, especially in financial services. After the Asian crisis, the need was felt for an order for international competition to improve the financial markets. Despite recurring bubbles and regional crises, the community largely failed to address the threat of outflanking and undermining hard-fought and hard-achieved market access rights as well as the protection of legitimate expectations as to fair conditions of competition.¹ Further, the General Agreement on Trade in Services (GATS) did not sufficiently consider the issue of international cooperation and possible harmonization of international supervisory standards.

Amidst all the debates that have been held on the relationship of competition policy to the multilateral trading system, plus the contrasting views on the need for the WTO to address this issue, one unanimous view has been expressed that international deliberations and/or agreements can play a crucial role in enabling developing countries to implement effective policies in this area, by promoting cooperative approaches to institution-building and enforcement and by providing a tool to overcome domestic constituencies that might otherwise block the reform process.² There is a growing recognition that anti-competitive practices directly impact the welfare and prospects of developing countries and hence are no longer (if they ever were) a concern exclusively for the developed world.³ A concern has also been voiced that an undue focus on market access

¹ See Thomas Cortier, *Challenges Ahead in International Economic Law*, 12 J. INT'L ECON. L. 3 (2009).

² Nancy Birdsall and Robert Z. Lawrence, *Deep Integration and Trade Agreements: Good for Developing Countries?* in GLOBAL PUBLIC GOODS: INTERNATIONAL COOPERATION IN THE 21ST CENTURY 128-51 (Inge Kaul, et al, eds, New York: Oxford University Press for the United Nations Development Program, 1999); Ignacio Garcia-Bercero and Stefan Amarasingha, *Moving the Trade and Competition Debate Forward*, 4 J. INT'L ECON. L. 481 (2001).

³ See Frédéric Jenny, *Globalization, Competition and Trade Policy: Convergence, Divergence and Cooperation*, in INTERNATIONAL AND COMPARATIVE COMPETITION LAW AND POLICIES (Yang-Ching Chao, et al, eds, The Hague: Kluwer Law International 2001), 31-70; Chiedu Osakwe, *Poverty Reduction and Development: The Interaction of Trade, Macroeconomic and Regulatory Policies*, 10th Joseph Mubiru Memorial Lecture Organized by the Bank of Uganda (Dec. 14, 2001); Bernard Hoekman and Peter Holmes, *Competition Policy, Developing Countries and the WTO*, 22 WORLD ECON. 875 (1999); Margaret Levenstein and Valerie Suslow, *Private*

objectives in a WTO agreement on competition policy, something which is thought by some commentators to be an inevitable consequence of negotiations in this area, would inevitably distort the principles of competition policy and/or be inimical to the needs of developing countries in this area.⁴ The disadvantages of an overly-rigid codification of the principles of competition policy have also been emphasized.⁵

The recent decision to exclude competition policies from the purview of the WTO seems to be an unwelcome move. There is a unison on the objectives for the WTO and general competition policies; both aim at establishing a fair trade regime. Unfair trade practices are a direct consequence of the liberalization of trade regimes. The decision to oust the competition policy from the ambit of the WTO will make the enforcement of such policies more difficult. Considering the rise in regional agreements on competition policies, it is not unsafe to assume that a parallel jurisprudence of competition policy may develop in different region of the world and make the harmonization of competition even more difficult.⁶ How will we reconcile this divergence with convergence of market and economy? Will this lead to a paradigm shift from globalization to regionalism? It is beyond the scope of this article to delve into a normative argument – the purpose of this article is to address the concerns that have arisen as a consequence of removing competition policies from the purview of the WTO.

The first part of the article will briefly discuss the relationship between competition policy and economic growth. Understanding this relationship is important in order to understand the overall relationship of the WTO (that aims to establish a fair trade regime and an equal economic order) and competition policies (which aim to establish fair rule for the free market!). The second part of the article will attempt to address the growing political concerns within the WTO. Although politics is inevitable when different polities are bargaining in an international venue, there is need to rise above such concerns and create a framework for competition law that serves the larger interest for all nations. The third part of the article will advance some evidence of growing regionalism within the competition policy regime and the threat of not having an

International Cartels and Their Effect on Developing Countries, Background Paper for the World Bank's World Development Report 2001 (2001); Simon J. Evenett, Margaret Levenstein, and Valerie Suslow, *International Cartel Enforcement: Lessons from the 1990s*, 24 WORLD ECON. 1221 (2001).

