

PART I
Institutions

Realising the Potential Synergies Between International Trade and Competition Policy: Carrying Forward the Vision of Frédéric Jenny

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Abstract

From May 1997 through the end of 2004, I served as lead officer in the Secretariat of the World Trade Organization (WTO) supporting the work of the Organization's Working Group on the Interaction between Trade and Competition Policy. The Working Group was ably chaired, throughout that period, by Professor Frédéric Jenny, following which it was formally suspended. In this chapter of Professor Jenny's liber amicorum (vol II), I survey the work done in the Working Group and its implications for current discussions and debates. I propose, as well, that

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a resumption of work in the Working Group could contribute usefully to the resolution of current concerns before the international trading community, including with respect to digital markets, industrial subsidies and the conduct of state-owned enterprises (SOEs). Whatever happens, the global community will be well served if it can follow Professor Jenny's approach to relevant issues during the original work of the WTO Working Group, in the course of which he was impeccably transparent, intellectually honest, patient, inspiring and thoughtfully engaged.

From May 1997 through the end of 2004, I had the honour to serve as lead officer in the Secretariat of the World Trade Organization (WTO) supporting the work of the WTO's Working Group on the Interaction between Trade and Competition Policy (the "WTO Working Group on Trade and Competition Policy" or the "Working Group"). The Working Group was chaired very ably, throughout that period, by Professor Frédéric Jenny. While I had already become acquainted with Fred during my previous work in the Canadian Competition Bureau, which included (for a period) representation of the Bureau in the OECD's competition policy work, in the course of the WTO's work on this subject Fred and I came to know each other much more closely. We shared joy, frustrations, disappointments and a lot of learning, pursuing what I came to think of as an amazing intellectual adventure: shepherding and supporting a global dialogue on the relationship of trade, competition policy and economic development. This experience influenced me profoundly, and I remain deeply grateful to Fred and to others involved for the shared learning and other experiences together.¹

The work of the WTO Working Group on Trade and Competition Policy has not, thus far, yielded formal results in the sense of new negotiated rules in the WTO.² The work was, in fact, officially placed on hold in August 2004, in the aftermath of the WTO's Cancún Ministerial Conference of 2003, at which no consensus could be found on "modalities" to initiate negotiations on this topic. It is not clear if or when the Working Group's work will be resumed, though an eventual resumption is certainly not precluded by the terms of the WTO General Council's decision on the matter³ and would be, in my view, appropriate and timely.⁴ In any

1 In addition to Fred, as key mentors and collaborators in this work, I would mention Eleanor Fox, Alberto Heimler, Peter Holmes, Bill Kovacic and Adrian Otten (my director in the WTO Secretariat during the time of the Working Group's work). The prominent international trade economist, Simon Evenett, also provided staunch support for the Working Group's work. See e.g., Julian L Clarke and Simon J Evenett, "A Multilateral Framework for Competition Policy?" in Simon J Evenett and State Secretariat of Economic Affairs (Switzerland), eds., *The Singapore Issues and the World Trading System: The Road to Cancun and Beyond* (June 2003), 77-168, preliminary text available at <www.alexandria.unisg.ch/19336/1/singaporeissues.pdf>.

2 See Part I, below.

3 The relevant decision, the General Council's decision of 1 August 2004, states that "no work towards negotiations on [competition policy or the separate but related issues of investment and transparency in government procurement] will take place within the WTO during the Doha Round" (WT/L/579, 2 August 2004). Clearly, this wording does not rule out a resumption of work in the Working Group subsequent to the Doha Round, which in the view of many observers has been moribund for years. It also, arguably, would not preclude a resumption of exploratory/educational work *not* aimed at negotiations, even before the formal conclusion of the Round.

4 See related discussion, below.

case, and as is well known, since the WTO's work in this area was put on hold, international cooperation in the field of competition policy has moved ahead very significantly in other important forums, including the International Competition Network (ICN), the OECD Competition Committee and the UNCTAD Inter-governmental Group of Experts on Competition Law and Policy. In this context, the long-run impact of the Working Group's work may not be self-evident.

My view would, nonetheless, be that the Working Group's work had a profound impact both on the understanding of competition policy globally and on the development of related institutions and legal instruments over time, at the national, regional and global levels. This is *not* to suggest that other international organisations or national bodies have followed views expressed in the WTO Working Group in a rote or unthinking fashion. Clearly, much valuable discussion has taken place since the days of the Working Group's original work, and important elaborations made on views expressed and ideas put forward at that time and subsequently. I suggest, merely, that clear lines can be drawn from debates and proposals put forward in the WTO Working Group in the years 1997–2003 to the chapters on competition policy that are increasingly included in regional trade agreements;⁵ to subsequent discussions and developments in the ICN and other relevant bodies;⁶ and to work and discussions in the WTO itself and in other international organisations that continue to this day.⁷

Moreover, I believe that, since the Working Group's work was placed on hold, issues at the interface of trade and competition policy have become, if anything, more salient. It is difficult to see how certain issues currently bedeviling the global economy, for example, the impact of state-owned enterprises and industrial subsidies on global trade flows, can be effectively addressed without harnessing the potential synergies of trade and competition policy with respect to these issues.⁸ Increasingly, as well, the relationship of competition policy to intellectual property (IP) has become a concern for international trade policymakers.⁹ Current proposals regarding these issues bear an important relationship to debates held and views expressed in the WTO Working Group in the years in which it was active.¹⁰

5 See François-Charles Laprévotte, Sven Frisch, and Burcu Can, "Competition Policy within the Context of Free Trade Agreements" (E15 initiative on Strengthening the Global Trade and Investment System for Sustainable Development, September 2015) <<http://e15initiative.org/wp-content/uploads/2015/07/E15-Competition-Laprevotte-Frisch-Can-FINAL.pdf>> and, for a complementary analysis based on WTO sources, Robert D Anderson and others, "Competition Policy, Trade and the Global Economy: An Overview of Existing WTO Elements, Commitments in Regional Trade Agreements, Some Current Challenges and Issues for Reflection" DAF/COMP/GF(2019)11 (OECD 2019) <[https://one.oecd.org/document/DAF/COMP/GF\(2019\)11/en/pdf](https://one.oecd.org/document/DAF/COMP/GF(2019)11/en/pdf)> [<<https://perma.cc/5T5N-JMZX>>].

