Abstract:

We argue that developing countries can gain from improving competitive processes within their economies. In large part such gains would come from increasing the contestability of markets through further opening to foreign competition, deregulating state-supported monopolies and similar protected enterprises, and ensuring adequate market entry and exit. Competition law could play a useful complementary role in this process, particularly if market power becomes concentrated in private hands. The introduction of new regimes covering intellectual property rights invites consideration of competition regulation because the two are closely related. Developing countries could benefit from a multilateral agreement establishing basic principles in competition enforcement. Even better would be an agreement to subject antidumping rules to competition standards, though reaching it is unlikely without finding broader tradeoffs. Finally, we argue that permitting each country to maintain its own approach to permitting parallel imports is sensible.
1. Introduction

Competition policy is a broad term, covering all aspects of government actions that affect the conditions under which firms compete in a particular market. Thus, trade policy, investment regulations, intellectual property rights (IPRs), regulations on service providers and product distributors, bankruptcy laws, subsidies and other state aids, and procurement practices are all components of competition policy. The term competition law refers to legislation, judicial decisions, and regulations specifically aimed at avoiding the concentration and abuse of market power on the part of private firms, which could use that power to exclude potential competitors. However, many regulations provide exclusive rights to favored firms or stipulate exemptions from competition disciplines for purposes of achieving various social goals. Competition policy is therefore complex in its intentions and effects.

For purposes of analyzing the interests of developing countries in this area, it is important to keep the distinction between broad competition policy and narrow competition law in mind. Competition law has emerged as an issue for the WTO largely because exporting firms in the high-income developed economies argue that anticompetitive practices of competitors in foreign markets hinder their ability to penetrate those markets. Such practices may be largely private in nature, but could be unimpeded by the absence or weak enforcement of local competition laws. Moreover, the rising incidence of cross-border mergers and acquisitions raise problems of jurisdictional authority in dealing with industry concentration in multiple markets. These problems and related issues have prompted a number of policymakers and analysts to call for the negotiation of a limited agreement on multilateral principles and disciplines in
competition law within the World Trade Organization (WTO).¹ As numerous observers have pointed out, however, the debate is contentious and no consensus has emerged on whether and how to address competition law and regulations within the WTO.²

We argue in this paper that developing countries would gain if a WTO agreement were reached that recognizes the fundamental principle that competition law should work to promote open competition, emphasizes international cooperation in competition enforcement, and disciplines the most anticompetitive forms of public and private restraints against market contestability. We argue further that developing countries have a greater interest in implementing active domestic competition policies, encompassing both appropriate, pro-competitive regulations in the narrow sense and market liberalization in the broader sense. An important reason for this is that existing WTO Agreements, especially the Agreement on Trade-Related Intellectual Property Rights (TRIPS), invite a full consideration of policies for competition maintenance in countries where such policies are weakly developed. More fundamentally, there are wider gains available from ensuring market accessibility.

Developing countries are presented with an historic opportunity to reorient their economies in the direction of competitive markets through a careful consideration of the intimate linkages among competition law, market liberalization, IPRs, and state-supported industrial policy. This important examination can and should be done whether or not a WTO agreement on competition law is negotiated. The interrelationships are complex and vary with economic circumstances. Nonetheless, most developing nations and economies in transition express interests in abandoning inward-looking intervention

² See Lloyd (1998), Neven and Roller (1999), and Hoekman (1997).
in favor of promoting outward-looking integration with rapidly expanding globalization processes. This transition is likely to be most successful and most beneficial in an environment of openly contestable markets, transparent and justifiable regulations, and incentives promoting dynamic competition.

In the next section we discuss aspects of competition policy in developing countries, making our essential case for a pro-competitive approach to broad regulation. We place particular emphasis on the role of competition policy in regulating the anticompetitive exercise of IPRs. A number of illustrations are provided from experience with competition problems in Tunisia. In the third section we turn specifically to linkages between IPRs and competition rules, noting that the need to strengthen the former raises opportunities for adopting or reforming the latter. In the fourth section we review international trade tensions that emerge from the varying state of competition law and enforcement in different countries. This discussion supports consideration of a limited multilateral agreement on competition law principles and procedures. Thus, we analyze the form in which such an agreement on “Trade-Related Antitrust Measures” (TRAMS) would be potentially most beneficial for developing countries. A welfare-enhancing TRAMS Agreement would focus on basic principles, cooperation in procedures, and disciplines against clearly anticompetitive measures such as tolerance of export cartels and domestic horizontal exclusionary agreements and the protectionist use of anti-dumping rules. Achieving such an agreement would be difficult but certain tradeoffs may be envisioned that could enhance its likelihood and effectiveness. Concluding remarks are in the final section.
2. Competition Policy in Developing Countries

While competition law remains nascent in most developing countries, it is misleading to claim that such countries do not have competition policies in the broader sense. For example, weak patent protection may be construed as a channel for promoting technical change through imitation and diffusion. Failing to protect trade secrets could encourage the development of spin-off firms to compete with subsidiaries of multinational enterprises (MNEs). Industrial policies that aim to achieve scale economies and industrialization through the protection of state-owned monopolies or private enterprises explicitly limit competition. Subsidies, state aids, and procurement preferences further limit accessibility of important markets. Governments that carefully screen technology-licensing contracts attempt to affect the terms under which technology is acquired in order to favor domestic competitors. Permission of mergers and joint ventures that concentrate market power represents a decision to promote size over competition.

With this panoply of policies, inward-looking economies attempt to encourage favored domestic enterprises and to discourage competition from abroad. Such interventions are justified as necessary for achieving economies of scale, dynamic learning economies, global market power, and other motivations for strategic industrial policy. In this context, the absence of competition law, or inadequate enforcement of existing laws, may be seen in part as an attempt to force industrialization through the encouragement of large domestic enterprises.

History has proven unkind to this view. To summarize an enormous literature, interventionist competition policy of this nature is inherently anticompetitive and
counterproductive. Trade barriers choke off imports of technologically sophisticated
capital goods and material inputs, sacrificing the cost-reducing spillovers that result from
their use in home production. Protected and subsidized enterprises have limited
incentives to innovate or adapt new technologies. Small and segmented markets limit the
attainment of meaningful scale economies, generating instead large and inefficient
enterprises producing at low rates and high costs. Monopolies in important service
markets, such as telecommunications and finance, tend to be unresponsive to changing
consumer needs. Weak IPRs promote significant imitative activities but restrain the
development of innovative local enterprises and discourage the acquisition of high-
quality foreign technologies. Tolerance of cartels and public and private monopolies
limits competitive entry by both foreign competitors and potential new domestic firms.