⁴ See Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy*, 94 AM. J. INT'L L. 478 (2000); see also Bernard Hoekman and Peter Holmes, *Competition Policy, Developing Countries and the WTO*, 22 WORLD ECON. 875 (1999).

⁵ *Id.*

⁶ The concepts of relevant market, adverse effect and other related concepts may differ from one region to another.

international regime. The fourth part of the article will address a few reasons that lead to the end of competition policies within a trade regime. It is believed that addressing such concerns can provide a workable solution for reinstating competition policies within the ambit of the WTO. Finally, the article concludes by discussing that the politicization of WTO and the regionalization of competition policy may prove to be detrimental to a good economic order. Competition is a direct consequence of the liberalization of a trade regime and an effective trade regime requires addressing the rules for trade and competition under the same umbrella in order to develop a cohesive jurisprudence.

I. COMPETITION POLICY AND ITS RELATION TO ECONOMIC GROWTH

The incoherence resulting from competition law being about everything is memorably articulated by Judge Frank Easterbrook, writing that “[w]hen everything is relevant, nothing is dispositive.”⁷ Lack of understanding varies from determining the objective of competition policies goals to setting out their periphery. Each country determines its own concept of abuse and dominance. Lack of uniformity in defining competition behaviors widens the divergence of competition policies. A trade regime cannot grow in isolation from its associated competition regime; for a liberal trade regime to work competition policies must develop in consonance with those trade policies. Both trade and competition are equally concerned with market access.

Increasing regional cooperation agreement may not succeed in resolving the competition disharmony, since a regional concept will develop parallel to global trade, making the harmonization more difficult. This has been dealt in latter part of this article.

Such a view is not to dismiss that the growing role of competition policy cannot be accommodated in the WTO with complete efficiency. However, the concern is that a global regime that has proved most effective, despite all debates, is nonetheless the WTO. The question arises as to should competition policies be put under a separate international code or will the regional dimension take care of such anticompetitive behavior. This can be resolved by adopting a twofold mechanism. The broader framework in terms of minimum requirements for a competition regime can be set out within the ambit of the WTO, keeping in mind the rules of the game as set out within the WTO. The details of the policies can be adopted with a regional document. It cannot be predicted with precision that this will lead to development.

⁷ Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 12 (1984).

However, one must understand the importance of competition policy for development and that other countries do not stand or fall on abstract discussions of the nature of competition and its relationship to economic performance. The main job of competition policy is to deter and/or provide remedies for specific abuses such as cartelization, monopolization, or anti-competitive mergers that raise prices and/or reduce the quality or availability of (often socially important) goods and services; practices which can hardly be justified on the ground that they are pro-poor or pro-development. Setting out a framework of competition policies will deter countries from entering into any regional cooperation which may have a direct or indirect effect on market access.

It can be noted at this point that there may be various factors other than competition policies that can have a bearing on the competition in a market. For example, the absence of regulatory barriers, or the competency of enforcement agencies may play such a role. However, it is a fallacy to conclude from this fact that competition policy itself is unimportant. However, since a strong competition policy is paramount for fair trade policies, the effort should be made to harmonize them *inter se* so that a perfect trade regime and a perfect competition regime remains no more a utopia.