6 See Anderson and others, "Competition Policy and the Global Economy" (n *), and references cited therein.

7 See Anderson and Müller (n *).

8 See also Anderson and others, "Competition Policy and the Global Economy" (n *) and references cited therein.

9 See, for comprehensive discussion and commentary, Robert D Anderson, Nuno Carvalho and Antony Taubman (eds), *Competition Policy and Intellectual Property Rights in Today's Global Economy* (to be published jointly by CUP, WIPO and the WTO in 2021).

10 Robert D Anderson, Anna Caroline Müller and Antony Taubman, "The WTO TRIPS Agreement as a platform for application of competition policy to the contemporary knowledge economy" in Anderson, Carvalho and Taubman (n 9).

In this chapter of Fred's *liber amicorum* (vol II), I survey these issues and developments. Part I sketches (in broad-brush terms) the intellectual and historical genesis of the Working Group's work. Part II recalls and reflects upon the work done by the Working Group in the period 1997 through 2003, identifying insights and themes that (in my view) remain relevant today. Part III looks at developments *subsequent* to the Working Group's work that have further affirmed and illuminated issues concerning the nexus of trade and competition policy, including the treatment of competition policy and state-owned enterprises in recent regional trade agreements. Part IV suggests a path forward to better harness the potential synergies between trade and competition policy, while respecting the primacy of competition agencies with respect to national enforcement policies and (conceivably) even eliciting their support! If such eventually unfolds, it will be, in my view, in significant part a testament to the long-run vision, tenacity and intellectual resourcefulness of Frédéric Jenny and the importance and continuing relevance of the ideas discussed in the Working Group.

I. The Intellectual and Historical Genesis of the Working Group's Work

Work at the interface of trade and competition policy has a considerable intellectual and historical pedigree. The deleterious effects of monopolies in international commerce (notably but not exclusively the British East India Company) were addressed extensively in Adam Smith's *The Wealth of Nations* and were a key underpinning of his case for the "system of natural liberty" (i.e. free trade and competitive markets) that he advocated.¹¹ Smith's analysis thus presciently drew attention to "the significance of international anti-competitive behaviour for trade and development and to the symbiotic role of private and public actors with regard to such practices" in a manner that resonates today,¹² for example, with respect to concerns regarding the role of state-owned enterprises (SOEs) in international trade.¹³

The founders of the post-war global trading system were likewise well aware of the interrelationships between international trade policy and competition in markets. Cordell Hull, US Secretary of State 1933–44 and an intellectual pioneer and godfather of reciprocal trade liberalisation and multilateralism, advocated tariff cuts in part to assist in the fight against the trusts and monopolies of the day.¹⁴ US President Franklin Delano Roosevelt himself corresponded with Hull on this point, writing that "cartel practices which restrict the free flow of goods in foreign commerce will have to be curbed".¹⁵

11 See Adam Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations* (first published 1776, OUP 1975).

12 See Robert D Anderson and Peter Holmes, "Competition Policy and the Future of the Multilateral Trading System" (2002) 5(2) J Intl Econ L 531 <<https://academic.oup.com/jiel/article/5/2/531/2193623?searchresult=1>>.

13 See related discussion, below.

14 See Robert B Zoellick, *America in the World: A History of US Diplomacy and Foreign Policy* (Hachette 2020), 219.

15 Letter from Franklin D Roosevelt to Cordell Hull on the elimination of cartels (6 September 1944) <www.presidency.ucsb.edu/documents/letter-the-elimination-cartels>.

Reflecting these and related sentiments, the Havana Charter of the International Trade Organization (ITO) that was championed by the US at the conclusion of World War II contained an entire chapter, Chapter V, on the subject of restrictive business practices, including a requirement for participating countries to address anticompetitive practices of an international nature. For better or worse, the chapter was subsequently left aside in light of opposition in the US Congress, when the proposal for the ITO was abandoned and the (more limited) General Agreement on Tariffs and Trade (the GATT) was adopted in its place.¹⁶

Likewise and relatedly, the role of competition policy was and remains central to the European project to create a single market and to ensure peace and prosperity in Europe in the aftermath of World War II. As observed by Anderson and Heimler:

Building on the ideas of seminal European figures such as Konrad Adenauer, Alcide de Gasperi, Hans Kelsen, Jean Monnet and Robert Schuman, the maintenance of undistorted competition was entrenched as a specific objective of the Treaty of Rome when it was adopted in 1957... Specific provisions regarding the prevention of anti-competitive practices that could undermine this objective (i.e. cartels and abuse of a dominant position) were included among the substantive provisions of the Treaty... [The] prominence given to competition and competition policy in the Treaty of Rome had as much to do with a desire to ensure peace through economic integration and intra-European trade as it had to do with the goals of economic efficiency and consumer welfare.¹⁷

In the 1980s, the role of competition policy in ensuring that the benefits of international trade and trade liberalisation are not undermined by anticompetitive practices of business enterprises was separately affirmed in the United Nations “Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices” (the UN Set).¹⁸ The UN Set is sometimes overlooked in developed jurisdictions but, in fact, has been an important influence in the adoption of competition policies by developing countries and is an important benchmark in the development of international policy in this area.¹⁹

None of the above historical references is intended to suggest that any particular approach to the interface of trade and competition policy – particularly the one

16 Anderson and Holmes (n 12); see, for rich and illuminating historical detail, Douglas A Irvin, Petros C Mavroidis and Alan O Sykes, *The Genesis of the GATT* (Cambridge 2008).

