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Competition Law/Policy and the Multilateral Trading System: A Possible Agenda for the Future

Robert D. Anderson and Anna Caroline Müller

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Tel: +41 22 917 8492
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World Economic Forum
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Tel: +41 22 869 1212
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Anderson: Counsellor (Team Leader for Government Procurement and Competition Policy), Intellectual Property Division, WTO Secretariat; Honorary Professor, School of Law, University of Nottingham; and Part-time Faculty Member, World Trade Institute, University of Bern.
Müller: Legal Affairs Officer, Intellectual Property Division, WTO Secretariat.
E-mail address for correspondence: robert.anderson@wto.org.

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ABSTRACT

Important synergies or complementarities exist between trade liberalization initiatives and the application of measures to suppress anti-competitive practices or arrangements. In fact, both anti-competitive practices of firms and state-orchestrated arrangements that restrict competition can undermine the gains from trade in myriad ways. Perhaps, the clearest examples of such effects involve international cartels that allocate national markets among individual producers, abuses of a dominant position that limit access to facilities that are necessary for the importation of goods or services, and import cartels or anti-competitive vertical market restraints that exclude foreign suppliers from a market. As another manifestation of complementarity, trade liberalization can itself be a powerful tool for addressing competition policy concerns, for example, where the liberalization of government procurement markets through participation in the WTO Agreement on Government Procurement (GPA) helps to make bid rigging more difficult, by increasing the number and diversity of competing suppliers. More generally, trade liberalization is an effective vehicle for enhancing competition in many contexts. As well, the WTO's cornerstone principles of non-discrimination and transparency have important application to competition law enforcement processes and institutions.

The purpose of this think-piece is not to make a general pitch for resumption of work on competition policy in the WTO, or to advocate a specific approach to renewed work. Rather, its purpose is to identify and set out a menu of issues that could be addressed in such work in the event that WTO Members choose to go forward in this area, taking account of both past work and current developments in the policy environment. As a basis for delineating relevant issues, the think-piece reviews and seeks to derive insight from (i) the work done by the WTO Working Group on the Interaction between Trade and Competition Policy (WGTCP) from 1997 to 2003, and the problems that related negotiating proposals encountered; (ii) the ways in which competition policy considerations already figure in existing WTO Agreements; (iii) the treatment of competition policy in recent regional trade agreements and ongoing negotiations; and (iv) other relevant developments in the global policy environment, including with respect to business community perspectives and the emergence of new concerns/analytical issues for consideration at the interface of trade and competition policy. On the basis of these considerations, the paper sets out a menu of issues for possible related work.
The ease of restarting even analytical work on trade and competition policy should not be overstated. There is, in any case, no suggestion here that related work be brought forward in any way that would detract attention from the conclusion of the current negotiating round. With these caveats, the think-piece draws attention to two contextual points of potential interest. First, the original WTO WGTCP, while currently designated as "inactive," still exists. Moreover, the decision taken by the WTO General Council in 2004 regarding the status of the Group leaves the door open to a resumption of work on relevant issues following the conclusion of the Doha Round. Arguably, it also does not rule out, even before that time, a resumption of exploratory work on these issues provided that such work is not directed "towards negotiations." Certainly, the WTO Working Group which, in its early years earned solid credit for just such an exploratory work programme, would be a logical body to undertake resumed work in this area.

Second, any resumed work programme on trade and competition policy in the WTO could and should invite and encourage input from other organizations active in the competition policy field. These could include, for example, the International Competition Network (which is the organization that competition agencies see as being most directly "theirs") but also the United Nations Conference on Trade and Development (UNCTAD), the Organisation for Economic Co-operation and Development (OECD) and the Consumer Unity and Trust Society (CUTS). There is no reason why such organizations could not eventually be given specific, dedicated roles in the development of relevant standards. This would be broadly comparable to the roles that other organizations and policy development exercises have had in relation to the negotiation of other important WTO Agreements. Such a consultative approach, with specific vectors for incorporating input from organizations with more specialized expertise in competition policy per se, could enhance both the usefulness and the political acceptability of resumed WTO work in this subject-area.

CONTENTS

LIST OF ABBREVIATIONS

CUTS	Consumer Unity and Trust Society
EU	European Union
FTAs	free trade agreements
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GPA	Agreement on Government Procurement
ICN	International Competition Network
IPRs	intellectual property rights
NGOs	non-governmental organizations
OECD	Organisation for Economic Co-operation and Development
RTAs	regional trade agreements
SOEs	state-owned enterprises
TRIPS	Trade-Related Aspects of Intellectual Property Rights
TPP	Trans-Pacific Partnership
TTIP	Transatlantic Trade and Investment Partnership
UNCTAD	United Nations Conference on Trade and Development
US	United States
USTR	United States Trade Representative
WGTCP	Working Group on the Interaction between Trade and Competition Policy
WTO	World Trade Organization

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INTRODUCTION AND PROBLEM STATEMENT

The interaction between trade and competition policy was an important element of the current round of multilateral trade negotiations—the Doha Development Agenda—as it was originally conceived. The Doha Ministerial Declaration (Article 23) recognized "the case for a multilateral framework to enhance the contribution of competition policy to international trade and development" and called for "negotiations [to] take place after the Fifth Session of the Ministerial Conference [the Cancún Conference of 2003] on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations." Despite this, at the Cancún Conference it was evident that no consensus existed either on the modalities for or on the basic desirability of negotiations on this topic. Developing countries mainly opposed negotiations, citing both a lack of negotiating capacity and apprehensions concerning the implications of a multilateral framework for related domestic policies and "policy space." In addition, while the European Union (EU) had resolutely championed the idea of a multilateral framework on competition policy, some other developed countries considered the idea to be premature and/or were apprehensive as to any negotiations or framework that could potentially impinge upon the discretion of national competition law enforcement authorities in their enforcement policies and decisions (for a classic statement of relevant concerns, see Klein 1996).