II. THE POLITICAL APPROACH OF COMPETITION LAW

This part of article will address the political considerations that affect the WTO. Global economic rules are not written by Platonic rulers, or their present-day pretenders, academic economists. If WTO agreements were truly about 'free trade,' as their opponents like to point out, a single sentence would suffice ('there shall be free trade').⁸ The WTO is not free from political considerations and the main concern within the member states is not to achieve apolity, but to redeem their objectives with mutual polity. This is not inherently a bad thing as politics, both at the domestic and international level, will and must always play a predominant role. However, to limit this political bargaining game at the WTO to producer interest – on the grounds that they are a proxy of majority welfare⁹ and democratic politics unavoidably ends up in protectionism – is effectively elevating one set of special interests above all others.¹⁰ Hence, a

⁸ Dani Rodrik, *Feasible Globalizations* (Nat'l Bureau of Econ. Research, Working Paper No. W9129, 2002) at 18, available at <http://www.hks.harvard.edu/fs/drodrik/Research%20papers/Feasglob.pdf> (last visited Jun. 11, 2011).

⁹ See John O. McGinnis and Mark L. Movsesian, *World Trade Constitution*, 114 HARV. L. REV. 511 (2000).

¹⁰ See Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 MICH L. REV. 167 (1999); see also Robert Keohane and Joseph Nye, *The Club Model of Multilateral Co-operation and Problems of Democratic Legitimacy*, in EFFICIENCY, EQUITY, AND LEGITIMACY: THE

trade relation is the outcome of the bargaining power and incentives that the countries negotiate (not to dismiss that some level of fairness is what the countries are trying to achieve). Hence to conclude, there is as much politics at the WTO, with special interest groups clamoring for favors, as there is in domestic parliaments. Protectionist agreements such as those concerning agriculture, textiles, or antidumping, and agreements that favor one group of countries over another (such as TRIPS¹¹) illustrate that the WTO does not necessarily lead to free trade in favor of the majority, but represents a forum for political deals brokered in the context of power and special interests. For historical reasons, many of which the developing world itself is to blame for, the system is seriously skewed in favor of the rich and powerful. Whenever developing countries have a chance to win the free trade game, the sector was either carved out (textiles, agriculture) or so-called fair trade remedies (anti-dumping, safeguards) were ushered in.¹²

This dichotomy between politics and law is engrained in all historical narratives of the world trading system. The common wisdom is, indeed, that the world trading system evolved from a power-based (politics) to a rules-based (law) regime.¹³ In a steady, unidirectional process of legalization, the argument goes, trade law has gradually replaced trade politics.¹⁴ Whatever other forms may exist to legitimize international governance, in the WTO none is currently strong enough to support the revolutionary shift from consensus-based to majority-based decision-making without seriously undermining the trading system's effectiveness, including its strong dispute resolution process; if such regime is not replaced, the effort should be made to achieve liberalization and fairness of trade policies within the existing regime. It has been undisputed that competition and trade go hand in hand and hence the need of the hour is to rise above all our political considerations and lay down a framework for competition policies so that greater interest can be met. The latter part of this article will attempt to justify a few reasons for removing competition policies. Though it is

MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM 10 (Roger B. Porter *et al*, eds, Brookings Institute, Washington, D.C., 2001).

¹¹ See Laurence Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1 (2004).

¹² Joost Pauwelyn, *The Sutherland Report: A Missed Opportunity for Genuine Debate on Trade, Globalization and Reforming the WTO*, 8 J. INT'L ECON. L. 329 (2005).

¹³ See John Jackson, *The Crumbling Institutions of the Liberal Trade System*, 12 J. WORLD TRADE L. 93, 99 (1978); Robert Hudec, *Review Article: Free Trade, Sovereignty, Democracy: The Future of the WTO*, 1 WORLD TRADE REV. 211, 219–20 (2002) (“The conventional history of GATT/WTO dispute settlement (for which I may be partly responsible) teaches that GATT dispute settlement evolved from a ‘diplomatic’ instrument into a ‘judicial’ instrument”).

¹⁴ See, e.g., Judith Goldstein, Miles Kahler, Robert Keohane and Anne-Marie Slaughter, *Introduction: Legalization and World Politics*, 54 INT'L ORG. 385, 389 (referring to a victory for trade 'legalists' over trade 'pragmatists').

beyond the scope of this article to put a normative argument to advocate either inclusion or exclusion of such policies, a deeper consideration of the concerns raised by the member states can give us guidelines as to what are the major issues to be addressed if we are to achieve a unanimous agreement on inclusion of competition policies within the periphery of the WTO.