In many developing countries the public sector is at least as much at fault as the
private sector as far as anticompetitive conduct is concerned. In Tunisia, for example,
investment licensing, which restricted entry was the rule rather than the exception until
the late 1980’s. Even though significant trade liberalization has occurred, including
through the ongoing implementation of a FTA with the EU, trade and industrial policies
still hinder competition on the domestic market. Today, imports of several products,
including cereals, coffee, sugar, tea and fertilizers remain monopolized by state trading
boards or public enterprises. A state-owned enterprise “Tunisie Telecom” holds the
monopoly of both fixed and cellular telephone services, with the latter being severely
rationed due to limited capacity. Licenses for internet services have been restricted to
two providers.
In public procurement domestic firms in Tunisia are granted a preferential margin of 20%, which is an important advantage over foreign bidders. Because the Euro-Med Agreement stipulates that national treatment should apply to EU firms, a law was recently passed that will phase out this margin by the year 2003. This measure illustrates the potential gains for competition resulting from integration with the EU.

The net effects of government-imposed arrangements are not always clear-cut. In Tunisia, imports of cars are regulated through “industrial cooperation” agreements concluded with carmakers. Tie-in clauses are attached to supply contracts, according to which carmakers are obliged to purchase automobile parts from Tunisian firms. Foreign suppliers likely have adjusted their prices in relation to their tie-in purchases, thus increasing costs of cars to Tunisian consumers. Such arrangements also have restricted the range of choice offered to consumers. Nevertheless, they have fostered the development of a dynamic automobile parts sector, which has attracted significant amounts of FDI in the last few years.

Increasingly, developing countries are coming to the view that promoting effective competition on their markets promises substantial net benefits over the long term, even if there may be short-term adjustment costs imposed on protected firms and workers. This may be seen from the fact that over 40 developing countries unilaterally strengthened their IPRs regimes in the 1990s and that, as of 1997, 58 developing countries or economies in transition had adopted or were in the process of adopting competition legislation. These policy changes are consistent with extensive and ongoing liberalization of trade and investment barriers and with privatization of public enterprises. While considerable scope exists for further liberalization, this tendency toward pro-
competitive regulatory changes is significant. Competition law becomes an important complementary support to general liberalization.

Objectives of Competition Law

Competition law should be designed primarily to protect the processes underlying efficient functioning of markets. Markets are inherently dynamic and experience the birth of new firms and products, the death of inefficient firms and outmoded products, and the natural expansion, contraction, and reorganization of enterprises engaged in competition. Competition may come from domestic producers, subsidiaries of foreign enterprises, and trade flows. Thus, an effective competition regime begins with ensuring that entry is not artificially blocked, that exit from production is orderly, and that efficient and cost-reducing combinations of enterprises and activities are permitted. Free exit is a critical feature; if regulations make it costly for firms to shut down they may choose not to enter production in the first place. Thus, effective bankruptcy and workout laws are an important element of competition regulation. Competition law further recognizes that firms compete in both a static and a dynamic framework, requiring that some balance must be struck between ensuring competitive access to existing products and encouraging innovation and new product development and introduction.

Put simply, the fundamental purpose of competition law is to ensure that markets for acquiring and developing technologies and for producing and selling goods and services are effectively contestable. A market is contestable if incumbent firms are not able to sustain monopolistic behavior for extended periods of time. In economic theory,

3 See Maskus (1999) and Hoekman (1997).
monopolistic behavior refers to setting price above fully allocated, long-run marginal cost. If enterprises are restrained in this sense by competition from similar goods and the threat of entry, a market is contestable.

However, the notion of anticompetitive practices goes beyond this textbook depiction. Such practices include merging with competitors with a view to attaining monopoly, refusing to supply goods or to license technologies on market terms in order to prevent competition, agreeing with other firms to collusive restraints on trade, and harassing potential competitors through cost-raising litigation that goes beyond protecting legitimate business rights. If such behavior limits competition artificially it should not be condoned by public policy. In this context, competition law aims at preventing or disciplining such abuses by establishing conditions or guidelines under which they would be examined for legality.

Note that this task is complex. Consider the United States, the European Union, and Japan, countries with extensive experience in antitrust investigation and enforcement. Published guidelines differ considerably across these countries in what behavior is viewed as potentially anticompetitive, what practices should be banned outright, and what circumstances should be investigated by authorities for anticompetitive effects. Indeed, the underlying analytical issues are typically so complicated that there can be no “ideal” definition or application of competition law. Moreover, there is danger that as developing countries expand their regulation of private behavior they may restrain competition through ill-advised application of rules and procedures. Thus, prudence and foresight in considering the scope and application of competition regulation are important.
Competitive processes in markets may suffer even more broadly because of public restraints on entry, such as import quotas, widespread procurement preferences, government-sanctioned monopolies, targeted subsidies, and reserved positions for service providers and distributors. In such cases, competition law can take on the useful role of competition advocacy, whereby antitrust authorities question the need for such restrictions and, perhaps, publicize their costs. It is evident that blockages to trade and innovation may emanate also from combined public and private actions, such as the encouragement of cartels and government approval of exclusionary product standards.

Competition advocacy seems rarely to be an active policy in many developing countries. For example, Tunisia is one of the few countries in the Middle East-North Africa region with a competition law. However, the Competition Council has insufficient resources to advocate competition. The government may consult it on competition-related issues such as mergers but has no obligation to do so. A striking feature of the Competition Council is its inactivity. Over a six-year period, from its creation in mid-1991 to mid-1997, it issued three decisions, two of which were rejections of complaints about competition abuse. Only one decision was a condemnation of abuse of dominance (involving a domestic poultry company). Thus, even though the enactment of competition legislation is important, the development of efficient competition institutions in developing nations takes time.

Competition law could have goals in addition to its fundamental one of supporting market processes. Many countries emphasize fairness in their competition systems by establishing exceptions for small enterprises, set-asides for minority entrepreneurs and cultural development, guarantees in order to promote servicing of rural regions, and the
like. For example, strongly influenced by EU and French legislation, the Tunisian competition law establishes numerous exemptions. Private agreements or dominant positions motivated by the objective of promoting economic or technical progress, while allowing equitable sharing of the benefits with users, are not considered anticompetitive. However, the Tunisian law does not tie the exemptions to two conditions provided for in the EU and French legislation. These are, first, that such agreements should not impose restrictions that are not indispensable to the attainment of the beneficial objectives and, second, that they should not offer the firms involved the possibility to eliminate competition for a substantial proportion of the products in questions.

It is evident that such exemptions and special treatment may spring from valid social objectives. However, the need to pursue them must be balanced against the gains from open competition. Carried too far, such exceptions eviscerate meaningful competition. Perhaps the best advice is to avoid the use of broad exceptions while carefully justifying the need for others in the name of transparency.

