INTERNATIONAL COMPETITION POLICY AND THE GATS: A PROPOSAL TO ADDRESS MARKET ACCESS LIMITATIONS IN THE DISTRIBUTION SERVICES SECTOR

JASON E. KEARNS*

I. INTRODUCTION

> *As the trade barriers fall like a waterline, the low tide reveals rocks and shoals—which are the private restraints and uncaught government restraints. Moreover, the freer trade engenders new, defensive restraints. Entrenched businesses, and nations themselves, face perverse incentives to rebuild border barriers for private and nationalistic ends, protecting the newly vulnerable national advantage. . . . Thus, trade liberalization sets the stage for private and hybrid abuses, suggesting the need for a voice for free trade and competition in the world.*[1]

When left to their own devices, national competition policymakers will favor domestic producer interests over foreign producer and consumer interests. The failure, whether real or perceived, of national policymakers to take action to eliminate anticompetitive private restraints is a growing source of international tension. For instance, in the so-called "Fuji-Kodak" dispute, the United States alleged that Japanese distributors of photographic film excluded foreign producers from their distribution systems, and that Japanese authorities failed to enforce their antitrust laws—and even encouraged the distributors to exclude foreign producers.[2] In addition, many national laws explicitly exempt

* Associate in international trade practice, Wilmer, Cutler & Pickering, Washington, DC. Thanks are due to Pierre Sauvé, Ann-Marie Slaughter and my wife, Lindy.

[1] Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT'L L. 1, 3-4 (1997).

[2] WTO Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R (Mar. 31, 1998) [hereinafter *Japan – Photographic Film*].

cartels that operate exclusively in export markets from the general provisions of antitrust law. In the European market, non-European suppliers of avionics and other components have alleged that Airbus Industrie uses standards that arbitrarily discriminate against foreign suppliers.[3]

Drawing from observations of the economics and law of competition policy, as well as from the basic principles of international relations ("IR") theory, this paper defines the most pressing problems of competition policies in the global economy, analyzes various proposals for dealing with competition policy at the international level, and provides an alternative proposal. Emphasizing the complexities and cultural nuances of competition policies, Section 2 sketches the basic economic, legal, and policy principles that surround competitive markets. Section 3 defines the "most pressing problems" of competition policies in the global economy. Section 4 introduces the basic principles of the three most prominent IR theories and uses these theories to analyze the origins of the problems identified in Section 3. Section 5 describes four international competition policy proposals and evaluates these proposals based on the economic and legal observations and on the basic principles of IR theory. Based on the lessons learned from Section 5, Section 6 provides an alternative proposal, exclusively addressing market access limitations that result from private vertical restraints. In essence, Members of the World Trade Organization would adopt a "Distribution Services Reference Paper on Regulatory Principles" as a means to enhance the effectiveness of the Article IX consultation procedure in the General Agreement on Trade in Services ("GATS"). Pursuant to this Reference Paper, Members would agree to submit such disputes to an ad hoc panel of competition policy experts for a non-binding determination of whether an action (or inaction) of the national competition authorities harms domestic consumers and limits market access for foreign producers. This determination would provide both the international community of states and domestic interest groups with much-needed information about the effects of a nation's competition policies. Section 7 concludes.

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[3] INT'L COMPETITION POL'Y ADVISORY COMM. TO THE ATTORNEY GENERAL AND ASSISTANT ATT'Y GEN'L FOR ANTITRUST, FINAL REPORT 217 (2000) [hereinafter ICPAC REPORT].

2. THE ECONOMICS, LAW AND POLICY OF COMPETITIVE MARKETS

Before reaching international issues, this section summarizes the basic economic, policy, and legal principles of competitive markets within national boundaries. The one consistent theme of this section is that the economics and legal principles guiding competition policy are especially complex—even in the relatively simple domestic setting. As discussed below, this complexity provides a formidable challenge to proposals that seek to lessen the tension between trade and competition policies.

2.1. The Economics of Free Trade and Competitive Markets

Competition is the linchpin of the free market system. A market is considered competitive if individual firms in that market have little or no power to influence the price or other terms on which products are sold.[4] By ensuring that resources are allocated efficiently and by spurring innovation, competitive markets ultimately maximize consumer welfare.[5]

Despite the many "efficiency gains" of competition, more competition, or at least more competitors, is not necessarily more efficient. In many instances *cooperation*, the antithesis of competition, produces even greater efficiency gains. For instance, joint ventures for research and development between competitors may lead to a greater degree of innovation; a merger of two rivals may result in significant economies of scale.

This tension between competition and cooperation is particularly relevant to so-called "vertical restraints," an area of competition policy that gives rise to many international trade disputes, including Fuji-Kodak.[6] Vertical restraints frequently involve the relationship between manufacturers and wholesale and retail distributors. They typically relate to the prices at which distributors sell, the geographic territories or classes of customers to which they sell, or the degree of exclusivity the manufacturer or the distributor can count on from the other.[7]

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4 RICHARD G. LIPSEY ET AL., MICROECONOMICS 212 (8th ed. 1988).

5 F. M. SCHERER, COMPETITION POLICIES FOR AN INTEGRATED WORLD ECONOMY 3 (1994).

6 *See* ICPAC REPORT, *supra* note 3, at 211-20.

7 MILTON HANDLER ET AL., TRADE REGULATION: CASES AND MATERIALS 572 (3d ed. 1990).

While the negative anti-competitive effects of these restraints can be considerable, the positive cooperative effects also deserve consideration. To ensure that its distributors have a strong incentive to promote its products, a manufacturer may prohibit its distributors from selling the products of competitors.[8] Without such a prohibition, a distributor may lack any incentive to pay for costly promotion campaigns, because other distributors can free ride on the promotion campaigns and then sell the product for less.[9] As a result, economists generally accept vertical restraints if rival firms have equivalent opportunities to cooperate and integrate. But if, for example, a new entrant must build an expensive new distribution network, the efficiency gains from eliminating the restraints are likely to outweigh the gains from existing networks of manufacturers and distributors.[10]

The crucial point is that the economics of competition policy, especially vertical restraints, do not permit easy answers. "The reasons for and consequences of such practices are extremely complex, and economists' evaluations of their desirability diverge by much more than the quantum customary in a profession not known for unanimity of viewpoints."[11] As explained below, this complexity, the result of the opposing efficiency gains from cooperation and competition, gives rise to international disagreements and makes dispute resolution difficult.

2.2. *The Law and Policy of Competitive Markets*

Three facts about domestic competition laws add to the complexity of the international problem. First, many national competition laws reflect the fact that market concentration, and especially vertical restraints, are not necessarily inefficient as explained above. As a consequence, courts and competition authorities reject bright-line rules in favor of a "case-by-case" or "rule of reason" approach. For example, courts in the United States recognize the efficiency gains that often result from vertical restraints such as exclusive dealing and exclusive purchasing contracts. "[These contracts] are illegal under a rule of reason if they can be proved to in-

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[8] *See* EDWARD M. GRAHAM & J. DAVID RICHARDSON, GLOBAL COMPETITION POLICY 23 (1997).

[9] *See* HANDLER ET AL., *supra* note 7, at 575.

[10] *See* GRAHAM & RICHARDSON, *supra* note 8, at 25.

[11] SCHERER, *supra* note 5, at 70.

crease the coordinative behavior of competitors in an oligopoly, or if they raise barriers to entry and thus enhance unilateral price-raising power."[12] While the "rule of reason" is necessary to ensure that legal decisions are consistent with economic principles, it also makes clear that a detailed analysis of each individual case is necessary before the text of competition laws may be applied. It also suggests that the drafters of international agreements on competition policy should recognize that general and flexible principles should be favored over bright-line rules.

Second, although economic theory largely drives competition law and policy, culturally nuanced considerations of fairness also play an important role in many countries. Unlike the fairly objective quality of efficiency, commentators and policymakers within, and especially across, countries will differ in their definition and pursuit of fairness in competition policy. "In the United States, [fairness] often means equality of opportunity or (in our context) free entry into a business endeavor. In other countries, it sometimes means that favored activity or loyalty should be rewarded, or that equity of process or outcome (market division according to historic shares) is valued."[13]

The interests in economic efficiency and social fairness can diverge in competition policy. For example, market concentration may achieve economies of scale and lower consumer prices, but may force small- and medium-sized enterprises out of the market, some would say "unfairly." Similarly, efficiency gains from consolidation may result in unemployment, due to no fault of the employees.

