

**BEFORE THE
UNITED STATES TRADE REPRESENTATIVE
WASHINGTON, D.C.**

**COMMENTS AND RECOMMENDATIONS
ON THE
COMPETITION ELEMENTS OF THE DOHA DECLARATION**

**AMERICAN BAR ASSOCIATION
SECTION OF ANTITRUST LAW
AND
SECTION OF INTERNATIONAL LAW AND PRACTICE**

I. INTRODUCTION AND SUMMARY

The American Bar Association Section of Antitrust Law and the Section of International Law and Practice (“SAL” and “SILP”, respectively; collectively “the Sections”) hereby submit these Comments and Recommendations on the competition elements of the Doha Declaration.¹ These submissions are intended to assist USTR in formulating an approach to discussion of competition issues both within the WTO Working Group on the Interaction Between Trade and Competition Policy (“WTO Working Group”)², and at the WTO Fifth Ministerial Session scheduled for Cancun, Mexico in September 2003. The views expressed herein are presented jointly on behalf of the Sections. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

For one of only a few times since the Havana Charter of 1948, proposals for multilateral rules of general applicability to marketplace conduct by business enterprises are under active consideration by WTO.³ Specifically, Paragraphs Twenty-Three through Twenty-Five of the Doha Declaration (reproduced below for convenience⁴) contain proposals for a “multilateral

¹ WTO Ministerial Conference, Fourth Session, Ministerial Declaration, Adopted November 14, 2001 (WTO Document WT/MIN(01)/DEC/1 (November 20, 2001); available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm).

² This is the WTO body invested by the Ministerial Session held in Singapore in December 1996 with a mandate to examine issues regarding the interaction between competition and trade.

³ A brief history of the competition aspect of the Havana Charter and other similar proposals is contained in American Bar Association Section of Antitrust Law and Section of International Law and Practice, *Report on the Internationalization Of Competition Law Rules: Coordination And Convergence*, available at <http://www.abanet.org/antitrust/convreport.html>.

⁴“23. Recognizing the case for a multilateral framework to enhance the contribution of competition policy to international trade and development, and the need for enhanced technical assistance and capacity-building in this area as referred to in paragraph 24, we agree that negotiations will take

framework [on] competition policy.” Negotiation of such a framework could begin at the Fifth Ministerial Session. On March 19, 2002, the Trade Policy Study Committee published a Notice and request for comments “Regarding the Doha Multilateral Trade Negotiations and Agenda in the WTO”.⁵ The Sections hereby provide this response to the Notice.⁶

Doha ¶23 recognizes “the case for a *multilateral framework*” on competition (emphasis added) – standard WTO parlance for agreements that include all WTO members. Included within this proposed framework are “core principles” of “transparency, non-discrimination and procedural fairness”, “provisions on hardcore cartels” and “modalities for voluntary cooperation.” In addition, there are references to various forms of assistance for “developing and least-developed” jurisdictions, including “enhanced technical assistance and capacity building . . . including policy analysis and development . . . cooperation with other intergovernmental organizations” as well as “strengthened and adequately resourced assistance . . . [and] support for progressive reinforcement of competition institutions”⁷

Doha ¶25 also includes “appropriate flexibility” to accommodate “the needs of developing and least-developed country participants” Finally, negotiations following Cancun are subject to “explicit consensus . . . on modalities of negotiations.” This last phrase seems to contemplate limitations on any negotiating process and/or its potential outcomes.

place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations.

“24. We recognize the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development. To this end, we shall work in cooperation with other relevant intergovernmental organisations, including UNCTAD, and through appropriate regional and bilateral channels, to provide strengthened and adequately resourced assistance to respond to these needs.

“25. In the period until the Fifth Session, further work in the Working Group on the Interaction between Trade and Competition Policy will focus on the clarification of core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building. Full account shall be taken of the needs of developing and least-developed country participants and appropriate flexibility provided to address them.”

These paragraphs are referred to hereinafter as “Doha ¶¶23-25.”

⁵ 67 Fed. Reg. 12637 (March 19, 2002).

⁶ These Comments and Recommendations are also being supplied to the Acting Assistant Attorney General for Antitrust and the Chairman of the Federal Trade Commission.

⁷This Report uses terms such as “assistance and support” or “capacity building and technical assistance” to refer generally to all forms of assistance contemplated by Doha ¶¶23-25.

The Sections have focused on several basic issues raised by the proposal for a WTO competition discipline. These concern (1) proposed “provisions on hardcore cartels” – the only overt reference to a substantive competition principle contained in Doha ¶¶23-25 (envisioning a requirement that WTO members prohibit a specific type of marketplace conduct) and (2) the Declaration’s numerous proposed forms of assistance and support. The Section’s Comments and Recommendations also encompass a variety of issues that arise in connection with the suggested “core principles”, especially those of transparency and procedural fairness.