Some observers in developing countries argue that competition law conflicts with the fundamental goal of industrialization, because open competition favors efficient and established foreign enterprises over inefficient domestic firms. However, such an outcome would be welfare enhancing in many instances. Moreover, the goal of competition maintenance is not to favor any particular interests but rather to support the development of markets. This emphasis should bear long-run payoffs in terms of efficient restructuring of enterprises and raising incentives for product development as entry barriers are reduced.

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4 See Graham and Richardson (1997a, b).
Competition Issues of Particular Concern to Developing Economies

Again, our basic view is that competition law and enforcement are issues of importance first on the internal markets of developing countries, independent of work on the international level. Moreover, many of the most significant restrictions on competition come from public supports, state monopolies, exclusive rights, commercial policies, and restrictions on FDI and rights of establishment for service providers. The most effective competition policy would be continued liberalization of these restrictions, buttressed by safeguards against higher private entry barriers being substituted for lower public entry barriers. Indeed, due attention should be paid to the effects of privatization policy on competition in order to avoid the transfer of market power and concentration from the public sector to a small number of private enterprises.

Regarding the preparation and implementation of competition law, a number of difficult issues must be addressed. They are difficult because it is not straightforward to identify particular behavior as anticompetitive or monopolistic. For example, setting predatory prices to drive competitors out of an industry in order to gain unassailable market power is anticompetitive and should be disciplined, in principle. However, whether predation is possible depends on many factors, including fixed costs of entry and exit in a sector, the extent of competition from similar goods, and the ability to import competing goods. Empirical evidence indicates that predatory behavior in open, competitive markets rarely occurs in practice and therefore does little damage to competition. In contrast, numerous regulations aimed at protecting domestic competitors from efficient entrants, in the questionable guise of avoiding predation, have injured competitive processes. The most prominent example of this problem is the
anticompetitive application of antidumping laws in developed countries, which are explicitly justified on the dubious grounds that foreign price competition amounts to predatory behavior.

Thus, competition authorities may wish set up guidelines within which to assess the likelihood that behavior is predatory in intent. In doing so, however, authorities should be aware of the great potential for misapplication of predatory practice laws, particularly when regulators are subject to capture by domestic firms and foreign investors. Further, it seems likely that the establishment of guidelines concerning whether behavior is predatory or anticompetitive would be difficult to achieve in developing countries because of a lack of transparency in enterprise behavior, including the unreliability of accounting practices. It may be advisable simply to avoid such laws and guidelines altogether in favor of maintaining open competition through trade liberalization and enterprise deregulation.

It may be more straightforward to recognize horizontal cartels among competitors as an attempt to monopolize a market. Virtually all developed competition regimes take a harsh view of such cartels to the extent they operate in the domestic market. Note that cartels may be both informal and formal, so that competition authorities need to be armed with investigative powers. However, as Graham and Richardson (1997a) emphasize, not all cartels among competitors are inefficient. Of particular interest to developing countries are so-called rationalization cartels, or crisis cartels, which may win temporary exceptions from antitrust enforcement in order to permit orderly exit of firms from markets. The efficiency emerges from the ability of firms jointly to avoid costly investment in excess capacity that would make future exit more difficult. At the same

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5 We can only provide a brief overview here. See the papers in Graham and Richardson (1997b).
time, such cartels may inefficiently delay effective resource reallocation. Perhaps the first-best policy would be to assist firms to exit markets through transparently provided subsidies. Rationalization cartels would be a second-best policy if the government cannot mobilize resources to subsidize the exit of non-competitive firms.

Even less clear is whether mergers, joint ventures, and other combinations should be considered anticompetitive or procompetitive. Merger guidelines in the United States, the EU, and Japan look at quantitative benchmarks for the concentration of market shares that would emerge from consolidation, sometimes including imports in the computation of market shares. An important factor here is in determining the “relevant market” within which firms compete. Even if domestic production were to become concentrated any resulting price increases could be outweighed by gains in scale efficiency. Mergers can also be efficient means of restructuring weak local firms. Similar comments apply to joint ventures, which may bring cost-reducing technological advantages to the economy but result in additional concentration. Thus, examination of mergers requires legal and economic expertise, with a view toward predicting the potential impact on competition.

In this context, it is evident that trade and investment liberalization form important complements to competition maintenance, for the former processes provide competitive discipline against merger-induced restraints. Mergers and privatization of monopolies in small and relatively closed markets embody considerably higher risks of concentration. Open trade in goods is not a complete solution, however, for many services are non-traded and potentially subject to competitive abuse. The classic example is a telecommunications monopoly, which might refuse access to its network to foreign
suppliers of equipment and telephone service. Similarly, monopolized port services can act as a significant drag on export development.

Whereas horizontal restraints among competitors may be generally anticompetitive, vertical restraints within enterprises may enhance competition, depending on circumstances. Downstream agreements refer to the awarding of exclusive territories by manufacturers to distributors in order to induce them to invest in marketing products, building distribution facilities, and providing after-market services. These investments, in principle, can increase the supply of goods and services on a market and raise investments in product quality. This is especially the case in markets where interbrand competition is sufficiently vigorous that competition is not harmed by private restraints on intrabrand competition. Upstream agreements refer to contracts to purchase inputs or assembled products from affiliates. Unless procurement of a critical input (such as a key raw material) is monopolized, such contracts rarely raise issues for competition maintenance.

It is possible that vertical agreements between manufacturers and distributors could have the effect of closing distribution markets to potential domestic and foreign competitors. Indeed, this was the crux of the American claim in the WTO against Japan in the Fuji-Kodak case. In this context, three issues of particular concern for developing countries emerge. First, if there is limited interbrand competition among manufacturers, vertical arrangements can support monopolistic collusion. Thus, it is important to ensure that potential entrants are able to acquire distribution facilities at reasonable cost. Second, industrial firms in developing countries tend to be small or medium-sized and
cannot readily establish their own distribution channels, raising some concerns about forestalled entry on the part of domestic firms.\textsuperscript{6}

Third, vertical arrangements may become particularly anticompetitive to the extent they are supported by government mandates on distribution. For example, many developing countries have laws dictating exclusive national dealerships for trademarked foreign goods. The intention is to provide guaranteed returns to the exclusive dealers for investing in product distribution. There is an important distinction between private territorial contracts and government mandates, however. Private enterprises may choose to license several dealers with a market, each within its own territory. Government mandates permit only one dealer in the country, thereby completely foreclosing intrabrand competition. Such policies invite rent-seeking, support monopolistic practices and likely result in smaller quantities and inferior services offered at higher prices. Elimination of such restrictions should be high on any government’s competition agenda.

Even in developing countries where competition law prohibits exclusive arrangements, enforcement is difficult due to the large number of cases to be examined. The Tunisian law differs in this regard from that of many other countries in that it prohibits such arrangements in principle unless they are authorized by competition authorities. In practice the law has proven quite difficult to enforce and exclusive arrangements are the general rule rather than the exceptional case.