Notwithstanding the failure to reach a consensus at Cancun, very important synergies or complementarities exist between trade liberalization initiatives and the application of measures to suppress anti-competitive practices or arrangements (relevant findings of the World Trade Organization [WTO] Working Group on Trade and Competition Policy [WGTCP] are discussed below; see, for other pertinent sources, Organisation for Economic Co-operation and Development [OECD] Joint Group on Trade and Competition 1999; United States [US] Council of Economic Advisers 1995; WTO 1997; Anderson and Holmes 2002; Anderson and Kovacic 2009; Anderson and Müller 2013; Anderson and Müller 2014). In fact, both anti-competitive practices of firms and state-orchestrated arrangements that restrict competition can undermine the gains from trade in myriad ways. Perhaps, the clearest examples of such effects involve international cartels that allocate national markets among individual producers, abuses of a dominant position that limit access to facilities that are necessary for the importation of goods or services, and import cartels or anti-competitive vertical market restraints that exclude foreign suppliers from a market (International Trade Centre 2012).

Even international cartels or transnational abuses of a dominant position whose primary impact is on the price or supply of goods or services as opposed to the exclusion of market participants per se directly impact the underlying objectives of the multilateral trading system. Contrary to what is sometimes perceived, the latter are not concerned with trade liberalization for its own sake but with the attainment of rising living standards, sustainable development, and growth (WTO 1994; Preamble to the Marrakesh Agreement establishing the WTO). These objectives, indeed, are highly congruent with the goals of competition policy and can be directly undermined by international cartels and other anti-competitive practices (OECD Joint Group on Trade and Competition 1999).

As another manifestation of complementarity, trade liberalization can itself be a powerful tool for addressing competition policy concerns, for example, where the liberalization of government procurement markets through participation in the WTO Agreement on Government Procurement (GPA) helps to make bid rigging more difficult (Anderson and Kovacic 2009; Anderson et al. 2011). More generally, trade liberalization is an effective vehicle for enhancing competition in many contexts (for example, in both primary products markets and service industries with limited possibilities for competition involving purely domestic players; see Anderson and Müller 2013). It is widely acknowledged, as well, that the principles of non-discrimination and transparency—the "founding" or "cornerstone" principles of the WTO—have important application to competition law enforcement processes and institutions (Ehlermann and Ehring 2002).[1] None of this is to suggest that competition policy or law enforcement should in any way be subordinated to trade prerogatives or that great care should not be taken to preserve the operational imperatives of law enforcement in this area—only that important synergies exist between the two fields (trade and competition policy) and that it is reasonable to acknowledge this and inquire whether additional steps are desirable to ensure their full realization.

It is important, as well, to note that, in the past decade, a number of contextual developments have occurred which suggest that the environment for a possible resumption of work on the relationship of competition policy to the multilateral trading system may be more promising than was the case in the period leading up to the Cancun conference and in the immediate years after it. This is not to suggest that the initiation of relevant work would be easy or that all barriers to effective action on related issues in the WTO have been eliminated; only that the environment has improved in some important respects.[2] As will be elaborated, relevant developments include the following.

1 The point here concerns the importance of non-discrimination and transparency to competition law enforcement processes and institutions. This is not to suggest that price discrimination by firms, as a form of market behaviour, may not have benign or even pro-competitive effects—a different issue entirely. See, generally, Varian (1989).

2 See also related discussion in Part 3, below.

- Widespread adoption of competition policy disciplines in regional trade agreements/bilateral free trade agreements (FTAs), providing confirmation of the general relevance of competition policy standards as a complement to trade liberalization and suggesting possible approaches to particular issues (see related discussion and sources cited below).

- Very significant progress in promoting better understanding of the objectives, modalities, and effects of competition policy around the world as a result of work undertaken by international organizations such as the International Competition Network (ICN); the OECD; and the United Nations Conference on Trade and Development (UNCTAD), in addition to national competition agencies and non-governmental organizations (NGOs) such as the Consumer Unity and Trust Society (CUTS).
- An increasing demand in the international business community for action to ensure adherence to the principles of non-discrimination, transparency, and procedural fairness in the field of competition policy, together with greater mindfulness of the risks entailed by the relative absence of enforceable international norms in this area (see related discussion and sources cited).

CONSIDERATIONS

PAST WORK OF WTO WORKING GROUP ON THE INTERACTION BETWEEN TRADE AND COMPETITION POLICY: REVIEW AND INSIGHTS/LESSONS FOR FUTURE WORK

From 1997 to 2003, the WTO WGTCP engaged in a wide-ranging study of the relationship between trade and competition policy and the implications of such policy for development and global prosperity. The work was chaired and led throughout by Frédéric Jenny, who was and is also Chair of the OECD Competition Committee and, subsequent to his work in the WTO, was appointed Conseiller En Service Extraordinaire on the French Cour de Cassation. It was accompanied by an intensive and worldwide programme of technical assistance, led by the WTO Secretariat, but with the active participation of Jenny and other eminent persons, and covering not only technical aspects of competition policy but also, very much, the relationship of such policy to economic development, trade, and poverty reduction. This work also involved very significant cooperation with other international organizations active in the competition policy field, including UNCTAD, the OECD and CUTS (Anderson and Jenny 2005; Anderson 2015).

The work programme of the WTO Working Group bears consideration in framing any agenda for future work in this area. A timeline of the work is provided in Box 1. In the first two years, the work of the Working Group was guided by terms of reference set out in the Chairman's "Checklist of Issues" (Annex 1). Under those terms, the work focused, among others, on the impact of anti-competitive practices

BOX 1:

Problem statement and contents of the remainder of the think-piece

The purpose of this think-piece is not to make a general pitch for resumption of work on competition policy in the WTO or to advocate a specific approach to renewed work. This is a decision that only the WTO's Members could take. Rather, its purpose is to identify and set out a menu of issues that could be addressed in such work in the event that WTO Members choose to go forward in this area, taking account of both past work and current developments in the policy environment. As a basis for delineating relevant issues, Part 2 reviews and seeks to derive insight from (i) the work done by the WTO Working Group on the Interaction between Trade and Competition Policy from 1997 to 2003, and the problems that related negotiating proposals encountered; (ii) the ways in which competition policy considerations already figure in existing WTO Agreements; (iii) the treatment of competition policy in recent regional trade agreements and ongoing negotiations; and (iv) other relevant developments in the global policy environment, including with respect to business community perspectives and the emergence of new concerns/analytical issues for consideration. On the basis of this discussion, Part 3 sets out a menu of issues for possible related work. Comments are also provided on possible institutional paths for relevant work.

of enterprises and associations on international trade, and specifically on

- the impact of state monopolies, exclusive rights and regulatory policies on competition and international trade;
- the relationship between the trade-related aspects of intellectual property rights and competition policy;
- the relationship between investment and competition policy; and the impact of trade policy on competition.