Most countries that have competition policies apply them so as to achieve a mix of economic efficiency and "fairness."[14] The United States, however, focuses almost exclusively on efficiency. "In the early 1980s, as part of a plan to free business from excessive government regulation, antitrust was re-engineered from policy that favored open markets and entrepreneurial opportunity to law

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[12] Eleanor M. Fox & Robert Pitofsky, *United States, in* GLOBAL COMPETITION POLICY, *supra* note 8, at 235, 259.

[13] GRAHAM & RICHARDSON, *supra* note 8, at 8.

[14] *See, e.g.*, Donald Hay, *United Kingdom, in* GLOBAL COMPETITION POLICY, *supra* note 8, at 199, 203. The United Kingdom grants its competition authorities wide discretion in pursuit of the public interest. According to Section 84 of the Fair Trading Act of 1973, these authorities are to consider how the business practice at issue affects the balanced distribution of industry and employment in the United Kingdom. *Id.*

narrowly focused on output-limiting conduct that provably raises prices to U.S. consumers."[15] These different objectives further complicate efforts to achieve an international consensus on the principles of competition policy.

Finally, a quick cross-country review of competition laws suggests that statutory formulations of legal principles differ very little across countries, but matter even less.[16] What matters most is the way these general statutory provisions are interpreted and applied by administrative agencies and courts. Administrative and judicial interpretations and enforcement of these laws differ greatly from country to country. This similarity in law and difference in the application of the law suggest that efforts to draft uniform international competition rules, interpreted and applied by national policymakers, would be futile.

3. THE UNRESOLVED PROBLEMS OF COMPETITION POLICY IN THE GLOBAL ECONOMY

The global economy creates numerous problems for competition policymakers and businesses today. For example, a business contemplating a transnational merger or simply seeking to do business in multiple markets may face inconsistent obligations as a result of legitimate differences in policies between two or more nations. In addition, many efforts on the part of producers and competition policy authorities are duplicated, as several nations separately investigate a potentially anti-competitive situation.[17] But the most pressing problems stem from national competition policymakers who have strong incentives to draft and apply policies with a view to protecting or supporting domestic producers over their foreign counterparts.

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[15] Fox, *supra* note 1, at 10. *See also* Daniel J. Gifford, *The Draft International Antitrust Code Proposed at Munich: Good Intentions Gone Awry*, 6 MINN. J. GLOBAL TRADE 1, 3 (1997).

[16] Indeed, many national competition statutes, such as those found in Japanese and EU law, are based on the laws of the United States. Also, "[m]ore than seventy countries, comprising 98% of world output and 99% of world trade, have now adopted some form of antitrust policy." Patricia I. Hansen, *Antitrust in the Global Market: Rethinking "Reasonable Expectations,"* 72 S. CAL. L. REV. 1601, 1612 (1999).

[17] For example, Gillette Company's acquisition of Wilkinson Sword had to clear fourteen merger review offices. *See OECD Committee Lacks Enthusiasm for Draft International Antitrust Code*, 65 Antitrust & Trade Reg. Rep. (BNA) 771 (1993).

3.1. *The Most Pressing Problems: Weak Competition Laws and Discriminatory Enforcement in the Market Access and Powerful Exporter Contexts*

National authorities often systematically favor the interests of domestic producers (but not necessarily of domestic consumers) over the interests of foreign producers and foreign consumers. The result, when compared to a purely autarkic jurisdiction, is weak competition laws and/or the discriminatory enforcement of such laws. While discriminatory enforcement is an obvious result of such conduct, weak competition laws are also possible. Indeed, policymakers have little incentive to close a loophole in the law if domestic producers as a whole benefit from the loophole.

When the interests of incumbent domestic producers are systematically favored over the interests of foreign producers, weak laws and discriminatory enforcement will limit a foreign producer's ability to access domestic markets. (This situation will be referred to as the "market access context.") Examples of such alleged conduct abound and frequently relate to vertical restraints.[18] A foreign producer may lack effective legal recourse in the import market for a variety of reasons. The competition authorities may refuse to prosecute the case. Alternatively, the competition laws may not provide an effective private right of action, may fail to address this vertical restraint, or may exempt this industry from general laws that prohibit such vertical restraints.

When the interests of domestic producers are systematically favored over the interests of foreign consumers, weak laws and discriminatory enforcement may enable firms in one country to concentrate their market power, eventually allowing them to increase the prices at which they export to consumers in another country. (This situation will be referred to as the "powerful exporter context.") The most obvious example of such conduct is the explicit exemption of export cartels from general competition laws.[19] The authorities in the exporting country lack the incentive to enforce competition laws against their colluding or merging

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[18] *See Japan—Photographic Film*, *supra* note 2; *see also* Aaditya Mattoo & Arvind Subramanian, *Multilateral Rules on Competition Policy—A Possible Way Forward*, 31 (5) J. WORLD TRADE 95, 97 (1997) (listing the distribution issues raised by U.S. authorities in the Japanese flat glass, paper, and automobile cases).

[19] For example, in the United States, the Webb-Pomerene Act creates an explicit exemption from the Sherman Act for cartels that operate exclusively in export markets. *See* Webb-Pomerene Act, 15 U.S.C. §§ 61-65 (1994).

producers, especially if the producers sell little or no products to the domestic consumers, or if the producers agree not to increase prices in the domestic market. The authorities in the importing country may be unable to enforce their competition laws against the exporters if, for example, the exporters lack any real assets in the importing country. While the importing country could "punish" the exporters by refusing to accept the exports altogether, this may harm the importing country's consumers even more than the price-fixing itself.

3.2. *The Failings of Existing International Commitments*

Two multilateral institutions, the Organization for Economic Cooperation and Development ("OECD") and the World Trade Organization ("WTO"), address issues of international competition more than any other. The OECD, an organization of only the most industrialized countries, provides a useful forum for its members to consult with one another about competition and trade policy. While these members have adopted various "recommendations," including a recent initiative concerning "effective action against hard core cartels",[20] the OECD has not established any firm commitments regarding the problems of weak competition laws and discriminatory enforcement. More important, the OECD does not have an effective procedure for the settlement of disputes between its members. For these reasons, the OECD generally is not considered an ideal forum for addressing the problems of weak laws and discriminatory enforcement.

On the other hand, the WTO administers numerous binding commitments dealing with international trade relations, some of which either explicitly or implicitly relate to competition policies. The following briefly analyzes the (limited) extent to which the WTO has addressed the problems of weak laws and discriminatory enforcement in the powerful exporter and market access contexts.[21]

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[20] News Release, OECD, Recommendation of the Council Concerning Effective Action Against Hard Core Cartels, C(98)35 (Apr. 28, 1998) (adopted in Paris), *available at* http://www.oecd.org/daf/clp/recommendations/rec9com.htm.

[21] For a more thorough analysis, see Maria-Chiara Malaguti, *Restrictive Business Practices in International Trade and the Role of the World Trade Organization*, 32 (3) J. WORLD TRADE 117, 128-31 (1998).

3.2.1. *Weak Laws and Discriminatory Enforcement in the Powerful Exporter Context*

The WTO is not designed to deal with either weak competition laws or even discriminatory enforcement in the powerful exporter context. Although predatorily low prices may in some cases be covered under Article VI of the General Agreement on Tariffs and Trade 1994 ("GATT"), which "condemns" the sale of imports at less than normal value, the high prices that result from monopoly power apparently do not violate any provision of the GATT or the GATS.[22] Furthermore, even under the "non-violation" provisions of Article XXIII of the GATT, a Member seeking to shield its consumers from the effects of a powerful exporter would have difficulty claiming that "any benefit" under the GATT is being "nullified or impaired."[23] While a complaining party could claim that the unchecked powerful exporter is impeding the "attainment of [an] objective of the Agreement," such as, for example, "developing the full use of resources of the world and expanding the production and exchange of goods,"[24] GATT and WTO jurisprudence suggest that a panel or the Appellate Body is unlikely to accept such an expansive interpretation of Article XXIII of the GATT.[25]

3.2.2. *Weak Laws in the Market Access Context*

As a general matter, the WTO provides little protection against weak national laws. The GATT generally seeks to prevent acts of

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[22] *See id.* at 123.

[23] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

[24] *Id.*

[25] *See* Petros C. Mavroidis & Sally J. Van Siclen, *The Application of the GATT/WTO Dispute Resolution System to Competition Issues*, 31(5) J. WORLD TRADE 5, 9-12 (1997) (arguing that the objective to achieve the "full use of the resources of the world," contained in the Preamble of the GATT, should not form an appropriate legal basis to bring competition-related disputes before the WTO dispute settlement mechanism under Article XXIII). *But see* Malaguti, *supra* note 21, at 132-33. Malaguti argued that:

> a combined reading of Article IX of the GATS, Article 11 of the Safeguards Agreement, Article 40 of the [Uruguay Round Agreement on Trade-Related Aspects of Intellectual Property Rights] and the 1960 Decision under the GATT [recognizing that restrictive business practices may hamper the expansion of world trade] could provide a legal basis for a non-violation complaint relating to any restrictive business practice....