The European Union is both the originator and the most enthusiastic sponsor of the proposal for a “multilateral framework” for competition within the WTO. In initially agreeing to explore the concept of such a framework, the U.S. expressed reservations about the pending proposal.⁸ As matters have progressed in the WTO Working Group, the U.S. has continued to identify a variety of unresolved issues presented by the proposal for a WTO multilateral competition framework.⁹

For many years the Sections have been studying and contributing to the increasingly intense and complex debate regarding the development of competition law and policy in the international environment. For example, in 1995 the Sections formed a Joint Task Force on the Interaction Between Trade and Competition, which produced several reports on significant international competition law and policy issues, including international harmonization of competition laws¹⁰, and the relationship between competition rules and market access.¹¹ The Sections jointly provide analysis and comment on many competition-law developments to the competition agencies of other jurisdictions and to multilateral institutions such as the International Competition Network. The Sections have monitored closely the rapid and profound recent developments in international antitrust and competition law and policy, including the proposals for a multilateral framework for competition in the WTO.

Several basic considerations may be set forth with regard to some of the key issues presented by Doha ¶¶23-25. First, the Sections oppose horizontal agreements of the type condemned as *per se* violations of Section 1 of the Sherman Act (including, for illustration – and

⁸ “U.S.-E.U. Efforts to Launch a Global Round of Trade Negotiations” at 3, Statement of U.S. Trade Representative Robert B. Zoellick, July 17, 2001 (noting both continuing efforts “to understand more clearly what the E.U. seeks”, and “questions” regarding core principles and dispute resolution).

⁹ The United States has made a series of submissions to the WTO Working Group, including separate Communications on Provisions on Hardcore Cartels (WG/WGTCP/W/203; 15 August, 2002), Modalities for Voluntary Cooperation (WT/WGTCP/W/204; August 15, 2002), Transparency and Nondiscrimination (WT/WGTCP/W/218; November 6, 2002) and Procedural Fairness (WT/WGTCP/W/219; November 6, 2002).

¹⁰ American Bar Association Section of Antitrust Law and Section of International Law and Practice, Report on the Internationalization Of Competition Law Rules: Coordination And Convergence. Available at <http://www.abanet.org/antitrust/convreport.html>.

¹¹ American Bar Association Section of Antitrust Law and Section of International Law and Practice, Report on Private Anticompetitive Practices as Market Access Barriers (January 2000). Available at <http://www.abanet.org/antitrust/marketaccess.html>

without attempting to provide or justify any particular definition – “naked” horizontal agreements to fix minimum prices or to allocate markets), which the Sections understand to be included within the meaning of the phrase “hardcore cartels.” Moreover, the Sections reiterate their previous testimony to USTR (based on the Market Access Report cited above) in connection with U.S. preparations for the WTO’s Fifth Ministerial Session in Cancun, to the effect that:

it is generally beneficial to international commerce that a government take action against [private access-denying anticompetitive] practices where they restrain market access in ways that substantially lessen competition in the markets within that government’s jurisdiction.

“Provisions on hardcore cartels” may also include rules against practices falling within this category (to cite an example – again for illustrative purposes only – rules prohibiting “naked” agreements among competing importers within a jurisdiction to refuse to purchase, or to fix the maximum price for their purchases of the imported product). Both of these positions are broadly consistent with and supportive of government prohibition of at least some significant category of “hardcore cartels”, as that term appears to be used in Doha ¶25.

Nevertheless, as explained below, the Sections believe that sound analysis and a variety of practical considerations require USTR to maintain strong reservations regarding current proposals for a multilateral framework for competition within the WTO. The Sections believe that the various potential burdens, uncertainties and costs of such an approach are likely to be significant, and that the benefits of the proposed multilateral framework are speculative. If and to the extent that the WTO continues to pursue the concept of a multilateral framework on competition, the Sections propose that USTR advocate more incremental and refined approaches to the issues. These approaches reflect a degree of caution that is appropriate in light of the novelty and potential impact of a multilateral competition framework on world trade and fundamental economic processes.

The Sections advocate that the USTR express similar strong reservations regarding WTO efforts in connection with assistance and support for competition rules adopted by WTO members. Nevertheless, the Sections urge the USTR to participate actively in any future WTO negotiations and deliberations and in any future capacity building, technical assistance, or other forms of assistance and support. The international trading system should not ignore valuable lessons learned from 113 years’ experience with U.S. antitrust enforcement, which has long stood as the most pervasively enforced competition rule system in the world.

