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Economic Development, Competition Policy, and the World Trade Organization

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Economic Development, Competition Policy and the WTO*

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Abstract: At the recent WTO ministerial meeting in Doha, Qatar, WTO members called for the launch of negotiations on disciplines relating to competition, on the basis of explicit consensus on modalities to be agreed at the 5th WTO ministerial in 2003. Discussions in WTO since 1997 have revealed little support for ambitious multilateral action. Proponents of WTO antitrust disciplines currently propose an agreement that is limited to 'core principles'—nondiscrimination, transparency, and provisions banning 'hard core' cartels. We argue that an agreement along such lines will create compliance costs for developing countries while not addressing the anticompetitive behavior of firms located in foreign jurisdictions. To be unambiguously beneficial to low-income countries, any WTO antitrust disciplines should recognize the capacity constraints that prevail in these economies, make illegal collusive business practices by firms with international operations that raise prices in developing country markets, and require competition authorities in high-income countries to take action against firms located in their jurisdictions in defense of the interests of affected developing country consumers. More generally, a case is made that traditional liberalization commitments using existing WTO fora will be the most effective means of lowering prices and increasing access to an expanded variety of goods and services.

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Introduction

Competition concerns have been on the multilateral agenda for many years (e.g., Davidow, 1981). It was already on the table during the discussions to create an International Trade Organization (ITO) in the late 1940s, reflecting concerns—informed by the behavior of German cartels and Japanese zaibatsu in the pre-war period—that international cartels and restrictive business practices could block market access. In the GATT context, the implications for competition of trade policies such as tariffs, antidumping, quotas and technical barriers to trade have a long pedigree, both in terms of policy discussion and economic analysis.[1] In the 1970s an active discussion took place in the UN-context on the need to discipline restrictive business practices by multinational enterprises. Renewed attention emerged in the 1980s in part as the result of US concerns that restrictive practices in distribution and conglomerates in Japan (keiretsu) nullified the expected benefits of negotiated trade liberalization (Rahl, 1981; Davidow, 1983). In the 1990s, concerns were voiced that 'mega mergers' and abuse of dominance (monopolization) could have anticompetitive effects and lead to disputes between competition authorities—examples included the Microsoft, Boeing-McDonnell Douglas, General Electric-Honeywell and Worldcom-Sprint cases. More generally, the fact that competition policy plays an important role in the creation of a European single market led to greater interest in exploring whether similar disciplines would be beneficial in the GATT/WTO context (European Commission, 1995).[2]

A formal effort to discuss the issue in the WTO was launched with the establishment of a Working Group in 1997 to investigate the relationship between trade and competition policies. The 2001 WTO ministerial meeting in Doha agreed that negotiations on this subject are to be launched at the 5th WTO ministerial in 2003, on the basis of explicit consensus on the modalities of such negotiations. Views on the merits and possible modalities of introducing competition law disciplines into the WTO vary widely among analysts. Proponents take the view that antitrust rules belong in the WTO insofar as market access is affected (e.g., Fox, 1997, 1999). The case

[1] See, e.g., Bhagwati (1968, 1988).

[2] See Graham and Richardson (1997) and Scherer (1994) for surveys and comparisons of national regimes.

has also been made for inclusion on 'constitutional' grounds—to bolster the WTO as a charter for international economic regulation. Opponents argue that the launch of negotiations on this topic will divert scarce policymaking resources in developing countries away from issues that are more urgent in terms of domestic reform and market access payoffs (e.g., Winters, 2002). Others oppose negotiations because of worries that an inappropriate 'one size fits all' approach may emerge (Hilary et al., 2002). Some competition authorities worry about the potential for 'pollution' of competition law as a result of the introduction of market access considerations in enforcement (Klein, 1995); many see little scope for international harmonization of antitrust rules and question whether the WTO should be the locus of any such efforts should they be pursued. The general thrust among antitrust authorities is to emphasize the need for cooperation among different jurisdictions to reduce uncertainty and transactions costs. Many in the trade community are keen to avoid the use of competition principles to constrain the application of trade policy.

Most analysts are agnostic, observing that practices can be identified that generate international 'competition' externalities that could in principle be disciplined through multilateral cooperation, but that some outcomes could be worse than the status quo.[3] As is often the case, 'the devil is in the details'.[4] There has been a concerted effort in the last 5 years to identify and discuss trade and competition linkages, both in the context of the WTO working group and in other fora (e.g., the OECD).[5] This dialogue revealed little support for ambitious international cooperation on competition law in the WTO. The current focal point for discussions on WTO antitrust disciplines is an agreement limited to 'core principles'—nondiscrimination, national treatment and transparency (due process), and, perhaps, provisions banning 'hard core' cartels

[3] The same is true regarding national antitrust enforcement: "[T]he intellectual basis for competition policy is frail … The people involved are far from being Platonic guardians of the public weal. Only those who expect to gain more from engagement than they expect it to cost them will bear the expense. Most of these plaintiffs will be competitors. Officials have careers to make, while judges may be consumed by self-love, love of power or dislike of the defendant. The legal process also imposes damaging uncertainty" (Wolf, 2002, p. 13).

[4] See Levinsohn (1996) for a review of the economics in an international trade context. For discussion of policy options and issues see Evenett (2002), Fox (1997, 1999), Scherer (1994), and Holmes (2002). Many tend to ignore the Winters (2002) point that administrative capacity in most developing countries is very scarce and that this is a major downside of putting this topic on the WTO agenda.

[5] CUTS (1999), OECD (2001) and Zach (1999) survey positions that have been taken by governments.

(Anderson and Jenny, 2001). Most agree that disputes on the substance of decisions taken by national competition authorities should not be subject to WTO dispute settlement.

Our focus in this paper is on developing country interests, i.e., we ask what type of international cooperation in the WTO could support most effectively national efforts to promote economic development. To be development relevant, any antitrust-related disciplines should promote the interests of poor consumers in developing countries. Two major questions that arise in this connection are the subject of this paper. First, what matters most from a competition point of view? Second, restricting attention to WTO competition law disciplines narrowly defined, what are the best options from a development perspective? On the first question, we argue that traditional liberalization commitments in existing WTO fora may well be the most effective means of lowering prices of—increasing access to—goods and services. On the second question, we argue that for WTO antitrust disciplines to support development they must discipline private practices that raise prices in developing countries without imposing significant implementation costs on developing country governments. The challenge is to identify options that satisfy these criteria. Both of these questions require analysis that recognizes capacity and implementation constraints in developing countries.