Id.

governmental discrimination against foreign producers, but an across-the-board failure to enact strong competition laws is not an obvious breach of any obligation under the GATT, even if the purpose and effect of this failure is to insulate powerful domestic producers from foreign competition.

The GATS addresses the problem of weak laws in the market access context, albeit in a fairly limited fashion. For example, Article VIII:1 of the GATS obligates Members to "ensure that any monopoly supplier of a service in its territory does not... act in a manner inconsistent with that Member's obligations under Article II [the most-favored-nation principle] and specific commitments."[26] This provision, however, only applies when there is a "sole supplier of that service":[27] it does not apply if there is more than one supplier of a service in a sector, even if competition is nevertheless severely limited. In addition, Article VIII only applies if the Member has affirmatively made commitments in the service sector at issue and, obviously, it only applies to trade in services, not in goods. Article IX of the GATS addresses a broad range of restrictive business practices across all service sectors, but it only obligates Members to consult with one another "with a view to eliminating" restrictive business practices: no substantive commitments are included.

3.2.3. Discriminatory Enforcement in the Market Access Context

WTO agreements do protect against the discriminatory enforcement of competition laws in the market access context, but even here the gaps in protection are wide. Take first Article III of the GATT, which contains the "national treatment principle." Pursuant to Article III:4, Members of the WTO agree to accord exported products of other Members "treatment no less favourable than that accorded to *like products of national origin* in respect of all *laws, regulations and requirements* affecting their internal sale, offering for sale, purchase, transportation, distribution or use."[28]

Although some commentators have suggested that Article III:4 protects against the discriminatory enforcement of competition

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[26] General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the WTO, Annex 1B, Legal Instruments — Results of the Uruguay Round vol. 31, 33 I.L.M. 142 (1994) [hereinafter GATS].

[27] *Id.* art. XXVIII:(h).

[28] GATT art. III:4 (emphasis added).

laws,[29] a complaining party claiming that another Member's discriminatory enforcement of its competition laws is violating Article III:4 would face at least two formidable hurdles. First, it is unlikely that a national competition authority's pattern of discriminatory enforcement will be explicitly written in any "law" or "regulation" or even that the pattern appears as a "requirement." Second, the Article III analysis depends on a comparison of "like products". As a result, a complaining party must establish that the discriminatory enforcement decision treats foreign products less favorably than like domestic products in the same sector. Because enforcement decisions affect an entire product sector, the failure to enforce competition laws by itself arguably does not necessarily treat foreign products less favorably, even though the decision effectively fails to level the playing field. It does not "afford protection to the domestic industry" in the strict sense; it only fails, intentionally and selectively, to remove the protection that the sector has established for itself.[30] In other words, evidence that the competition authorities have decided not to enforce the competition laws in a sector that is vulnerable to imports, but have enforced these laws vigorously in other sectors, may be irrelevant to the Article III analysis.[31]

According to Article X:3(a) of the GATT, "Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this article."[32] Article X:1 applies to all "[l]aws, regulations, judicial decisions and administrative rulings of general application... pertaining to... requirements, restrictions or prohibitions on imports or exports... or affecting their

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[29] *See, e.g.*, Mavroidis & Van Siclen, *supra* note 25, at 8; *see also* Malaguti, *supra* note 21, at 128 (arguing that Article III requires non-discriminatory competition conditions).

[30] *See* Mavroidis & Van Siclen, *supra* note 25, at 8.

[31] This analysis is only intended to show the difficulties of establishing a complaint under Article III relating to discriminatory enforcement, not to suggest that such a complaint cannot be established. Indeed, there is support for the general proposition that Article III broadly calls for "the effective equality of opportunities for imported products in respect of the applications of laws," WTO Panel Report, *United States - Section 337 of the Tariff Act of 1930*, GATT B.I.S.D. at 36S/345, para. 5.11 (Nov. 7, 1989), and seeks to preserve "*the conditions of competition* between the domestic and imported products on the internal market." WTO Panel Report, *Italian Discrimination against Imported Agricultural Machinery*, GATT B.I.S.D. at 7S/60, para. 12 (Oct. 23, 1958) (emphasis added).

[32] GATT art. X:3(a).

sale, distribution, [and] transportation[.]"[33] Similar to the Article III:4 analysis, it is again not clear whether an administrative decision, or even a pattern, of discriminatory enforcement constitutes an administrative ruling of general application affecting the sale or distribution of imports.

Based on this "near miss" of an Article III violation, a complaining party could resort to the "non-violation" clause in Article XXIII of the GATT and claim that the discriminatory enforcement of competition laws "nullifies or impairs" benefits accruing to it under the GATT.[34] Even here, however, the complaining party would face an uphill battle. For example, the complaining party would have to establish that it "could not have reasonably anticipated" or expected that benefits accruing to it under the GATT would be offset by the "subsequent" practice of discriminatory enforcement.[35] Given that the discriminatory enforcement of competition policies is presumably not a new phenomenon, a complaining party would have difficulty establishing its surprise. Moreover, due in part to several important changes in law and legal structure that resulted from the Uruguay Round of negotiations, Frieder Roessler has suggested that "it would . . . be an illusion to think that panels or the Appellate Body would eagerly embrace the idea of handing out licenses to retaliate against restrictive business practices without any prior normative guidance by the membership of the WTO."[36]

Compared to the GATT, the GATS provides more protection against discriminatory enforcement, albeit mostly only in service sectors in which a Member has made specific commitments. For example, in addition to Articles VIII and IX described above, Article VI of the GATS requires Members to ensure that "all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner" in sectors where specific commitments are undertaken.[37] Because a "measure" includes a "decision" or "administrative action" by a Member,[38] Article VI appears to prohibit the discriminatory enforcement of

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[33] GATT art. X:1.

[34] GATT art. XXIII.

[35] *See Japan – Photographic Film, supra* note 2, ¶ 10.76-10.77.

[36] Frieder Roessler, *Should Principles of Competition Policy be Incorporated into WTO Law Through Non-Violation Complaints?*, 2 J. INT'L ECON. L. 413, 418 (1999).

[37] GATS art. VI.

[38] GATS art. XXVIII(a).

competition laws in service sectors in which specific commitments have been undertaken.[39]

In addition, through the GATS framework, Members have adopted more detailed commitments in specific sectors. For example, Members, pursuant to a Telecommunications Reference Paper on Regulatory Principles, have agreed to maintain appropriate measures to prevent suppliers in the telecommunications sector from engaging in anti-competitive practices.[40]

In short, the GATT and GATS provide only limited protection against discriminatory enforcement of competition laws. The GATT provides little protection against discriminatory enforcement for imported goods. Incidentally, it provides no protection for foreign investors who manufacture goods abroad, as the GATT only applies to trade, not investment. The GATS provides greater protection, and even protects the foreign investor's "commercial presence," but only for trade in services, and only for services in which specific commitments have been undertaken.

More troubling, however, is that the WTO at present lacks the competence and resources to address the problem of discriminatory enforcement of domestic competition laws, even if such a claim could be made under the GATT or GATS. The rule of reason, for example, would require a WTO panel to pore over the factual details of many cases before it could find discriminatory enforcement. At present, panels, the Appellate Body, and, generally, the WTO as an institution lack the resources, time, and evidentiary tools to do so.

4. INTERNATIONAL COMPETITION POLICY PROBLEMS FROM THE PERSPECTIVE OF IR THEORY

International relations theory provides three different lenses through which to view the problems of, and proposals to address, weak laws and discriminatory enforcement of domestic competition policies. While IR theorists from each of these three different schools often reach conclusions that theorists from the other schools would not accept, for our purposes it is not necessary to

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[39] *See also* GATS arts. XVI:1 & XVII.

[40] For a more complete list of WTO provisions relating to anti-competitive practices, see Eleanor M. Fox, *Competition and the Millenium Round*, 2 J. INT'L ECON. L. 665, 669, n.12 (1999).

choose just one lens. Instead, the three lenses should be used together to analyze these problems and proposed solutions.