17 Robert D Anderson and Albert Heimler, “What has Competition Done for Europe? An Inter-Disciplinary Answer” (2007) 4 *Aussenwirtschaft* (Swiss Review of International Economic Relations) 62, pre-publication text <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1081563>, 419; David J Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (OUP 1998).

18 See UNCTAD, “The United Nations Set of Principles and Rules on Competition” TD/RBP/CONF/10/Rev.2 (2000) <<https://unctad.org/system/files/official-document/trdrbpconf10r2.en.pdf>>.

19 See, for related discussion, Hugh M Hollman and William E Kovacic, “The International Competition Network: Its Past, Current and Future Role” (2011) 20 *Minn J Intl L* 274.

taken by the Working Group – was or is inevitable or “right”. Rather, it is to say that the relationship is an important and multidimensional one that has figured in policy initiatives and debates at least from the inception of the modern international trading system. Certainly, delegates to the WTO’s First Ministerial Conference, held in Singapore in December 1996, were mindful of this history when they established the Working Group and gave it its initial mandate,²⁰ as were Fred and I throughout the course of the work. In retrospect, it implied both that the issues involved were consequential and that they would not be easy to resolve.

II. The Work of the WTO Working Group on Trade and Competition Policy: an Apparent Failure and (in my Submission) a Long-Term Success²¹

From 1997 through 2003, the WTO Working Group on Trade and Competition Policy engaged in a sweeping study of the relationship between these two policy areas and their implications for development and global prosperity. An extensive debate was also held on proposals to develop a “multilateral framework on competition policy”.²² It was accompanied by an intensive worldwide programme of technical assistance, led by the WTO Secretariat but with the enthusiastic participation of Professor Jenny and other eminent persons, covering not only technical aspects of competition policy but also, very much, the relationship of such policy to economic development, trade and poverty reduction.²³

The work on trade and competition policy in the WTO in the period 1997–2003 was not without elements of controversy. Whereas a major focus of the early work of the Working Group was on how sound national competition policies (as implemented by established national competition agencies) could promote development²⁴ (and this was certainly as Fred and I had hoped), some representatives

20 See WTO, Singapore Ministerial Declaration WT/MIN(96)/DEC/18 (December 1996) <www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm#investment_competition>, [20].

21 This part of the chapter draws upon material published in Robert D Anderson, “Making law in ‘new’ WTO subject-areas” (n *), 275–290, and in Robert D Anderson and Frédéric Jenny, “Competition Policy, Economic Development and the Role of a Possible Multilateral Framework on Competition Policy: Insights from the WTO Working Group on Trade and Competition Policy” in Erlinda Medalla (ed), *Competition Policy in East Asia* (Routledge 2005), chapter 4.

22 See related discussion, *infra*.

23 Together and separately, Fred and I travelled to multiple cities in Central, East and Southeast Asia; English and French-speaking Africa; Eastern Europe; Latin America and the Middle East to present workshops, seminars and regional forums on topics concerning the relationship of trade, competition policy and development with other colleagues. The OECD and UNCTAD Secretariats, in addition to prominent academics and a good number of officials from the national competition agencies of developed and developing countries, contributed importantly to this work. See, for pertinent details, WTO, “Technical Assistance in regard to Trade and Competition Policy” <www.wto.org/english/tratop_e/comp_e/ta_e.htm>.

24 WTO, “Report of the Working Group on the Interaction Between Trade and Competition Policy to the General Council” WT/WGTCP/2 (1998) <www.wto.org/english/tratop_e/comp_e/wgtcp_docs_e.htm>. See, for related analysis and commentary, Robert D Anderson and Anna Caroline Müller, “Competition Policy and Poverty Reduction: A Holistic Approach” (WTO Staff Working Paper ERS-2013-02, 20

of some non-governmental organisations (NGOs) saw this as part of an effort to “kick away the ladder” by which developing countries would emerge from poverty.²⁵ Equally, in the developed world, prominent antitrust enforcers were wary of a feared effort to subordinate the principles of competition policy to market access imperatives²⁶ and/or to impose an unwanted rigidity and uniformity in the application of such policy (the notorious, if, arguably, imaginary, “one size fits all” approach against which Professor Daniel Tarullo inveighed in a 2000 article in the *American Journal of International Law*).²⁷ Certainly, no-one active in the Working Group’s work supported such an approach; Fred and I would have been among the first to disavow it. In the run-up to the 2004 Cancún Ministerial, an article in *Foreign Affairs* warned that WTO rules on competition policy “could be administered through a supranational agency”.²⁸ This was despite the fact that such a possibility figured nowhere in any of the proposals that were put forward in the WTO and was explicitly disavowed by the proponents of WTO negotiations on numerous occasions!²⁹