After defining terms (Section 1), we start with an overview of some of the literature on the relevance and appropriate design of national competition law for developing countries. This is critical in terms of determining what a multilateral agreement might do to assist such countries to pursue desirable national competition regimes (Section 2). We then discuss international spillovers created by anticompetitive practices or competition laws—focusing in particular on market access effects, international cartels and control of mergers (Section 3). The extent to which existing WTO mechanisms can be used to deal with antitrust spillovers is discussed in Section 4, which also summarizes the state of play in the WTO working group on trade and competition and briefly discusses competition issues that arise in a number of existing WTO agreements—including on services, procurement, standards, antidumping and intellectual property. Options for cooperation on antitrust that would benefit developing countries are discussed in Section 5. Questions related to cross-issue linkage are the topic of Section 6. Section 7 concludes with a summary of the policy research agenda suggested by our analysis.

1. Defining Terms

National competition *law* can be defined as the set of rules and disciplines maintained by governments aiming to counteract attempts to monopolize the market (and thus ensure that competition is guaranteed), either through agreements between firms (including attempts to create a dominant position through merger) that restrict competition or through unilateral behavior (abuse of a dominant position). The underlying objective of antitrust law in most jurisdictions tends to be to ensure that markets are competitive, and thereby the maximization of national welfare. The focus of competition laws is on competition, reflecting the belief—extensively supported by empirical evidence—that vigorous competition is an effective way to foster economic efficiency. Hence, antitrust/competition law is a component of the broader set of policies affecting competition on markets that are pursued by governments.

Competition *policy* is often used as a synonym for competition law. In our view it is more appropriate to define it as spanning the broader set of measures and instruments that may be pursued by governments to enhance the contestability of markets. This might include actions to privatize state-owned enterprises, deregulate activities, reduce licensing requirements for new investment or entry, cut firm-specific subsidy programs, and trade liberalization. Thus, competition policy disciplines constrain both private and government actions, whereas antitrust rules pertain to the behavior of private entities (firms).

Governments pursue trade, industrial and related policies for a variety of reasons, including as a means to raise revenue (via tariffs), to protect specific industries, encourage participation by minorities or small and medium-sized enterprises, promote regional development, to shift the terms of trade, to attain certain foreign policy or security goals, or to restrict the consumption of specific goods for environmental or moral reasons. Whatever the underlying objective, such policies redistribute income between segments of the population by assisting specific industries, factors of production or activities. Often they do so in an inefficient manner that is inconsistent with the objectives underlying competition law. The way this inconsistency is frequently put is that competition law aims at protecting *competition* (and thus economic efficiency), while trade barriers act to assist *competitors* (or factors of production).

The latter is socially costly as it gives rise to deadweight losses and social costs of rent seeking. It also reduces dynamic competition.

Many economists argue that a liberal trade and investment policy stance is the cheapest and most effective competition policy instrument available to a government (Blackhurst, 1991). Competition from imports is a very important source of discipline upon the behavior of firms operating in a market,[6] especially for countries with high entry barriers. Thus, governments need to determine the relative rate of return to alternative actions to promote competition. A much larger 'bang for the buck' may be obtained by dealing with government policies—including trade policies—that directly restrict competition, as opposed to pursuit of government regulation of private business practices.

2. National Competition Law: Norms and Implementing Institutions

Any assessment of how antitrust rules might fit into the WTO in a way that supports development requires an understanding of the role and need for national competition legislation. The presumption underlying active competition law enforcement is that vigorous competition between firms in an industry will foster efficiency and thus economic welfare. However, competition *per se* will not necessarily ensure efficient outcomes, nor is it necessarily the case that agreements between firms in an industry that reduce competition between them are welfare reducing. Certain types of agreements between firms may be welfare enhancing for the nation as a whole. For example, allowing national firms to form an export cartel may permit the domestic industry to raise prices on export markets and improve the country's terms of trade (albeit at the expense of foreign consumers) (Caves, 1979). Cooperation between firms may lead to dynamic benefits, e.g., research joint ventures or agreements on the development/use of common standards can allow positive network externalities to be realized. Because of these possibilities, most competition laws recognize that some agreements between competitors that appear to be

[6] This is a basic principle of international trade theory that applies to both the traditional setting of competitive markets and in the more recent literature that allows for imperfect competition. For empirical studies on the role of import competition as a source of market discipline see, e.g., Roberts and Tybout (1997), Chappell and Yandle (1993), Levinsohn (1993) and Djankov and Hoekman (2000).

competition-reducing may in fact not reduce competition, or, even if limiting competition, may be welfare increasing. This recognition is reflected in the distinction that is generally made between *per se* prohibitions and the 'rule of reason'. The former unconditionally prohibit certain forms of behavior (agreements). Under the latter, competition authorities judge whether cooperation (collusion) is welfare (efficiency) enhancing.[7]

There are very few competition-reducing agreements between firms that can be rejected on an *a priori* basis (assuming the objective is efficiency), of which price fixing and agreements with similar effects (like market sharing agreements among competitors –inter-brand) are the most important. The overwhelming majority of antitrust cases do not pertain to *per se* violations but involve rule of reason—practices that *may* be prohibited. Most vertical schemes—intra-brand —fall into this category if they are not exempted from antitrust prosecution altogether. Important in this context are not so much the specific legislated rules, but the criteria that apply when implementing the law. For example, in the context of an investigation into alleged abuse of a dominant position, the criteria may include definition of product and geographical scope of the market, the threshold of necessary market power, and the methods used to determine the feasibility of entry.

A litmus test for the potential existence of private anticompetitive practices is whether there are profit opportunities that are not competed away through (the threat of) entry. Necessary conditions for such a situation is that prices exceed marginal costs substantially for a significant period of time; that there is no or very little entry (or exit) in such industries; and that the domestic industry is highly concentrated. However, high concentration ratios in a domestic industry or above average growth in producer prices of an industry may not reflect a lack of competition (Djankov and Hoekman, 1998). It may reflect the existence of economies of scale and/or robust demand or quality upgrading rather than the exploitation of market power. Low (or declining) import penetration may reflect a competitive domestic industry that is capable of

[7] The literature on competition policy, both economic and legal, is huge. See Viscusi et al. (1995) for a survey of current economic thinking; Khemani and Dutz (1995), CUTS (1999) and Fels (2001) for developing country perspectives.

withstanding competition from imports. Moreover, high concentration in a domestic industry may be accompanied by either low or high import penetration. In industries with increasing returns to scale and high entry costs, domestic concentration may rise after trade liberalization as the least efficient are forced to exit and survivors become more productive as greater output leads to lower unit costs.[8]

This brief discussion suggests two conclusions. First, antitrust enforcement is a complex endeavor that requires substantial inputs of technical expertise. Second, there is a need for judgment (flexibility). The latter helps explain why proposals to establish common international rules (in the WTO or elsewhere) are regarded as inappropriate by many observers.