III. DEVELOPMENT OF REGIONAL AGREEMENTS

This part of the article will deal with development of regional agreements on competition policies and the long-term consequences which such policies may have with respect to establishing a global perspective on anticompetitive practices.

In the 1960s, the US and other industrialized countries discussed measures to cooperate procedurally within the OECD; these discussions culminated in a 1967 recommendation providing for notification when one member's antitrust enforcement activity affects another member's important interests, consultation on antitrust enforcement, consideration of other members' significant national interests, cooperation in enforcement, or consideration of other members' requests to investigate anticompetitive practices taking place in the requested parties' jurisdiction.¹⁵ The US has also entered into bilateral agreements on procedural cooperation with Germany (1976), Australia (1982), the EC (1991, supplemented by a 1998 agreement on positive comity) and Canada (1984, revised in 1995).¹⁶ These agreements provide for roughly the same sort of procedural cooperation as called for under the original OECD recommendation.

¹⁵ Communiqué, Antitrust Summit of the Americas (20 October 1998), *available at* <http://www.ftc.gov/opa/1998/10/panama.shtm> (last visited Jun. 11, 2011).

¹⁶ Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Co-operation Regarding Restrictive Business Practices, reprinted in 4 Trade Reg. Rep. (CCH) para. 13,501 (23 June 1976); Agreement Between the Government of the United States of America and the Government of Australia Relating to Co-operation on Antitrust Matters, reprinted in 4 Trade Reg. Rep. (CCH) para. 13,502 (29 June 1982); Agreement Between The Government of the United States of America and The Commission of the European Communities Regarding the Application of Their Competition Laws, reprinted in 4 Trade Reg. Rep. (CCH) para. 13,504 (23 September 1991); Agreement Between The Government of the United States of America and The European Communities on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws (4 June 1998), *available at* www.ftc.gov/bc/us-ec-pc.htm (last visited Jun. 11 2011); Memorandum of Understanding between the Government of Canada and the Government of the United States of America as to Notification, Consultation and Co-operation with Respect to the Application of National Antitrust Laws, reprinted in 4 Trade Reg. Rep. (CCH) para. 13,503A (9 March 1984), superseded by Agreement Between the Government of the United States of America and the Government of Canada Regarding the Application of Their Competition and Deceptive Marketing Practices Laws, reprinted in 4 Trade Reg. Rep. (CCH) para. 13,503 (3 August 1995).

Only recently, 11 of the 12 countries in the Western Hemisphere that enforce a competition code also adopted a policy pronouncement of hostility to cartel behavior and a commitment to cooperate in international enforcement against such behavior.¹⁷ There is no definitive answer to the debate. History teaches us that regional discrimination, as in the 1930s, can have devastating political as well as economic consequences.¹⁸

Regional agreements were not common in the early years of GATT operation. They increased in frequency particularly during the 1990s, so that in 1995 when the WTO was formed, nearly all the members of the new organization were also concurrently members of at least one regional trade agreement.¹⁹ The main provision governing such agreements is GATT Article XXIV, which applies to both free trade agreements and customs unions.²⁰ Article XXIV establishes two main requirements. The first requirement relates to internal trade and provides that the proposed free trade agreement must eliminate “duties and other restrictive regulations of commerce ... on substantially all the trade between the constituent territories in products originating in such territories.” This obligation is subject to exceptions of quantitative restrictions and currency exchange arrangements as well as a few general exceptions to the GATT. The second main requirement for a free trade agreement relates to external trade with other WTO countries that are not members of the free trade agreement. In external trade, the “duties and other regulations of commerce maintained in each of the constituent territories ... shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area.” It is not the objective of this article to discuss this provision at length. However, it must be noted that the running theme of all these provisions is to attain free trade and fairness of treatment for foreign players in free trade.