II. ISSUES RELATED TO THE SCOPE OF DOHA ¶¶23-25

A. The Intended and Likely Scope of the Framework

It has been suggested that some may construe the proposal for a WTO competition framework as creating, in effect, a multilateral competition “code,” with the WTO acting as a supranational competition enforcement agency. A recent article by the Chair of the WTO Working Group and another individual directly involved in its work rebuts this view, pointing

out that the framework is not a “code” to the extent that the term “impl[ies] a comprehensive set of substantive rules.”¹² In reply to characterizations of the WTO as a potential multilateral “enforcement agency”, the same article states, “it has become clear that none of the proponents [of the proposal] (including the European Community) is calling for more than a limited application of the WTO dispute settlement machinery in this field.” The article goes on to identify a degree of flexibility in the proposal for hardcore cartel rules, specifically with regard to “transition periods for countries without national competition laws, arrangements for small countries that prefer to meet their obligations under a possible WTO agreement on competition policy through regional as opposed to national instruments, and possibly other aspects.” *Id.*

While these statements reject certain expansive and rigid interpretations of the proposal for a WTO competition framework, they seem to confirm the natural meaning of Doha ¶25 that the framework *will* require WTO members to prohibit hardcore cartels in some fashion. Procedurally, it seems that the WTO proposal seems to envision something more potent than mere encouragement in favor of voluntary adoption of hardcore cartel provisions by WTO members that do not yet have them. Any requirement for hardcore cartel prohibitions stronger than mere encouragement would imply the application of some form of sanction for failure to comply. Without mechanisms for assuring effective enforcement of hardcore cartel rules, a requirement reaching only *de jure* prohibitions could become a mere formal exercise.

Thus, it is important to focus on the substantive rather than the semantic elements of any discussion of the proposed hardcore cartel discipline. Whether or not the discipline is denominated a “code” and whether or not the means of assuring compliance render the WTO an “enforcement agency”, it should be recognized that negotiations resulting from Doha ¶¶23-25 seem intended to and do carry some significant potential for real consequences. They could produce a new multilateral competition discipline for WTO members and create for the WTO some new– and potentially important – role in assuring the enactment and enforcement of substantive competition rules along the lines to be agreed.

B. Long-Run Stability of Substantive and Procedural Limitations on the Framework

A WTO competition discipline, even if narrowly limited, seems unlikely to remain confined in either substantive or procedural respects. Assuming that some version of the minimalist approach – restricted substantively to hardcore cartel prohibitions and procedurally to “limited” dispute resolution – emerges from negotiations following Cancun, a variety of considerations undermine assumptions that a subject as fundamental and inherently broad as competition policy could be placed into the WTO and easily confined to such a small but significant area.

The Sections are unaware of any jurisdiction with antitrust rules covering only “hardcore cartels.” It seems far more likely that if required or otherwise inclined to consider legislation on

¹² Robert Anderson and Frédéric Jenny, “The current proposals for WTO negotiations on competition policy: background and overview,” Paper presented to the Conference Board’s 2003 Conference on Antitrust Issues in Today’s Economy (March 18-19, 2003).

antitrust matters in response to a WTO discipline, most jurisdictions would adopt a full set of antitrust rules – including provisions covering restrictive agreements in addition to hardcore cartels, monopolization or abuse of dominance and structural transactions (mergers and acquisitions, joint ventures, etc.). Some jurisdictions might go farther, including provisions on price discrimination, for example. (Such provisions exist in U.S. law, for example, and have been subject to substantial criticism for their tendency to protect individual competitors rather than the process of competition.)

A recent EU submission to the WTO Working Group seems to anticipate favorably the possibility that countries adopting antitrust legislation in compliance with a WTO framework would adopt a more comprehensive set of antitrust rules:

Presumably, a number of WTO members . . . would also want to include other substantive issues in their domestic competition laws such as abuse of a dominant position, monopolisation and merger control.

EU submission to WTO Working Group, par. 8 (Nov. 19, 2002). The EU seems to advocate the creation of a WTO Competition Policy Committee – the typical WTO organizational pattern for administration of a WTO code – to implement the competition discipline and to extend it to other areas over time.

[W]hat such a [framework] agreement could and should do is to establish a solid basis for dealing with basic competition policy issues, which have an impact on international trade, and facilitate multilateral cooperation on these issues. Once such a framework agreement is in place, the establishment of a WTO Competition Policy Committee would provide a well-placed forum for examining whether greater convergence can be provided *on other competition policy questions* of importance for the multilateral trading system of today.

Id. Para. 1 (emphasis added). The EU submission also seems to welcome a broader competition policy approach, suggesting that provisions on abuse of “disproportionate” market power could be viewed as a safeguard needed to protect members from the consequences of trade and investment concessions made during the Doha Round:

[E]ffective application of competition policy actually helps importing or host countries to avoid some of the perceived risks that are associated with market access concessions or foreign direct investment, that is, of foreign firms or investors with market power disproportionate to that of domestic firms, abusing such power.

