#### TABLE OF CONTENTS

Abstract 15
Foreword by The Rt. Hon. The Lord Brittan 17
Table of Authorities 21
Abbreviations 30
Prologue 31
Executive Summary 41

# CHAPTER I MULTILATERAL COMPETITION RULES: THE ELUSIVE (AND THE EXTANT) 45

1. Peripatetique 45

In the beginning... 45
Out of Havana 46
American self-help 48
Europe advances alone 50
Still stalled in Geneva 50
Parisian Recommendations: developed co-operation 51
A UN Set piece: developing market access 52
Existing WTO 'competition' rules 53
GATT and GATS 53
TRIPS 53
Pro-competitive Regulation 54

2. The Quest refreshed 55

The March from Davos 55
WTO: Binding Behaviour 56
The Singapore Mandate: to Talk 59
Turbulence across the Atlantic 61
Compromise before Seattle 62
The Doha Agenda 64

# CHAPTER II THE CURRENT 'COMPETITION' AGENDA AT THE WTO: MAKING THE POSSIBLE NECESSARY 67

- 1. A WTO commitment to banning cartels 67
  - Binding multilateral cartel rules are unnecessary and may be unattainable 68
  - WTO Market Access 74
  - Cartel rules would not address the problem 78
- 2. A WTO commitment to enforcement co-operation 81
  - Co-operation against cartels 81
  - International abuses and exclusionary agreements 82
  - Current comity 82
  - Co-operation in merger review 83
  - Improved modalities 84

One possible international advance 87 Moving on ... at the WTO 88

# CHAPTER III MAKING THE NECESSARY POSSIBLE: EXAMINING THE TOLERATION OF EXCLUSIONARY BUT EFFICIENT BUSINESS ARRANGEMENTS 91

- 1. What is the 'interaction' of trade and competition policy all about? Exclusive Arrangements 91
- 2. The Economics of Exclusive Arrangements 96
- 3. Legal Analysis of Exclusive Arrangements 98
- 4. Competition Policy Approaches to Exclusive Arrangements 99
  - A. The Antitrust Evolution 101
  - B. The European Impression 104
  - C. Trans-Atlantic Differences in Competition Policy Approaches 108
    - Exclusion at the heart of the Divergence 108
      - Vertical and Horizontal Arrangements 108
      - Abuse of Dominance 110
      - Merger Control 113

Conclusion 122

# CHAPTER IV BEYOND EQUALITY: THE APPLICABILITY (AND INAPPLICABILITY) OF NATIONAL TREATMENT 125

- The Trade and Competition Policy Debate about Exclusive Arrangements 125
- 2. Are 'lax' Competition Policy Approaches to Exclusive Arrangements Discriminatory and Protectionist? 129
- 3. The Proposals for Non-Discriminatory Competition Policy 132
  - A. The 'Evolution' of the EU proposal 133
  - B. The commitment to provide National Treatment 137
    - (i) What is discrimination in world trade? 138
    - (ii) The relationship between National Treatment and Market Access 139
      - (a) National Treatment is a proxy for Market Access 140
      - (b) The application of National Treatment commitments to Competition Law 142
      - (c) Are there different forms of National Treatment? 144
  - C. Why is National Treatment not relevant? 148
    - (i) Exclusive arrangements are not discriminatory 148
    - (ii) Exclusive arrangements do not affect comparative advantages 154
  - D. Why propose National Treatment? 155
  - E. Where is this heading? Market Access 156

# CHAPTER V BEYOND ANTITRUST: MARKET ACCESS AND GLOBAL WELFARE PROPOSALS FOR REFORM 159

- 1. A More International Focus on Exclusion 161
- A. Changing Competition Policy 161
- A.1. EU: A Multilateral Agreement on Competition 161
- 1. What is the EU's Proposal? 161
  Remembering 'History' 162
  Future work plan 164
  The specific proposal: prohibit 'substantial foreclosure', particularly of foreign competitors 166

#### A.2. Trade Related Antitrust Measures 168

Parish Politics 169

Market-Opening Competition Law 170

'Europe's Comparative Advantage' 171

Liberal v Conservative: freedom v discipline 172

The Details of the 'Market Access' Principle: 'no substantial 174 unjustified market blockage'

## B. Ignoring Competition Policy\* 177

# **B.1.** Introducing Pro-Competitive Regulation 177

- 1. The Economic Rationale 178
- 2. The Legal Means 182

# B.2. Imposing Market Access Warranties 184

- 1. Giving up on competition policy at the WTO 184
- 2. Market Access warranties 187

# 2. A Global Perspective on Efficiency 192

## C. Judging Competition Policy 192

Aggregate World Welfare 192

Parochialism (part II) 192

The problem with the 'domestic consumer welfare' standard 193

'Total national welfare' is worse 194

Global Economics: the Butterfly effect 194

Spillovers and Distortions 195

Moving towards global solutions 196

Local commitments to a global standard 197

# 3. Recurring themes 199

#### CHAPTER VI THE NEED FOR DISCIPLINE 201

# Evaluating the five proposals 205

A. Changing competition policy 205

1. A commitment that competition measures will prevent 'substantial foreclosure of competitors', particularly of foreign competitors 205

- 2. A commitment that competition measures will ensure that there is 'no substantial unjustifiable market blockage', generally 209
  - A. Rivalry, not efficiency 213
  - **B.** A liberal 'opportunity' based model: economic freedom 217 The opportunity to let abilities reign 218 Economic freedom, competition policy and the WTO 219
- B. Ignoring competition policy 227
- 3. A commitment to more pro-competitive regulation 228

  Compromise on the Reference Paper 229

  The Problems with Pro-competitive Regulation in the Private Sector 234

  Reduced incentives to compete 235

  Increased costs, bureaucracy and continued intervention 237

  Distorting competition 239
- 4. The introduction of 'market access warranties' 241

  Definitional Difficulties 241

  Increasing international tension 244

  Preventing effective market access 245
- C. Judging competition policy 247
- 5. A proposal to ensure that competition decisions accord with aggregate world welfare 247

An unworkable test 248
Cutting corners on the analysis 248
Applying the Secretariat's formula 249
An improper test 251

Conclusions from the Critique 252

#### CHAPTER VII A POSSIBLE ANALYTICAL FRAMEWORK 253

- 1. Consensus not compromise 254
- A. 'Trade...' 257

  Dealing with non-discriminatory barriers to market access 258

  Back to 'National Treatment? 262

  A 'substantial hindrance to market access' rule 264

  Refining the 'Refinement' 266

#### 'Substantial impediments to market access...' 267

Testing for the substantiality of the impediment 268 Objections to applying competition policy analysis to the test of foreclosure 269

#### B. '...and Competition Policy' 273

Sequencing 274
The harm to competition 274
'that thereby lessen competition substantially...' 277
Probable harm 282
'...in the relevant market' 283

#### 2. The Proposed WTO Test 284

A Few More Possible Objections! 284 '...and no remedy shall lessen competition substantially...' 285 Mechanics 286

Conclusion 288

Annexes 291

Bibliography 375 Index 387 Acknowledgements 391