If it is not clear whether an international competition policy agreement is needed in a forum such as the World Trade Organization (WTO), there is a stronger case for the introduction of a regional competition policy authority

¹⁷ Communiqué, Antitrust Summit of the Americas (20 October 1998), available at <http://www.ftc.gov/opa/1998/10/panama.shtm> (last visited Jun. 11, 2011).

¹⁸ C. Fred Bergsten, Op-Ed, *Competitive Approach to Free Trade*, *Peterson Institute for International Economics*, Financial Times, Dec. 4, 2002, available at <http://www.iie.com/publications/opeds/oped.cfm?ResearchID=490> (last visited Nov. 18, 2010).

¹⁹ World Trade Organization Secretariat, *REGIONALISM AND THE WORLD TRADING SYSTEM* 27 (Geneva, 1995).

²⁰ A free trade area differs from a customs union in that member countries of a free trade area continue to apply their own tariffs and commercial policies in external trade with non-members of the area. In a customs union, member countries have a common tariff and commercial policy toward the outside. Most of the analysis below focuses on free trade areas.

within regional integrating areas. In particular, in the case of deep forms of regional integration, such as customs unions and common markets, the need for a common approach to competition policy is stronger. The reason for this is that regional integration reinforces the arguments in favor of a common competition policy whereas many of the arguments against an international approach to competition lose their significance (or vanish) in the case of regionalism.

At this point it may be noted that competition policy aims to avoid not market power *per se*, but the abuse of a dominant position. The basic idea is that competition law should not penalize efficient firms which have established a dominant position in their market due to their better performance when compared with their competitors. The objective is rather to ensure potential access to the relevant market and to guarantee 'fair' competition.²¹ The contentious issues then are first to determine which behaviors constitute an 'abuse' of market power and how to promote competition without penalizing successful enterprises which would establish a dominant position through excellence. Considering the unison of both trade and competition policies, they can be looked into isolation, rather in relation to each other. The most significant development over the last 15 to 20 years in international antitrust is the way in which enforcement authorities in various countries cooperate and coordinate on a daily basis in investigating, occasionally challenging, and negotiating settlements involving transactions with an international dimension. Regional cooperation is unwarranted, but the point to make here is that such regional cooperation can play a very effective role in enforcing competition policies by sharing information, and giving recognition to trans-competition judgments. Such regional cooperation can be better put to use under some broad guidelines that need to be set forth, considering the overall trade policies. Competition policies should impede trade objectives or vice-versa.

IV. END OF COMPETITION WITHIN TRADE REGIMES

The economic crisis gripping the world has brought us under increasing protectionist pressures and has once again raised calls from some quarters for greater coherence between trade and competition policies. But concerns have always existed as to what extent such policies can complement each other and further the objectives of establishing a free and fair trading regime. The close relationships between trade, investment and competition policy have long been recognized. One of the intentions, when GATT was drafted in the late 1940s, was for rules on investment and competition policy to exist alongside those for

²¹ Diane P. Wood, *Competition and the Single Firm: Monopolization and Abuse of Dominant Positions, Competition Policy in a Global Economy* (paper presented at the symposium on Pacific Economic Cooperation Council, Taipei, Taiwan, 19 April 1995).

trade in goods.²² In July 2004, the General Council of the WTO decided that the interaction between trade and competition policy (in addition to investment, and transparency in government procurement) would no longer form part of the Work Programme set out in the Doha Ministerial Declaration and therefore that no work towards negotiations on any of these issues would take place within the WTO during the Doha Round.²³

The effort to include competition law in the WTO began to take shape in the mid-1990s under the leadership of the European Union.²⁴ Frederic Jenny, a well-known French economist and vice president of the French Competition Council who was tasked by the WTO with the responsibility for looking into this possibility, gathered support for such a move and became relatively confident that significant support existed.²⁵ Nevertheless, the effort to put competition law on the agenda failed, when both the United States and a large group of developing countries declined to support it.