Determining National Priorities

There are two major decisions to be taken by governments with respect to competition law: (i) whether (when) and how much to invest in such disciplines; and (ii) how to design and enforce the rules. A free trade stance does not make competition law redundant. Many products are non-tradable (e.g., many services). Even if tradable, competition may be limited to local markets for other reasons (e.g., transport costs). Certain products may be produced by (natural) monopolies, by firms with global market power, or by firms where 'unnatural' (government-made) barriers to entry restrict contestability. And, the more open are markets to foreign products, the greater the potential vulnerability to anti-competitive practices of foreign monopolists or cartels.[9] The experience of the EU and US suggests that even in open markets there will be attempts to monopolize.[10]

For competition law to be a priority, it must yield a higher pay-off than other choices. Competition law is technical and requires the use of skills that are in short supply in many developing countries—building capacity to apply competition legislation effectively will take

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[8] Roberts and Tybout (1997) study evidence from developing countries.

[9] In principle, a country confronted with foreign monopolists can use tariffs to improve its terms of trade by transferring part of what would be monopoly profit to the Treasury.

[10] Although as relatively large and thus closed economies, there is a greater need/rationale for competition law—see Kee and Hoekman (2002).

time. Dealing with trade and investment barriers and government regulation that restrict competition may generate a higher rate of return. The available empirical evidence suggests that removing government-created entry regulation and other barriers to competition—e.g., trade restrictions—does have a higher payoff (e.g., Djankov et. al, 2002; Hoekman, Kee and Olarreaga, 2001; Vandenbussche, 2000). Most of the empirical work in this area does not include competition law explicitly into the analysis, however. A recent exception is Kee and Hoekman (2002), who investigate the impact of competition law on estimated industry markups over cost, using cross-country, cross-industry time series panel data on the number of firms by industry (turnover), sales (market size), and import competition, as well as data on the adoption of competition law by countries. They conclude that antitrust legislation on its own has no impact on markups, while imports and lower entry barriers have a major and statistically significant effect in reducing markups. Competition law does have an indirect effect, however, by reducing the first order marginal effect of imports and reinforcing the marginal effect of domestic competition, an effect that is statistically significant for larger economies. For nontradables, the impact of government policies that restrict competition may also be more important from a development perspective than antitrust enforcement (e.g., Fink. Mattoo and Neagu, 2002; Francois and Wooton, 2001).

The implication of the empirical literature is that liberalization—the core mandate of the WTO—is likely to have a much greater direct impact on competition than antitrust enforcement, especially in smaller economies. Importantly, trade and investment liberalization and deregulation of entry barriers are not costly in administrative capacity and do not require the use of scarce technical expertise.[11] Issues relating to institutional design, the independence of investigating authorities, effective judicial review and appeal mechanisms, and the availability of expertise—both legal and analytical—are all critical for the effective application of antitrust law. Complementary institutions will be needed to ensure that decisions are appropriate. In many

[11] Competition law enforcement is expensive. OECD and national sources indicate that the annual budget of the antitrust office in OECD countries is in the $15-50 million plus range; for developing countries with enforcement agencies the budgets are lower but still significant, e.g., Mexico ($14 mn), Argentina ($1.4 mn), Venezuela ($1.5 million), Poland ($4.1 mn), Hungary ($2 mn).

countries the development of competition law occurred gradually over a long period of time and continues to evolve. The necessary administrative apparatus cannot be put into place within a short time frame. The institutional guarantees necessary for a competition authority to be independent from eventual political influence (and thus concentrate on its mandate) requires acceptance by governments that branches of the national administration will operate outside its direct control. Until a few decades ago most EU member states had no experience in the field of antitrust. Indeed, Mavroidis and Neven (2001) question whether even today EU member states have the institutional expertise at the national level needed to assume enhanced responsibilities for de-centralized enforcement of competition law. Finally, it should also be recognized that the type of legal and economic analysis skills needed to design and enforce sectoral regulation will be similar to those needed for competition law enforcement. Given the need to ensure adequate regulation of services in order to achieve equitable as well as efficient outcomes, one can also ask whether scarce technical expertise is best allocated to antitrust enforcement as opposed to regulatory bodies.

The conclusion we draw is that it is not clear that an approach in the WTO requiring members to have an antitrust law will be very beneficial in terms of addressing priorities (maximizing the 'competition payoff').[12] However, it may be the case an approach centered on national antitrust will have a substantial payoff for developing countries in helping them to deal with international 'antitrust spillovers'—an issue to which we turn next.

3. International Competition Policy Spillovers

Antitrust is nationally defined (the exception is the EU where national legislation is complemented and superceded by common EU-wide rules that allow actions to be taken against the trade distorting effects of anticompetitive behavior by firms). The enforcement (or non-existence) of national antitrust policies may give rise to international pecuniary externalities. Such spillovers may arise for a number of reasons, but most frequently analyzed in the literature are 'terms-of-trade' effects. These may be contemporary (ongoing), reflecting cartels or

monopolization, or, in the case of mergers and acquisitions, they may be prospective (potential 'abuse of dominance').

Terms-of-trade (market access) effects

Weak antitrust enforcement may allow incumbent firms to block or attenuate foreign competition—e.g., restricting access to the distribution system (something that has often been alleged by firms seeking to export to Japan).[13] Firms may also collude to raise prices in export markets—this may take the form of a legal export cartel or an illegal international cartel. All such cases act to alter the terms of trade by restricting output or raising prices—the types of effects that are associated with market access restrictions.

In principle, market access considerations should not factor in a competition case. Antitrust methodics generally make no mention of the nationality of firms or products—what matters is whether business practices that have an effect on market outcomes reduce efficiency and this is not offset by dynamic benefits. Whether a business practice reduces foreign firms' market share is irrelevant for competition authorities—what matters is the impact on efficiency. Market access is of course a critical issue for the WTO. The 'market access' effects of national antitrust therefore offers a potentially compelling rationale for inclusion of competition law disciplines into the WTO. Fox (1997, 1999), for example, argues for a general obligation on WTO members to have a competition law that ensures market access is not 'unreasonably impaired', with other matters to be left to other *fora*. A theoretical foundation for this has been developed by Bagwell and Staiger in a series of papers that suggest countries have incentives to seek compensation for—or to 'retaliate' against—actions by trading partners that detrimentally affect a previously negotiated market access deal (e.g., Bagwell and Staiger, 1999).

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[12] It may even be harmful if enforcement is too focused on allegations of "predatory pricing' and this reduces, rather than enhances, competition on markets.

[13] The nonviolation case brought by the US government on behalf of Kodak is illustrative, as the claim is that Kodak's market share was constrained by actions by Fuji that induced distributors not to carry Kodak. See WTO Doc. WT/DS44/R.