4.1. Institutionalism

"Institutionalists" are a diverse group of theorists who share a fundamental belief that international institutions can facilitate mutually beneficial cooperation between states. These theorists assume that states are monolithic units and the primary actors in the international system; they do not examine the role of individual and group behavior in domestic and transnational civil society. As the primary actors in the system, each state pursues its own self-interest and attempts to maximize its power in an anarchic environment.[41] Institutions, or "regimes," can create a cooperative and ordered environment in which states together can pursue overlapping interests.[42] "[R]egime-governed behavior must not be based solely on short-term calculations of interest. Since regimes encompass principles and norms, the utility function that is being maximized must embody some sense of general obligation."[43] Most importantly for our purposes, "rational" institutionalists apply economic and game theory in their examination of the cooperative role that international institutions play. For example, international institutions may solve a "prisoner's dilemma," by seeking to reduce uncertainty and various costs associated with specifying and enforcing international agreements.[44]

This analysis helps to explain state behavior in matters of trade.

> Regime theorists postulate that state policymakers achieve their biggest payoffs within a trade regime if they can deliver the best of both worlds to their domestic constituencies: free access to foreign markets for their exporters and protection at home for their producers and workers. If all

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[41] *See* Stephen Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables, in* INTERNATIONAL RULES: APPROACHES FROM INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 167 (Robert J. Beck et al. eds., 1996). [hereinafter INTERNATIONAL RULES].

[42] Stephen Krasner described international regimes as "principles, norms, rules, and decision-making procedures around which actor expectations converge in a given issue area." *Id.*

[43] *Id.* at 168.

[44] *See* Robert O. Keohane, *International Institutions: Two Approaches, in* INTERNATIONAL RULES, *supra* note 41, at 195.

> countries engage in absolute protection, however, all lose the benefits of trade because export markets close, leaving each state locked within its own domestic market.[45]

International institutions, such as the WTO, attempt to achieve a more stable, second-best solution through cooperation. If all countries agree to open their markets, all countries will achieve some gains from trade.

The problems of weak competition laws and discriminatory enforcement are functionally equivalent to protection through tariffs and quotas. If a nation simultaneously can refuse to enact or enforce its competition laws and can reap the benefits that accrue from strict enforcement overseas, the nation will maximize its perceived payoff. This is most obvious in the powerful exporter context, where the gains to domestic producers, or "national champions," are not offset by any losses to domestic consumers. "This gives rise to the familiar 'prisoner's dilemma' rationale for cooperation: each country might be better off if it employed competition policies to secure national advantage, but the pursuit of such a strategy by all countries would render each of them worse off."[46] If, however, these countries can agree to fully and indiscriminately enact and enforce their competition policies, they will achieve a stable, second-best solution.

4.2. Liberalism

Liberal IR theorists first look within states to explain state behavior. Unlike institutionalists,

> [l]iberals begin with individuals and groups operating in both domestic and transnational civil society. These are the primary actors in the international system. State behavior is in turn determined not by the international balance of power, whether or not mediated by institutions, but by the relationship between these social actors and the governments representing their interests .... State preferences are

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[45] G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829, 862 (1995).

[46] Mattoo & Subramanian, *supra* note 18, at 103-04. *See also* Alan O. Sykes, *Externalities in Open Economy Antitrust and Their Implications for International Competition Policy*, 23 HARV. J. L. & PUB. POL'Y 89, 89 (1999).

> are derivative of individual and groups preferences, but depend crucially on which individuals and groups are represented.[47]

Two forms of liberalism, commercial and republican, are particularly relevant to the problems of weak competition laws and discriminatory enforcement.

> Commercial liberalism explains the individual and collective behavior of states based on the patterns of market incentives facing domestic and transnational economic actors. One source of pressure for protection is domestic distributional conflict, which arises when the costs and benefits of national policies are not internalized to the same actors, thus encouraging rent-seeking efforts to seek personal benefit at the expense of aggregate welfare. . . .
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> The key variable in republican liberalism is the mode of domestic political representation, which determines whose social preferences are institutionally privileged. When political representation is biased in favor of particularistic groups, they tend to "capture" government institutions and employ them for their ends alone, systematically passing on the costs and risks to others. The simplest resulting prediction is that policy is biased in favor of the governing coalition or powerful domestic groups. . . .[48]

Both of these forms of liberalism explain why nations may enact weak competition laws or discriminatorily enforce competition policies against foreign producers. In the market access context, most economists would assert that it is often in a nation's best interest to open market access by applying competition laws strictly against powerful domestic producers—the gain to domestic consumers typically outweighs the loss to domestic producers. Liber-

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[47] Anne-Marie Slaughter, *Liberal International Relations Theory and International Economic Law*, 10 AM. U. J. INT'L L. & POL'Y 717, 727-28 (1995).

[48] Andrew Moravscik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513, 528-29 (1997).

als, however, would predict a different result. Because the costs and benefits are not internalized to the same actors (domestic consumers benefit; domestic producers incur costs), commercial liberals would expect domestic producers to seek personal rents at the expense of the general welfare. Republican liberals may predict the same outcome. If the benefits of strict enforcement are spread thinly over a large population of consumers, whereas the costs are incurred by a smaller population of producers, one might expect producers to voice their opposition more intensely, through campaign contributions or through well-mobilized lobbying efforts. As a result, the domestic producers would "capture" government institutions at the expense of domestic consumers.

In the powerful exporter context, economists and liberals would agree that strict competition laws and enforcement measures are unlikely. Economists would admit that a nation gains (even though the world loses) because the costs of the anti-competitive restraints are "externalized" to foreign consumers. Because no domestic constituency is harmed, liberals would expect nations to enact and enforce weak laws in favor of powerful exporters.

4.3. Realism

Like institutionalists, realists believe that states are the primary actors in the international system. Unlike institutionalists, however, realists assert that international institutions will be ineffective, at best. Because no central authority exists in the international system, anarchy and distrust prevail and cannot be mediated by international institutions. The dominant preference of states, therefore, is to attain and maintain power, as power determines the outcomes of state interactions.[49] States pursue their narrow and immediate self-interests in all interactions with other states. As a consequence, effective international law exists only to the extent that this law reflects the interests of the most powerful states.

While neoclassical trade theory, and the game theory of the institutionalists, emphasizes the absolute gains that states can achieve through comparative advantage, realists suggest that powerful states will only engage in trade if it enhances their *relative*

[49] Slaughter, *supra* note 47, at 722.

power in the international system.[50] As a result, realists believe that international trade regimes, such as the WTO, simply reflect (and should only reflect) the preferences of states with the largest markets:

> For the purpose of evaluating the relative power of states to influence the rules of international trade, power may be seen as a function of market size. Market access has been the primary goal of trading nations in every round of trade negotiations since establishment of the GATT in 1947. The sovereign powers that have most influenced the rules of that system have been those with the largest markets. Those powers have used access to their markets to coerce and compensate lesser powers into accepting rules of the system: they have compensated others with promises of increased market access (e.g., promising tariff reductions or elimination and quota expansion or elimination) and coerced others with threats of market closure (e.g., threatening unilateral action by means of section 301 of the Trade Act of 1974, as amended).[51]

Because weak laws and discriminatory enforcement further narrow self-interests and enhance economic power, realists would expect such conduct. They also would expect that the most powerful states would take action, either through multilateral institutions or unilaterally, to force weaker states into removing private restraints that interfere with their market access. In short, realists would suggest that weak laws and discriminatory enforcement are not problems at all; they simply reflect reality.

5. EXISTING PROPOSALS FOR THE INTERNATIONAL INSTITUTIONALIZATION OF COMPETITION POLICY

Policymakers and commentators have offered a wide variety of proposals for the international institutionalization of competition

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[50] *See* Joseph M. Grieco, *Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism*, 42 INT'L ORG. 485, 487 (1988).

[51] Richard H. Steinberg, *Great Power Management of the World Trading System: A Transatlantic Strategy for Liberal Multilateralism*, 29 LAW & POL'Y INT'L BUS. 205, 217 (1998).

policy. While there are almost as many proposals as there are commentators, four proposals provide an overview of the range of possibilities: comprehensive supranationalism, international harmonization through a "uniform laws" project, evolutionary minimum standards, and cooperative unilateralism. The various lenses of IR theorists help to clarify the strengths and weaknesses of these proposals.

5.1. Comprehensive Rules and a Supranational Agency

The first approach envisions a comprehensive international code with a supranational enforcement agency. Over the years numerous proposals have taken this approach. Most recently, in 1993, a large group of antitrust scholars met in Munich and prepared the comprehensive and supranational "Draft International Antitrust Code" (the "DIAC").[52] Although a thorough discussion of the DIAC is beyond the scope of this paper, three aspects deserve close analysis and scrutiny.