To summarize, developing countries have much to gain from improving the operation of competitive processes in their markets. In greatest measure, such gains would come from additional market liberalization and deregulation of government

\textsuperscript{6} Note further that such firms are unlikely to invest in the substantial fixed costs of building distribution channels in developed countries. Thus, exclusive arrangements in those nations may prevent developing-
supports to business that block market contestability. Establishing an institution for competition advocacy is particularly important. There is also scope for developing procedures for competition maintenance if private market power becomes more concentrated. However, appropriate application of such procedures is complex, requires considerable expertise, and must be transparent. Establishing an interventionist competition regime that serves mainly to protect entrenched firms from new entrants would be counterproductive.

3. The Interface Between Competition Policy and Intellectual Property Rights

Intellectual property rights and competition regulation are intimately related. The former provide exclusive rights within a designated market to produce and sell a product, service or technology that results from some form of intellectual creation and meeting specific requirements. These inventions may be protected by patents (for novel and non-obvious products and technologies with industrial applicability), copyrights (for artistic and literary expression), trademarks (for identifying names and marks conveying some guarantee of quality), trade secrets (for confidential business information), or \textit{sui generis} forms of protection (for new plant varieties, integrated circuits and other technologies). Many products and technologies are awarded multiple patents and are protected by a combination of devices. Thus, IPRs designate boundaries, sometimes complex, within which competitors may exercise their rights. They exist to solve the fundamental appropriability problem arising from investment in information, which is a non-rival and often non-excludable public good. Failing some exclusive rights to exploit
the information, inventors might not earn enough to justify the investment in research and product development.

Thus, IPRs create market power by limiting static competition in order to promote investments in dynamic competition. In competitive product and innovation markets the awarding of IPRs rarely results in sufficient market power to generate significant monopoly behavior. Typically there are substitute goods available and competitors may invent around a patent, invest resources to learn trade secrets fairly (through reverse engineering, for example), and develop competing trademarks. However, in some circumstances a portfolio of patents and trademarks may generate considerable market power through patent-pooling agreements among horizontal competitors. In countries that do not have a strong tradition of competition and innovation, strengthening IPRs could markedly raise market power and invite its exercise.\(^8\)

For its part, competition regulation aims at curbing the unwarranted exercise of market power, which may be defined here as attempts to extend exploitation of an intellectual asset beyond the boundaries provided by IPRs. Thus, there is an inherent tension between competition laws and IPRs, particularly if competition laws emphasize static market access and IPRs emphasize incentives for dynamic competition. Structured properly, however, the two regulatory systems complement each other in striking an appropriate balance between needs for innovation, technology transfer, and information dissemination.

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\(^7\) We provide here an analytical overview. For an excellent discussion of the economics and law of this interrelationship, see Gallini and Trebilcock (1998). See also Maskus (1999).  
\(^8\) Smith (1999) provides indirect evidence of this possibility through an examination of trade data. See also Maskus (1999) and UNCTAD (1996).
In this context, an important reason for developing countries to consider implementation and reform of competition regulations is that the TRIPS Agreement envisions a clear link between strengthening protection of IPRs and the need for control of anticompetitive abuses in the use of IPRs. Countries must adopt minimum standards of protection for IPRs that are, in many dimensions, markedly stronger than those prevalent in many developing economies. Chief among these are the provision of pharmaceutical product patents, reversal of burden of proof in process patent cases, limitations on the issuance of compulsory licenses, designation of a protection system for plant varieties, recognition of copyrights for computer programs, protection of well-known trademarks, security of trade secrets and confidential information from unfair revelation by competitors and governments, and a comprehensive system of enforcement.⁹

In response to concerns that such protection would invite unwarranted exploitation of market power, Article 40 of TRIPS provides considerable discretion to WTO member states in specifying “…licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market.” The Article goes on to specify three examples of potentially abusive licensing practices (exclusive grantback conditions, conditions preventing challenges to validity, and coercive package licensing) but this list is not exhaustive. Read broadly, the Article could cover any potential abuse of IPRs, including monopoly pricing, refusals to license, effectuating horizontal cartels through patent pooling, and exclusive vertical arrangements that forestall competition.

**IPRS Standards as Competition Regulation**

In an important sense IPRs and competition laws overlap in that the scope of exclusive rights granted by the former determines the degree of potential market power. An immediate opportunity arises for many developing countries to define and implement minimum standards for IPRs, consistent with TRIPS requirements, that are dynamically procompetitive.\textsuperscript{10} Economic development is a dynamic process and IPRs may be used fruitfully to push it forward. The dynamic shortcoming of weak IPRs is that economies are liable to remain technologically isolated and to lag behind the information frontier. Such economies emphasize free-riding on the technical advances of others, a strategy that bears short-run competitive advantages but suffers from inadequate access to new technology and a growing inability to imitate more sophisticated formulations. The task is to select standards that help convert “free riders” into “fair followers” in Reichman’s (1993) apt phrase.

A brief review of how such standards may be selected is useful. Consider patents first, which must apply to all fields of technology for a minimum 20-year term under TRIPS. However, countries may exclude inventions from patent eligibility for purposes of maintaining public order, national defense, and environmental protection. They may exclude therapeutic, surgical, and diagnostic techniques and patents need not be extended to discoveries of nature, scientific principles, and mathematical formulas and algorithms. Patents need not pertain to higher life forms, nor must plant varieties be patented if they are protected by another system. Finally, TRIPS does not require that computer programs be awarded patent protection.

Countries have flexibility in defining the conditions for protection. Developing countries could choose to set high standards of novelty and non-obviousness, though

\textsuperscript{10} See UNCTAD (1996) and Maskus (1999) for further analysis.
requirements much in excess of global practices would be of questionable utility. Patents might recognize only narrow claims in order to promote the ability of competitors to invent around patent claims. In this context, the availability of utility models with significantly lower thresholds defining the “inventive step” is procompetitive. Authorities could also permit opposition proceedings prior to the grant of a patent and early disclosure of patent applications.

Article 30 of TRIPS provides that member states may issue compulsory licenses of patented inventions under certain circumstances, so long as these exceptions do not unreasonably prejudice the legitimate interests of the patent holder. In practice, this allows countries to permit limited use for private and non-commercial purposes, for research and experimental or teaching purposes, for obtaining approval of generic drugs, and for preparation of individual medicines by pharmacies. The research and teaching exceptions are particularly important for promoting learning and dynamic competition.