Despite such misunderstandings, the Working Group’s work, particularly in the years prior to the 2001 Doha Ministerial Conference, was in most respects *not* controversial and well within the mainstream of competition policy thinking. This is unsurprising as the dominant voices in the Group were, especially during that period, those of the EU and US competition and trade authorities. Their very extensive and well-prepared inputs to the discussion were reinforced by those of other delegations and the OECD Secretariat (adroitly facilitated by Fred in his dual capacity as chair of both the Working Group and the OECD Competition Committee), the UNCTAD Secretariat and the WTO Secretariat itself. Reflecting these inputs, much of the Working Group’s work particularly until the end of 2001 was of an analytical rather than a normative nature and stressed such non-controversial (to competition enforcers and advocates) themes as:

- The ability of both private anticompetitive practices and state measures to limit competition and thereby harm consumers and (potentially) impede development;

February 2013); see also International Trade Centre (R. Anderson, F. Jenny and A. Müller, principal authors), *Combating Anti-Competitive Practices* (ITC 2012) <www.intracen.org/layouts/three-column.aspx?Pageid=45836&id=62357>; and Chiedu Osakwe, “Poverty Reduction and Development: The Interaction of Trade, Macroeconomic and Regulatory Policies” (10th Joseph Mubiru Memorial Lecture, 2001).

25 See Ha-Joon Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective* (Anthem Press, 1st edn 2002).

26 See, for the classic statement, Joel Klein, “A Note of Caution with Respect to WTO Agenda on Competition Policy” (remarks to the Royal Institute of International Affairs, Chatham House, November 1996).

27 Daniel K. Tarullo, “Norms and Institutions in Global Competition Policy” (2000) 94(3) *AJIL* 478. See also A. Douglas Melamed, “International antitrust in an age of international deregulation” (1997) *Geo Mason L Rev.*

28 See David S. Evans “The new trustbusters” (2002) 81(1) *Foreign Affairs* 1.

29 See also Anderson and Jenny (n 21).

- The particular harm caused by cartels in addition to abuses of a dominant position and anticompetitive mergers, and the cross-border effects that such practices can have;
- The usefulness of competition advocacy, particularly in relation to regulatory barriers to competition;
- The importance of a case-by-case approach to competition issues involving IP rights; and
- The transcendent importance of capacity-building and the value of both formal and informal inter-agency cooperation mechanisms.³⁰

The Working Group also found time to consider (more controversially but surely not without basis) the potential anticompetitive effects of trade remedy laws.³¹ Later, the importance of transparency and of procedural fairness (“due process”) in competition law enforcement were also stressed,³² in a manner prefiguring subsequent work in the ICN, the OECD and other forums.

The foregoing is not to suggest that other voices and perspectives did not come into the debate or that all perspectives were equally well informed. Surely, though, this was to be expected in what was, very much, intended as a cross-disciplinary learning exercise bringing together competition and trade specialists, and engaging countries at diverse stages of development. It is also true that positions in the Working Group became more hardened with the direction given at the Doha Ministerial Conference at the end of 2001 to develop “modalities” for expected negotiations, with the EU and other supporters (broadly including Canada, Japan, Switzerland, the Republic of Korea and Australia) favouring the launch of negotiations on a “multilateral framework” (platform for cooperation with modest minimum standards); the US sceptical though positively engaged; and developing countries, loosely and at various times led by India, Brazil, South Africa and Mexico, concerned at potentially making commitments beyond their capacities to fulfil.

Through all this, Fred performed superbly as chair, maintaining positive relations and good communication with all delegations in the Working Group, avoiding any perception of bias, doing what he could to temper the discussion, and personally contributing directly and formidably to the ongoing learning process, for example in the multiple symposia and regional workshops we held for the Group on relevant issues. As evidence of this, he was enthusiastically re-elected

30 See, in particular, WTO, “Report of the Working Group on the Interaction Between Trade and Competition Policy to the General Council” WT/WGTCP/2 (1998); and WTO, “Report of the Working Group on the Interaction Between Trade and Competition Policy to the General Council” WT/WGTCP/6 (2002).

31 See WTO, “Report of the Working Group on the Interaction Between Trade and Competition Policy to the General Council” WT/WGTCP/2 (1998).

32 See WTO, “Report of the Working Group on the Interaction Between Trade and Competition Policy to the General Council” WT/WGTCP/6 (2002).

as chair, without opposition, on multiple occasions throughout the period of the Working Group's work. This was an exceptional achievement, very much at variance with the then-prevailing practice in other WTO bodies where most chair-ships were rotated from year to year.

Looked at in a broad perspective, the work done by the Working Group had, I would argue, a lasting impact. At the national level, the period from the commencement of the Working Group's work in July 1997 to the present has witnessed a *huge* increase in the number of countries in the world having functioning competition law regimes, from perhaps 40 or so such countries before the work began to more than 135 now.³³ The BRICS economies, in particular, have all now implemented such regimes, notwithstanding that particular enforcement decisions and policies of their responsible agencies continue to be criticised by the Western antitrust and scholarly community (arguably showing the need for renewed discussion to create mutual understanding and explore relevant concerns!).³⁴

While these developments were undoubtedly the result of diverse forces and efforts at national and international levels, it would be hard to argue that they had no relation to the WTO's work, which was avidly followed by a broad cross-section of WTO members. Through the first three years, the predominant theme of the Working Group's work was, very simply, the utility and importance of national competition laws in curtailing anticompetitive practices, and thereby in promoting development. The US International Competition Policy Advisory Committee, a body that signalled clear reservations about the WTO as the principal forum for international cooperation on competition policy at the time, nonetheless acknowledged in its report issued at the end of 2000 that the "dialogue and hard work undertaken by the Working Group" had already made an important contribution to global understanding and awareness of relevant issues.³⁵

At the international level, two important related developments should be noted. First, concurrent with and particularly subsequent to the Working Group's work, competition policy provisions have been extensively integrated into bilateral and regional trade agreements (RTAs). These include not only numerous chapters of such agreements dealing with the enactment/maintenance of competition laws and cooperation in competition law enforcement as such, but also extensive provisions relating to other dimensions of competition policy such as the treatment of state monopolies and other SOEs. In many respects, these chapters in regional and bilateral trade agreements draw upon and carry forward ideas

33 See Anu Bradford and others, "Competition Law Gone Global: Introducing the Comparative Competition Law and Enforcement Datasets" (2018) 16 JELS 411.