At the 2001 WTO Ministerial Conference in Doha, Qatar, members put the competition question on the agenda, and defined a focus for future work for the WGTCP in the Doha Ministerial Declaration. They emphasized that the Working Group would 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.”²⁶ Further, they vehemently put forth the desire that “full account shall be taken of the needs of developing and least-developed country participants and appropriate flexibility provided to address them.”²⁷ At subsequent WTO meetings, however, members failed to reach a consensus on the content of possible rules, mostly due to the objections of developing countries. As mentioned previously, after the September 2003 Cancún

²² World Trade Organization, *Investment and Competition: What Role for the WTO?*, at http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey3_e.htm#investment (last visited Jun. 11, 2011).

²³ World Trade Organization, *Interaction between Trade and Competition Policy*, at http://www.wto.org/english/tratop_e/comp_e/comp_e.htm (last visited Jun. 11, 2011).

²⁴ David J. Gerber, *Competition Law and the WTO: Rethinking the Relationship*, 10 J. INT’L ECON. L. 707, 707 (2007).

²⁵ For Jenny’s view of these issues, see, e.g. Frederic Jenny, *Cartels and Collusion in Developing Countries: Lessons from Empirical Evidence*, 29 WORLD COMPETITION L. REV. 109 (2006). Rob Anderson, a WTO official with experience in the Canadian competition authority, also played an important role in this process.

²⁶ World Trade Organization, *Interaction between Trade and Competition Policy*, http://www.wto.org/english/tratop_e/comp_e/comp_e.htm (last visited Jun. 11, 2011).

²⁷ World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002), para. 25, available at http://www.wto.org/english/thewtoe/minist_e/min01_e/mindecl_e.htm#interaction (last visited Jun. 11, 2011).

Ministerial Conference ended in deadlock, the General Council of the WTO dropped competition policy from the Doha agenda in 2004.²⁸

Lack of confidence in the norms and procedures of the WTO was a central theme, where the resistant group doubted that the WTO would make decisions on the basis of adequate respect for that group's interests. Further, there was a fear that such inclusion will only benefit US, European and Japanese firms in getting access to the markets and raw materials. This concern was driven by past experience where the US had aggressively used antitrust for this purpose in the not too distant past (*e.g.* Japan in the early 1990s) and market access was a focus of much US and European energy in the WTO.²⁹

In the United States, there was fear that a competition law in the WTO might be directed primarily at large multinational firms, many of which are US-based. US government officials were not prepared to accept such a threat to US interests.³⁰ Developing countries also generally showed little confidence that a competition law regime in the WTO would be implemented in ways that took account the interest of a broad number of Member States.³¹

In effect, neither group had confidence that the WTO was likely to operate on the basis of a robust conception of community. There were also concerns that the proposed model would be dominated by the US model. It was difficult to form unanimity on the inclusion of competition policies under the WTO regime, where for developing countries, the US model remained suspect and there was uncertainty of an unbiased approach that it would adopt.³² The US concept of antitrust law (and increasingly also the EU's concept as well) seemed more likely to affect agreements among producers in developing countries than the unilateral conduct of multinationals and this seemed to many to represent an imbalance designed to favor the interests of developed country.³³

As discussed in Section I *supra*, competition law must serve 'trade' interests, so the pertinent question arises, whose trade interest? It is a general view

²⁸ After the Cancún Ministerial, WTO members came up with the so-called July package, in an effort to put the negotiations and the rest of the work program back on track. The text of the General Council's decision on the Doha Agenda work program (the "July package") was agreed on August 1, 2004. World Trade Organization, *Interaction between Trade and Competition Policy*, at http://www.wto.org/english/tratop_e/comp_e/comp_e.htm (last visited Jun. 11, 2011).

²⁹ Gerber, *supra* note 24, at 707.

³⁰ See, *e.g.*, Joel L. Klein, *Anticipating the Millennium: International Antitrust Enforcement at the End of the Twentieth Century*, Address presented at the Fordham Corporate Law Institute, 24th Annual Conference on International Law and Policy (Nov. 9, 2000).

³¹ For a recent discussion of the positions of developing countries in this debate, see Aditya Bhattacharjee, *The Case for a Multilateral Agreement on Competition Policy: A Developing Country Perspective*, 9 J. INT'L ECON. L. 293 (2006).