The TRIPS agreement places new limits on the use of compulsory licenses but recognizes their suitability as devices for maintaining competition or ensuring access to critical technologies. Indeed, on close reading the provisions of Article 31 provide much leeway for specifying conditions under which they may be used. They reflect a carefully crafted compromise between technology developers and potential users and do not unduly burden policymakers wishing to employ compulsory licenses in specified circumstances. Non-exclusive and non-assignable licenses may be issued when patent holders have failed, within a reasonable period of time, to negotiate voluntary licenses with applicants offering reasonable commercial terms. The use of the licenses must be meant predominantly for the supply of domestic markets and the right-holder should be
paid adequate remuneration based on the economic value of the license. Less stringent requirements pertain to compulsory licenses issued to correct practices that have been demonstrated by authorities to be anti-competitive.

Ultimately, the TRIPS Agreement will increase the cost of acquiring licenses but will not significantly interfere with conditions under which licensing may be compelled. For example, the new Argentine patent law anticipates the use of compulsory licenses, permitting domestic pharmaceutical firms to retain relatively flexible access to foreign-owned patented drugs and chemical processes. This situation concerns major international pharmaceutical firms. It remains to be seen whether such conditions will be applied sparingly to promote domestic competition, accounting for the interests of patent holders, or whether they will be used to force the transfer of technologies at the expense of patent owners.

As noted earlier, TRIPS requires member states to afford some form of protection for plant varieties. It is unlikely that many developing nations will provide patents for the foreseeable future. Rather, countries may provide exclusive rights limited by a breeders’ exemption (allowing free use of seeds for purposes of breeding new varieties) and a farmers’ privilege (permitting farmers to re-use protected seeds on their own farms).

Regarding trade secrets, Article 39 requires laws or judicial mechanisms aimed at preventing unfair acquisition of confidential information. Left undefined are the acts that are deemed unfair, leaving some flexibility to member states. States must protect against commercial bribery and industrial espionage, including hiring workers with the intent of inducing them to reveal competitors’ trade secrets. Note in this sense that a fine line

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must be drawn between this practice and legitimate labor mobility of professional and technical workers, which is a valuable form of technology diffusion and competition.

Reverse engineering is not mentioned in TRIPS, suggesting that this method of learning trade secrets may be considered an honest form of competition, which is sensible from the standpoint of dynamic efficiency and learning. Such a right affords potential rivals the ability to discover and use unpatented information, but only at the cost of undertaking their own engineering and design efforts. Despite past opposition to the protection of trade secrets, a regime of trade secrets with liberal treatment of reverse engineering poses one of the greatest potential dynamic benefits for developing economies in the area of IPRs.

Trademark protection can be valuable in developing nations, for it provides incentives to develop local crafts, clothing, and foods, among other goods and services. It also reduces costs of transferring technology and monitoring licensees, tending to expand technology trade and franchising. There is likely to be little effective market power associated with all but well-known international marks. To the extent that trademark owners impose unreasonable or anticompetitive commercial conditions on licensees, recourse may be made to competition policies.

In copyrights, countries may adopt a fair-use doctrine permitting the unauthorized use of copies for purposes of achieving social objectives. Copying on a commercial scale is not fair use, but is acceptable to allow limited copying for educational and research purposes and some countries extend the doctrine to a single “private-use” exception. The scope of copyrights may also be limited by the first-sale doctrine and parallel imports. Wholesale copying of computer software must be prohibited but TRIPS allows for
reverse engineering by honest means. In this context, programs that deliver essentially similar functional performance as original software are legitimate forms of competition. This ability to decompile software in order to understand the unprotected aspects of the code is partially responsible for the development of applications software industries in numerous developed and developing economies, and should be retained as a competitive measure.

*Regulation of IPRs through Competition Policy*

A broader issue is the use of competition rules to discipline anti-competitive practices in the post-grant use of IPRs. To abuse an intellectual property right is to try to extend one’s exploitation beyond the limitations established. Claims that a rights holder has engaged in anti-competitive activity are often complex and require significant judicial and legal expertise in their interpretation. In countries with well developed competition law, three general issues dominate discussion over their interrelationships between competition regulation and IPRs.

First, concern over monopoly pricing reflects fear of one potential abuse. However, in developed countries prices are rarely the focus of competition policy *per se* and more often the subject of price regulation for purposes of public health and nutrition. The fact that competition policy tends to ignore the pricing decisions of firms protected by IPRs stems from the basic view that property rights provide the mechanism for firms to extract some portion of consumer surplus as the reward for innovation. Firms set prices in recognition of market substitutes that are rarely absent (both in a static and dynamic context), suggesting that policy concern over monopoly pricing is misplaced.

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12 Maskus (1997) provides evidence on this point in Lebanon.
However, this optimistic view may not be shared by developing countries, both because the number of available substitutes may be more limited (insufficient static competition) and because most innovations protected by IPRs are owned by foreign interests (inadequate domestic entry in dynamic competition). In that context, price monitoring may take on additional scope in developing countries, although efforts to improve competitive processes are critical and complementary supports.

Second, most abuses of the rights inherent in IPRs relate to business strategies, including selling practices and licensing restrictions. There are few concrete guidelines in the area because of the complicated nature of markets for information and technology. Vertical licensing agreements, for example, may serve the purpose of ensuring downstream product quality on the part of local vendors, which aids competition. However, tie-in sales of unrelated products to technology purchasers could be injurious to competition.

Several potential competitive problems are raised by the exploitation of IPRs. One is potential cartelization of horizontal competitors through licensing agreements that fix prices, limit output, or divide markets. Competition authorities have found it difficult to set rules covering such licensing agreements. Instead, the focus has been on whether the agreement presents the potential for cartelization of a significant share of the market. Thus, authorities apply a “rule of reason” approach in such cases. Concerns also arise over agreements among licensors and licensees that require resale price maintenance of distributors’ prices. Such agreements may be disguised price-fixing arrangements. It is evident that such risks are greater, the more regulated is entry into distribution contracts, a common problem in many developing countries.
A second difficulty relates to exclusionary effects of license agreements. Such agreements could exclude other firms from competing in particular markets by raising barriers to entry. This could happen through required tie-in sales and mandates that licensees may only use the licensor’s present and future technologies. If a licensor succeeds in establishing such restrictions over a significant share of licensees, it gains a dominant position in secondary markets making competitive entry difficult. Further, licensors may seek to hinder the development of competing technologies through exclusive grant-back provisions. Again, competition policy must attempt to assess the potential anticompetitive impacts of such arrangements. These impacts depend critically on the structure of the markets in which agreements operate, the share of markets covered, and the difficulty of entry of licensors and licensees.

A third class of problems relates to attempts to acquire market power beyond a firm’s own protected technology or product by purchasing exclusive rights to competing technologies and products. Such efforts effectively are horizontal mergers, which may be analyzed in terms of their impact on current and future market concentration.

A final problem is non-price predation, in which IPRs may be used to bring bad-faith litigation and opposition proceedings in order to exclude and harass competitors. This may be particularly troublesome in cases where potential rivals are small and new. Other forms of entry deterrence may be practiced as well, and it is the burden of competition authorities to distinguish predation from legitimate private enforcement of IPRs.