An approach focusing on terms of trade effects would impose a huge burden on WTO panels, as disputes can be expected to be numerous and heated if unilateral actions are taken to 'rebalance' the terms of a negotiated market access deal.[14] It is very unlikely that the trading system could handle this, providing an argument for the development of specific disciplines for policy areas that might be used by governments to affect their terms of trade. This raises the question where to draw the line—many policies can impose pecuniary externalities on foreigners. Although the WTO already offers substantial scope to address alleged market access impeding effects of competition law enforcement (Hoekman and Mavroidis 1994; Bagwell et al, 2002)—these are discussed further below—the fact that competition law can give rise to pecuniary externalities provides a potential case for cooperation in the WTO. We argue below that the focus of such cooperation should be on cartels with international effects (that impose externalities) *and* that are difficult and/or costly for developing countries to address themselves.

Cartels with international effects

In the 1990s, both the EU and US investigated a number of cartels in industries such as vitamins, steel, and animal feeds (ICPAC, 2000). The cartels that were identified often affected more than one national market. Levenstein, Oswald and Suslow (2002) analyze the purchases of developing countries of sixteen goods whose supply was found to internationally cartelized by European and/or American enterprises at some point during the 1990s. They found that in 1997 developing countries imported US$36.4 billion of goods from a set of 10 industries that had seen a price-fixing conspiracy during the 1990s. This represented 2.9 percent of developing country imports and 0.7 percent of their GDP. These results update earlier work by Levenstein and Suslow (2001) which found somewhat higher figures. Their work is one of the primary pieces of evidence cited by proponents of WTO antitrust disciplines, e.g., 'countries without adequate competition law and access to international cooperative mechanisms are routinely victimized by international cartels that operate in many industries' (Anderson and Jenny, 2001,

[14] In practice, of course, even if governments attempt to alter the terms of trade through changing standards this may not necessarily have the desired effect.

p.3). However, the Levenstein/Suslow analysis provides only suggestive and informal evidence on the price raising or welfare effects of the agreements. Much more research is needed in this area. Indeed, as argued below, mechanisms to generate information would constitute a valuable contribution a WTO agreement might make in the medium term.

The above-mentioned types of cartels are generally illegal under domestic antitrust laws. Similar effects may result from export cartels—agreements between competitors that are designed to exploit market power on foreign markets or to allow firms to benefit from economies of scale or scope through cooperation.[15] Export cartels may be legal, that is, firms engaging in such practices may be exempted from national antitrust in their home market, if they have no detrimental effect on home consumers. Cartel-type arrangements that have serious detrimental effects on developing countries—because they impact on enterprise-level competitiveness—include international air and maritime transport cartels. These are often legal in that the arrangements have been blessed by national (competition) authorities, but have been found to raise prices significantly for developing country shippers and consumers. For example, Fink et al. (2001) estimate that restrictive trade and anti-competitive practices raise maritime liner transport costs by up to $3 billion on goods carried to the US alone.

A precondition for an export cartel to operate is that there are two distinct geographical markets. When defining markets geographically, competition authorities ask one question: within which geographical space are conditions of competition homogeneous? Geographical markets do not necessarily coincide with national frontiers: it could very well be the case that due to trade liberalization, conditions of competition are homogeneous between two national markets (e.g., Belgium and Luxembourg); conversely, conditions of competition are not necessarily homogeneous within one national market. International cartels do not have to be export cartels; companies of different nationalities (hence, international) may behave in an anti-competitive manner (hence, cartel) in the same geographic market (hence, no export cartel).

[15] The latter is often mentioned for small and medium sized firms. Export cartels have long been the subject of analysis in the literature. See e.g., Caves (1979) and Auquier and Caves (1979). Note that similar issues arise in the exercise of monopsony power, e.g., actions by a small number of large buyers of a product or commodity to force down the price paid to foreign suppliers.

In principle, national competition authorities can enforce domestic antitrust law against export cartels. However, many developing countries have limited ability to do so. This suggests there are potential gains from international cooperation on combating export cartels. This could be pursued through a multilateral agreement involving a ban on exemptions for export cartels (Messerlin, 1994). As discussed below, to be effective in assisting developing countries, in our view such a ban would need to be complemented by agreement that OECD countries take action to enforce it.

Mergers

Another 'terms of trade' dimension of national antitrust enforcement are merger approval requirements. Cross-country differences in notification requirements and approval criteria for mergers became an increasing source of concern for multinationals and policymakers in the 1990s (see ICPAC, 2000). The issue here is the nationalistic focus that is taken by reviewing competition authorities, which can lead globally welfare (efficiency) improving mergers to be rejected by authorities that conclude that the impact on their jurisdiction is negative. The obvious solution to this problem—the creation of a world competition authority that considers global welfare—is impossible given concerns of sovereignty, etc. An alternative is to try to devise mechanisms that allow for gainers to compensate losers—through side payments. While theoretically a possibility, implementing this in practice is very difficult.

It remains an open question to what extent governments have an incentive to use merger review strategically to improve their terms of trade. Horn and Levinsohn (1997) conclude that it is not very likely that countries will use antitrust for this purpose. This is essentially an empirical question on which much more research is needed (the same is true for export cartels). In particular, research should focus on documenting the prevalence, magnitude and incidence of international merger-related spillovers on developing countries. As is the case with other 'term-of-trade' arguments, even if 'merger approval spillovers' are found to be significant, the question is whether developing countries can intervene appropriately and effectively, or whether this is an area where many countries will have to rely on 'outsourcing'. Realism suggests that a delegation strategy may well be most efficient for many developing countries. The approach

proposed below for cooperation to deal with international cartel spillovers will also allow developing countries to identify and address 'potential abuse of dominance' cases.

4. Existing WTO Disciplines and Agreements

From a legal as well as policy point of view an important question is what the WTO does to allow members to deal with competition law–related 'terms-of-trade' spillovers, and what could be done to allow existing disciplines to be used more effectively.

The WTO and National Antitrust Law

The GATT does not impose common competition law disciplines on its members. This contrasts with the ITO Charter, which contained specific provisions on the treatment of private restrictive business practices (RBPs). Matters are different under the GATS. Art. VIII GATS imposes a legal obligation on WTO Members to ensure that national monopolies do not, through their behavior, erode the value of general obligations and specific commitments (although the narrow definition of the term "monopoly supplier" in Art. XXVIII(h) GATS severely limits the coverage of this obligation). Art. IX GATS requires consultations with respect to RBPs not covered by Art. VIII. The combined effect of the two provisions only marginally circumscribes competition law of WTO Members. With respect to telecoms, the Annex and the Reference Paper on telecoms go further and impose obligations to interconnect, limits (albeit loosely defined) on access pricing, and obligations relating to "bundling" etc. These disciplines are sector-specific only, not general—they are binding only on those WTO Members which have voluntarily made commitments in the telecoms sector. Finally, the terms used (e.g., 'reasonable' price for interconnection) are not self-interpreting. Jurisprudence will be required to be more specific regarding their meaning.[16]

Thus, WTO Members are free to adopt any competition law they wish—the only constraint that is potentially imposed is nondiscrimination (national treatment) (Art. III GATT). National competition law is covered by national treatment insofar as its enforcement is a