34 See, for useful discussion of relevant themes, Tembinkosi Bonakele, Eleanor Fox and Liberty Mncube, *Competition Policy for the New Era: Insights from the BRICS Countries* (OUP 2017).

35 US, International Competition Policy Advisory Committee, Final Report (2000), 262–263.

and proposals that were first articulated, in a systematic fashion, in the WTO Working Group.³⁶

Second, the work undertaken by the Working Group, in important ways, set the stage for the subsequent work of the ICN, a body that was established in 2001 in order to “advocate the adoption of superior standards and procedures in competition policy around the world, formulate proposals for procedural and substantive convergence, and seek to facilitate effective international cooperation to the benefit of member agencies, consumers and economies worldwide”.³⁷ Although the establishment of the ICN was clearly intended, in part, to provide an alternative to the WTO (and other established international organisations) as the main venue for fostering cooperation among national competition agencies, it also explicitly sought to build, consciously and constructively, on the work undertaken in those organisations and bodies, including the Working Group.³⁸ Indeed, the subsequent work of the ICN had important elements in common with the ideas that had received the greatest attention in the Working Group, namely the significance of well-functioning competitive markets for development and prosperity; the importance of a strong commitment to non-discrimination, transparency and procedural fairness in the work of competition agencies; the desirability of enhanced cooperation among such agencies in their enforcement and policy advocacy work; and the clear threat posed to global prosperity by international cartels and similar arrangements.³⁹

Hence, while some see the ICN as having effectively pre-empted possible related developments in the WTO, I see it as having provided a forum for carrying forward, powerfully and constructively, the core concerns articulated by the leading contributors to the work of the Working Group.⁴⁰ I would argue, as well, that the work done in the ICN could now facilitate a *resumption* of work in the WTO, as a means of carrying forward the ICN’s concerns and objectives in a forum in which they can be translated into binding international disciplines (as opposed to mere soft-law commitments). In any event, all was and is far from being lost: the main concerns articulated in the Working Group have not been forgotten and are being carried forward effectively, in diverse forums and contexts.⁴¹

To draw the discussion together, the core elements that were ultimately proposed for inclusion in the mooted “multilateral framework on competition policy” in

36 See also Part III, below.

37 Quotation taken from ICN website <www.internationalcompetitionnetwork.org>.

38 Joel Klein, “Time for a Global Competition Initiative?” (10th Anniversary Conference on EC Merger Control, 14 September 2000). See, for related discussion, Hollman and Kovacic (n 19).

39 See, for related discussion, Hollman and Kovacic (n 19).

40 See, for related perspectives, Hollman and Kovacic (n 19).

41 See Anderson and Müller (n *).

the Working Group's work leading up to the Cancún Ministerial Conference were the following:

- Commitments regarding the application of the WTO core principles of non-discrimination, transparency and procedural fairness in the field of competition law and policy;
- A commitment by all WTO members to taking action to prevent/deter hard-core cartels;
- The encouragement of cooperation among competition authorities, on a voluntary basis and subject to modalities to be worked out by the agencies themselves; and
- A broad international commitment to strengthened capacity-building in the competition policy field, embracing the role of UNCTAD, the OECD and other organisations active in the field including, very much, the competition agencies of developed jurisdictions.⁴²

Thus, without reaching a formal consensus position, the leading currents in the Working Group broadly favoured *not* a narrow focus on market access issues or (still less) “harmonisation” of competition rules (which never came up) but a broadly-based effort to recognise, support and strengthen the role of competition policy in the global economy that would support but not dictate inter-agency cooperation and institution-building, in ways consistent with emerging global practice.⁴³ The focus on hard-core cartels never meant that the WTO itself would investigate or prosecute such arrangements; it meant that the member governments of the WTO would collectively commit themselves to work toward their effective suppression – hardly a step at variance with modern competition policy thinking.⁴⁴

Following the discussion in the Working Group, the first element noted above (the principles of non-discrimination, transparency and procedural fairness) subsequently became a pillar of the work of the ICN and OECD. Recently, this culminated in the “Multilateral Framework on Procedures in Competition Law Investigation and Enforcement” which was championed by then-US Assistant Attorney-General for Antitrust Makan Delrahim, and came into effect on 15 May 2019⁴⁵ – an important achievement entirely congruent with the discussions held in the Working Group. The Working Group's concern with the impact of

42 See, for detailed discussion of these possible elements, “Report of the Working Group on the Interaction of Trade and Competition Policy to the General Council” WT/WGTCP/7 (17 July 2003).

43 See, for related discussion, Anderson and Jenny (n 21) and, for a thoughtful related exposition, Eleanor Fox, “International Antitrust and the Doha Dome” (2002–2003) 43 Va J Int'l L 911.