Id. Para. 18.

The likelihood that WTO competition rules would expand beyond any initial limitations is also supported by the inherent elasticity of the concept of “hardcore cartels”.¹³ This term does not appear to be found in the present laws of any specific jurisdiction. It seems intended to define a limited category of anticompetitive activities that are considered inherently inimical to the competitive process by a broad consensus of WTO jurisdictions. But even within a single well-developed competition system – the U.S. antitrust laws – concepts of seriously pernicious conduct have shown a surprising degree of flexibility.

In *United States v. Topco Associates*, 405 U.S. 596 (1972), for example, the Supreme Court condemned a joint venture using a *per se* analysis, dismissing proffered efficiency defenses that had been considered and accepted by the lower court under the “rule of reason”. The Supreme Court’s approach in *Topco* has been criticized, and more recent cases arguably provide greater scope for the consideration of efficiencies in evaluating joint ventures. *See, e.g., California Dental Association v. Federal Trade Commission*, 526 U.S. 756 (1999). Nevertheless, government enforcement actions continue to test the line between conduct judged under the rule of reason and conduct deemed so inherently pernicious as to warrant *per se* condemnation. *See, United States v. Village Voice Media, LLC*, Civ. Ac. No. 1:03CV0164, N.D. Ohio, Complaint filed Jan. 27, 2003 (agreements between newspaper publishers styled facially as acquisition challenged as *per se* illegal market allocation); *United States v. The Mathworks, Inc.*, Civ. Ac. No. 02-888-A, E.D. Va., Complaint filed June 21, 2002 (agreements between software developers styled facially as acquisition challenged as *per se* illegal market allocation and price-fixing).¹⁴

This ongoing U.S. debate regarding the scope of *per se* rules is a microcosm of likely future debates about the scope of any “hardcore cartel” definition. Additional flexibility in the

¹³ The term has been defined for purposes of the OECD “Recommendation of the Council Concerning Effective Action Against Hard Core Cartels” (adopted March 25, 1998) as follows:

- a) a “hard core cartel” is an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce;
- b) the hard core cartel category does not include agreements, concerted practices, or arrangements that (i) are reasonably related to the lawful realisation of cost-reducing or output-enhancing efficiencies, (ii) are excluded directly or indirectly from the coverage of a Member country’s own laws, or (iii) are authorised in accordance with those laws. However, all exclusions and authorisations of what would otherwise be hard core cartels should be transparent and should be reviewed periodically to assess whether they are both necessary and no broader than necessary to achieve their overriding policy objectives. After the issuance of this Recommendation, Members should provide the Organisation annual notice of any new or extended exclusion or category of authorisation.

This definition has been reproduced here solely for illustrative purposes.

¹⁴ Both complaints are available on the website of the United States Department of Justice Antitrust Division, <http://www.usdoj.gov/atr/index.html>.

definition of hardcore cartels is likely to emerge in connection with the debate about legal exemptions and immunities from rules against such conduct.

In attempting to predict whether a WTO discipline initially limited in substantive and procedural scope would remain so limited, the recognized natural tendency of institutions to broaden their authority should also be considered, especially in light of the stated expectations of the framework's sponsors. In light of these considerations, the Sections believe that USTR would make a serious error by assuming that the proposed WTO discipline will be limited to hardcore cartel prohibitions and limited dispute resolution. To the contrary, USTR should anticipate that any WTO competition framework would expand to encompass other substantive areas and the application of other procedural modalities for enforcement (*e.g.*, creation of a Competition Policy Committee having the functions suggested for it in the EU submission just cited).

Accordingly, the Sections urge USTR to advocate explicit limits on the substantive reach of any "hardcore cartel" concept considered by the WTO. Specifically, USTR should advocate:

1. Any continued WTO consideration of substantive competition rules should be limited carefully to hardcore cartels, and should exclude both vertical arrangements and joint ventures involving non-pretexual efficiency claims;
2. Any definition of hardcore cartels should be fully consistent with the central economic objectives (maximization of economic efficiency, consumer welfare and productivity growth) of U.S. antitrust law;
3. Pending development of a broader international consensus on fundamental antitrust policy objectives, WTO members should first address hardcore cartels through incremental steps such as those identified in Section III.B., *infra*;
4. Pending development of a broader international consensus on both fundamental antitrust policy objectives and on the extent to which substantive competition rules can and should be promulgated as international disciplines or recommendations to individual countries, no dispute resolution mechanisms should be provided for WTO competition matters. If dispute resolution mechanisms are provided, such mechanisms should extend no further than a requirement that member governments consult with and consider sympathetically the views of other member governments.