'requirement affecting' trade. GATT case-law makes it clear that WTO members are required to provide products of foreign origin with opportunities equal to those available to domestic products as regards access to distribution channels (the 1980s *Alcoholic Beverages* cases). The 1997 *Kodak – Fuji* case made it clear that competition laws are covered by the national treatment obligation, explicitly by subjecting Japanese competition law to the national treatment obligation (§§10.376-7 of the panel report), and implicitly by accepting that the term "affecting" extends to national competition laws.[17]

The practical implication of this is that national competition law should treat products of foreign and domestic origin equally. The national treatment discipline is not concerned with the treatment of *entities* (physical or legal persons); the only concern is with the treatment of *products* resulting from government policies. Say a company incorporated under US law and another incorporated under EC law both abuse a dominant position in the EC, but that they produce different goods. If the EC competition authority intervenes only against the US firm, there is no violation of national treatment under the GATT. The GATT concern for the purposes of Art. III.4 is whether a government measure treats 'like' foreign products less favorably. Moreover, the WTO engages the responsibility of governments only and not of private parties. The terms "laws", "regulations", and "requirements" in Art. III.4 denote some form of positive action by governments. Mere *tolerance* of RBPs is not enough—there must be some positive action (say, a 'comfort' letter).[18]

Cartels and Article XI GATT

Under the "effects" doctrine (or subjective territoriality), countries may take action against foreign practices that have negative effects in their markets. Cartels are an example. The WTO

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[16] The United States lodged a complaint against Mexico with respect to the latter's practices in the context of the obligation of interconnection. The panel was established in mid-April 2002.

[17] Note that because the case was not appealed the Appellate Body has not yet had the opportunity to reflect on the precise boundaries of the term "affecting".

[18] For economists, inaction also reflects a regulatory choice. Not so for lawyers. One cannot exclude that the Appellate Body might adopt an "imaginative" interpretation of one of the three terms in the future. However, the *Kodak – Fuji* panel adopted a restrictive interpretation of the term "measure".

may be relevant in this connection through GATT Art. XI, which states: "no prohibition or restriction … shall be instituted or maintained … on the exportation or sale for export". Export cartels are a restriction on exportation. As with national treatment, the threshold issue is whether the export cartel can be attributed to government behavior. On this, a GATT panel (*Japan – Semiconductors*) argued that a "but for" test should be used, i.e., to what extent the observed behavior would have taken place absent government involvement. Unfortunately the precise degree of government involvement was not specified and thus it is doubtful whether mere 'tolerance' of a cartel suffices. Arguably, however, even passive behavior could be caught by Art. XI, given that the term "restriction" invites a wider reading than the terms "law", "regulation" or "requirement" figuring in Art. III.4. A legislative (rule making) initiative could usefully clarify this gray area.

The second issue of importance is the form cartel action takes. If competition is limited via quotas and there is a government measure supporting the cartel, the practice can be attacked in the WTO. The same may be true if the instrument used is a price agreement—the *Japan – Semiconductors* panel argued that increases in prices due to cartel-type behavior is captured by Art. XI, as it decreases the volume of sales. All this suggests that with marginal additional interpretation of GATT rules, cartels can already be addressed in the existing WTO framework *if* the national enforcement capacity exists.

Nonviolation Complaints (Art. XXIII.1b GATT)

Non-violation complaints can provide a means to attack RBPs in the WTO. What is needed is that a plaintiff shows that (i) the value of concession (ii) was reduced by a subsequent measure that (iii) is not illegal under the GATT but which (iv) could not have been reasonably anticipated when the concession was consolidated (bound). The *Kodak – Fuji* case was the first example in which this approach was used. The mention of the term "measure" again requires some form of positive action by the government. As contested measures are not illegal, the remedy cannot be withdrawal of the practice. Instead, the WTO adjudicating body will recommend that the Member concerned "make a mutually satisfactory adjustment" (Art. 26.1b Dispute Settlement Understanding). Thus, compensation can be sought to 'rebalance' the terms of trade.

Nonviolation disputes can be valuable 'transparency' devices to determine to what extent market access deals have been affected through the introduction of new domestic policies that could not have been foreseen at the time concessions were negotiated (Hoekman and Mavroidis, 1994).

Competition Dimensions of Existing WTO Disciplines

Many WTO agreements have a competition dimension. For example, the Agreement on Safeguards prohibits the use of voluntary export restrictions, orderly marketing arrangements and similar measures on either exports or imports, including compulsory import cartels, and states further that WTO members are to refrain from encouraging or supporting the use of measures with equivalent effect by public *or* private enterprises (Art. 11:3). Many if not most trade policies have anticompetitive effects—indeed, abstracting from revenue objectives, presumably an objective of the government is to reduce competition from imports. However, trade policies may also be used by firms to support tacit or overt collusion—as 'facilitating practices' (Krishna, 1989). What follows discusses briefly some WTO agreements where competition issues arise.

Antidumping. Despite often being regarded as *the* example of a trade policy that is consistent with the objectives of competition law, most economists agree that the purported rationale of antidumping—to combat predatory pricing by foreign firms—is the exception, not the rule (see Lawrence 1998; Pierce, 2000 and Taylor, 2001 for recent analyses). Instead, antidumping is straightforward protectionism, with the added twist that it can be used strategically by firms to collude. Introduction of competition criteria into the rules of the game for contingent protection has been proposed by many as a way to reduce its perverse impact on domestic competition (e.g., Wood, 1989; Messerlin, 1994; Hoekman and Mavroidis, 1996). This could be done by shifting from a concept of injury to competitors to injury to competition. One way this could be achieved is to use the same tests that the competition authorities would use to determine whether price discrimination or selling below cost is anticompetitive. At a minimum, competition offices should have the mandate to determine whether antidumping duties—and, indeed, trade policies in general—may lead (or have led) to an excessive reduction

in competition on the domestic market. Finally, antidumping could be made subject to appeal on the basis of competition concerns—as pointed out by Messerlin (1990), there have been a number of EU antidumping cases brought by firms that were also subject to antitrust investigations.

Intellectual property. The TRIPs agreement allows governments to take measures to control anti-competitive practices in contractual licenses that adversely affect trade and may impede the transfer and dissemination of technology. One competition law issue that arises in the TRIPs context is the treatment of parallel imports. The agreement leaves this to the discretion of each member, but events in the 1990s illustrated that some countries would like to see disciplines in this area. Space constraints prohibit a detailed discussion of this issue. Recent research (Maskus 2000, Richardson 2002) reveals that the case for harmonization of rules is weak in itself. However, restrictions on parallel trade may be required if countries decide to accept differential pricing for patented medicines.