5.1.1. The DIAC Protects Competitors, Not Competition

In many respects, the comprehensive substantive provisions of the DIAC do not reflect the interests of the United States, arguably the most powerful state in the international commercial system. As explained above, the United States has adopted a "rule of reason" approach to many aspects of competition law and is almost exclusively concerned with efficiency and consumer welfare, not with so-called "fairness" concerns for the welfare of other producers. By contrast, the DIAC favors *per se* rules and seeks to protect competitors, not competition. For example, under the DIAC, "[u]ndertakings may neither solicit nor inflict disadvantages upon other undertakings," regardless of whether these "disadvantages" benefit consumers.[53]

The DIAC's protection of competitors interferes with the ability of U.S. firms to access foreign markets. Many of the largest multinational corporations are American, and international policies that seek to protect less powerful (and less efficient) competitors will only harm the interests of the United States.

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[52] *Draft International Antitrust Code as a GATT-MTO-Plurilateral Trade Agreement*, 64 ANTITRUST & TRADE REG. REP. S-1 (Special Supp. Aug. 19, 1993) [hereinafter DIAC].

[53] *Id.* art. 7.

5.1.2. The DIAC Addresses the Powerful Exporter Problem

The subject matter of the DIAC is broad. The DIAC applies "to all restraints of competition . . . affecting at least two Parties" to the DIAC.[54] In other words, this proposal addresses the problems of weak laws and discriminatory enforcement in both the market access and the powerful exporter contexts.

If states are treated as "monolithic units," both of these contexts should be addressed, as both suggest an aggregate harm to each individual nation. However, if state behavior is determined by powerful domestic interest groups, as liberals contend, it becomes clear that states are unlikely to support the DIAC because of the powerful exporter component. Because producer interests generally dominate in matters of international trade, liberals would expect that states are more likely to accept proposals that address the problems of weak laws and discriminatory enforcement only in the market access context. After all, producers rarely would benefit from proposals that target conduct in the powerful exporter context.

5.1.3. The DIAC's Enforcement Provisions are Inflexible

Perhaps most strikingly, the DIAC grants both private actors and a supranational enforcement agency the power to enforce the DIAC against both private actors and member states.[55] With its reliance on domestic courts and its authorization of private rights of action, the DIAC's enforcement provisions remove all flexibility and make it impossible for members to protect their power. As a result, the most powerful nations, especially the United States, oppose this approach.[56]

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[54] *Id.* art. 3, sec. 1. "A Party to the [DIAC] is affected whenever there are economic effects in its territory or otherwise on its commerce, or private persons nationals of this Party, or undertakings having their main commercial establishment on the territory of the Party, are initiators or victims of a restraint of competition." *Id.*

[55] *Id.* arts. 17-20.

[56] For a discussion of the relationship between international relations theory and inflexible international trade dispute resolution systems, see Shell, *supra* note 41.

5.2. *Harmonization*

The second approach seeks not to draft international competition rules that would be enforced ultimately by a supranational authority but to harmonize national competition laws. There are several proposed methods for achieving harmonization, including "roots-up," where informal information exchange eventually leads nations to approach anti-competitive behavior in a similar fashion.[57] For the purposes of this analysis, however, it is best to focus on the use of a "uniform laws" project. Nations would agree to accept the provisions of the uniform law, but would retain enforcement power and would not be subject to international or supranational oversight.

Unlike the DIAC, harmonization recognizes that, especially in the short term, nations are unwilling to relinquish enforcement power. This recognition reflects some of the concerns of both realists and liberals. From the realist perspective, decision-making authority ultimately remains in the hands of national authorities. These authorities could interpret the code in a way that furthers the national interest, without regard for the competing interests of others. Realists, especially in most powerful nations, would favor this flexibility over the constraints of a supranational code. From the liberal perspective, harmonization recognizes the entrenched interests of national judges and bureaucrats in enforcement agencies. Any change in international competition policy would be extremely difficult to achieve without the support of these judges and bureaucrats. Harmonization reaffirms the role of these officers.

Nevertheless, the virtues of harmonization reflect three even greater vices. First, national differences are likely to persist even after the superficial harmonization of laws occurs. This outcome is particularly likely in the area of antitrust because a uniform international antitrust code is unlikely to contain precise rules that can be easily applied and do not depend on a detailed factual analysis in a given case.

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[57] *See* Robert Pitofsky, *Competition Policy in a Global Economy — Today and Tomorrow*, 2 J. INT'L ECON. L. 403, 410-11 (1999) (stating that "there is a kind of informal convergence by 'learning.' As scholars, practitioners and enforcement officials meet more frequently, explain the unique qualities of their system, and debate the merits of each, there is a slow, subtle but discernible trend toward more uniform approaches."). The problem with this form of convergence, however, is that it is too slow to achieve the necessary results in a rapidly changing and growing global economy. *See* Fox, *supra* note 1, at 16-17.

> [D]isparate antitrust treatment . . . normally results not from different formulations of the principles but from the different meanings given to specific key words—particularly "anticompetitive" and "abuse"—and different methodologies for defining markets and assessing market power. These differences in treatment are not apparent in the literal words of the antitrust rules; the rules could have exactly the same wording and the differences would persist. The persistent differences tend to be based on matters of principle; e.g., whether abuse law should be used to remedy unfair exploitations and exclusions, or only to improve market efficiency.[58]

Thus, the tension between international trade and competition policy is likely to persist even after the superficial harmonization of laws.

As Spencer Weber Waller has argued, uniform laws will fail to achieve their purpose unless they reflect common underlying principles and values.

> The tensions between the United States and Japan are an excellent illustration of the problems and assumptions underlying recent attempts at harmonizing competition law. Much of the frustration in the United States stems from the assumption—at least implicit—that competition law in Japan should work in a similar fashion as in the United States given the textual similarities between the two sets of legal rules and the role of the United States in the promulgation of the Japanese Antimonopoly Act at the end of World War II. Instead, Japan, without an indigenous tradition of competition as a value to enforce through legal mechanisms, began amending its antitrust laws as soon as politically possible. . . . Japan thus was successful in shaping its antimonopoly law to meet indigenous societal needs, but may have eliminated the core of a competition law system in doing so. In reality, the United States and Japan are not

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[58] Fox, *supra* note 1, at 16.

> even discussing the same topic when they discuss competition policy.[59]

Thus, to achieve true harmonization, each state must reshape its underlying values, and all states together must construct common principles.[60] Many proponents of harmonization fail to appreciate that this is a slow process that can only be achieved through an ongoing dialogue between nations.

Second, harmonization does not directly address the problem of national competition authorities systematically favoring domestic interests over foreign interests and does not offer a solution to the discriminatory enforcement of competition laws. It "jumps ahead" to resolve more subtle problems that result from more legitimate national differences.

Finally, the subject matter of harmonization is even broader than that of the DIAC. Harmonization targets the problems of weak laws and discriminatory enforcement in the market access context, the powerful exporter context, and even conduct that has no effect on international trade. It implies the modification of existing national laws, even in cases in which no foreign producer, consumer, or government has any interest. Because pre-existing national laws may reflect unique cultural concerns, even if true harmonization of law can occur, it will unnecessarily constrain a nation's antitrust preferences. Thus, harmonization may result in even more resistance from domestic interest groups than does the DIAC.

5.3. *Evolution from Bilateral Comity to Plurilateral Minimum Standards*

As envisioned by the European Commission in the 1995 "Van Miert Report" and by Eleanor Fox, the third approach would combine informal bilateral and plurilateral cooperative efforts from "below" with "top down," international minimum standards.

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[59] Spencer Weber Waller, *Neo-Realism and the International Harmonization of Law: Lessons from Antitrust*, 42 U. KAN. L. REV. 557, 573-74 (1994).

[60] *See* John Gerard Ruggie, *What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge*, 52 INT'L ORG. 855, 868 (1998) ("The most important feature differentiating [constructivists] . . . is that they make the case that principled beliefs are not simply 'theoretical fillers,' . . . employed to shore up instrumentalist accounts, but that in certain circumstances they lead states to redefine their interests or even their sense of self.").

Substantive principles would be few and of major market importance, e.g., an anticartel rule and a market access rule. Nations would agree to adopt the consensus principles into their national law, using any nonparochial formulation of their choice. They would agree to apply the rules for the benefit of harmed persons or entities anywhere within the territory of the contracting nations; and to enforce the rules, particularly when foreign trade or investment is concerned.[61]

In the first instance, national courts would apply the minimum standards, but an international body, perhaps the WTO, would have the jurisdiction to determine whether patterns of failure to enforce competition law exist in cases affecting the trade and investment of other WTO members.[62] As the system develops, international standards and principles would increasingly replace *ad hoc* positive comity.