As detailed in following sections, the Sections believe it is essential for the USTR to protect the public interest in sound competition rules and a competitive international trading system in view of the potential for future expansion in the substantive scope of WTO competition rules.

III. MULTILATERAL RULES – SAFEGUARDS AND ALTERNATIVES

As described more fully below, even a minimal WTO competition discipline with strict and durable limitations could contribute to the creation of substantial additional burdens on the conduct of international trade, thus adversely affecting the world economy. Even a limited WTO competition mandate could transcend its initial boundaries and evolve into a structure with broader substantive scope and more comprehensive enforcement procedures. Accordingly, proposals for a multilateral competition framework require USTR to consider steps to assure that the public interest in a competitive international economy will be protected given the potentially far-reaching outcomes of any negotiation that might originate at Cancun.

The Sections have identified several alternative approaches to enhancing the scope of market activity subject to appropriate hardcore cartel prohibitions. The Sections have also identified a variety of preconditions and safeguards appropriate for any further WTO engagement on competition issues. The Sections present these to USTR for consideration as the basis for its position on Doha ¶¶23-25 at Cancun.

A. Building Competitive Markets and Coherent Competition Rules

Creating a successful antitrust regime is a complex and dynamic undertaking. Canadian and EU competition approaches are still undergoing significant reform and innovation after 114 and forty-six years, respectively. There is a proposal in the U.S. Congress for an Antitrust Modernization Commission (authorized but not yet funded) to examine whether there is any need for additional legislative change in the 113-year-old antitrust laws, which have already undergone extensive amendment and supplementation. Creating and maintaining a market economy and designing and administering a system of competition rules are sophisticated processes that include many elements of law, administration, public attitudes and economic understandings.

Even if limited to hardcore cartels, an antitrust regime – if poorly designed, implemented or administered, or if introduced when market institutions are unstable or when public and private sectors are unwilling to support or comply with competition rules – can have important adverse effects. These include chilling innovation and other productive and legitimate business conduct and retarding the economic progress that competition law is intended to promote. In the international sphere these results would be contrary to international trade policy objectives as well. Antitrust rules cannot always be launched successfully merely by enacting a statute and staffing an enforcement agency. Their success is dependent on a wide variety of conditions and circumstances.

The recent and dramatic proliferation of new antitrust laws, especially when combined with the widespread adoption of jurisdictional tests based on local “effects”, “implementation” or similar principles, has given rise to the phenomenon of multiple overlapping antitrust jurisdiction and has created order-of-magnitude increases in the complexity and cost of antitrust compliance.¹⁵ WTO actions that result in the creation of dozens of new antitrust regimes will not

¹⁵Abbott B. Lipsky, Jr., *The Global Antitrust Explosion: Safeguarding Trade and Commerce or Runaway Regulation?*, 26 Fletcher Forum of World Affairs 59 (2002).

advance the objectives of the world trading system if the nations adopting them are not equipped to implement them successfully. Nations in turmoil or lacking recent experience with market approaches to economic activity, for example, may not have had the opportunity to recognize and address all of the requirements for creating and administering a successful market environment governable by antitrust rules. Without any effort to narrow the eclectic mix of policy objectives found within the numerous competition-rule systems now in effect around the world (or that will be included within new laws created in response to any future WTO discipline), the trend toward increasing compliance burdens can only intensify.¹⁶

For these reasons the Sections recommend that if the WTO mandate is to include competition issues, USTR should advocate the adoption of safeguards intended to ensure that jurisdictions subject to a WTO competition discipline are receptive to the successful introduction or expansion of market institutions and the implementation of competition rules.

1. The need to identify and clarify fundamental objectives

With about 100 jurisdictions already enforcing competition rules (not including subordinate jurisdictions such as the States of the U.S.), and with important differences among the policy objectives incorporated within the laws of different jurisdictions, the addition of even more new antitrust regimes carries a strong potential for imposing significant additional costs and burdens on the international economy. The impact of differences in approach among the competition rules of different jurisdictions is exacerbated by the observed tendency of competition-rule systems to claim authority to investigate and intervene based on the local market effects or implementation of transactions and conduct. As business organizations expand worldwide, and as transactions and conduct have wider effects in more jurisdictions, overlapping application of multiple antitrust rules to business conduct is becoming the norm.

As described in a recently issued Section of Antitrust Law Report on Antitrust Policy Objectives (*supra*, n. 16), economic objectives (*e.g.*, consumer welfare, economic efficiency, productivity growth) are the most common and fundamental among present day competition-rule systems. The pursuit of objectives in tension or conflict with the fundamental economic objectives of antitrust law can lead to incoherence and uncertainty, imposing significant costs and burdens on private economic actors and retarding innovation and economic growth. When the antitrust rules of various jurisdictions each follow a different mix of policy objectives, and where multiple antitrust regimes claim jurisdiction over the same business actors and conduct, the conflicts and uncertainties – as well as the economic costs – quickly multiply.