Services. As mentioned previously, the GATS recognizes that business practices may restrain competition and thus trade in services, but no obligations are imposed on members regarding either the scope or the enforcement of competition law. However, the 1997 agreement on basic telecommunications introduces (voluntary) disciplines on issues such as interconnection[19] in recognition of the fact that private dominant players in the telecoms market, left free to make decisions about how to treat other suppliers, may frustrate negotiated market access commitments. Services are activities where there is often need for some type of regulation to address market failures or achieve social (noneconomic) objectives. Technological developments and ongoing processes of privatization of service industries have major implications for the design of appropriate regulatory instruments to ensure both efficiency and equity. Many of the 'backbone' services that are critical to development—transport, energy, telecoms, and finance—are industries where network externalities are important. An implication is that regulation should focus on ensuring that markets are contestable. Doing this is anything

[19] Typical firm-based access barriers in telecoms include a denial of network interconnection, a refusal to provide interconnection on commercial terms, and misuse of commercial information.

but trivial—see recent discussions of finance and energy by Claessens (2002) and Evans (2002)—implying a need to strengthen domestic institutions and a careful approach towards the setting of enforceable international standards in the WTO (Trolliet and Hegarty, 2002). An open issue on which more research is needed that focuses on the developing country context is how applicable competition law is as a discipline compared to sectoral regulation. Most jurisdictions have tended to follow a regulatory route, even for service markets that have been liberalized, in part reflecting social and equity considerations, as well as public good concerns (prudential regulation, etc.) What works best in different country contexts? What role/need is there for international cooperation? Cartels (de jure or de facto) of service-providing enterprises may have a greater negative impact on developing countries. Examples are air and maritime transport cartels—generally supported by governments—and computer reservation systems, where the risk of dominant positions being abused is non-negligible. Determining the relative importance/magnitude of private (that is, governmentally tolerated) practices as compared to those created by government policies is another important area for further research.

Product standards. The agreements on Sanitary and Phytosanitary Measures and Technical Barriers to Trade also have competition dimension. They require WTO members to adopt the least trade restrictive measure when pursuing a regulatory objective. In such cases the burden of proof is on the complainant and in practice it might prove a difficult test to apply. Given that standards can be used to exclude competitors from the market, it would appear important to strengthen mechanisms to allow enterprises to contest proposed standards. This is something that goes beyond the WTO, as standards are not set in the WTO, and will require significant capacity-building efforts. It may also imply a need to reconsider the emphasis given to harmonization of technical regulations to international norms. Harmonization may not be optimal, in part because the standards-setting process can be captured and used in protectionist ways to 'raise rivals' costs'.[20]

Procurement. Another WTO set of disciplines where competition issues arise is government procurement. It is well known that collusive tendering occurs in many settings and

[20] See Gandal and Shy (2001); Barrett and Yang (2001); Veall (1995).

that this can be expected to occur more frequently in settings where competitive and transparent bidding procedures are not followed. This is an area where the introduction of effective competition is vital to reduce costs. However, even if such mechanisms are applied, tenders for products that are non-tradable can easily give rise to attempts to collude—construction contracts are an example that is often noted in the literature. To address such collusive practices a domestic antitrust mechanism may be useful—more important, however, is to design procurement systems that generate competition between potential suppliers, create incentives for whistleblowers and allow for challenges to be brought during the process of procurement.

Agriculture. Agricultural export and production subsidies have well-known effects on competition and are a priority negotiating issue for many developing countries. Marketing boards, state-trading, the exercise of monopsony power by multinational buyers, restrictive conditions imposed on access to—and the use of—seeds, and food safety and related labeling standards set by retailers are examples of practices and policies that can have major implications for competition on markets for agricultural products.

In sum, many competition issues arise in existing WTO agreements. Some of the issues just discussed require mechanisms to induce competition among suppliers, but not necessarily national antitrust enforcement (e.g., procurement). Others require international cooperation and action outside the WTO (e.g., development of international product standards). In several areas what is needed are traditional GATT-type market access commitments (e.g., services), complemented by a willingness to address entry restrictions and market distortions that are supported by or the result of government policies (e.g., agricultural subsidies). To some extent existing rules could also usefully be clarified to facilitate the use of the WTO as an instrument to ban discriminatory conditions of competition for foreign products. Whether pro-competitive liberalization and de- or re-regulation deserves priority over the adoption of multilateral disciplines on national antitrust is something that must be answered on a case-by-case basis. We expect that in many of the instances identified, such disciplines will have a lower payoff than alternative options for most low-income countries.

5. Open Issues and Options

Discussions in the WTO Working Group on Trade and Competition, established in 1997, have revealed little support for the negotiation of common rules for national antitrust (harmonization), let alone for a global competition authority with supranational powers. Proponents of WTO antitrust rules currently argue for the creation of mechanisms to facilitate convergence in national policies, starting with agreement to adopt competition laws that satisfy certain 'core principles'—MFN, national treatment, transparency and due process, and, perhaps, provisions on 'hardcore' cartels. The latter would be akin to those embodied in the 1998 OECD Recommendation Concerning Effective Action Against Hardcore Cartels.[21] Discussions on 'hardcore' cartels have focused on three types—international, export and import—and emphasized the need for international cooperation to deal with the first type. Supporters of WTO rules argue that cooperation between antitrust authorities be voluntary—the notion of 'compulsory positive comity' is not on the table (Anderson and Jenny, 2001).[22] Concerns regarding the confidentiality of business information have led many governments to oppose requirements to exchange such information—instead preferring an approach that is based on mutual trust and past experience in cooperation. There is little if any support for using the WTO dispute settlement mechanisms to contest specific national antitrust decisions; instead, enforcement could take less binding forms, e.g., peer review or multilateral monitoring.

Many recognize that there is a case for cooperation to reduce legal uncertainty and transactions costs for firms. Wolf (2002) echoes legal scholars who call for international agreement on process—e.g., criteria to determine the lead agency that would act on the behalf of all interested authorities, or agreement to pursue joint investigations. Potential solutions to

[21] OECD, C/M(98)7/PROV, adopted March 25, 1998. The OECD Recommendation focuses on *national* enforcement and excludes export cartels: "the hard core cartel category does not include agreements, concerted practices, or arrangements that (i) are reasonably related to the lawful realization 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 authorized in accordance with those laws".

[22] WTO members with established competition enforcement appear to be insistent that a precondition for cooperation is that developing countries adopt legislation and establish enforcement capacity: "[C]ooperation with respect to competition matters [is] only possible when a competition regime was already in operation; that is, when there [is] a domestic competition law of some sort and a domestic competition authority existed with sufficient powers to effectively enforce that law….While cooperation could be provided within a voluntary framework of mutual interest, it would not be possible for a developing country to eradicate anticompetitive practices which had an impact on their markets unless it also developed a national competition law" (WTO, 2001, p. 27, para. 79).

some of the antitrust-related spillover problems discussed previously include bilateral cooperation agreements and Mutual Legal Assistance Treaties (see ICPAC, 2000 and Janow 2000 for a review of experience). Evenett (2002) argues that these could be extended to include more nations to permit authorities to request other signatories to collect evidence and extradite defendants. They could also include the simultaneous application of corporate leniency in multiple jurisdictions and procedures under which fines would be based on the total excess profits generated by the cartel from all the markets involved. Such options do not require pooling national sovereignty or the creation of a supra-national body. Indeed, an open question is whether such approaches need to be anchored in the WTO.