Under the framework, Fox suggests the WTO would have a robust set of available remedies. "Remedies might include mandatory injunctions to implement the common principles, enforce the law, or open markets; and they might include fines, and compensatory damages, rather than trade remedies such as retaliation, which tend to heighten barriers and may lead to managed trade."[63]

This proposal has many advantages. With its reliance on an international dispute settlement body, it effectively addresses discriminatory enforcement. Indeed, the types of remedies Fox contemplates would ensure that even a small, powerless nation could prevent a large, powerful nation from cheating on the agreement. More importantly, this "bottom up, top down" approach recognizes that common principles must precede truly harmonized laws; it allows the international community to discuss and develop the more controversial international standards over time.

Despite its improvements over the DIAC and "uniform laws" harmonization, however, this approach is unlikely to succeed in the immediate future for at least two reasons. First, especially with remedies such as injunctions and fines, the United States is unlikely to bind itself to these minimum standards, as explained in the discussion of the DIAC above. With its extraterritorial application of national antitrust laws, and its use of Section 301 of the

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61 *See* Fox, *supra* note 1, at 19.

62 *See* ICPAC REPORT, *supra* note 3, at 266.

63 Fox, *supra* note 1, at 24.

Trade Act of 1974, the United States generally has the market power and legal tools to pressure others to treat the United States "fairly." As a result, it has little to gain, and something to lose, by accepting international minimum standards. While the U.S. one day may perceive its interests in such a way that the loss of flexibility in this area is no longer a significant concern, today it appears unwilling to forfeit its power to determine unilaterally which nations are restricting market access.

Second, like the DIAC, this approach addresses competition policy problems in both the market access and the powerful exporter contexts. Even though it applies only "minimum standards" initially, politically and commercially powerful producers are more likely to oppose the inclusion of anticartel rules and other measures in the powerful exporter context.

5.4. "Cooperative Unilateralism"

Largely reflecting the *status quo*, the final approach primarily encourages bilateral agency cooperation and, if cooperation is not forthcoming, the enforcement of existing national laws (including the extraterritorial application of these laws and "self help").[64] The U.S. Department of Justice, under the direction of Joel Klein, former Assistant Attorney General for Antitrust, supports this approach. A majority of the members of the International Competition Policy Advisory Committee to the Attorney General recently recommended a continuation of this policy as well.[65]

Fox has criticized the dependence on national laws approach, concluding that it "overstates the extent to which national law and agency cooperation can . . . solve antitrust problems. . . . [A]gency cooperation is fruitful only when nations perceive their interests to be common and choose to cooperate."[66] From a realist's perspective, of course, this is exactly the point. The flexibility of *ad hoc* agency cooperation, when supported by "self-help" mechanisms such as Section 301 and the extraterritorial application of U.S. antitrust law, clearly reflects the immediate interests of the United States. By contrast, inflexible, long-term commitments that fail to

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[64] *See id.* at 17-18.

[65] ICPAC REPORT, *supra* note 3, at 265-277; *see also* Joel Klein, Editorial, *No Monopoly on Antitrust*, FIN. TIMES (London), Feb. 13, 1998, at 20.

[66] Fox, *supra* note 1, at 18; *see also* ICPAC REPORT, *supra* note 3, annex 1-A (providing the separate statement of Advisory Committee member Eleanor M. Fox).

reflect the power and interests of states will be ineffective or even harmful to the international system.

While cooperative unilateralism respects the power and narrow self-interests of states, its proponents also explain why otherwise effective international institutions, such as the WTO, would be unable to deal with the complexities of competition policy. According to Joel Klein, WTO oversight of governmental enforcement actions would "involve the WTO in second-guessing prosecutorial decision making in complex evidentiary contexts—a task in which the WTO has no experience and for which it is not suited . . . ."[67] In other words, proponents of cooperative unilateralism argue that WTO decision-makers cannot distinguish "cheating" from legitimate and unbiased national enforcement decisions. Since international institutions cannot easily monitor compliance with the norm of national treatment, they are ill-equipped to solve any "prisoner's dilemma."

There are at least three important flaws to the arguments of cooperative unilateralists. First, cooperative unilateralism fails to imagine how the WTO could be modified so as to gain the experience and tools to tackle the economic and legal complexities of antitrust. Second, this approach fails to recognize that even powerful states can benefit from international institutions. For example, the United States' efforts to convince Japan to apply its competition laws more strictly have been ineffective in many respects. Because international institutions are better able to tie behavior to reputation (the "shadow of the future") and to link disparate issues together, they can be a more effective force for change, even if sanctions are not authorized.

Finally, like harmonization, cooperative unilateralism seeks to impose uniformity before legitimate differences in values have been resolved. The extraterritoriality of American antitrust law and the use of Section 301 often only exacerbate international tensions. By contrast, a more constructive approach, in which states would slowly develop common underlying principles, would ameliorate international tensions.

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[67] Assistant Attorney General Joel Klein, A Reality Check on Antitrust Rules in the World Trade Organization, And a Practical Way Forward on International Antitrust, Address Before the OECD Conference on Trade and Competition (June 30, 1999) (transcript available at http://www.oecd.org/daf/clp/trade_competition/conference/klein_sp.htm).

In summary, IR theory helps to explain the shortcomings of these proposals. Another explanation applies equally to all of these proposals: none considers how domestic interest groups within a country could be mobilized to achieve reform. With respect to the market access context, it is assumed that the state favors domestic producer interests, *even at the expense of domestic consumer interests* (and foreign producer interests, of course). Although the above proposals assume that only the international community of monolithic states can resolve the problem of weak laws and discriminatory enforcement in the market access context, strengthening the voice of domestic consumers could help.

6. AN ALTERNATIVE PROPOSAL: A DISTRIBUTION SERVICES REFERENCE PAPER TO THE GATS

Drawing on concepts from IR and economic theory, the following modest initiative targets anti-competitive behavior solely in the distribution sector (i.e., most vertical restraints). This initiative would take the form of a distribution services "Reference Paper" as an annex to WTO Members' Schedule of Specific Commitments under the GATS.

Although vertical restraints in the distribution services sector are not the only restraints that limit market access, these restraints play a crucial role in most international disputes at the intersection of trade and competition policy.[68] Because the marketing of almost every good involves "distribution services" of some kind, this initiative would begin to bridge the gap between the present, limited sectoral approach to competition policy in the WTO (e.g., telecommunications and intellectual property) and universal, cross-sectoral WTO coverage. Only after the WTO develops its competence to deal with vertical restraints should it consider addressing a wider range of private restraints to market access.

[68] Private or quasi-private restraints in the distribution services sector are at the core of almost every trade/competition policy dispute between the United States and Japan. The U.S. has criticized Japan's distribution networks in the automotive, flat glass, paper, photographic film, electronic equipment, and soda ash industries. *See* ICPAC REPORT, *supra* note 3, at 211-16. These services are also at the heart of trade/competition disputes involving Latin America, other countries in Asia, and in Europe. *See id.* at 216-20.

6.1. The Framework of the Proposal

Like the Telecommunications Reference Paper on Pro-Competitive Regulatory Principles, this Distribution Services Paper would serve as a clarification and modification of existing competition policy commitments under the GATS. The central modification would relate to Article IX of GATS:

> 1. Members recognize that certain business practices of service suppliers . . . may restrain competition and thereby restrict trade in services.
>
> 2. Each Member shall, at the request of any other Member, enter into consultations with a view to eliminating practices referred to in paragraph 1. The Member addressed shall accord full and sympathetic consideration to such a request and shall cooperate through the supply of publicly available non-confidential information of relevance to the matter in question. The Member addressed shall also provide other information available to the requesting Member, subject to its domestic law and to the conclusion of satisfactory agreement concerning the safeguarding of its confidentiality by the requesting Member.[69]

In essence, the Paper would seek to enhance the effectiveness of the consultation procedure referred to in Article IX (2) by including an impartial panel of experts to hear disputes. A Member would be entitled to request consultations and a panel if the anti-competitive business practices harm either that Member's distribution service suppliers or, even, that Member's goods manufacturers, who rely on another Member's distribution services suppliers.

The Paper would obligate Members, who have failed to resolve the dispute through initial consultations, to submit the dispute to a *non-binding* panel of antitrust experts. The panel, selected *ad hoc* by the parties to the dispute and sitting in the country of the responding Member, would be charged with determining whether

[69] GATS art. IX:1-2.

an action (or inaction) taken by the competition authorities of the responding Member (1) resulted in inefficiencies that harmed consumers through higher prices (or reduced output or quality) and (2) tended to significantly distort trade in the market access context. The panel would consist of at least three members and its affirmative decisions would need to be unanimous. The complaining Member would bear the burden of proving, with "clear and convincing evidence", that the authority's behavior harms consumers and limits market access.