Without overstating the extent of agreement or convergence in views that was reflected in the above work, it is important to appreciate the very high degree of interest that was evident in it (in all, the work generated more than 220 papers/other analytical inputs by participating WTO Members) and the (perhaps surprising) commonality of views that was evident with respect to key underlying issues. This was as distinct from the divergence of views which subsequently became evident regarding specific proposed actions or policy measures. For example, the Working Group had no difficulty recognizing the general significance of competition policy for economic development (recognizing the detrimental effects of cartels and other practices on the welfare of citizens), and referred specifically to a large number of ways in which anti-competitive practices of firms in addition to state monopolies and privileges could undermine or disrupt the beneficial effects of trade liberalization (WGTCP 2002: 7–15, 25–37). It noted, as well, that "the role of competition policy in addressing anti-competitive practices of enterprises that [affect] international trade might be particularly important in a developing country setting" (WGTCP 2002: 12). The Group also referred to "the heightened importance of competition policy as a tool of development in the current, globalizing economic environment, as compared to previous eras" (WGTCP 2002: 11).

Subsequently, in the period 1999 to 2001, the Working Group pursued a refocused mandate emphasizing "(i) the relevance of fundamental WTO principles of national treatment, transparency, and most-favoured-nation treatment to competition policy and vice versa; (ii) approaches to promoting cooperation and communication among Members, including in the field of technical cooperation; and (iii) the contribution of competition policy to achieving the objectives of the WTO, including the promotion of international trade" (WT/WGTCP/3, 4 and 5, respectively). Again, without overstating the degree to which views converged, the work done in relation to the revised mandate yielded broad agreement on certain fundamental points. For example, there was general acceptance that adherence to principles of non-discrimination, transparency, and procedural fairness in competition law/policy enforcement procedures is vital to both the effectiveness and the public acceptability of such law and policy (WGTCP 2000). Non-discrimination is the key to ensuring that competition policy is not employed selectively by countries as a tool of industrial policy; transparency and procedural fairness are vital both for compliance purposes and to ensure the confidence of firms subject to the law.

TABLE 1:

The Evolving Work Program of the WTO Working Group on the Interaction between Trade and Competition Policy

Period	Substantive focus	Outcome(s)
1997–1998	Exploratory work program on fundamental relationships between trade, competition policy, and development, including with respect to: (i) state monopolies and regulation; (ii) intellectual property rights (IPRs); investment; and (iv) the impact of trade policy on competition.	Improved understanding of fundamental relationships, for example, the importance of competition law/policy to combat anti-competitive practices that harm development and trade; role of competition policy vis-à-vis IPRs and investment.
1999–2001, including Doha Ministerial Conference	Relevance of WTO principles (non-discrimination and transparency) to competition law enforcement and vice-versa; cooperation between relevant agencies and general contribution of competition policy to WTO objectives.	Broad recognition of the significance of non-discrimination and transparency principles for effective competition law enforcement and public support. Broad agreement on usefulness of inter-agency cooperation and capacity building for competition law enforcement in a globalizing environment.
2002–2003 and Cancún Ministerial Conference	Possible elements of a multilateral framework and "modalities for negotiations."	No agreement on the way forward. At Cancún, rejection by developing country representatives of proposals for a multilateral framework championed by the EU/some other developed countries.
2004 and subsequently	Working Group officially "inactive"	N/A

The foregoing is not to say that all WTO Members were ready to agree on specific proposals to implement these principles (those proposals were still to be developed), but that, at the level of principle, essentially no WTO Member disagreed. This is not surprising given the importance that established competition agencies themselves give to these principles (see, for example, Varney 2010). Indeed the nurturing of adherence to these principles has been a key concern of subsequent work at the international level, for example, in the ICN.

Pursuant to the Doha Ministerial Declaration (2001), the work of the Working Group was further refocused to emphasize specific elements of a possible "multilateral framework on competition policy" as proposed by the proponents of such a framework, particularly the EU. These comprised "core principles, including transparency, non-discrimination, and procedural fairness; provisions on 'hard-core cartels'; modalities for voluntary cooperation (between competition agencies); and support for progressive reinforcement of competition institutions in developing countries through capacity building." By the end of 2002, the Working Group had completed a wide-ranging analysis of these elements. Subsequently, the four elements cited became the main proposals that were considered by the WTO's Members in the context of the Cancún Conference.

At the WTO Ministerial Conference in Cancun, Mexico, in September 2003, the majority of WTO Members rejected launching negotiations on a multilateral framework on competition policy incorporating the above elements. It seems fair to say that this was not due exclusively to problems associated with the competition proposals per se but also to wider WTO negotiating priorities and concerns and a general backlash, at the time, against the WTO and its work (see, for a related discussion, Evenett 2007). Still, concerns regarding the competition policy proposals themselves must also be acknowledged. The latter concerns included (i) scepticism and/or a lack of understanding on the part of developing countries' representatives regarding their potential interests in relation to the suppression of anti-competitive practices; (ii) concerns on the part of the same countries regarding a lack of negotiating capacity in this area; and (iii) as already noted, reservations on the part of certain developed country national competition authorities on the implications of a possible multilateral framework for their investigative and prosecutorial independence. Subsequent to the Cancun Conference, the General Council of the WTO decided, as part of the so-called "July package" of 2004, that no further work would be undertaken toward negotiations on competition policy (or on the separate but related issues of investment and transparency in government procurement) for the duration of the Doha Round.