An important question from a development perspective is whether approaches that revolve around voluntary cooperation between national authorities will do much to address those international spillovers that are most likely to be detrimental to their interests. Some developing countries have expressed concern in the WTO Working Group that limited cooperation mechanisms that are voluntary in nature and are premised on the existence of effective antitrust enforcers in their jurisdictions will not help them to deal with international and export cartels (WTO, 2001, p. 24). For low-income economies with limited antitrust enforcement capacity, an approach centered on national enforcement may not have a positive payoff. It would impose implementation costs for countries without competition laws, while not dealing with the issue that is perhaps are most important from a 'terms of trade' point of view—international and export cartels—given the limited capacity in many countries to deal with these practices.[23]

The response by proponents to such concerns has been to emphasize technical assistance. In our view this is not enough. What is needed is a ban on export cartels—including instances of alleged abuse of monopsony power by large buyers on the world market—and a commitment on the part of OECD members to enforce such a ban. From a development

[23] Capacity constraints and weaknesses in many developing countries imply that a positive comity based approach will be inadequate, given that this is voluntary, is premised on cooperation and trust between national enforcement authorities, and is limited to the application of each country's legislation to its own firms (it does not involve changes in national legislation). See Janow (2000).

perspective such an approach would ensure that WTO antitrust disciplines have a direct payoff by dealing with practices that national authorities in developing countries will find difficult, if not impossible, to address by themselves—even if they have antitrust. In principle, developed WTO members can make such commitments in the consolidated GATT schedules of concessions.[24]

A number of questions will have to be addressed in operationalizing the above idea. The first is what developing countries would have to 'pay' for such a commitment, given that OECD antitrust enforcers (and thus taxpayers) would be confronted with the need to prosecute in favor of foreign consumers and to incur the associated enforcement costs. In practice the quid pro quo most likely would have to take the form of tariff commitments or specific commitments on services trade liberalization—that is, market access concessions. This issue linkage question is discussed in Section 6 below. A second question is how cases would be initiated—determining who would have standing to do so. One option would be to allow for negatively affected governments (or firms) to sue in the courts of the relevant OECD countries. This raises issues not only of standing but also the criteria embodied in national legislation. Insofar as the OECD country's welfare is not affected negatively (and by definition it will not be in the case of export cartels), current legislation would not permit cases to be brought.[25] Legislation would need to be revised, and there would need to be acceptance that national resources could be used to the benefit of foreign consumers—i.e., be seen as an 'in-kind' type of development assistance.[26]

Given that many countries/stakeholders will find it difficult and costly to identify potential WTO-illegal international anticompetitive practices, the creation of a 'Special Prosecutor' might also be considered (Hoekman and Mavroidis, 2000). This entity could be given the authority (and resources) to bring cases in the relevant jurisdiction on behalf of developing country consumers. If it proves to be impossible to induce OECD countries to alter national legislation and enforcement practices to allow developing country interests to be defended before the

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[24] Non-tariff concessions appear in Part III of various GATT schedules. An example is a commitment made by Egypt to remove certain products from import licensing requirements.

[25] This remains true after the recent U.S. Court of Appeals for the Second Circuit decision in *Kruman v. Christie's International PLC*, which creates some scope for foreign plaintiffs to obtain recourse under US law, but only if there are effects in the US—see U.S. App. Lexis 3895 (2d Cir. Mar. 13, 2002).

[26] Although enforcement costs could be recovered to a lesser or greater extent through fines imposed.

relevant OECD authorities, a Special Prosecutor might be given the mandate to bring alleged restrictive business practices (RBPs) that injure developing countries before the WTO instead of national courts or authorities. This was the approach that was envisaged in the ITO, although it was not limited to developing countries. Here there are also a number of alternatives. One would be to seek to make WTO disciplines binding and, for example, rely on multilateral sanctions as an enforcement device in cases where a WTO member does not take action to implement the conclusions that emerge from whatever process or mechanism is established. Another would be to limit the process to fact-finding, and use the Special Prosecutor as a mechanism through which to generate information on the impact and incidence of alleged cartel behavior.

A problem with all these options is that WTO remedies are unlikely to constitute a credible threat to induce compliance if OECD authorities refuse to take action on behalf of developing countries, or a country whose firms are found to be in violation does not act. A developing country can only threaten to restrict market access—remove prior tariff or other concessions. This is likely to be costly to the economy as well as ineffective in terms of affecting the incentive of the defendant to take antitrust action.[27] To date there is not a single example of a small, developing country imposing countermeasures against a major OECD country even when authorized to do so (e.g., Ecuador in the *Bananas* litigation—see Hudec, 2002). In short, the creation of an incentive compatible enforcement structure to induce the major traders to act against their firms that cartelize foreign markets may require changes to be made to WTO remedies.

Much if not all of the foregoing proposals can be criticized as being utopian. The same can be said for proposals that have been made to make antidumping enforcement more consistent with competition law criteria or to abolish it altogether (Messerlin, 1994; Hoekman and Mavroidis, 1996). However, in principle there is not much difference between the feasibility of implementing these types of suggestions and past initiatives to reduce trade barriers. Both

[27] This assumes the government is small—and cannot affect its own terms of trade—and does not see value in raising protection for political economy reasons. As noted by Either (2002), the latter may provide a motivation for restricting trade in such cases.

involve actions that benefit trading partners. Although the magnitude and distribution of benefits will differ—trade liberalization is in the self-interest of the country doing it—for large players like the EU and US, trade liberalization does imply giving up some ability to influence their terms of trade. The real issue is what will need to be offered to the Quad to induce them to accept a pro-development set of competition law disciplines in the WTO.

6. Linkage Questions—What's it Worth to Who?

In order to obtain commitments of the type proposed above, reciprocal concessions will be demanded by OECD countries—that is, issue linkage will be required. Linkage goes to the heart of the political economy problem confronting developing countries in the Doha talks more generally. It is necessary to mobilize constituencies at home and abroad that will support greater access to export markets and better WTO rules from a development perspective. The linkage question boils down to how to design a socially beneficial grand bargain scenario—what can and should be offered in the context of WTO bargaining to obtain an overall desirable outcome? This depends on the *net* national benefits of a package of proposals, i.e., taking into account losses incurred by losers, the benefits to those who gain, and the need for (and cost of) compensation mechanisms. Benefits will depend on the payoff to own reforms implied in the package and those offered by trading partners. The value of the package to trading partners will determine what they are willing to offer, which in turn will depend on the intensity of interest and the (lobbying) power of the domestic groups that negotiators care about—multinationals, NGOs, unions, etc.[28]

Developing countries have much to bring to the table. Concessions on market access in services or tariff reduction on imports of goods can be offered. In general, a good criterion for linkage is to make concessions in areas where the economics point to clear benefits—such as is the case for trade liberalization. But there is much on the Doha negotiating table where the economics are not clear and/or where agreements may have substantial implementation costs.