Thus, there are complex relationships between IPRs and their potential abuse. Competition authorities must develop the capability to distinguish various forms of
behavior in terms of its potential impact on static and dynamic competition. Further, it is important to recognize that the anti-competitive effects of licensing and sales agreements are heavily dependent on market structure, including the potential for entry of competitors. In those developing economies in which entry is made difficult by protected monopolies, exclusive-distributor laws, restrictions on trade and investment protection, and weak financial markets and bankruptcy laws, the anticompetitive exploitation of IPRs could be particularly problematic. The remedy is not to delay implementation of IPRs but to develop procedures for ensuring effective competition and engaging in wider liberalization and market reform.

_Treatment of Parallel Imports_

A country’s policy regarding exhaustion of intellectual property rights is central to its regulation of those rights. Parallel imports are goods brought into a country without the authorization of the patent, trademark, or copyright holder after those goods were placed legitimately into circulation elsewhere. Parallel trade involves legitimate goods, not pirated copies or knock-offs, although they may be packaged differently and may fail to carry the original manufacturer’s warranty.

Policies regulating parallel imports stem from specification of the territorial exhaustion of IPRs. Under national exhaustion, rights end upon first sale within a nation but IPRs owners may prevent parallel trade with other countries. Under international exhaustion, rights are exhausted upon first sale anywhere and parallel imports are permitted. A third option is regional exhaustion, by which rights are completed within a group of countries, thereby allowing parallel trade among them, but are not exhausted
Despite efforts by U.S. negotiators in the Uruguay Round to incorporate a global standard of national exhaustion into TRIPS, it was impossible to reach such an agreement. Rather, Article 6 simply states that:

For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4, nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.

This clause means that no violation or limitation of a TRIPS obligation beyond national treatment and MFN may be invoked to challenge the treatment of parallel imports, although there is legal debate about this interpretation.\(^{13}\) It preserves the territorial prerogative to regulate parallel trade.

Considerable debate persists over the question of whether to amend TRIPS to achieve a global approach. Some analysts advocate a global ban on parallel trade as a natural extension of the rights of intellectual property owners to control international distribution.\(^ {14}\) Others prefer a consistent rule of international exhaustion, placing no restrictions on parallel imports, in order further to integrate markets.\(^ {15}\) In this view, proscriptions of parallel imports amount to non-tariff barriers to trade, which are counter to the fundamental thrust of the WTO.

Exhaustion policies vary widely, even among developed economies. The European Union adopts exhaustion in all fields of intellectual property within the Community but bars parallel imports coming from outside its territory. American policy on parallel imports is mixed. Within its borders the United States enforces the first-sale doctrine, under which rights are exhausted when purchased outside the vertical

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\(^{13}\) See Abbott (1998), Cottier (1998), and Bronckers (1998).

\(^{14}\) See Barfield and Groombridge (1998).
distribution chain. This approach is viewed as an important policing mechanism for exclusive territories, which are permissible under antitrust law subject to a rule-of-reason inquiry. The United States maintains a “common-control exception” in the case of parallel imports in trademarked goods. This principle permits trademark owners to block parallel imports except when both the foreign and U.S. trademarks are owned by the same entity or when the foreign and U.S. trademark owners are in a parent-subsidiary relationship. Owners of U.S. patents are protected from parallel imports by an explicit right of importation. Finally, the Copyright Act of 1976 bars parallel importation of copyrighted goods. Japan permits parallel imports in patented and trademarked goods unless they are explicitly barred by contract provisions or unless their original sale was subject to foreign price regulation. Under its case law, Japan is considerably more open to parallel imports than is the United States.

Few developing countries restrict parallel trade in any field of protection. Indeed, limitations on parallel imports in developing countries stem primarily from the private enforcement of restrictions imposed on distribution partners by foreign firms. In some degree the absence of regulations in this area reflects the general absence of competition policies and the existence of limitations on IPRs. However, parallel imports may be seen as a useful policing device against price collusion emanating from exclusive territorial restraints. Finally, parallel exports may be viewed as a channel for penetrating foreign markets.

This wide disparity in policies and attitudes toward parallel imports suggests accurately that there is no obvious answer to whether they are beneficial or harmful in welfare terms, although they are certainly detrimental to the interests of IPRs owners.

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15 See Abbott (1998).
Arguments favoring parallel trade begin with the view that restrictions on parallel imports amount to nontariff barriers to goods that have legitimately escaped the control of IPRs owners. Such barriers run counter to the WTO principle of liberal trade and sacrifice the consumer gains available from market integration. A second argument is that parallel imports can discipline abusive price discrimination and collusive behavior based on private territorial restraints. In this context, the allowance of parallel imports is a form of competition policy and acts as an important limitation to the scope of IPRs. Because the colluding firms are likely to be foreign in the case of parallel imports, the loss to consumers is not balanced by a gain in local profits. The final argument is that government enforcement of territorial rights invites rent-seeking on behalf of firms that claim they need relief from free-riding competitors but are actually interested in setting collusive prices. In this view it is superior to rely on private enforcement of contractual exclusive territories while permitting parallel trade.

Many arguments are made in favor of banning parallel imports. First, international price discrimination need not be harmful and under certain circumstances can raise economic welfare. Banning parallel trade would support the setting of one price per market, whereas parallel trade would result in uniform pricing by the IPRs holder, subject to differences in transport and marketing costs. This comparison sets up several tradeoffs. Economies with large markets and inelastic demand face higher prices under price discrimination than under uniform pricing, harming consumers. To the extent that such countries are not significant developers of intellectual property, they are made worse off by price discrimination. This logic underlies the favorable treatment of parallel imports in Australia, Japan, and elsewhere.
Countries with small markets and elastic demand, typically developing economies, face lower-than-uniform prices under price discrimination. In the presence of parallel trade, foreign rights holders may optimally choose not to supply such countries because local demand is insufficient under uniform pricing. In this view, international exhaustion would lower welfare of developing economies through higher prices and lower product availability. However, this notion may be inaccurate because restrictions against parallel imports limit intra-brand competition. This problem could significantly impair competitive processes in small developing countries, where limited market size generally supports only a small number of substitute products. Thus, for each brand the demand elasticity could well be lower in developing countries than in large developed markets with a sufficient range of close substitutes. Particularly with respect to luxury branded products, demand may be highly inelastic and support higher prices in small markets.

Indeed, most developing countries express opposition to restricting parallel trade. In part, this reflects concern that domestic prices could actually be higher for imported goods under price discrimination. This concern is registered most often in the context of pharmaceuticals trade if patents encourage monopoly pricing. More fundamentally, many nations see opportunities for being parallel exporters and achieving export and industrial growth through that channel, discounting the likelihood of their markets going unserved. Indeed, many view potential restrictions on parallel trade as back-door attempts by industrial countries to close their markets through implicit non-tariff barriers.