44 See, for related discussions, Anderson and Jenny (n 21) and Harry M First, “The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law” (2001) 68 Antitrust LJ 711.

45 See US Dept of Justice, “New Multilateral Framework on Procedures Approved by the International Competition Network” Press Release (5 April 2019) <www.justice.gov/opa/pr/new-multilateral-framework-procedures-approved-international-competition-network> [<https://perma.cc/LF3V-T3GX>]. Asst Atty Gen Makan Delrahim Delivers Remarks on Global Antitrust Enforcement at the Council on Foreign Relations (1 June 2018) <www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-global-antitrust-enforcement>.

hard-core cartels on development and shared prosperity has likewise been widely affirmed and validated, for example, in subsequent work of the OECD, ICN and national competition authorities (such arrangements are typically and rightly viewed by national competition authorities as being their highest priority for enforcement action).⁴⁶ The promotion of cooperation between national competition authorities and support for related capacity-building are similarly now mainstream themes of national and international work in this area.⁴⁷

III. Subsequent Developments Manifesting the Continuing Relevance of Issues Discussed in the Working Group, and of Newer Issues at the Interface of Trade and Competition Policy⁴⁸

Since the cessation of work in the Working Group in 2004, very significant contextual developments have occurred that, I suggest, reinforce and manifest further the continuing relevance of ideas and proposals that were first discussed systematically in the Working Group. Versions of these ideas and developments seem likely to play a central role in the eventual further development of the international trading system in a post – COVID-19 and post-Trumpian world.⁴⁹

Relevant developments include the following:

- The (already-noted) widespread adoption of competition policy disciplines in RTAs, providing important confirmation of the general relevance of competition policy standards as a complement to trade liberalisation and suggesting possible approaches to particular issues at the multilateral level. While space constraints preclude an in-depth discussion of related developments, it is worth noting that:
 - o Out of the 296 RTAs notified to the WTO and (to date) available in the WTO’s Regional Trade Agreements Information System,⁵⁰ around 80 % contain either dedicated chapters or provisions on competition policy (55 %) or less detailed provisions recognising the importance of competition policy for trade (21 %).⁵¹

46 See, to cite just the most obvious reference, OECD, “Recommendation concerning Effective Action against Hard Core Cartels” OECD/LEGAL/0452 (2019, superseding a previous 1998 Recommendation) <<https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0452>>.

47 Hollman and Kovacic (n 19).

48 See also Anderson and others, “Competition Policy and the Global Economy” (n *); and Anderson and Müller (n *).

49 Anderson and others, “Competition Policy and the Global Economy” (n *).

50 See the WTO Regional Trade Agreements Information System <<http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx>>.

51 See, for details and elaboration, Anderson and others “Competition Policy, Trade and the Global Economy” (n 5). Lapr vete, Frisch and Can (n 5), provide a very useful and broadly parallel analysis.

- o The avowed purposes of competition policy chapters in RTAs have much in common with concerns articulated in the original work of the Working Group. They include the following: (i) ensuring that the potential gains from trade liberalisation are not undermined by anti-competitive practices; (ii) promoting economic efficiency, development and prosperity; and (iii) ensuring that competition law, itself, is not applied in ways that adversely affect business confidence and/or favour domestic as compared with foreign enterprises. For this purpose, most RTAs that contain dedicated competition chapters include horizontal provisions on transparency, non-discrimination and procedural fairness – a direct echo of the Working Group’s work.⁵²
- The abovementioned very significant progress that has occurred in the global competition community, with explicit support from the international business community, regarding the development of standards to ensure procedural fairness in the enforcement of competition law internationally. As already mentioned, a key development here is the recently-adopted “Multilateral Framework on Procedures in Competition Law Investigation and Enforcement”.⁵³ While the new framework builds importantly on elements contained in the existing network of cooperation agreements between competition agencies and related work, e.g. in the OECD, Delrahim himself cites a third source for relevant ideas and concepts: the commitments regarding transparency, non-discrimination and procedural fairness that are contained in competition chapters in many free trade agreements.⁵⁴ These, as we have noted, closely parallel elements of the original proposals for a multilateral framework on competition policy in the Working Group.

Beyond the above developments, in the past couple of decades a further set of issues has arisen in international policy debates that directly implicate the interface of trade and competition policy and warrant, I suggest, reflection and discussion in an appropriate international body such as the Working Group. These include, at a minimum, the following:

- The treatment of SOEs and the concept of competitive neutrality. As noted by Anderson and others:

SOEs comprise some of the world’s largest multinational companies, participating in industries including finance, public utilities, manufacturing, mining, and petroleum... [They] often compete with private firms for resources, ideas, and consumers. SOEs may also enjoy

52 Anderson and others “Competition Policy, Trade and the Global Economy” (n 5).

53 See US Dept of Justice (n 45).

54 *ibid.*

government-granted advantages including direct subsidies, state-backed guarantees, preferential regulatory treatment, and antitrust or bankruptcy exemptions, all of which can provide a competitive edge.⁵⁵

Indeed, concerns regarding the role of SOEs are at the centre of current tensions regarding China's trade and commercial relations with Western economies.⁵⁶ Possible ways forward are embodied in recent RTAs⁵⁷ and in the work of other international organisations such as the OECD.⁵⁸ There is, moreover, a clear link to elements of the existing WTO agreements.⁵⁹ As such, the issue would seem to be ripe for discussion in a body such as the Working Group.