³² *Id.* at 316-23.

³³ See Gerber, *supra* note 24.

among the developing nations that if effected, competition law will serve as a tool of trade for only developed nations.

Therefore, in light of the above-stated concerns, that competition law and trade law must operate together for the objective of protecting the competitive process and establishing a liberal but fair market at a transnational level. Trade law deals with the constraints placed on global competition by governments, while competition law deals with the impediments created by private firms. They must operate in tandem.³⁴

There is concern that the decisionmaking process under the WTO will need to be modified in contrast to the current trade-based regime, because competition law involves standards of conduct and procedures that are intended to be the same for all participants and to apply equally to all.³⁵ In my view, this can be resolved if the decisionmaking and enforcement process is separated from the purview of WTO and is left for regional cooperation and agreement. In order to make such a project both possible and effective, it is important to identify the range of concepts in competition law and on that basis to develop a concept of competition law that is appropriate for inclusion in the WTO.³⁶ There is a possibility that even if Member States agree on the broader framework of a competition regime, they may not equally participate with the same unanimity for its implementation and enforcement. This can be successfully achieved only through international comity and cooperation, to include proposing sanctions under the auspices of the WTO. The enforcement of these sanctions can then take place on a regional basis.

CONCLUSION

Trade and competition policies run parallel with the converging objective of establishing free and fair markets. The WTO operates primarily as a forum for negotiating market access rights and is likely to require modification if it is to support an effective competition law regime.³⁷ Competition is the basic rule of the game in the economy. Nevertheless, if the outcome of competition is to be

³⁴ *Id.* at 25.

³⁵ Joseph Weiler discusses related issues of legitimacy with penetrating insight in Joseph H. H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Some Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 35 J. WORLD TRADE 191 (2001).

³⁶ For discussion of the range of differences among existing systems and the issues involved in comparing and relating them to each other, see David J. Gerber, *Comparative Antitrust Law*, in OXFORD HANDBOOK OF COMPARATIVE LAW 1193 (Mathias Reimann and Reinhold Zimmerman, eds, Oxford: Oxford UP, 2006); for further discussion of how competition laws can relate to each other in the context of globalization, see e.g., Ky P. Ewing, *COMPETITION RULES FOR THE 21ST CENTURY: PRINCIPLES FROM AMERICA'S EXPERIENCE* (The Hague: Kluwer Law International, 2003); for discussion of this view of the 'correctness' of US antitrust law, see David J. Gerber, *Competition*, in THE OXFORD HANDBOOK OF LEGAL STUDIES 510 (Oxford: Oxford UP, 2004).

³⁷ Gerber, *supra* note 24, at 707-724.

accepted by society at large, the process of competition itself must not only be free but also be fair. Fair competition must go in tandem with free competition. An unfair component of competition policy may be anathema to policymakers in mature market jurisdictions, especially Western jurisdictions, because such a concept can protect competitors from competition itself and application of this point of view has (in the developed world) no payoff except to the protected competitors.

In an illuminating essay presented at the Japan Fair Trade Commission's 50th Anniversary Competition Symposium in December 1997, Kyu-Uck Lee stated the case for a fairness component in competition law.

I believe that the abstract notion of fairness rests, *inter alia*, on equitable opportunities, impartial application of rules and redemption of past undue losses Fairness, then, does not imply absolute libertarianism but instead takes the form of socially redefined freedoms.