In sum, the work of the WTO WGTCP was broad, substantive, and multifaceted. Without yielding agreement on specific negotiating proposals (on which there was no consensus), it showed a depth of insight and relative commonality of views on certain important underlying issues (for example, the complementary roles of competition policy and trade liberalization; the harmful consequences of anti-competitive practices for development, and the need for appropriate remedial measures) that belie the perception of general failure which is sometimes associated with this work. In this context, and without denying other possible insights or minimizing related difficulties, three further lessons may be drawn.

- The clear importance of developing a narrative on the goals of such work and the benefits to be achieved that is accessible to all stakeholders, including consumers, businesses, governments, and NGOs.

- The importance, in any further work on competition policy in the WTO framework, of elements that address specific concerns of developing countries, and of a substantially stronger level of understanding and negotiating capacity among such countries than existed in 2003–04 (it will be argued below that this condition is now, to a considerable extent, fulfilled).

- The equal importance of taking seriously the concerns of developed countries and, specifically, of avoiding measures that could be seen as limiting the independence or impinging on the discretion of national competition law enforcement authorities in relevant cases.

Subject to the above, it can be argued that the 2003 proposals were, in their main elements, broadly sound (see also Anderson and Jenny 2005). In particular, it is suggested that few, at least, in the international competition community would, today, reject out of hand the utility of the proposals' main elements:

- Recognition of the general importance of the principles of non-discrimination, transparency, and procedural fairness in the application of competition law and policy (this is widely affirmed, for example, in the work of the ICN and of national competition authorities).

- A universal commitment to action by WTO Members to eradicate hard-core cartels (such arrangements are typically viewed by national competition authorities as being their highest priority for enforcement action and are already the subject of important, though non-binding, international instruments such as the OECD Recommendation Concerning Action Against Hard-core Cartels; OECD 1998).

- The encouragement of cooperation among competition authorities, at least on a voluntary basis and subject to modalities to be worked out by the agencies themselves (support for such cooperation is universally proclaimed by national authorities and other international organizations).

- General commitments to broad international support for ongoing capacity building in the competition policy field (this is widely accepted as an essential pillar of any international work in this area).

Still, there is no suggestion here that the previous Working Group proposals could or should simply be recycled. Rather, it is suggested, any possible revival of work should also take account of other contextual elements and developments, which are noted below.

SPECIFIC AREAS OF INTERFACE BETWEEN COMPETITION POLICY AND EXISTING WTO AGREEMENTS

The above-outlined work of the WGTCP is far from being the only context in which competition policy has been addressed in the framework of the WTO. Indeed, the importance for the multilateral trading system of measures to ensure the competitive operation of markets is reflected in a number of provisions and subordinate instruments that have been incorporated in the various Agreements over the years, particularly with the 1994 transition from the General Agreement on Tariffs and Trade (GATT) to the WTO. The following outlines three broad areas of interface which seem particularly topical in the present environment.[3] As will be emphasized below, while these areas of interface are important manifestations of the relevance of competition policy concepts and concerns, their existence also raises significant questions of application which, arguably, merit further consideration in a forum such as the WTO WGTCP.[4]

A first broad area of policy interface: Competition rules embodied in the GATS Agreement and the Reference Paper on Basic Telecommunications Services

Article VIII of the existing General Agreement on Trade in Services (GATS) obliges WTO Members to ensure that any monopoly supplier of a service in its territory does not, in the supply of the monopoly service in the relevant market, act in a manner inconsistent with that Member's fundamental obligations under Article II of the Agreement (the general obligation relating to national treatment) and to that Member's specific commitments under the GATS. The focus on monopoly suppliers has an obvious interface with competition policy. In addition, Article IX of the GATS recognizes specifically that "certain business practices of service suppliers … may restrain competition and thereby restrict trade in services." Article IX also obliges WTO Members to enter into consultations with a view to eliminating such practices upon request by another Member – an apparent example of a WTO provision encouraging international cooperation in the resolution of competition policy concerns.

Another important example of the incorporation of competition policy concepts and principles into elements of the WTO Agreements concerns the so-called "Reference Paper" on regulatory principles which forms part of the commitments made by most WTO Members in the context of the WTO Negotiations on Basic Telecommunications Services that were conducted under the overall rubric of the GATS and were concluded in February 1997. The Reference Paper is intended to address, among other possible concerns, situations where the services provided by public telecommunications networks constitute essential facilities that are exclusively or predominantly provided by a single or limited number of suppliers and for which there are no feasible substitutes—a situation which potentially constitutes an impediment to both competition and market access for service suppliers. More generally, the Reference Paper both recognizes the threat of, and requires participating WTO Members to address, the anti-competitive practices of dominant firms in this sector.

To address this concern, the Reference Paper sets out detailed rules relating to interconnection of downstream service providers with major suppliers on non-discriminatory terms; the prevention of anti-competitive acts such as cross-subsidization; and the making available of information needed for efficient inter-connection. These rules draw importantly on concepts of antitrust and regulatory policy such as exclusionary practices and the essential facilities doctrine (Anderson and Holmes 2002).

Key elements of the Reference Paper and related provisions of Mexico's GATS commitments were considered in the 2007 WTO Panel Decision in the *Mexico: Telecoms (Telmex)* case. In this case, which was brought against Mexico by the US, the panel found that several features of Mexico's framework for regulation of international telecommunications services were in violation of its commitments under the Reference Paper.[5] It is instructive that, rather than appealing the case to the WTO Appellate Body, Mexico chose to accept the panel's ruling. In the view of some observers, it did so precisely because this was in the best interest of Mexico's consumers and the long-run development of its telecommunications sector (see, for example, Hufbauer and Stephenson 2007; and, for a useful related commentary, Fox 2006).

As to the systemic importance of the case, Fox (2006) concludes as follows:

3 It is emphasized that these are only three of many possible areas that could be discussed. See WTO (1997) for a more complete mapping.

4 See also WTO (1997) and Anderson and Müller (2014). In addition to these specific areas of policy interface, in a broad sense, the entire spectrum of WTO Agreements can also be viewed as advancing competition policy objectives. See WGTCP (1998).

5 See "Mexico — Measures Affecting Telecommunications Services" at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds204_e.htm.