- The relationship between competition policy and industrial policy more generally. As Fox and Healey suggest, while specific parameters require discussion and reflection, competition law has an important role to play in addressing state measures that significantly and needlessly distort competition. These include state measures that facilitate the organisation of private cartels and state-granted monopoly or exclusive rights that impede entry to otherwise competitive markets.⁶⁰ Moreover, in the aftermath of the COVID-19 pandemic and related economic downturn, increasing tensions seem likely between the requirements of open and free markets and efforts to promote “onshoring” and “decoupling”.⁶¹
- The impact on competition of governmental barriers to participation in public procurement markets, and the complementary roles of trade liberalisation and competition law enforcement in this sector. This issue is a dynamic and vital one in the WTO.⁶² The issues manifest important confluence between the interests of export-oriented businesses (seeking access to foreign procurement markets) and those of competition

55 Anderson and others, “Competition Policy and the Global Economy” (n *), 134.

56 Rory MacFarquhar, “State-Owned Enterprises and U.S.-China Relations” (lecture, Peterson Institute for International Economics, 7 February 2017) <<https://piie.com/system/files/documents/macfarquhar20170207ppt.pdf>> [<<https://perma.cc/WLQ4-3P6W>>]; William E Kovacic, “Competition Policy and State-Owned Enterprises in China” (2017) 16 *World Trade Rev* 693.

57 The CPTPP and the USMCA, in particular, incorporate significant disciplines on SOEs and designated monopolies (even beyond the level of WTO agreements). See, for relevant discussion, Anderson and others, above note 4.

58 Antonio Capobianco & Hans Christiansen, *Competitive Neutrality and State-Owned Enterprises: Challenges and Policy Options* 7 (OECD Corporate Governance Working Paper No 1, 2011); and Przemysław Kowalski et al., *State-Owned Enterprises: Trade Effects and Policy Implications* 4 (OECD Trade Policy Paper No 147, 2013).

59 Anderson and others, “Competition Policy, Trade and the Global Economy” (n 5).

60 Eleanor M Fox and Deborah Healey, “When the State Harms Competition – The Role for Competition Law” (2014) 79(3) *Antitrust LJ* 769.

61 Robert D Anderson, William E Kovacic and Antonella Salgueiro, “Competition policy in relation to public procurement: an essential element of the policy framework for addressing COVID 19 and its aftermath” in Sue Arrowsmith and others (eds), *Public Procurement in (a) Crisis: global lessons from the COVID-19 pandemic* (Hart 2021 (forthcoming)).

62 Robert D Anderson and Nadezdha Sporysheva, “The Revised WTO Agreement on Government Procurement: Evolving Global Footprint, Economic Impact and Policy Significance” (2019) *Public Procurement L Rev*.

authorities (who know that closed markets both intrinsically limit competition and facilitate bid-rigging).⁶³

- The potential significance of competition policy – related disciplines such as those contained in the WTO Reference Paper on Basic Telecommunications for other infrastructure sectors, and for trade in services more generally. The Reference Paper is, perhaps, the area of the WTO agreements in which competition policy concepts have been used most explicitly and which goes the furthest in committing members to action against anticompetitive practices. Yet, other infrastructure sectors (for example, electrical energy) embody, or arguably embody, related structural problems.⁶⁴

The usefulness of the WTO Telecoms Reference Paper was evident in the *Mexico: Telecoms (Telmex)* case, brought against Mexico by the United States. The panel in this case (chaired, in my view, adroitly and fortuitously, by Professor Ernst-Ulrich Petersmann) found that several features of Mexico’s framework for regulation of international telecommunications services were in violation of Mexico’s commitments under the WTO’s 1997 Reference Paper on Regulatory Principles in Basic Telecom services, including a core requirement to maintain appropriate measures to prevent anticompetitive practices by firms that are major telecom suppliers (Article 1.1 of the Reference Paper).⁶⁵ It is interesting, moreover, that rather than appealing the case to the WTO’s appellate body, Mexico chose to *accept* the panel’s ruling. In my view, and that of other observers, it did so precisely because this was in the best interest of Mexico’s citizens and consumers.⁶⁶

Regarding the systemic importance of the panel decision in *Telmex*, my view is that of Eleanor Fox, who concludes that:

The Mexican telecom case illuminates why competition rules must extend cross-border and why hybrid trade-and-competition (public/private) restraints must be treated as a unified whole, if we are to realize the good potential of globalisation.

...

The GATS Annex with its Reference Paper is the first instrument providing a unified vision for disciplining linked public and private restraints. The Panel Report’s interpretation of the antitrust obligation gives life to the discipline. A positive reading of the

63 See Robert D Anderson, William E Kovacic and Anna Caroline Müller, “Promoting Competition and Deterring Corruption in Public Procurement Markets: Synergies with Trade Liberalization” (2017) 26 Public Procurement L Rev 77. A preliminary version is available at: <<http://e15initiative.org/publications/promoting-competition-and-deterring-corruption-in-public-procurement-markets-synergies-with-trade-liberalisation>>.

64 See, for thoughtful discussion, Gary Hufbauer and Sherry Stephenson, “Services Trade: Past Liberalization and Future Challenges” (2007) 10(3) J Intl Econ L 605.