A second argument is that parallel traders free ride on the investment, marketing and service costs of authorized distributors. Indeed, this is the primary motivation for

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16 See Malueg and Schwarz (1994).
permitting privately contracted exclusive territories in the first place. Such restrictions may be procompetitive, both through enhancing inter-brand competition and through providing incentives to build markets and provide services. Failing to provide adequate protection risks the dynamic problem that markets may be underserved due to slower rates of product introduction and more limited service contracts. Moreover, exclusive territorial representation permits lowers the rights-holder’s costs of monitoring and controlling product and service quality and ensuring compliance with supply conditions. In this sense restrictions against parallel imports may be viewed as welfare improving.

An important issue is that international price differences may be the result of national price regulations established for purposes of achieving social objectives. The most prominent example is pharmaceuticals. Virtually all nations regulate prices in order to limit consumer costs or health procurement budgets. Such regulations differ widely across countries and account for significant price variations. Permission of parallel trade could defeat the purposes of regulation as distributors in more regulated (lower-price) markets export to less regulated (higher-price) markets. In this context, it is appropriate to bar parallel exports from regulated markets on the theory that such regulations amount to a sector-specific export subsidy.

The question of whether regulating parallel imports is beneficial or harmful is ultimately an empirical question and depends on circumstances. Unambiguously, restrictions on parallel trade raise profitability of intellectual property developers, which are overwhelmingly located in a few developed countries. The possibility that price discrimination could result in lower prices in developing countries, in the face of this enhanced market power, must seem a leap of faith to those unschooled in industrial
organization theory. Moreover, even in relatively low-income economies with large
markets there may well be lower-priced sources of goods in regional trade. Given this
situation, it is impossible to place confidence in either the prescription for banning
parallel imports or mandating that there be a free global regime in parallel trade. The
best advice seems simply to permit the status quo ante to continue, with each country or
region selecting its own policy.

4. A Multilateral Agreement on Competition Policy and the Developing Countries

Variations across countries in the regulation of IPRs and the treatment of parallel
imports are one example of how competition policy affects trade flows. Other aspects of
regulation raise tensions among trading partners that figure prominently in the global
debate. First, many countries exempt export cartels from their competition disciplines on
the theory that such cartels do not harm consumers in the exporting country but are able
to exercise market power in destination markets. This is a classic example of a “beggar-
your-neighbor” policy and distorts trade. Developing economies may participate in such
arrangements and may be reluctant to abandon them.\(^{18}\) However developing countries
may be particularly susceptible to harm from cartels organized by developed countries
that fix prices of materials, capital goods, and technology. While some analysts argue that
the extent of trade affected by such cartels is minimal, they should be banned on the same
logic that induced WTO member states to ban voluntary export restraints. Similar
treatment should be accorded import cartels, which are properly viewed as horizontal
mergers that restrain imports, an important form of competition.

\(^{17}\) See Danzon (1997).
\(^{18}\) See Scherer (1994). Scherer argues for permitting nations to designate temporary exceptions for thee
specific commodity or product cartels in which they participate, a suggestion of debatable value.
As discussed earlier, trade may be limited by the monopolistic actions of state enterprises, national champions, and service providers offered exclusive rights. Countries have internal interests in phasing out such restrictions through a combination of trade liberalization, rights of establishment, and competition enforcement. Exemptions need to be firmly justified and readily transparent. Markets also may be effectively closed due to the absence of competition law or limited enforcement of disciplines against domestic restraints on trade. Such restraints include cartels stemming from horizontal arrangements, including those associated with licensing IPRs, which should generally be disallowed in any event on competition grounds. They may also include vertical restrictions in thin distribution markets, which could foreclose domestic and foreign entry. The difficulty here is that vertical contract restraints are not necessarily anticompetitive and need to be examined carefully on that score.

While the economic effects of the issues just mentioned may spill across borders, they arise from domestic distortions that are best removed by domestic policy. In that context, difficult sovereignty questions arise in incorporating into the WTO requirements that nations take action against private competition restraints with indirect trade-restricting effects. Few nations would be willing to agree to such rules because their approaches to competition law and enforcement are so different and because their authorities may not agree with claims of anticompetitive effects. In the Kodak-Fuji case, for example, Japan rejected the U.S. claim that distribution restrictions enforced by Fuji effectively prevented Kodak from constructing a competing distribution system. The WTO panel agreed with the Japanese interpretation.
Thus, it may be neither possible nor desirable to subject domestic public and private competitive restraints and exceptions from competition law to specific WTO disciplines. Cases in which such restraints operate to nullify or impair the benefits anticipated by trading partners from other trade liberalization may be subject to non-violation complaints, a route that exists already in the WTO but is rarely undertaken. In most cases, an agreement to engage in bilateral consultation, information sharing and enforcement under the rule of positive comity may be most effective.\textsuperscript{19}

Thus, even if it were not comprehensive, a multilateral approach embodying a minimum set of principles would be in the interest of developing countries. As multinational enterprises become increasingly important conduits of trade in goods, services, and technologies, governments compete more intensively to attract them. Developing countries have little leverage to prevent or sanction anticompetitive practices by these enterprises. It is unlikely, for example, that officials in developing countries could have discovered, let alone disciplined, the international vitamin cartel that the U.S. antitrust authorities recently indicted and heavily fined. A multilateral commitment to banning cartels and horizontal agreements is thus important, whether the markets targeted are domestic or foreign.

One of the greatest threats to global competition is the international proliferation of antidumping laws and enforcement actions. As written and executed, antidumping laws are fundamentally anticompetitive, a point on which economists widely agree. While use of these laws remains largely the practice of developed countries, their adoption and use is rising sharply in developing countries as well. Indeed, as their

\textsuperscript{19} Indeed, this approach is anticipated by TRIPS, in which members that feel aggrieved by competition actions against firms domiciled in their jurisdiction regarding their alleged abuse of IPRs are to be accorded
imports are further liberalized, developing countries are likely to take additional refuge in antidumping action. In order to avoid the restriction of genuine competition on their markets, it may be important to place antidumping under the jurisdiction of national competition authorities.

At the international level, enforcement actions taken by developed nations continue to be poised at developing countries in the main. These countries legitimately fear that this situation that could become more pronounced over time as the WTO Agreement on Textiles and Apparel is phased in.