Competition is a process that produces winners and losers. Jurisdictions without market traditions and/or competition rules should be made aware of extensive experience in other jurisdictions – such as the U.S. and the E.U. – indicating that it is usually better to permit the competitive process to occur rather than to favor some market participants over others, even where one market participant or group may appear more deserving than others. Where pursuit of other objectives is deemed essential, the means chosen should neither disrupt market signals nor confuse the basic rules for marketplace conduct.

¹⁶ See, American Bar Association Section of Antitrust Law, Report on Antitrust Policy Objectives (February 2003). Available at <http://www.abanet.org/antitrust/home.html>.

International trade could be inhibited materially by the addition of yet more antitrust regimes without any attempt to achieve a more coherent understanding of what antitrust law is and is not, and to channel the development of antitrust regimes (present and future) to assure that they support the broader trade objectives of the WTO. Conflicts arising from additional social objectives contained in new systems of competition rules that may be enacted in compliance with a WTO competition mandate – objectives such as preservation of “national champions” or protection of favored economic sectors – create a danger that the current system of multiple overlapping antitrust rules could be rendered incoherent. The Report on Antitrust Policy Objectives does not take issue with the choice of particular jurisdictions to pursue non-competition objectives (although it urges caution in doing so), but identifies how competition enforcement (in both the national and international context) can be improved when such other objectives are pursued through distinct rules or, if such objectives are included as part of a competition-rule system, through transparent and distinct forms and methods of analysis.

Although it is unrealistic to expect worldwide consensus on antitrust policy objectives in the near future, further clarification of the role of economic and non-economic objectives in the competition rules of different jurisdictions will help reduce inconsistent compliance signals and minimize costs attributable to overlapping competition rules. Such clarification will help limit the risk that competition-rule enforcement will retard legitimate business conduct and thereby reduce innovation and limit economic growth. Conversely, to create numerous additional competition laws and enforcement agencies in additional jurisdictions without any effort to improve coherence among the distinct competition-rule systems threatens basic economic goals fundamental to WTO.

Accordingly, USTR should advocate additional focused efforts to achieve tangible progress in reaching better international consensus on how to improve the coherence of overlapping competition-rule systems, including those that embody a variety of non-economic objectives. These efforts logically precede the implementation of any multilateral framework such as Doha ¶¶23-25, which may require or lead to the enactment of additional competition rule systems.

2. Ensure basic compatibility with local conditions

As mentioned, the underpinnings of a successful market economy are complex and dynamic and the rules and institutions needed for a functional system of competition law are sophisticated. Thus, to simply require the enactment of antitrust rules (even if limited to hardcore cartel provisions) and create an agency to enforce them is not necessarily a positive step in contexts where the infrastructure needed for markets and market-governing rules is absent or inadequate. The Sections also recommend that any WTO competition discipline be conditioned on the presence of certain infrastructure characteristics before application of such a discipline to WTO members.

These infrastructure characteristics include the rudimentary elements of social stability, the basic underpinnings of a private-sector market-based economy, and the elementary legal protections needed to prevent a new competition-rule regime from becoming either a paper gesture that would feed cynicism about the WTO, or an instrument of oppression and unnecessary interference in legitimate business conduct due to a lack of controls intended to

assure an objective and fair enforcement process. The elements of these infrastructure characteristics include:

- (i) Security and stability sufficient to permit the creation and maintenance of a market system.
- (ii). Substantial support from both public and private constituencies and institutions for the choice of market competition as the organizing principle for significant sectors of economic activity.
- (iii). Basic economic infrastructure, including:
 - (A) A functional financial system;
 - (B) A functional system for the definition, protection and exchange of common forms of tangible and intangible property (including intellectual property);
 - (C) A functional system for enforcing contracts, licenses and other common business and trade agreements;
 - (D) A functional system for the creation and governance of common business organizations (stock corporations, partnerships, cooperatives, *etc.*)
- (iv) Basic legal and administrative infrastructure, including safeguards to assure that substantive, procedural and remedial standards provided by competition rules (or made applicable in competition proceedings) are implemented effectively and objectively, such as the following:
 - (A) Clear and fully disclosed substantive, procedural and evidentiary rules, remedial principles and enforcement practices, including mechanisms for assuring adherence to procedural and evidentiary safeguards;
 - (B) Protection for competitively sensitive, proprietary and confidential information and information subject to legal or other privilege;
 - (C) Mechanisms for presentation of evidence of anticompetitive practices to suitable tribunals and/or enforcement agencies (*e.g.*, submission of complaints to an investigating agency), consistent with legitimate enforcement interests (such as preservation of evidence), mechanisms to allow meaningful participation in competition matters by parties having a legitimate interest;