> The Mexican telecom case illuminates why competition rules must extend cross-border and why hybrid trade-and-competition (public/private) restraints must be treated as a unified whole, if we are to realize the good potential of globalization. … The GATS Annex with its Reference Paper is the first instrument providing a unified vision for disciplining linked public and private restraints. The Panel Report's interpretation of the antitrust obligation gives life to the discipline. A positive reading of the antitrust clause is a step forward on intertwined issues of trade and competition.

While the Reference Paper's disciplines on anti-competitive practices proved their utility in the *Telmex* case, it could be useful to ponder relevant lessons in the context of a broader reflection process on trade and competition policy. A possible question for reflection would be whether there could be a need for comparable disciplines in other infrastructure sectors (for example, energy). Potentially, this could be easier than the development of a broad horizontal framework for the application of competition policy at the multilateral level. At the same time, it should be recognized that the purposes of sectoral arrangements and a horizontal framework, while allied, are not identical. Whereas a horizontal framework would be intended to promote the effective application of competition solutions across the board, sectoral approaches such as the Telecoms Reference paper respond to particular structural and market access concerns that are manifested in infrastructure sectors, which, at least in the past, have often been characterized by extensive monopolization.

A second broad area of policy interface: Competition rules of the TRIPS Agreement

The area of intellectual property rights is another important example of a sphere in which the role of competition policy is already directly reflected in an existing WTO Agreement, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (Anderson and Holmes 2002; Anderson 2008). At a broad level, Article 8.2 of the Agreement stipulates that "Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology."

In the same spirit but focusing on the specific issue of licensing practices, Article 40.1 of the Agreement notes that "Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of new technology."

To address this concern, Article 40.2 recognizes the right of Member governments to take measures to prevent anti-competitive abuses of intellectual property rights, provided that such measures are consistent with relevant provisions of the Agreement. Article 40.2 also contains a short illustrative list of practices which may be treated as abuses.[6] It should be noted that neither Article 8.2 nor Article 40.2 indicates that specific practices shall be treated as abuses or specifies remedial measures that must be taken. In this sense, the competition provisions of the Agreement are permissive rather than prescriptive (Anderson 2008).

Article 40.3 of the Agreement provides that a Member considering action against an intellectual property owner that is a national or domiciliary of another Member can seek consultations with that Member. The latter Member is required to cooperate through the supply of publicly available non-confidential information of relevance, and of other information available to that Member, subject to domestic law and to the conclusion of mutually satisfactory agreements concerning the safeguarding of its confidentiality.

Competition policy considerations are also embodied in the TRIPS Agreement provisions relating to compulsory licensing in respect of patents. Article 31 sets out detailed conditions that must be respected in the granting of any compulsory licences by Member states. However, subparagraph (k) of Article 31 stipulates that Members are not obliged to apply certain of these conditions in circumstances where the compulsory licence is granted "to remedy a practice determined after judicial or administrative process to be anti-competitive."[7] In particular, requirements to show that a proposed user has made efforts to obtain voluntary authorization from the right holder on reasonable terms and conditions and that such efforts have not been successful within a reasonable period of time are not applicable in these circumstances. In addition, the requirement (in Article 31 [f]) that authorization for use of a patent under a compulsory licence be predominantly for the supply of the domestic market of the Member authorizing such use can be rendered inapplicable by such a finding.

The competition-related provisions of the TRIPS Agreement, while representing an essential element of balance in the Agreement (Anderson 2008), also leave important questions unanswered. For example, they do not define the basis on which practices may be deemed to be anti-competitive—that is, the evaluative standards to be employed. Consequently, the full set of practices that may be deemed anti-competitive (beyond the three examples mentioned) is left undefined. The Agreement also provides little in the way of guidance regarding the remedies that may be adopted in particular cases, beyond making clear that any measures adopted must be consistent with other provisions of the Agreement. These gaps heighten the technical challenges for WTO Members in putting the provisions to good (sound) use and also raise potential international coordination problems.

6 These are exclusive grant-back conditions, conditions preventing challenges to validity, and coercive package licensing.

7 Specifically, those contained in paragraphs (b) and (f) of Article 31.

For example, it could be the case that remedies imposed in one jurisdiction may impinge or be felt to impinge on behaviour and on economic welfare in other jurisdictions. The potential for such problems has already been seen in international tensions relating to remedies imposed in the various Microsoft and other cases. In this context, and without implying any need for amendment to the TRIPS Agreement itself, there could be merit in a policy analysis and reflection exercise at the multilateral level to further elucidate the relationship between competition policy and intellectual property rights and promote international policy coherence in this important area.

A third broad area of policy interface: Competition policy and the WTO Agreement on Government Procurement

A further specific example of an aspect of the WTO Agreements to which competition policy provides a very important complement, even though this is only fleetingly recognized in the relevant text, concerns the WTO GPA. Indeed, the enforcement of relevant competition rules can fairly be characterized as an essential adjunct to the Agreement, and to the opening up of procurement markets generally (see, for related discussion, Anderson and Kovacic 2009; Anderson et al. 2011). In broad terms, the GPA aims at promoting the welfare of citizens by ensuring an appropriate degree of transparency in government procurement regimes and by providing market access to foreign suppliers (thereby augmenting, very substantially in some cases, possibilities for obtaining value for money through competition). Provisions similar to the GPA are incorporated in many regional trade agreements (RTAs), including with parties to the agreement and non-parties.

The GPA itself does not establish separate or extensive competition rules as tools to combat bid rigging. Rather, it serves a closely related purpose—as a trade liberalization agreement with operational impact in this sector, it both expands the number of potential competitors for individual procurements and increases their diversity. As such, it directly attacks the underlying conditions that are known to facilitate supplier collusion, especially the unnecessary closing of markets/limitation on the scope for participation of alternative suppliers (Anderson and Kovacic 2009; Anderson et al. 2011).

While acknowledging the above-outlined role of the GPA, there is, in any case, a very clear need to apply competition (antitrust) rules to bidders, even where international market opening has taken place. This is because the possibility of rigging of bids can never be eliminated altogether merely by opening procurement processes to foreign competitors (since the latter may also be party to bid-rigging conspiracies). Further, even after procurement rules have been liberalized, competition policy has a role to play in addressing residual regulatory barriers to supplier participation and in ensuring that foreign bidders are not excluded by private sector anti-competitive behaviour (Anderson and Kovacic 2009).