A significant boost to trade and competition would come from abolishing antidumping laws or at least replacing them with actions based on principles of competition law. Such principles could include increasing the de minimus exceptions for undertaking reviews, raising injury standards, replacing the “like product” standard in antidumping with the “relevant market” standard in competition regulation, and establishing judicial review mechanisms for antidumping actions.\(^{20}\)

Reaching agreement on such reform would be quite difficult in light of the strong political interests in favor of antidumping as a protectionist and selective safeguard measure.\(^{21}\) It is worth pointing out, however, that an important linkage exists between competition policy in developing countries and potential antidumping reform. Advocates of antidumping actions in the high-income economies claim that foreign firms are able to sustain profitable monopoly positions in their own markets by virtue of formal and informal measures to close markets, including weak competition enforcement. In turn, these monopoly rents provide the support for dumping products abroad at prices below sympathetic consultation.

\(^{20}\) See Messerlin (1996) and Scherer (1994)
average costs. Whatever the merits of this case may be in practice, it is the primary justification made in policy circles for sustaining active and intrusive antidumping enforcement. It follows that if developing economies were to engage in significant market liberalization and to adopt competition laws that improve accessibility to their markets, programs that promise unilateral gains in any event, the force of the argument would disappear. In brief, developing countries are in a position to use the potential adoption of competition policies as a lever for pushing for disarmament in antidumping.

Arguments for a WTO Agreement

With this background, consider the justifications that may be put forward for reaching an agreement on competition issues in the WTO. First, it is clear that some public and private restraints on competition have cross-border anticompetitive effects and distort trade. Direct examples include export and import cartels and government mandates on exclusive distributorships. Indirect examples include horizontal cartels, state aids, exclusive monopolies, and certain types of vertical agreements among enterprises. Second, mergers that take place across borders involve multiple reviews of potential impacts on competition, while even mergers among firms domiciled within a single country may have effects on competition abroad. Third, antidumping laws are decidedly anticompetitive in their execution, having the effect of limiting the contestability of markets in which they are used. Finally, countries may engage in opportunistic or strategic use of competition policy in order to extract rents from foreign firms or consumers. If many countries do this, each may be made worse off. Thus, there may be a policy coordination failure in competition regulation that could be eased by multilateral agreement.

21 See Hoekman and Holmes (1999).
The Form of a Beneficial Agreement

A variety of proposals exist for fashioning a WTO Agreement on competition, called TRAMS. Graham and Richardson (1996) advocate a phased, gradualist approach, which they term “cooperative unilateralism”. In essence it involves a national treatment obligation, enlarged WTO consultation in competition cases, international notification of mergers and acquisitions with potential spillover impacts on competition, and an international agreement to ban most cartels. The last provision would be modified by a “TRAMS safeguards” mechanism, in which countries would be allowed to designate and notify rationalization cartels.

Fox (1995) sets out a broader conceptual approach, which she terms a “minimal but unitary” system. Here, contracting nations would negotiate shared competition principles for the trading system, including a rule outlawing cartels (with transparent exceptions for valid social reasons) and an agreement to make markets accessible and free of artificial restraints on competition. Enforcement would involve national treatment in that competition authorities would consider harm to foreign interests with the same gravity as harm to domestic competition. Governments would forego taking or sanctioning anticompetitive actions that substantively harm foreign interests. Members would make their antidumping enforcement more consistent with competition principles. Finally, nations would agree on principles under which to recognize some market arrangements among competitors potentially to enhance efficiency, such as research joint ventures, production networks, and vertical arrangements. Members believing they have experienced damages from actions of another member could petition for enforcement in that nation and, failing satisfactory resolution, initiate enforcement action in its own
jurisdiction if feasible. A dispute resolution system would be set up along the lines of the WTO procedures. A strong emphasis would be placed on cooperation and transparency.

Hoekman and Holmes (1999) are pessimistic that any agreement that broad could be negotiated successfully. They note that such negotiations are potentially subject to political capture that could produce anticompetitive rules in the name of competition maintenance, analogous to the situation with antidumping. They see little likelihood that expanded use of non-violation complaints aimed at weak competition enforcement would be satisfactory for complainants. Further, they find little reason to believe that an agreement to restrain antidumping with competition principles would be feasibly negotiated. They are also skeptical about the chances for a multilateral agreement to ban trade cartels. They find merit in expanding the WTO’s transparency role in the competition area, which would produce information about government policy and help establish competition advocacy within countries. Finally, they see a positive role for the establishment of notification and transparency requirements, procedural cooperation and technical assistance, and adoption of positive comity as a guiding principle in enforcement. Thus, they envision an agreement limited to procedural cooperation and transparency requirements as the maximum that may reasonably be envisioned.

The minimalist approach that Hoekman and Holmes set out may well be all that is politically feasible but it is not the best agreement that could be formulated for developing countries. Transparency mechanisms and cooperation are desirable in any case and may not require a multilateral approach. For the WTO to be involved meaningfully a mixture of the suggestions put forward by Graham and Richardson seems sensible as a basis for the next round of negotiations. In particular, agreement on broad
principles of market contestability, a national treatment obligation, a commitment to phase out export cartels and horizontal arrangements (with transparent and justifiable exceptions), and consultation and dispute resolution are beneficial and potentially feasible in the context of a multilateral trade negotiation. Moreover, as discussed above, it may be possible to overcome the substantial opposition to antidumping reform through a competition agreement, though such a change almost surely would require additional concessions elsewhere in the negotiation.

None of these commentators placed intellectual property rights in their equations. The oversight is surprising in light of the close linkages between them. Indeed, if TRIPS is to be revisited in the next round of negotiations, its broad limitations on IPRs exploitation in the name of competition could come up for review. Developing countries should consider carefully the extent to which they wish to retain these limitations. Moreover, at this time it seems advisable to oppose proposals to ban parallel imports.

5. Concluding Remarks

In this paper we have provided an overview of the advantages of an active competition policy, broadly construed, for developing countries. As they adopt and implement competition laws, it is important to recognize the synergies between them and intellectual property rights, market openness, and deregulation. Many nations are presented with an historic opportunity to render their markets considerably more competitive, which could have the beneficial impact of freeing up global competition as well.
Competition policy must be confronted in any event because of the need to implement new standards of protection for IPRs. To an important degree, the scope of such rights determines how they may be used and constitutes itself a form of competition regulation. However, there is some tension between IPRs and competition regulation, which must be addressed in a dynamically procompetitive framework. Competition enforcement in the IPRs area should aim at disciplining clearly anticompetitive licensing practices rather than attempt to force technology transfer on concessional terms and to encourage imitation without compensation.

The upcoming Millennium Round may incorporate negotiations on competition regulation, with a view toward enhancing global market accessibility. Developing countries could achieve gains from such an agreement if it is structured in a way that assists the establishment of competition on their markets and disciplines the most anticompetitive measures undertaken by developed countries, including antidumping. While it may be unrealistic to anticipate more than an agreement on basic transparency and cooperation, a broader vision could succeed in bringing competition principles more fully into the global trading system.