This initiative uses both the international community of states and non-governmental interest groups to persuade a state to strengthen its competition laws and enforcement measures. An affirmative panel finding should mobilize interest groups, including domestic consumers and foreign producers, to push for competition policy reform "from within." After all, an impartial and unanimous finding that a nation's enforcement authorities are clearly failing to act in the best interests of domestic consumers is likely to focus attention on a nation's competition policy. In the international community of states an affirmative panel finding would facilitate discussions of the issue among member states, while maintaining flexibility and respecting sovereignty.

The following is an explanation of the major elements of this proposal:

(1) Panel Selection:

The parties to the dispute select the members of the panel for two important reasons. First, an *ad hoc* selection mechanism allows the parties to tailor the panel to the specific issue in dispute. Experts in resale price maintenance may lack expertise in vertical mergers, for example. Because competition policy is complex and dependent on a high level of economic analysis and fact-finding, this "customization" may be more important than it is in traditional trade disputes. Second, because the losing party participates in the selection of the panel and because the panel will have particular expertise in the precise issue before it, panel findings will be more persuasive and legitimate.

(2) The Location of the Panel Proceedings and Public Pronouncements:

Local proceedings facilitate the mobilization of domestic political support for competition policy reform. One would expect that the local press is more likely to cover the investigation and outcome of the panel if the panel proceedings take place at home. In addition, local proceedings may facilitate the discovery of information used in the proceeding.

In addition, Members should consider other ancillary commitments designed to inform the responding Member's general public. For instance, the Members could agree on the general form of a press release from the WTO panel. Wherever possible, the press release could contain a panel estimate of the cost consumers incur as a result of the existing competition policy or practice. The WTO would then distribute the press release, especially to the major media groups in the country of the responding Member. In addition, non-governmental organizations, including the foreign producers that were injured by the discriminatory policies and possibly domestic consumer rights organizations, would disseminate the finding of the panel to the general public.

(3) Scope of the Subject Matter:

A panel would be authorized to hear any dispute that concerns the competitive nature of the distribution services sector (i.e., any alleged vertical restraints that occur after the manufacture of an end product, as well as horizontal restraints and anti-competitive mergers between distributors).[70]

Limiting a competition policy initiative to the distribution services sector will allow the WTO to begin to experiment with, and to grow accustomed to, matters of competition policy beyond those involving telecommunications and other narrowly focused sectors. The application of wide-ranging standards and "hard" enforcement measures, by contrast, could overwhelm a fledgling competition authority.

[70] Although this includes most cases of vertical restraints, vertical restraints that occur, for example, between raw material providers and manufacturers would not be included.

Disputes could concern individual determinations or, more likely, a pattern or practice of behavior on the part of the competition authorities. Although previous proposals reflect a reluctance to examine individual determinations at the international level, a panel, like a national court, would have little difficulty with such an examination. In any event, it is impossible to avoid an examination of individual cases, even in reviews of general patterns or practices. Joel Klein does not know:

> what it means to say . . . that individual cases will not be reviewed but that a "pattern" may be; a pattern is a series of individual cases, and even if the whole were greater than the sum of its parts, any meaningful dispute resolution powers in this field could not ignore the parts.[71]

(4) The Standards: Detrimental Effect on Domestic Consumers and Significant Market Access Limitation:

Central to this proposal are the two broad questions that the panel must answer: (1) does the Member's action, or failure to act, have a detrimental effect on domestic consumer welfare and (2) does it significantly limit market access for foreign producers?

The first prong of the test is important for at least two fundamental reasons. First, it addresses the efficiency objective that all national competition policies should pursue. If a vertical restraint increases consumer prices, reduces output, or reduces a product's quality, it is inefficient and harmful to consumers. By phrasing the question in general and conclusory terms, per se rules that are easy to apply (but harmful to the market) are avoided. In other words, this question grants a panel substantial discretion to apply a "rule

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[71] Klein, *supra* note 61. *See also* Mark A. A. Warner, *Competition Policy and GATS*, *in* GATS 2000: NEW DIRECTIONS IN SERVICES TRADE LIBERALIZATION 371 (Pierre Sauvé & Robert M. Stern eds., 2000).

> Although there appears to be a consensus that dispute settlement should not apply to individual cases because of the complex and fact-intensive nature of competition law and policy, it is worth noting that the WTO already deals with complex and fact-intensive cases under the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) or involving environmental measures.

Id.

of reason" and to consider the specific merits of each individual case.

Second, the "consumer" prong reflects the underlying purpose of the initiative. Rather than using a binding enforcement mechanism to compel a Member to change its policy, a non-binding panel finding seeks to mobilize domestic and international political support for reform. When an impartial panel publicly finds that a Member's authorities are adopting policies that harm its consumers, those consumers become better informed and more likely to mobilize for change. This attempt to inform and change domestic public opinion responds to the rising tide of critics who claim that the WTO usurps decision-making authority from democratically elected national and sub-national officials. Instead of "stripping countries of their sovereign rights," this approach attempts to inform the local democratic process. In other words, this approach simply seeks to inform domestic consumers in order for them to determine whether they are willing to accept inefficiencies and higher prices in exchange for competitive "fairness," for example, in the form of protection for small- and medium-sized enterprises.

The "market access" prong ensures that competition policy provisions adapted to the needs of the distribution services sector are consistent with the basic purpose of the WTO. Moreover, because this prong ensures that international involvement in competition policy will be limited to cases in which foreign producers have an interest, this initiative is likely to be more popular with WTO Members. The requirement that any market access limitation be "significant" (i.e., not *de minimis*) also respects the authority of the Member's competition policymakers; competition policies and decisions that are only incidentally related to international trade will remain within the exclusive purview of the national authorities.

(5) Panel Unanimity and "Clear Evidence":

Because the effectiveness of any affirmative panel finding depends in part on public perception, the finding should be strong and clear. A *unanimous* conclusion that a policy or practice *clearly* harms consumers and limits market access achieves this goal. In addition, it may be easier for the Members to accept WTO involvement in competition policy if panel findings are subject to unanimity and a high burden of proof.

(6) Non-Binding Findings:

The general purpose of this approach is to mobilize domestic and international political support for reform, instead of creating an inflexible obligation to bring national laws into conformity with WTO commitments. As a result, findings should have no direct legal consequence. Of course, the non-binding nature of the panel decisions necessarily implies that these decisions will be less effective than they would be under the traditional WTO approach, in which a party may be authorized by the Dispute Settlement Body to suspend the application of concessions.[72] Nevertheless, domestic and international political pressure will be mobilized in the worst cases, where national policies clearly harm consumers and limit market access.

While this "soft approach" may appear inconsistent with existing dispute mechanisms of the largely successful WTO, it is important to remember that it took almost fifty years for the GATT to accept binding enforcement through the "negative consensus" rule. A similar evolution is necessary with respect to competition policy.

(7) Why a Multilateral Solution? Why the WTO?

A multilateral approach, especially within the WTO framework, is most likely to succeed for several reasons. First, the WTO already addresses a number of competition policy issues, as mentioned in Section 3 above. Second, when the Members begin to develop the principles contained in the Reference Paper, these principles could be incorporated more directly in the general WTO dispute settlement framework, with its binding force and authorization of retaliatory countermeasures.[73]

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[72] *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, arts. 22(2), 23(6), LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 112 [hereinafter Understanding on Settlement of Disputes].

[73] The WTO is a more appropriate forum than the OECD:

> [A]lthough the OECD contributes significantly to advancing the international competition policy debate, institutional limitations constrain its ability to play a more expansive role in developing a global approach to trade and competition interface issues. For one thing, the organization is

Third, placing this proposal within the broad WTO framework increases the likelihood that nations will accept it. Many Members that would otherwise oppose the Reference Paper will be willing to accept the initiative in exchange for other concessions, such as further tariff reductions on their exports. Because different Members will have different preferences, adding competition policy to other issues within the WTO allows Members to "trade on these differences" and increase the value of their negotiated solution.[74]

Finally, a multilateral approach is likely to improve the likelihood of competition policy reform. As explained in more detail below, a state will want to maintain its reputation in the international community, and "third-party" states are likely to persuade the state to comply with the principles of national treatment and open market access.

6.2. The Reference Paper, as Viewed from IR Theory

The Reference Paper rests on the assumption that domestic political pressure from consumers and pressure from the international community of nations is sufficient to achieve competition policy reform where reform is needed most. This mechanism will only be effective in the most egregious cases, but that is exactly where to begin. The more subtle disputes can be addressed after the international community has achieved a consensus on the principles of competition policies.

As viewed through the various lenses of IR theory, the Reference Paper is a sensible first step in dealing with the international tension between trade and competition policy for the following reasons.