Although the importance of competition law rules against bid rigging is well known to competition authorities, this and the general significance of market opening in the public procurement sector would seem to be less well known to WTO negotiators. Conversely, competition authorities may not, in all cases, be aware of the scope for international liberalization to expand the underlying possibilities for beneficial competition in the public procurement sector and to help in the deterrence of bid rigging—thereby meriting the authorities' support. The GPA also has an important interface with the prevention of corruption in procurement markets that are covered by the Agreement (Anderson et al. 2011). In this context, there would be merit in further reflection on these issues, in appropriate fora (a separate think-piece on this topic for the E15 Expert Group is in preparation).

Summary and overall reflection

This section has explored three particular areas of interface between competition policy and the existing rules of the multilateral trading system. Even though these and other examples represent, at best, a partial and ad hoc integration of competition policy concepts and provisions into the system, they demonstrate that such considerations cannot be entirely excluded from the system. Moreover, as has been elaborated, each of these could benefit from further input/joint reflection by competition and trade authorities together. .

TREATMENT OF COMPETITION POLICY IN REGIONAL TRADE AGREEMENTS

A further consideration bearing importantly on the issues and developments discussed above is that a large number of RTAs concluded between WTO Member governments now contain detailed provisions dealing with competition law and policy-related matters. Indeed, this trend appears to have accelerated following the suspension of work in the WGTCP (see, for the latest developments and authoritative analysis, the E15 think-piece on this topic by Laprévote [2015]).

Two earlier studies of these phenomena are also pertinent—Anderson and Evenett (2006) and Teh (2009). As an initial observation, Anderson and Evenett (2006) note as follows:

Perhaps the most important development [in addition to the proliferation of RTA chapters and provisions devoted specifically to competition policy] is that competition language is being used increasingly in non-competition-specific chapters of RTAs, in particular in chapters on the general obligations of the parties, on state-owned enterprises, and on regulated industries. That is, whether or not an RTA has a designated chapter dealing specifically with competition policy is not necessarily a reliable guide as to potential impact of competition language codified in a RTA.

Nor, is it simply a matter, as some fear, of trade principles contaminating competition law; there is plenty of movement in the opposite direction with competition principles influencing the interpretation of trade-related obligations.

> Carrying forward this analysis, Teh (2009), who analysed 76 RTAs, found that:
>
> Nearly three-quarters of the RTAs contain competition policy provisions. Despite the reluctance of many developing countries to enter multilateral negotiations on competition policy, fifty of the sixty-eight RTAs with developing countries as members have a competition policy provision or chapter. The principal objective of these provisions is to prevent the gains in market access arising from the RTA from being eroded by anti-competitive behaviour that is condoned or tolerated by RTA partners. The main obligations thus involve adoption or application of competition laws to curb anti-competitive behaviour and closer co-operation among competition authorities of RTA partners.
>
> Continuing, Teh (2009) observes,
>
> More than 40 per cent of the RTAs in the sample stipulate promotion and advancement of the conditions of fair competition as an objective of the RTA suggesting that competition considerations are not necessarily subordinate to the goal of expanding trade and investments. A large number of the RTAs in this survey included competition disciplines in the chapters on investment, services (in telecommunications, maritime transport and financial services), government procurement and intellectual property.

The foregoing speaks eloquently to the range of policy concerns that could be implicated in a thorough assessment of the links between trade and competition policy.

Anderson and Evenett (2006) also find that the competition chapters of some RTAs appear to be as advanced, if not more advanced, in their provisions to foster cooperation between competition agencies on enforcement matters as second-generation inter-agency agreements between competition authorities. Relatedly, it is worth noting that the competition elements in many recent RTAs go well beyond the degree of cooperation that was envisioned in the proposals for a multilateral framework on competition policy in the WTO. Moreover, the competition provisions of some RTAs appear to have been deliberately structured so as to strengthen the competition agencies in at least one signatory, ensuring that more resources, stature, and powers are made available to the implementing body. It is possible that similar elements in a multilateral agreement could serve a similar purpose (Anderson and Evenett 2006).

Looking beyond the above studies, the ongoing negotiations in the framework of the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP) further illustrate the continuing importance of competition policy considerations in the context of modern trade negotiations and policy formulation. While the details of the negotiating texts are confidential to the parties, important insights can be gleaned from the websites of the parties to the negotiations and relevant stakeholders. For example,

- With respect to the TPP negotiation, the website of the United States Trade Representative (USTR) indicates, "The competition text will promote a competitive business environment, protect consumers, and ensure a level playing field for TPP companies. Negotiators have made significant progress on the text, which includes commitments on the establishment and maintenance of competition laws and authorities, procedural fairness in competition law enforcement, transparency, consumer protection, private rights of action and technical cooperation" (USTR website undated A). Separately, it is indicated, "We are also pursuing pioneering rules to ensure that private sector businesses and workers are able to compete on fair terms with SOEs [state-owned enterprises], especially when such SOEs receive significant government backing to engage in commercial activity" (USTR website undated B).

- With respect to the TTIP negotiation, the website of the European Commission sets out detailed textual proposals covering competition law and policy as such (including relevant legislative frameworks) in addition to the treatment of state enterprises and enterprises granted special privileges. The USTR website indicates, "We and the EU … agree that the sound and effective enforcement of competition law is a matter of importance to the efficient operation of our respective markets and trade between them. Competitive markets provide the environment necessary for entrepreneurship and innovation, protects against anticompetitive behavior that distort market outcomes, and helps consumers obtain more innovative, high-quality goods and services at lower prices" (USTR website undated C).

- The websites of relevant stakeholders indicate support for even more far-reaching measures (see next section).

The relevance of the foregoing survey of relevant developments at the regional level for the present think-piece can be summarized as follows. WTO Members, including the largest Members, have made abundantly clear, in relevant bilateral and regional agreements and initiatives, the importance they attach to competition disciplines as a dimension of trade policy making in the present environment. In addition to potentially detailed commitments on the prevention of anti-competitive practices, strong interest has been shown in the negotiation of safeguards to ensure non-discriminatory and competitive behaviour by state-owned enterprises/other entities enjoying special privileges. While recognizing the possibly greater difficulty of negotiating such commitments at the multilateral level, it is hard to conceive that they will not

eventually be needed if the multilateral trading system is to continue to be relevant to today's economy.