65 I was honored to serve as one of several WTO Secretariat advisers to the panel in this case.

66 See, e.g., Hufbauer and Stephenson (n 64).

antitrust clause is a step forward on intertwined issues of trade and competition.⁶⁷

- The interface of competition policy and IP is arguably a further area of competition law and policy that warrants renewed discussion at the multilateral level in order to better ensure coherence and balance between these two policy areas in international commerce. The TRIPS Agreement specifically invokes concerns about the impact of anticompetitive licensing practices and provides for the application, in this context, of competition rules. Still, the relevant provisions offer only very limited guidance on questions such as: (i) the set of anticompetitive practices that attract particular scrutiny; (ii) the standards under which such practices are to be evaluated (*per se* or *rule of reason*); and (iii) the remedies that may be adopted in particular cases, beyond making clear that any measures adopted must be consistent with other relevant provisions of the Agreement.⁶⁸

As the foregoing “headline” developments have occurred, other evidence has accumulated more quietly of the significance of national competition policies for international trade policy. For example, WTO Trade Policy Reviews – the reviews that the WTO carries out, according to an established cycle, of the trade policies of each of its members, often contain detailed information/commentary on developments in the field of national competition law and policy. That this is an accepted feature of such reviews manifests the general (and very appropriate) recognition of the significance of competition policy for international trade and investment flows.⁶⁹ Increasingly, competition policy also figures in WTO accession commitments.⁷⁰ The significance of competition policy for government procurement has also received extensive attention in the context of the WTO’s technical assistance work on the latter subject.⁷¹

IV. Where Do We Go from Here?

In my view, the time has come to resume and reinvigorate the work of the WTO Working Group on Trade and Competition Policy. The issues and developments cited in the preceding section well merit discussion in forums that bring together representatives of both the trade and competition policy worlds. Indeed, as

67 Eleanor Fox, “The WTO’s First Antitrust Case – Mexican Telecom: A Sleeping Victory for Trade and Competition” (2006) 9(2) J Intl Econ L 271.

68 Anderson, Carvalho and Taubman (eds) (n 9).

69 Anderson and others, “Competition Policy and the Global Economy” (n *).

70 Robert D Anderson, Anna Caroline Müller and Nivedita Sen, “Competition policy in WTO accessions: filling in the blanks in the international trading system” in Alexei Kireyev and Chiedu Osakwe, *Trade Multilateralism in the Twenty-First Century: Building the Upper Floors of the Trading System Through WTO Accessions* (CUP and WTO 2018), 299–319.

71 See Anderson and Sporysheva (n 62).

already suggested, key issues at the centre of current global trade conflicts – including the roles of SOE and industrial subsidies, and the interface of competition policy and IP standards – are unlikely to be resolved without the joint deliberations of the two communities. In my submission, this is an opportunity for competition authorities, institutes and thinkers to *expand* the scope of their influence, and not something they should fear. If competition authorities act proactively in these discussions, they will to a large extent control their outcome, as they did in the early work of the Working Group.

As an initial new mandate for a revived Working Group, it could be tasked to review and catalogue developments regarding competition policy and related issues (e.g. state monopolies and SOEs) in RTAs, with the goal of identifying approaches that could be relevant in the WTO.

Further to the above, there is no reason why other interested international organisations, including the ICN, OECD and UNCTAD, could not be given specific, dedicated roles in the development of relevant standards. This would be broadly comparable to the roles that other organisations and policy development exercises have had in relation to the negotiation of other important WTO agreements. To cite just two pertinent examples, work in the WTO in the area of trade-related IP rights has been extensively cross-fertilised by the work of the World Intellectual Property Organization (WIPO). Moreover, the TRIPS Agreement builds very deliberately upon and integrates elements of pre-existing international treaties including the Paris Convention for the Protection of Industrial Property, the Berne Convention for the Protection of Literary and Artistic Works, and others. Likewise, the negotiation of the WTO Agreement on Government Procurement drew, very importantly, on preparatory work done in the OECD.⁷² These examples remind us that international organisations can, when their members support and require this, work together in a complementary and synergistic fashion.

To be sure, meaningful work on these issues at the multilateral level will be possible only when the political environment allows this, and would require an affirmative decision or decisions on the part of the WTO's member governments. There is no suggestion here that this process will be easy. The WTO as an institution is currently in a weakened state. In due course, though, the future prosperity of the world will undoubtedly require both a reinvigoration of the WTO and a broadening of its remit to address new sets of issues.⁷³

72 See Annet Blank and Gabrielle Marceau, “The History of the Government Procurement Negotiations Since 1945” (1996) 4 *Public Procurement L Rev* 77, 79; and Robert D Anderson and Sue Arrowsmith, “The WTO Regime on Government Procurement: Past, Present and Future” in Sue Arrowsmith and Robert D Anderson (eds), *The WTO Regime on Government Procurement: Challenge and Reform* (CUP and WTO 2011), 3–58.

73 See Simon Evenett and Richard Baldwin, “Revitalising Multilateralism: Pragmatic Ideas for the New WTO Director-General” (*VoxEU*, 10 November 2020) <<https://voxeu.org/content/revitalising-multilateralism-pragmatic-ideas-new-wto-director-general>>; David Laborde and others, “Reinvigorating the WTO as a Negotiating Forum” (*G20 Insights*, 7 May 2019) <www.g20-insights.org/policy_briefs/reinvigorating-the-wto-as-a-negotiating-forum/>; and Steve Charnovitz, “Solving the Challenges to World Trade” (2020). GW

Whatever happens, the global community will be well served if it can follow Professor Frédéric Jenny's example and approach to these issues, in the course of the original work of the Working Group. In that work, Fred was always impeccably transparent, intellectually honest, patient and thoughtfully engaged. He entertained in good faith all related concerns, and never pushed for a premature conclusion of the discussion. Fred literally went to the ends of the earth to explain what we were doing and to make the case for the utility of sound competition policies (as developed and respected in the competition community) for development, shared prosperity and good governance. If we go forward in that spirit, we will be very well served.

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