[28] See Tollison and Willet (1979) for an early formulation of the linkage argument and Leidy and Hoekman (1993) and Conconi and Perroni (2002) for applications to trade negotiations.

Ascertaining the net costs of the quid pro quo demanded by OECD countries will be an important challenge for developing countries.

The discussions in the WTO working group have not addressed the linkage question, given that it is not a negotiating group. However, the lack of good data and analysis on the potential magnitude of the welfare costs of international anticompetitive practices impede informed assessments of appropriate quid pro quos. The asymmetry that exists between WTO members on existing antitrust capacity also has implications for linkage design. Countries with well-developed competition law mechanisms have less need to 'outsource' enforcement to OECD countries—they can do this for themselves. Other, primarily small and poorer countries, stand to benefit more from outsourcing. But it is precisely these countries that may find it difficult to offer the required quid pro quo incentives, suggesting that a deal that benefits the poorest may need to be motivated on the basis of equity as opposed to mercantilist arguments. That in turn implies the need for active engagement at the national level by the development community broadly defined—bilateral donors, NGOs—in support of a pro-development competition law outcome.[29]

7. Conclusion: Implications for Policy and Research

Competition *law* can be an important component of a desirable competition *policy*, but priorities will differ across countries—low-income countries need to assess where to invest scarce human resources, both across policy domains (reform in other areas may have a larger 'competition payoff' than investment in competition law enforcement). The WTO market access-driven negotiating process is of course designed to address government restrictions on the contestability of markets. In our view the relative payoffs to continuing traditional liberalization of entry into markets will be greater than investment of significant resources into development of competition law disciplines—at both the national and multilateral levels.

[29] These differences in incentives may also facilitate concluding a so-called Plurilateral agreement on competition law in the WTO. Such an approach is not necessarily in the interest of countries which do not sign the agreement as it will be difficult if not impossible for excluded countries to change the rules of game at a later date if they want to join, and may result in discrimination against nonmembers.

However, this is an *empirical* issue. Much more work should be undertaken to identify where the priorities lie on a country-by-country basis.

The state of play of discussions in the WTO working group suggests that a key question is whether it makes sense to accept an agreement requiring adoption of a competition law that satisfies procedural due process norms, complemented with commitments to provide technical assistance and a call for case-specific cooperation on a voluntary basis. Such an approach does not constitute motherhood and apple pie given the fundamental opportunity cost problem that arises due to limited expertise and capacity in low-income economies (Winters, 2002), as well as the uncertainty regarding net payoffs in comparison with other options that can be pursued through existing agreements to increase competition on markets more directly.

For any WTO antitrust agreement to be pro-development it will need to focus on the international dimensions of competition law enforcement that are most detrimental to developing countries, and recognize the capacity constraints and differences in priorities that prevail in many developing countries. The WTO arguably has a role to play in dealing with international competition law spillovers that affect countries' terms of trade. Any such role should imply asymmetric obligations in that rich countries undertake to alter their legislation regarding export cartels and commit to devote their enforcement resources to pursuing anticompetitive practices by their firms that have effects on developing country markets. This does not entail a need for all WTO members to adopt competition law mechanisms. Capacity constraints and differences in priorities suggest that approaches to developing *national* competition law enforcement capability should be based on a cooperative, *voluntary* approach. It is not clear whether the WTO is the appropriate venue for such cooperation.

There is much scope and need for additional research in this area. Despite almost a decade of talks and policy discussion, there is a dearth of rigorous empirical analysis that can inform decision-makers regarding priorities. One unanswered question is how large the payoff will be to developing countries of the 'external enforcement' (outsourcing) approach. The lack of information on the global magnitude and distribution of anticompetitive practices, in particular due to international cartels and related practices, is a problem. More work is needed on the (potential) magnitude of the exercise of market power by global multinationals, both as buyers

and suppliers. Is this a significant issue for developing countries? How prevalent are export cartels? How large are the associated markups of price over cost? How large are the welfare losses? Such information is needed to allow policymakers to form negotiating strategies and assess linkage options.

Much more work is also needed on how OECD antitrust enforcers could assist developing country stakeholders to combat international and export cartels. The fact that national competition authorities do not intervene at present is the result of exercise of discretion and not of legal compulsion. Although the proposals that have been made here are a direct way of recognizing the capacity constraints that exist in many developing countries, more work is needed on the mechanisms that would be used. Who would bring cases? Can this be left to the private sector—those hurt by alleged anticompetitive behavior? Should it be left to governments? Should there be a role for international surveillance and monitoring? What are the pro's and con's of mandating a 'special prosecutor' to bring cases before national courts/authorities? If such an approach is followed, should it (initially) be limited to a transparency function, with cases simply being documented and reported to a WTO body?

A major determinant of the incentives to implement an international agreement is how it would be enforced. Proposals now on the table at the WTO would not apply standard DSU procedures to disputes. Is this credible? What could be done to hold OECD competition agencies and high-income WTO members to account? Surveillance is one option, and the WTO might have an important role to play in that connection. More generally, one can ask what are the incentive effects of peer review and similar approaches towards surveillance of national competition enforcement. Although many developing countries now have antitrust legislation, and many more are considering its introduction, enforcement may be uncertain or inconsistent. Allowing for multilateral surveillance of WTO members who have decided to adopt legislation—e.g., through panels of experts who would determine whether national law was applied correctly; or through expansion of the WTO Trade Policy Review Mechanism—could help ensure consistency, diffuse tensions and expand knowledge of options and alternative experiences.

Our bottom line is that in the WTO market access is what counts. It will be needed to 'buy' a competition law agreement that improves the terms of trade of developing countries while not implying significant implementation costs. Any deal that does not improve the terms of trade for developing countries is unlikely to benefit countries that have not already decided to adopt and enforce national antitrust laws. And even those that have done so may not benefit much, if at all, although for them the downside of a purely procedural agreement on competition law would be minimal. This is not to say that a national competition law is irrelevant, nor does it imply that efforts should not be made to provide technical assistance to countries that have decided to adopt and enforce competition legislation. Our premise is simply that the WTO is best placed to address barriers to competition that are created through government policy, and that if competition law is put on the WTO negotiating table, the focus should be on those dimensions that create negative spillovers for developing countries. Strengthening national competition law regimes in developing countries should not be regarded as something that needs to be negotiated; it should be driven by national decisions that this is a priority, and be supported through bi- and multilateral development assistance.

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