- (D) Mechanisms to assure that officials involved in the enforcement process at any stage are free from improper or corrupt influences;
- (E) Checks and balances to assure objective and careful evaluation of all relevant evidence and arguments throughout proceedings, including thorough pursuit and careful assessment of all material probative evidence, both inculpatory and exculpatory, and to ensure that proceedings are concluded in a timely manner;
- (F) Mechanisms to assure that relevant economic analysis is considered seriously, including assurance that officials have (or have access to) sufficient expertise in relevant economic disciplines (industrial organization theory, econometrics *etc.*);
- (G) Provisions for respondents and investigation targets to be fully informed of allegations, to confront evidence and arguments supporting such allegations at the earliest practicable time consistent with legitimate enforcement interests (*e.g.*, preservation of evidence), and to provide a full response on factual, legal, economic and policy grounds;
- (H) Public access to all proceedings (subject to safeguards against disclosure of specific categories of information for legitimate reasons, such as protection of competitively sensitive information, professional privileges, *etc.*) including provision for written judgments based on disinterested assessment of all available evidence, full description of each step in reasoning, and clear statement of material conclusions;
- (I) Reasonable and proportionate remedies and mechanisms to ensure that the innocent accused have a realistic opportunity for timely vindication;
- (J) Right of appeal or review within a reasonable time to a neutral tribunal, with the nature and scope of review broad enough to ensure the integrity, objectivity and accuracy of judgments.

Many of these elements could be covered under WTO “core principles” of transparency and procedural fairness. But if WTO is to embark on a process of requiring or encouraging competition legislation in additional jurisdictions, the Sections believe it is essential to extend this list somewhat beyond any narrow legal conception of “due process.”

Competition rules – perhaps uniquely among important systems of economic law – require a certain significant degree of social, economic and legal infrastructure in order to have a chance of acceptance and successful implementation without unintended adverse effects. There are profound dangers in promoting new antitrust rules and enforcement systems without first establishing safeguards to assure both “reality checks” against the empirical facts of industry and firm characteristics and behavior, and the use of reasonable economic logic in the enforcement process. The Sections urge the USTR to express strong reservations regarding any WTO competition discipline that does not recognize these fundamental aspects of competition rule systems.

B. Incremental Alternatives to the Multilateral Framework Proposal

If there are to be negotiations involving the creation of a WTO competition discipline involving hardcore cartels, the Sections recommend that USTR advocate a more limited and cautious initial effort to introduce competition-rule systems to jurisdictions that do not yet have them. Rather than supporting the creation of laws and agencies *per se* as a means to address hardcore cartels, the Sections recommend that USTR advocate approaches that would make use of more limited but more readily available – and therefore potentially more effective – tools.

Specifically, the Sections urge USTR to advocate that, before encouraging new legislation or the creation of additional agencies for hardcore cartel disciplines, WTO members should first examine the potential use of laws against serious fraud to reach hardcore cartel behavior (*e.g.*, collusive tendering). Prosecution for fraud is still a characteristic means for U.S. enforcement against the most serious antitrust offenses – including the type of conduct regarded as “hardcore cartel” behavior. Countries that lack a competition-law structure may have fraud statutes that could be enforced using existing legislation and prosecutorial and administrative mechanisms. In such jurisdictions it is possible that cartels could be pursued with relatively minor additions or adjustments to legislation or to legal institutions and practice. Again, this could be a test-bed for broader and more sophisticated mechanisms to be used against hardcore cartels. This more targeted approach may provide many of the benefits of the proposed hardcore cartel discipline while avoiding its potential costs and uncertainties.

Similarly, USTR should advocate that individual jurisdictions concerned about hardcore cartel behavior examine other existing legal mechanisms, in order to find means to address hardcore cartels within existing legal, administrative and judicial frameworks.

C. Capacity Building and Technical Assistance

In accord with the themes outlined above, the Sections urge the USTR to express strong reservations regarding any WTO efforts to provide technical assistance and capacity building without first examining the prerequisites and alternatives identified in the foregoing analysis. USTR should help to assure that any capacity-building efforts undertaken or encouraged by WTO fully recognize the elements of social, economic, legal and other infrastructure that are necessary to create an environment in which competition can succeed. Conversely, USTR should oppose WTO mandates that focus narrowly on providing instruction in drafting, enacting and enforcing antitrust and competition rules and funding and operating competition enforcement agencies. The latter form a very small part – albeit an important part – of the

former. Again, USTR should advocate recognition within the WTO that the long-run success of free-market institutions requires preconditions and safeguards to prevent a competition-rule regime from being stillborn or subject to misuse.