6.2.1. The Reference Paper has a Limited Subject Matter

The Reference Paper only addresses the problems of weak laws and discriminatory enforcement in the market access context, not in the powerful exporter context. This limitation recognizes that producer interests often determine a state's preferences in matters of international trade. Producers have little reason to support ef-

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perceived by nonmember nations as a forum for more developed countries.

ICPAC REPORT, *supra* note 4, at 258.

[74] *See* MAX H. BAZERMAN & MARGARET A. NEALE, NEGOTIATING RATIONALLY 98 (1992).

forts to rein in powerful exporters. If these powerful exporters are charging excessively high prices, that only benefits other producers. If these exporters are pricing "predatorily" (i.e., excessively low prices to drive out foreign competitors), existing anti-dumping laws usually provide a remedy. By contrast, producers do have some reason to support efforts to resolve the problems of weak laws and discriminatory enforcement in the market access context. These efforts will benefit foreign producers, as well as domestic consumers.

6.2.2. *The Reference Paper Recognizes the Need for Flexibility and the Interests of Powerful States*

Especially in the immediate future, the United States is unwilling to relinquish its enforcement powers in exchange for untested and rigid supranational rules. The Reference Paper recognizes that the most powerful states, including the United States and the European Union, are more likely to favor a more diplomatic approach over binding enforcement rules. In addition, because the panel of experts will make determinations solely on the basis of efficiency concerns, not culturally nuanced fairness concerns, the determinations will be consistent with existing U.S. antitrust policy and U.S. interests. Nations that base competition policies on vague fairness concerns will be able to continue to do so, but will be compelled to explain the basis of these concerns to the international community and to domestic consumers.

6.2.3. *The Reference Paper Addresses Competition Laws, As Applied*

At least until the international community develops a consensus on the basic principles and purposes of competition policies, uniform laws will be interpreted differently in different states. As a result, efforts to harmonize legal standards serve little purpose. The Reference Paper avoids formalistic legal standards in favor of an *ad hoc* economic analysis of domestic competition laws, as applied.

By focusing on the application of the law, the Reference Paper recognizes that international institutions have a comparative advantage over individual nations in monitoring the behavior of other nations—especially when the legal and economic complexities of competition policy can be used to mask discriminatory treatment of foreign interests. In many areas of trade, detection of non-compliance is a fairly straightforward matter. After all, an ex-

porter immediately recognizes when a Member imposes excessive tariffs and quotas. The discriminatory enforcement of competition policies, however, is much more difficult to detect. As explained in Section 2 above, the "rule of reason" makes it difficult to determine whether national competition authorities treated foreign competitors fairly in a given case. In addition, when an agency decides that it is not necessary to prosecute a given case, this decision may be unpublished, making detection of discrimination almost impossible. An impartial panel will have greater access to information and will be better able to determine whether discrimination occurred. As a result, the panel's determination is more likely to be treated as an objective assessment of these facts.

6.2.4. The Reference Paper Provides a Forum for Developing an International Consensus on the Principles and Purposes of Competition Policies

Over time the panel process will lead states to reconsider and reshape their interests in favor of the socially constructed frames of consumer welfare, market access, and national treatment.[75] Before, during and after a panel investigation, a target Member may explain how its conduct is consistent with these principles. Alternatively, the Member may argue that there is an interest that overrides these principles in an "exceptional case." For example, the Member may assert that its present policy is based on some culturally nuanced principle of "fairness" that rises above efficiency concerns.

The point is that, as a result of an affirmative panel finding, and the concomitant pressure from the international community, Members must attempt "to gain assent to value judgments on reasoned rather than idiosyncratic grounds."[76] Through this process,

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[75] *See* Ruggie, *supra* note 60.

[76] ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 119 (1995).

> In the conditions we have called the new sovereignty, there are too many audiences, foreign and domestic, too many relationships present and potential, too many linkages to other issues to be ignored. When a state's conduct is challenged as inconsistent with a legal norm or otherwise questionable, the state, almost of necessity, must respond—it must try to show that the facts are not as they seem to be; or that the rule, properly interpreted, does not cover the conduct in question; or that some other matter excuses non-performance.

the target Member's interests are reconstructed "in terms of shared commitments to social norms."[77]

This discussion is a prerequisite for the deep harmonization of international competition policies. While such a discussion may be *useful* in many areas of international commercial policy, the economic complexities and culturally nuanced fairness objectives of competition policy today *necessitate* an on-going discussion in this field. Without the collective development of some of the core principles of competition policy (e.g., the existence and meaning of "abuse" of market position), nations will continue to apply even identical laws very differently.

6.2.5. The Reference Paper Increases the Likelihood of Reform

The Reference Paper will reduce the problems of weak laws and discriminatory enforcement, even without binding decisions. The panel process will serve as an ongoing forum for members to persuade respondents to reform their competition policies. There are, of course, many different persuasive techniques: a Member may appeal to reason and existing international norms, may threaten retaliation, or, perhaps most importantly, may remind the respondent of the importance of maintaining its present standing in the international community of nations, in which a broad range of issues are linked.

> A good deal of the compliance pull of international rules derives from the relationship between individual rules and the broader pattern of international relations: states follow specific rules, even when inconvenient, because they have a longer-term interest in the maintenance of law-impregnated international community. It is within this broader context that ideas about reputation are most powerful and most critical. This can, to a certain extent, be captured by ideas of "lengthening the shadow of the future," by broadening notions of self-interest and reciprocity . . . .[78]

Id.

[77] *Id.* at 123.

[78] Andrew Hurrell, *International Society and the Study of Regimes: A Reflective Approach*, *in* INTERNATIONAL RULES, *supra* note 41, at 213.

When an impartial panel of experts unanimously determines that a measure harms domestic consumers and limits market access, failure to reform is likely to harm a Member's reputation both within the WTO and more generally within the international community.

6.2.6. The Reference Paper Mobilizes Domestic Interest Groups

The Reference Paper differs significantly from previous proposals in that it seeks the participation of domestic interest groups, especially consumers, in the reform process. It recognizes that domestic consumers have a stake and can play an important role in international trade disputes involving competition policies.

By making the principle of consumer welfare explicit and central to the panel's determination, affirmative panel findings will better inform consumers and lead to pressure "from within" the member state for competition policy reform. Indeed, because panelists will explicate and estimate the harm to consumers, in monetary terms if possible, consumers are more likely to demand change. No longer will national governments be able to hide behind the intricacies of competition policies and claim that their actions promote consumer welfare; an impartial body of experts, chosen by the national government itself, will establish otherwise.

This attempt to mobilize consumers replaces the need to obtain binding international enforcement mechanisms.

> Supranational institutions may not always be able to promulgate and enforce law, but they can and do frequently generate norms [and applications of norms to particular circumstances] that are disseminated by nongovernmental organizations (NGOs) to pressure domestic political actors. Many of these NGOs are . . . skilled in the ways of using law to promote social change, however slowly and imperfectly.[79]

While consumer interest groups generally are not known for their power in domestic politics, they occasionally do mobilize for

[79] Anne-Marie Slaughter et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT'L L. 367, 371 (1998).

political action. In fact, European consumer groups recently "waged war" on the car industry's special distribution rules and were given credit for forcing the EU competition commissioner to reconsider an exemption that allowed car manufacturers to establish exclusive distributorships.[80] The power of these groups is likely to grow if an international and impartial panel of experts can provide valuable information about the costs of cozy deals between domestic producers and national governments.

7. CONCLUSION

Most observers and policymakers would agree that nations should have and enforce laws prohibiting commercial conduct that "unreasonably" impairs market access and should enforce their laws without discrimination as to nationality.[81] The disagreement revolves around what exactly these basic principles would require in practice. For example, what constitutes an "unreasonable impairment" to market access and how should the decision-maker treat a nation's culturally nuanced "fairness" considerations? Who should determine whether a nation has applied these principles, and what should happen when a nation fails to do so?

A non-binding dispute resolution procedure that attempts to inform domestic consumers and the international community of the economic costs that result from the failure to address vertical restraints to market access would be a first step in answering these questions. In the short term, domestic consumers and the international community may persuade nations that fail to address such commercial conduct to reconsider their policies in the most egregious cases. In the long term, this procedure and the discourse that it creates will help to develop an international consensus on the principles and objectives of competition policies.

This proposal represents a compromise between the pure power politics behind unilateral action, on the one hand, and an inflexible system of international, legalistic rules, on the other. By informing domestic interest groups and by facilitating international discourse, it seeks to reduce existing tensions and to take a modest step toward a more comprehensive approach to international competition policy.

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[80] *See Monti Attacks Carmakers on Restrictive Sales*, FIN. TIMES (London), May 12, 2000, at 8.

[81] *See* Fox, *supra* note 40, at 672.

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