OTHER RELEVANT DEVELOPMENTS POTENTIALLY BEARING ON RENEWED WORK ON COMPETITION POLICY AT THE MULTILATERAL LEVEL: THE CAPACITY BUILDING THAT HAS TAKEN PLACE: INDICATIONS OF POTENTIALLY GREATER SUPPORT FROM THE BUSINESS COMMUNITY: AND THE EMERGENCE OF NEW ANALYTICAL ISSUES MERITING ATTENTION

It is important, as well, to note that in the past decade a number of contextual developments have occurred which suggest that the environment for a possible resumption of work on the relationship of competition policy to the multilateral trading system may be more promising than was previously the case. A few of these developments are as follows.

- Very significant efforts at promoting better understanding of the objectives, modalities and effects of competition policy that have been undertaken in the period since the work in the WTO was suspended by international organizations such as the ICN; the OECD, including through its Global Forum on Competition Policy and its outreach programs; and the UNCTAD, in addition to national competition agencies and NGOs such as the CUTS.

- The availability of much more extensive and convincing documentation of the deleterious effects of anti-competitive practices on developing country consumers and producers than was previously available (see, for example, Levenstein and Suslow 2005; see also OECD 2013; International Trade Centre 2012; Anderson and Müller 2013).

- Related to the above, far greater practical experience on the part of developing economies with the application of competition policy, reflecting the capacity building that has taken place and the proliferation of competition laws across such countries in recent years.[8]

- An apparently substantially greater level of concern, in the international business community, regarding potential use of competition policy as a tool of industrial policy, together with an increased awareness of the over-riding importance of the fundamental WTO principles of non-discrimination, transparency, and procedural fairness in the application of competition policy, and the risks entailed by the relative absence of enforceable international norms in this area (see, for example, US-China International Business Council 2014; New York Times 2014). As a further indication of this, the Competition Working Group of the US Business Coalition for TPP puts forward detailed proposals for binding commitments on (i) competition law and anti-competitive conduct, including with respect to transparency and enforcement of laws against hard-core cartels; and (ii) state-designated monopolies and state-owned enterprises (US Chamber of Commerce website undated).

A further important consideration is the emergence, since the past work of the WTO Working Group, of new analytical perspectives or at least new interest in particular issues in the field of trade and competition. For example, very significant work has been done in the OECD on the concept of competitive neutrality in relation to the governance of state-owned enterprises (Capobianco and Christiansen 2011). This overlaps importantly with and provides an analytical framework for responding to the above-cited concerns regarding state-designated monopolies and state-owned enterprises, in addition to the language of GATS Article VIII (quoted above).

Further, the issue of export cartels and their exemption from many national competition laws has received renewed attention as a jurisdictional issue arguably requiring attention at the multilateral level (Jenny and Mehta 2012; see Jenny 2012 for a related analytical perspective). And, the relationship between measures limiting access to public procurement markets and collusive tendering or bid rigging has received attention in multiple contexts (see, for example, OECD 2010; Anderson et al. 2011).

A further emerging set of issues at the interface of trade and competition policy derives from the proliferation of global value chains (GVCs) as a key mode of economic organization in the current era. As pointed out in an important recent joint report of the OECD, the WTO Secretariat and the World Bank to the G20 Trade Ministers on Challenges and Opportunities Relating to the Emergence of Global Value Chains (OECD, WTO and World Bank Group 2014):

> Competition policy is another area that merits priority treatment. .... Competition law and policy can help add value to exports from developing and least-developed countries (LDCs) by removing barriers to key sectors in GVCs. Many developing countries have adopted domestic competition and consumer laws and have used them as an effective tool to promote market-led poverty reduction strategies and to ensure that the benefits of trade and investment liberalization are not negated by private and government anti-competitive practices. Yet

8 Whereas in the years from 1997 to 2004 when the WGTCP was active, an estimated 40–50 WTO Members had active national competition regimes, current surveys cite 110–120 countries having such laws.

others, notably LDCs, still struggle with basic formulation and implementation of the competition and consumer laws and policies.

In addition to issues concerning competition law enforcement (relating, for example, to exclusive supply arrangements), the foregoing concerns may call for competition advocacy work aimed at limiting government-imposed or tolerated barriers to access by competing suppliers to Global Value Chains.

TOWARDS AN AGENDA FOR FUTURE WORK

This section reflects on/sets out an array of possibilities for carrying forward some of the issues and concerns that are flagged above. It begins with a list of possible issues to be addressed, extracted from the foregoing discussion. Subsequently, some brief reflections are offered on possible organizational paths for addressing them.

SPECIFIC POSSIBLE ISSUES THAT COULD BE CONSIDERED IN RENEWED WORK ON COMPETITION POLICY IN THE WTO

The following issues, among other things, have been flagged as potentially meriting further consideration.

- The relevance of the WTO's core principles of non-discrimination, transparency, and procedural fairness (also referred to as due process) to competition law enforcement. As we have seen, this interest derives from both the work of the original WTO Working Group and much subsequent work in the ICN; at the level of national competition policies; and in the context of regional trade agreements and initiatives. Though much of the latter work does not reference these as "WTO principles," the relevance is obvious. The issue merits attention both generally and with specific reference to alleged abuses of a dominant position; and mergers.

- The case for general commitments by WTO Members relating to action against hard-core cartels and international cooperation. Again, this element is common to both the work of the original WTO Working Group and the subsequent developments in regional trade initiatives/related discussions. It also acknowledges the priority given to these arrangements in the work of competition agencies themselves.

- Jurisdictional issues concerning the application of competition law to export cartels. Potentially, this issue unites interest from developing countries and at least some elements of the business community (recall the reference to this issue in the work of the Competition Working Group of the US Business Coalition for TPP).

- Possible competition law enforcement issues relating to the role and operation of Global Value Chains, for example exclusive supply arrangements.