The Sections note the references to an ongoing and active WTO program of capacity building with regard to competition law and policy, as described in the December Report of the WTO Working Group. USTR should closely examine the content of the seminars, conferences and other elements of this program, and should participate actively in any WTO future capacity building or technical assistance in order to ensure to the maximum feasible extent that the views conveyed to WTO members are consistent with the fundamental economic objectives of U.S. antitrust law and policy and with sound principles of antitrust law enforcement.

V. CONCLUSION

The Sections urge USTR to express strong reservations regarding the launch of negotiations on a competition discipline within WTO at the Fifth Ministerial Session at Cancun. USTR should advocate that such negotiations be preceded or at least accompanied by tangible progress in identifying and clarifying a common understanding of the basic objectives of competition rules and in reducing the potential for incoherence and conflict from the emergence of ever-increasing numbers of competition regimes. If and to the extent WTO continues to examine competition matters, USTR should discourage approaches that mandate the creation of new laws and new agencies, and focus more on efforts intended to create conditions in which free-market competition can emerge and prosper. Specifically, in preference to a discipline that would require WTO members to enact hardcore cartel prohibitions, USTR should urge the WTO to first explore more limited attempts to introduce hardcore cartel prohibitions. These include reliance on existing prohibitions on fraud in order to reach conduct included within the definition of hardcore cartels, and possibly other existing mechanisms.

SAL/SILP RECOMMENDATIONS

1. USTR should express strong reservations regarding continued WTO consideration of proposals for a multilateral competition framework such as that contained in Doha ¶¶23-25.
2. USTR should advocate that any continued WTO consideration of competition rules or principles should be preceded by focused efforts to achieve greater international consensus on methods to ensure the coherence of multiple overlapping competition-rule systems applicable to international business activity.
3. USTR should advocate that any WTO discipline involving substantive competition rules or principles should be explicitly limited in application to jurisdictions in which there is both (a) adequate infrastructure for free-market competition and a competition-rule framework, and (b) support for such a framework from public and private constituencies and institutions. As to any such jurisdictions USTR should urge that any competition-rule systems encouraged or required by a WTO discipline should be fully consistent with basic economic objectives: maximizing economic efficiency, consumer welfare and productivity growth.
4. USTR should express strong reservations regarding WTO provision of assistance and support for competition-rule systems other than those adopted in accord with Recommendations 2 and 3. If the WTO does engage in the provision of assistance and support for competition-rule systems, the United States should participate actively in order to assure that such assistance and support is consistent with these Recommendations to the extent possible.
5. USTR should advocate, as an alternative to Doha ¶¶23-25, that WTO members consider whether existing fraud legislation may allow prohibition of hardcore cartels, which often include covert behavior as an element, without significant changes to existing laws or administrative and judicial rules and practices.
6. If competition remains within the WTO mandate following the Fifth Ministerial Session, USTR should urge the WTO to create a Working Party which, in concert with the other international bodies that are now addressing international competition rules (such as the International Competition Network), should seek to develop a consensus as to
 - a. the extent to which substantive competition rules can and should be promulgated as international disciplines or recommendations to individual countries;
 - b. the basic objectives of competition rules, preferably on the basis of the principles expressed in ¶¶2-3, and

- c. the elements of essential infrastructure and internal support that would serve as preconditions to application of any WTO competition discipline to members.
7. USTR should advocate that the mission of the Working Party referred to in ¶6 include the development of a competence sufficient to enable the WTO to consider specification of competition rules in the substantive area of “hardcore cartels,” whether such rules are to be expressed as a requirement, recommendation, or suggestion to member nations. In particular, the Working Party should
- a. achieve greater consensus on the elements that support the characterization of conduct as a “hardcore cartel,” and on methods to avoid determinations that efficiency-enhancing joint ventures and vertical arrangements are classified as “hardcore cartels”;
 - b. study the potential for over-deterrence and other adverse competitive consequences arising from uncoordinated multiple and simultaneous investigations and proceedings in different jurisdictions against “hardcore cartels,” and study mechanisms for minimizing such adverse consequences, and
 - c. clarify how disciplines involving “hardcore cartels” would be applied to economic sectors that are either exempt or immune from competition rules or that are not organized by a market system within member nations.
8. USTR should advocate that, if the WTO engages in any program of assistance and support following the Fifth Ministerial Session, before the conclusion of deliberations by the Working Party described in ¶¶6-7, such program should include the following goals:
- a. To inform WTO member nations of the policy justifications for and benefits of free-market competition among private business enterprises within an appropriate competition-rule framework, based on the principles set forth in ¶¶1-6.
 - b. To increase understanding of the importance in any competition-rule framework of a sophisticated and effective legal system, of effective supporting institutions, and of expertise in a variety of disciplines such as administrative law, procedural and evidentiary rules, and economics, including industrial organization theory and econometrics.