Viewed from this perspective, the polemic whether competition laws should aim only at enhancing economic efficiency rather than at promoting some social policy goals such as fairness may appear to be irrelevant. After all, efficiency is intrinsically not a value-free concept.³⁸

He further noted that in a developing economy where, incipiently, economic power is not fairly distributed, competition policy must play the dual role of raising the power, within reasonable bounds, of underprivileged economic agents to become viable participants in the process of competition on the one hand and of establishing the rules of fair and free competition on the other. In his opinion, if these two objectives are not met, unfettered competition will simply help a handful of privileged big firms to monopolize domestic markets that are usually protected through import restrictions.³⁹

³⁸ Kyu-Uck Lee, *A "Fairness" Interpretation of Competition Policy with Special Reference to Korea's Laws*, in THE SYMPOSIUM IN COMMEMORATION OF THE 50TH ANNIVERSARY OF THE FOUNDING OF THE FAIR TRADE COMMISSION IN JAPAN, COMPETITION POLICY FOR THE 21ST CENTURY 61 (Korean Free Trade Commission 1997).

³⁹ Mario Monti, *European Competition Policy for the 21st Century*, in INTERNATIONAL ANTITRUST LAW & POLICY, FORDHAM CORPORATE LAW 2000 257 (Barry Hawk, ed., Juris, 2001). Other competition commissioners have taken a more eclectic view of the basis for the open market principle. Thus, Commissioner Monti's predecessor, Karel Van Miert, argued that "the aims of the European Commission's competition policy are economic, political and social. The policy is concerned not only with promoting efficient production but also achieving the aims of the European treaties. ... To this must be added the need to safeguard a pluralistic democracy, which could not survive a strong concentration of economic power." *Frontier-Free Europe*, May 5, 1993 (quoted in Per Jebsen & Robert Stevens, *Assumptions, Goals, and Dominant Undertakings: The Regulation of Competition Under Article 86 of the European Union*, 64 ANTITRUST L. J. 443, 450-61 (1996).

Despite the practical importance of fairness in competition policy, however, it is all the more difficult to have a practical yet socially agreed-upon concept of fairness due to diverse concepts of fairness that may vary with geography and the polity of every nation. Competition authorities must bear this in mind when implementing competition laws. Similarly, the notion of competition itself differs in countries with different social and cultural traditions and conditions. Therefore, it is essential that competition authorities in the various countries be able to better understand each other's stance and policy environment in searching for the global rules of the economic game.⁴⁰ Nam-Kee Lee, Chairman of the Korea Fair Trade commission, has observed that "developing countries cannot avoid concerns about the competitiveness of domestic businesses. In this context, it would not be well advised to suggest that developing countries adopt the same level of competition policy as developed countries, when their markets are not as mature and businesses not as competitive."⁴¹

Fox argues whether we can ever create a reasonably seamless world competition system if we disagree on that most basic of questions, what is harm to competition?⁴² This discourse concludes with a note that neither trade nor competition policies can attain their desired goal if they are pursued in separate paradigms. Both trade policies and competition policies aim at creating free and fair markets.

In the future as in the past, the outcome will be determined not by theory but by the policies of the main players. Developing countries are now more important than ever but it is the actions of the US and the European Union that will be decisive. Hence the outlook is for a series of preferential pacts over the next few years that will generate "competitive liberalization" and produce a sweeping Doha agreement by the middle of 2007. That would bring the world considerably closer to the state of global free trade that would obliterate the distinction between the competing approaches and the endless debate about them.

The unison of their objective requires us to consider both trade and competition within the realm of WTO, so that any tension within the WTO be reconciled so that trade and commerce get better impetus.

⁴⁰ To many developing nations, restrictive business practices, now called anticompetitive practices, is harm to competition. See United Nations Conference on Trade and Development, Model Law on Competition, TD/RBP/CONF. 5/7 (UN 2000), available at <http://www.unctad.org/en/docs/tdrbpconf5d7.en.pdf> (last visited Jun. 11, 2011).

⁴¹ Nam-Kee Lee, *Korean Economic Development Policy Lessons — The Shift from Industrial to Competition Policy*, Keynote Speech at the Intergovernmental Group of Experts on Competition Law and Policy (Fourth Session) of UNCTAD, July 3, 2002, available at <http://ftc.go.kr/data/hwp/200207.doc> (last visited Jun. 11, 2011).

⁴² Eleanor M. Fox, *What Is Harm To Competition? Exclusionary Practices and Anticompetitive Effect*, 70 ANTITRUST L. J. 371 (2002).

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