Issues concerning the interaction of trade and competition policy

An even broader array of issues is evident with respect to the interaction of trade and competition policy (recognizing that the distinction between law and policy is certainly not watertight). These would include the following, at a minimum.

- The treatment of state-owned enterprises and the concept of competitive neutrality. This concern already figured importantly in the original work of the WTO Working Group. It has only been amplified in the subsequent work in the framework of regional trade initiatives and the work of other international organizations such as the OECD. The latter provides a conceptual framework for relevant discussions. As we have seen, there is also a clear link to elements of the existing WTO Agreements, notably GATS Article VIII.

- The significance for competition policy of governmental barriers to participation in public procurement markets. This issue is ripe for consideration at the international level. As we have seen, the area of government procurement is already a dynamic and vital one in the WTO. The issues manifest important confluence between the interests of export-oriented businesses (seeking access to foreign procurement markets) and those of competition authorities (who know that closed markets both intrinsically limit competition and facilitate bid rigging).

- The potential significance of competition policy-related disciplines such as those contained in the WTO Reference Paper on Basic Telecommunications for other infrastructure sectors, and for trade in services more generally. As discussed, the Reference Paper is arguably the area of the WTO Agreements in which competition policy concepts have been used most explicitly and which goes the furthest in committing Members to action against anti-competitive practices. Yet, other infrastructure sectors (for example, electrical energy) share, or arguably share, similar structural problems. As well, the outcome in the *Telmex* case by itself merits further study.

- The TRIPS Agreement is a further element of WTO Agreements that specifically invokes concerns about

the impact of anti-competitive practices and anticipates the application of competition rules. Still, the relevant provisions offer only very limited guidance on questions such as (i) set of practices that may be deemed anti-competitive (beyond the three examples mentioned); (ii) the standards under which such practices are to be evaluated (per se or rule of reason); and (iii) the remedies that may be adopted in particular cases, beyond making clear that any measures adopted must be consistent with other relevant provisions of the Agreement. These questions, it is submitted, demand the input of competition agencies which, apart from a select few academics and other persons, are the repositories of the requisite experience and expertise.

- Issues concerning governmentally imposed or tolerated barriers to participation in Global Value Chains.

ORGANIZATIONAL PATHS FOR CARRYING FORWARD RELATED WORK: TWO CONTEXTUAL CONSIDERATIONS

The ease of restarting even exploratory and analytical work (as distinct from negotiations) on trade and competition policy should not be overstated. Any decision to resume work in this area in the WTO rightly could be taken only by the Organization's Members. Notwithstanding the contextual developments noted above, there is no suggestion that this is assured. Ultimately, the possibility of fruitful work on these issues in the WTO may also implicate broader political and policy questions not addressed in this think-piece, for example the scope for adoption of additional agreements in the WTO framework that may be binding on less than the full set of the Organization's Members (that is, plurilateral agreements). There is, in any case, no suggestion here that related work be brought forward in any way that would detract attention from the conclusion of the current negotiating round.

With these caveats, this brief sub-section serves merely to draw the reader's attention to two contextual points of potential interest.

First, the original WTO WGTCP, while currently designated as "inactive," still exists. The decision taken by the WTO General Council in 2004 reads as follows:

> The Council agrees that work on [the Interaction between Trade and Competition Policy, together with the related issues of the Relationship between Trade and Investment and Transparency in Government Procurement] will not form part of the Work Programme set out in that Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round.

Clearly, this formulation leaves the door open to a resumption of work on these issues following the conclusion of the Doha Round. Arguably, it also does not rule out, even before that time, a resumption of exploratory work on these issues provided that such work is not currently directed "towards negotiations." Certainly, the WTO Working Group, which in its early years earned solid credit for just such an exploratory work programme, would be a logical body to contribute to such an assessment.

Second, in any event, in any further WTO work programme on trade and competition policy, broad input should be sought from other organizations active in the competition policy field. These would include, first and foremost, the ICN (which is the organization that competition agencies see as being most directly "theirs") but also organizations such as UNCTAD, the OECD and CUTS. There is no reason why such organizations could not be given specific, dedicated roles in the development of relevant standards. This would be broadly comparable to the roles that other organizations and policy development exercises have had in relation to the negotiation of other important WTO Agreements.[9] Such a consultative approach, with specific vectors for incorporating input from organizations with more specialized expertise in competition policy per se, could go a long way to enhance both the usefulness and the political/institutional acceptability of renewed work on trade and competition policy in the framework of the WTO.

9 To cite just two examples of many, the TRIPS Agreement incorporates substantive elements of the (much earlier) Paris Convention for the Protection of Industrial Property. The initial GPA built very significantly on preceding negotiations and policy development work in the OECD.

ANNEX: THE WTO WORKING GROUP'S TERMS OF REFERENCE IN 1997-98: THE 'CHECKLIST OF ISSUES SUGGESTED FOR STUDY'

Excerpted from the Chair's Non-Paper of May 1997

"It was widely recognized that the Working Group's work programme should be open, non-prejudicial and capable of evolution as the work proceeds. It was also emphasized that all elements should be permeated by the development dimension. Particular attention should be paid to the situation of least-developed countries. In pursuing the items of its work programme, the Working Group should draw upon and avoid unnecessary duplication of the work of other WTO bodies concerned with specific trade measures as well as the work under way in UNCTAD and other organizations.

I. Relationship between the objectives, principles, concepts, scope and instruments of trade and competition policy.

   - Their relationship to development and economic growth.

II. Stocktaking and analysis of existing instruments, standards and activities regarding trade and competition policy, including of experience with their application:

   - national competition policies, laws and instruments as they relate to trade;

   - existing WTO provisions;

   - bilateral, regional, plurilateral and multilateral agreements and initiatives.

III. Interaction between trade and competition policy:

   - the impact of anti-competitive practices of enterprises and associations on international trade;

   - the impact of state monopolies, exclusive rights and regulatory policies on competition and international trade;

   - the relationship between the trade-related aspects of intellectual property rights and competition policy;

   - the relationship between investment and competition policy; [and]

   - the impact of trade policy on competition.

IV. Identification of any areas that may merit further consideration in the WTO framework."

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